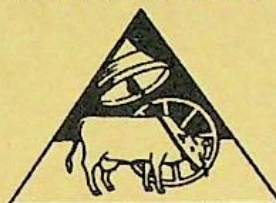


LST REVIEW

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PROPOSED NATIONAL COMMISSION ON WOMEN AND GENDER EQUALITY

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LAW & SOCIETY TRUST

LST REVIEW

*(This is a continuation of the
Law & Society Trust Fortnightly Review)*

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Editor's note.....

In this issue we publish the Supreme Court determination on the Postal Corporation Bill which was tabled in Parliament in March 1999. Three petitions were filed in the Supreme Court alleging that certain clauses of the Bill entitled "The Sri Lanka Postal Corporation Bill" were inconsistent with Articles 10, 12, 14(1)(a), (g), 15(7) and 84 of the Constitution. The Supreme Court held that certain provisions were indeed inconsistent with the provisions of the Constitution and may only be passed with the special majority prescribed by Article 84(2) of the Constitution.

We also publish the text of the Bill to establish a National Commission on Women released in September last year. This Bill seeks to establish a National Commission on Women for the "promotion, advancement and protection of rights of women in Sri Lanka." The preamble to the Bill refers to the Universal Declaration of Human Rights, the International Covenants and the Convention on the Elimination of all Forms of Discrimination against Women as well as the Women's Charter of Sri Lanka of 1993. It is understood that several amendments have been proposed to the Bill by various women's groups to make the Commission autonomous and to empower it to take binding decisions, akin to the powers given to the Human Rights Commission of Sri Lanka.

Dr Mario Gomez in his article looks at the proposed legislation and suggests several amendments to the draft law. He suggests that an independent entity outside government should be created which will be able to initiate a variety of activities to achieve gender equality. He also recommends that legal effect be given to the Women's Charter by incorporating it into the draft law because, at present, the Charter is not legally enforceable. Finally, he states that the success of an institution of this nature depends on civil society groups which will need to interact closely with the proposed Commission and monitor its performance.

**Supreme Court of the Democratic Socialist
Republic of Sri Lanka**

AN ACT TO PROVIDE FOR THE ESTABLISHMENT OF A CORPORATION NAMED THE SRI LANKA POSTAL CORPORATION; FOR THE TRANSFER OF ALL PROPERTY, RIGHTS AND LIABILITIES OF THE DEPARTMENT OF POSTS TO THE CORPORATION; FOR THE REPEAL OF THE POST OFFICE ORDINANCE (CHAPTER 190); AND FOR MATTERS CONNECTED THEREWITH OR INCIDENTAL THERETO.

In the matter of Applications under
Article 121 of the Constitution

S.C. (S.D.) No 1/99

Suranjith R.K. Hewamanna,
530/7, Havelock Road,
Colombo 6.

Petitioner

- vs -

The Attorney-General,
Attorney-General's Department,
Colombo 12.

Respondent

S.C. (S.D.) No 2/99

1. Muditha Karunamuni,
10, Government Flats,
St. Anthony's Mawatha,
Colombo 3.

2. Weliwita Liyanarachchilage
Harinda Weliwita,
Nedurana, Erepolu.
3. Udaya Kumara Kashyapa
Weerawardhana,
10, Horetuduwa, Polgasowita.

Petitioner

- vs -

The Attorney-General,
Attorney General's Department,
Colombo 12.

Respondent

S.C. (S.D.) No 3/99

A.J.S. Vidanagamage,
239 6/18, Horagolla
Ganemulla.

Petitioner

- vs -

The Republic of Sri Lanka

Respondent

BEFORE : Fernando, J,
Amerasinghe, J, and
Gunawardana, J.

COUNSEL : R.K.W. Goonasekera with J.C. Weliamuna and
Ms Kishali Jayawardene for the Petitioner in SC
(SD) 1/99;

A.S.M. Perera, P.C., with J.C. Weliamuna,
Ms. Shamila Daluwatta and Neville Ananda for
the Petitioners in SC (SD) 2/99;
Ran Banda Seneviratne with Roshan Dayaratne
for the Petitioner in SC (SD) 3/99;
K. Sripavan, DSG, with M. Gopallawa, SC, for
the Respondent.

ARGUED ON : 22nd February 1999

DETERMINATION

Three petitions were filed alleging that clauses 13, 36, 51 and 70 of the Bill entitled "The Sri Lanka Postal Corporation Bill" ("An Act to provide for the establishment of a Corporation named the Sri Lanka Postal Corporation; for the transfer of all property, rights and liabilities of the Department of Posts to the Corporation; for the repeal of the Post Office Ordinance (Chapter 190); and for matters connected therewith or incidental thereto") were inconsistent with Articles 10, 12, 14(1)(a), 14(1)(g), 15(7), and 84 of the Constitution.

These petitions were referred to this Bench by His Lordship the Chief Justice, and were taken up for consideration together on 22.2.99. In the course of the hearing, questions arose as to the constitutionality of certain other clauses as well. We have therefore to determine the constitutionality of clauses 7(1)(c), 13 and 69, 14 and 15, 23 and 28, 36(3) and (5), 51, and 70.

CLAUSE 7(1)(c)

Clause 7(1) provides that:

"... the Corporation shall have the exclusive right to provide the following services (hereinafter referred to as "reserved services") -

(a) convey standard articles within Sri Lanka and between Sri Lanka and places outside Sri Lanka; ...

(c) convey letters sent by any government department including letters sent by the Commissioner of Elections containing ballot papers or poll cards..."

Clause 7(1)(c) grants the Corporation the exclusive right to "convey ... letters sent by the Commissioner of Elections containing ballot papers and poll cards." In the course of the hearing, the question arose whether this was inconsistent with Articles 4(e), 93, 103 and 104 of the Constitution.

In considering that question we have to take into account other clauses of the Bill as well. Clause 64(1) provides that "the Minister may give from time to time to the Board general or special directions in writing, and it shall be the duty of the Board to comply with the same." Clause 5(2) requires the Board "in achieving the object of the Corporation [to] act in accordance with the general or special directions given by the Minister;" writing is not stipulated. Clause 70 provides for Presidential directives in regard to the interception, detention and delivery to the Government, of any postal articles, or any class of postal articles.

Such directives and directions could be given in respect of postal ballot papers and poll cards.

It may well be argued that it is improbable that such statutory powers would ever be exercised in respect of ballot papers or poll cards. But the constitutionality of the enabling provisions cannot be determined by speculating on the possibility, or probability, or likelihood, of the exercise of such powers.

If such directives or directions are given, they may prevent the safe or the timely delivery of ballot papers and poll cards; and the Corporation, as well as its directors, officers and servants who give effect to them, would enjoy extensive exemptions from civil and criminal liability, and immunity from civil suit and criminal prosecution (by virtue of clauses 13 and 69, which are considered later in this Determination.)

The question we have to decide is whether granting the Corporation the exclusive right to convey ballot papers and poll cards, subject to such directives and directions, is inconsistent with Articles 4(e), 93, 104 and 105.

It is true that the only constitutional provision which makes express reference to the powers of the Commissioner of Elections is Article 104, which empowers and requires him to "exercise, perform and discharge all such powers, duties or functions as may be conferred or imposed on or vested in

him by the law relating to elections to the office of President ... or by any other written law." There is no constitutional provision in regard to the delivery of postal ballot papers and poll cards. "Written law" provides for delivery "by post," namely, by means of the existing postal service provided by the State.

But that does not mean that at present the Commissioner of Elections has no residual power or discretion if he finds that a situation has arisen in which delivery by post will not ensure the safe or timely receipt of ballot papers or poll cards. If there is a postal strike, or if in some area post offices have been taken over by armed gangs, he is not helpless. He has the power and the duty to devise an alternative method of delivery. Although the relevant Acts of Parliament may be silent, and may - taken in isolation - suggest that there is no alternative to delivery by post, those enactments have to be understood and interpreted in the context of the Constitutional provisions contained in Articles 4(e) and 93, in particular. If delivery by post is not possible, in that ballot papers would not reach those entitled to vote by post, and poll cards would not reach the rest, there can neither be an "exercise of the franchise" within the meaning of Article 4(e), nor "free, equal and secret" voting, within the meaning of Article 93. Those provisions cannot be regarded as pious aspirations, conferring no powers and imposing no obligations. On the contrary, they necessarily confer rights on the Commissioner of Elections and impose correlative duties on the appropriate officials of the State, in regard to all aspects of an election, which are reasonably necessary to ensure a free, equal and secret election at which the franchise may be duly exercised.

The Commissioner of Elections does not have within his direct control, premises required for polling booths and counting centres; the personnel to man them; vehicles for the transport of personnel, ballot boxes, etc; personnel to provide security for polling booths, counting centres, and election staff, and to prevent the intimidation of voters in the vicinity of polling booths; nor does he have the infrastructure and the personnel to deliver ballot papers and polling cards. For all these, he must depend on State officers and State services. If what is made available to him will not suffice to ensure a free and fair election, he is entitled to insist on reasonable alternatives necessary to ensure a free, equal and secret election, and the due exercise of the franchise.

Can clause 7(1)(c) be similarly interpreted as recognising such implied powers and discretions of the Commissioner of Elections, having regard to Articles 4(e) and 93? There are at least two reasons which militate against such a construction. The phrase "exclusive right" seems to exclude the right of the Commissioner of Elections to make alternative arrangements even where that is necessary to ensure a free and fair election. While section 3(1) of the Post Office Ordinance gave the Government the exclusive privilege of conveying by post all "letters", at the time that provision was enacted postal voting was not recognised, and "letters" would not have included ballot papers and poll cards. There is sufficient reason for interpreting "letters", now, as not including such documents. But even otherwise, it is now the privilege of the government - not of the Postmaster-General or the Postal Department - and that is quite compatible with the implied rights of the Commissioner of Elections. A second reason is that the express provisions made by clauses 5(2), 64(1) and 70 - in unrestricted terms - for Presidential directives and Ministerial directions, attract the principle expressio unius, exclusio alteris, leaving no room to infer an implied power or discretion of the Commissioner of Elections to give necessary directions to ensure a free and fair election.

Clause 7(1)(c) is inconsistent with Articles 4(e), 93 and 104 of the Constitution insofar as (a) it does not recognise the power and discretion of the Commissioner of Elections in relation to the delivery of ballot papers and poll cards, and (b) it is subject to Presidential directives and Ministerial directions.

CLAUSES 13 AND 69

Clause 13 provides:

"(1) Subject to the provisions of subsections (2) and (3), no liability shall accrue to the Corporation, a director, or any officer or servant of the Corporation in respect of any injury, loss or damage suffered by any person by reason of -

(a) any loss, misdelivery, delay in delivery of or damage caused to any postal article in the course of its transmission by post;

(b) any failure to provide or delay in providing any postal service or any equipment associated therewith or service ancillary thereto;

(c) any failure, interruption, suspension or restriction of any postal service or service ancillary thereto, or delay of or fault in, any communication by post;

(d) any loss or secrecy in communication arising from the use of any postal service; or

(e) any wrongful payment or delay in payment in connection with any remittance of money or any other irregularity in any document used in connection with such remittance;

Provided that no director or officer or servant of the Corporation shall be exempt from liability in relation to any matter specified in this subsection, where it is due to the misconduct, deliberate omission or any other malicious act of such director or officer or servant as the case may be.

(2) Notwithstanding the provisions of subsection (1), the Corporation may, in the event of loss or damage to any article enclosed in, or forming part of a parcel or insured postal article or the loss of any registered postal article while in the custody of the Corporation, pay an indemnity in accordance with the provisions for the time being in force of the Statute of the Universal Postal Union or any other international agreement to which Sri Lanka is a signatory...."

Clause 13(1) excludes the "liability" (not distinguishing between civil and criminal liability) of the Corporation, and of its directors, officers and servants, in respect of the numerous acts and omissions which are listed in paragraphs (a) to (e), although many of those would be in violation of the fundamental obligations of the Corporation - whose principal object as set out in clause 5(1) is "to ensure the provision of a reliable and efficient postal service." This exemption from liability militates against accountability; and is a disincentive to the attainment of "such performance standards as would reasonably meet the social and economic needs of the community" (see clause 5(1)(c)).

The Corporation will enjoy this sweeping exemption from liability, not only for acts and omissions which are negligent or accidental, but even for those "due to the misconduct, deliberate omission or any other malicious act" of a

director, officer or servant. It is little consolation that, in the latter case, the director, officer or servant is not exempt from personal liability; and that clause 13(3) empowers the Corporation, at its discretion, to pay compensation" in respect of any delay, loss or damage caused to a postal article" - a discretion that does not extend to the many other acts and omissions specified in paragraphs (b) to (e).

Learned Counsel for all the Petitioners contended that the grant of such an extensive exemption from liability was arbitrary and unreasonable, and was inconsistent with Article 12(1).

To reinforce, as it were, that exemption from liability, clause 69 further confers on the Corporation, its directors, officers and servants, a wide immunity from suit or prosecution.

To appreciate the extent of the exemption liability and immunity from suit which the Corporation will enjoy, it must be noted that all five directors of the Corporation will be appointed by the Minister; four (i.e. all except the Managing Director) are summarily removable by the Minister without assigning any reason (schedule, rule 2). Besides, the Minister may give the Board general or special directions in writing (clause 64(1)), or, it seems, even otherwise than in writing (clause 5(2)(b)); and the Board will be obliged to comply with such directions. Thus however unlawful, unreasonable or improper such directions (and the consequential acts or omissions of the Board) may be, the Corporation would be exempt from liability under clause 13(1). Even if the act or omission of a director, officer or servant, pursuant to such directions, might in some instances fall outside the scope of paragraphs (a) to (e), nevertheless clause 69 would grant, to those who carry out such directions, immunity from any "suit or prosecution ... for any act which in good faith is done, or purported to be done or on the direction of the Board." Arguably, acts done by directors on the direction of the Minister, and acts done by employees on the directions of the Board, would in most cases be "in good faith," thus falling under clause 69.

It is unnecessary to consider whether such exemptions and immunities might have been justified if the Corporation was a service agency of the State, not at all concerned with viability or profit. However, the Bill manifests an intention that the Corporation should be viable, "providing a basic letter service ... at the lowest price, consistent with meeting the cost [thereof]"

(clause 5(1)(d)); and in due course, generate "sufficient revenue to cover all its operational expenses and the capital expenditure required to maintain and develop existing operations" (clause 23(b)); and thereafter, generate profits, sufficient, after tax, to make payments to the Government (clauses 23(c) and (28)).

Although certain services are, by clause 7(i), reserved exclusively for the Corporation, it is nevertheless contemplated that there would be "other providers of postal services" besides the Corporation (clause 75(d)) engaged in providing non-exclusive services. The functions of the Regulator, under clause 74, include, among other things, ensuring the provision of efficient and reliable postal services, satisfying the reasonable demands for such services; protecting and promoting the interests of consumers and users with respect to charges, quality and variety of services' and promoting effective competition with a view to ensuring quality, etc.

Clauses 13(1) and (3) deny equal treatment to other providers of postal services by denying them similar exemptions and immunities. The denial of such exemptions and immunities would not only confer an unfair advantage on the Corporation, but would inhibit effective competition in the interests of consumers. Clauses 13(1) and (3) also confer special privileges on the Corporation *vis-a-vis* other persons and bodies, public and private, providing public utility services in other spheres, which must inevitably lead to distortions in the comparative evaluation of the performance of comparable institutions.

We must now turn to the provision in clause 13(2), that the Corporation "may" pay an indemnity, in the event of loss or damage to any article enclosed in, or forming part of an insured postal article. This confirms that the exemption from liability granted by clause 13(1) would extend even to insured articles.

Clause 6(b) empowers the Board to determine the prices, and terms and conditions, for registration and insurance of postal articles. "Insurance" necessarily contemplates an obligation of the insurer to compensate the insured if the event insured against occurs. Clause 55(1) proceeds to make it an offence, punishable by imprisonment not exceeding two years, to send certain valuables "except in an insured package." The combined effect of clauses 6(b), 13(2) and 55(1) is that the consumer would be legally bound to insure

certain valuables sent by post (and may insure other articles); the Corporation would be entitled to insist upon a premium for such insurance; and although the consumer will expect in return for that premium indemnity in the event of loss or damage, the Corporation will be under no obligation to compensate him for loss or damage, and thereby fulfil his legitimate expectations. The combined effect of clauses 6(b), 13(2) and 55(1) would be to permit the right to extort premia without the corresponding duty of assuring protection. No other insurer enjoys such a protection.

The amplitude of clause 69 is also alarming. A prosecution for various offences committed by a director, officer or servant would be barred by clause 69(b) if committed "in good faith on the direction of the Board." Examples of offences which could thus be rendered immune from prosecution, are: opening a postal article in the course of transmission by post, where the stipulated exceptions do not apply (clause 47(1)); damaging, destroying, delaying, intercepting, etc., a postal article (clause 49(i)); falsifying a document relating to postal services provided by the Corporation (clause 50(1)(a)); disclosing the contents or existence of a postal article where the stipulated exceptions do not apply (clause 52(1)). Article 15(7) affords no justification for such unequal treatment.

Clauses 13 and 69 of the Bill are inconsistent with Article 12(1) of the Constitution.

CLAUSES 14 AND 15

Clause 14 provides:

"(1) The Board may appoint any member of the staff of the Corporation by name or by office, to be an inspector for the purposes of this Act.

(2) Every person appointed under subsection (1) as an inspector shall be furnished with a certificate of appointment as an inspector by the Managing Director. The certificate shall be in such form as may be determined by rules made under this Act, and shall, if so required, be produced by the inspector to the occupier or person holding a responsible position in any place or establishment or to the person in charge of any vehicle which such inspector intends to inspect in the performance of his duties under this section.

(3) In the performance of his duties an inspector shall have the power to obtain the assistance of the police, if he has reason to believe that an offence under this Act is about to be committed, is being committed or has been committed.

(4) An inspector may, if he has reason to believe that any offence under this Act has been or is being committed, seize and detain -

(a) any postal article in connection with which the offence is believed to have been committed or is being committed;

(b) any book, register, record or other document which in his opinion will be necessary or useful for the prosecution of any person for an offence under this Act.

(5) Where an inspector seizes any postal article under subsection (4), such article shall be kept in the custody and control of the Corporation, pending its disposal as hereinafter provided."

Clause 14 would empower the Corporation to appoint any member of its staff to be "an inspector," and clause 14(4) would confer on an inspector wide powers of seizure and detention (if need be, after entry into and search of "any place or establishment" or vehicle - see clause 14(2)).

In respect of a postal article seized under clause 14(4)(a), clause 15 empowers an inspector to declare the article forfeited to the State, if he is satisfied, after inquiry, that the article "was used for the commission, or in connection with the commission, of an offence." That forfeiture would stand even if no prosecution was instituted in respect of that offence; and even if a prosecution was unsuccessful. Thus a seizure and forfeiture made even on the basis of an unfounded suspicion that an offence had been or was being committed would nevertheless remain effective. The right of seizure and forfeiture is made to depend on the subjective appraisal of the inspector. It is true that clause 15(3) gives the person aggrieved a right to challenge the forfeiture in the District Court. However, in those proceedings, the burden of proving that the seizure and forfeiture was unlawful is cast (by clause 15(5)) upon the claimant. Accordingly, the forfeiture would stand, not because the Corporation or the inspector proved that an offence had been committed, but only because the claimant failed to prove the negative. It is only the person who arrived at the

decision who would be aware of the circumstances which warranted his conclusion, and unless the duty is cast upon him to disclose and substantiate his grounds the inspector's powers would be grossly excessive and would open the door to abuses enabling the transgression, with impunity, of the rights of citizens under the ordinary law.

Thus seizure and forfeiture of an article on the basis that an offence had been committed would be legitimised, without proof of that offence either beyond reasonable doubt in criminal proceedings, or even on a balance of probability in civil proceedings.

In respect of goods seized and detained under clause 14(4)(b), the aggrieved party is left even without that inadequate remedy. Although seizure is on the basis that the thing seized would be necessary or useful for a prosecution, even if no prosecution is instituted, there is no right, and no procedure, to claim restoration. If a prosecution is instituted, but is unsuccessful, the position is the same.

Mr. Sripavan was unable to suggest any reason why the provisions of the ordinary law should not apply to the search of premises, and to the seizure, detention and disposal of such articles. The conferment of such powers - which are essentially powers exercised by the police - on a person who is not even a public officer, denies those whose property is seized and detained, the equal protection of the ordinary law, for which Article 15(7) affords no justification.

Clauses 14 and 15 are inconsistent with Article 12(1) of the Constitution.

CLAUSES 16 TO 18

Clause 16 provides for the automatic vesting of "all of the assets, property, rights and liabilities of the Department of Posts" in the Corporation upon the "transfer date" to be appointed by the Minister. Clauses 17 and 18 make certain consequential and transitional provisions. There is, an inconsistency between clause 16, and clause 17(c)(i). The latter provides that "immovable property of the Department of Posts required or used to maintain or supply the postal services of the Department of posts ... shall be deemed to have been leased to the Corporation by the State for such period [etc] as may be agreed to between the Corporation and the State." It is, therefore, not clear whether

land vests in the Corporation, or is only deemed to have been leased.

Had it been provided in the Bill, by definition or otherwise, that by immovable property, or property, "of the Department of Posts" was meant State land, then the question might have arisen whether clauses 16 and/or 17 were inconsistent with the constitutional power of the Executive President under paragraph 1:3 of Appendix II to list I ("the Provincial Council List") in the Ninth Schedule to the Constitution:

"Alienation or disposition of State land within a Province ... to any organisation shall be by the President, on the advice of the relevant Provincial Council, in accordance with the laws governing the matter."

Since the Bill provides only for the vesting of property "of the Department of Posts," we express no view on the question of inconsistency with paragraph 1:3.

CLAUSES 23 AND 28

Clauses 23 and 28 provide:

"23. The financial objectives of the Corporation -

(a) for the period of five years from the transfer date, shall be the progressive reduction of its operational losses;

(b) from the sixth year until the eighth year after the transfer date, shall be the generation of sufficient revenue to cover all its operational expenses and the capital expenditure required to maintain and develop existing operations, taking one year with the other; and

(c) from and after the eighth year after the transfer date, shall be to generate sufficient profit after deducting all expenses, to be able to pay the Government such sum as may be determined by the Minister under section 28."

28. The Corporation may, after deducting any amount paid as tax under the Inland Revenue Act, No. 28 of 1979, pay to the Government out of its profits, such sum of money as may be determined by the

Minister, in consultation with the Minister in charge of the subject of Finance, having regard to the cost that the Corporation is required to bear in providing uneconomical service in achieving the principal object of the Corporation under section 5."

Clause 23 has two different aspects: subclauses (a) and (b) would require the Corporation to become financially viable and self-sufficient in two stages, within eight years. Subclause (c) would require the Corporation thereafter to become profitable, almost as if it were a commercial enterprise, and able to pay a portion of its profit, after tax, to the Government.

Mr. Goonesekera on behalf of one of the Petitioners contended that the postal service, as presently provided by the Department of Posts, was essentially a service to the public; however, it was different from other public services because it was directly a means of "securing and advancing" (within the meaning of Article 4(d)) the freedom of speech and expression and freedom of thought - by conveying postal articles for citizens who wish to communicate with each other, and also by disseminating information and knowledge among citizens.

He referred to the provisions for the registration of newspapers for transmission by post contained in section 9 of the Post Office Ordinance and submitted that at present concessional rates of postage are allowed for newspapers and educational material. Since clause 23 required the Corporation to become viable and thereafter profitable, he argued, the Corporation would have no option but to increase rates of postage very considerably and to withdraw existing concessions. He could see no harm in the Department of Posts running at a financial loss and being subsidised by the Government; and he urged that the Corporation should also be subsidised similarly, as it was intended to provide the same public service which the Postal Department now provides. He cited *Indian Express Newspapers v. Union of India*, AIR 1986 SC 515, and *T & T Newspaper Publishing Group v. Central Bank of Trinidad and Tobago*, [1990] LRC (Const) 391.

We acknowledge that the postal service plays, and will continue to play, an important part in promoting the freedom of speech and the dissemination of information and knowledge, despite increasing competition from radio, television, computers and other means of transmitting information. However, we cannot agree either that attaining financial viability is a constitutionally

impermissible goal for the postal service or that increasing prices is the only way to achieve financial viability. The financial objectives specified in clauses 23(a) and (b) can be achieved by more efficient utilisation of human and other resources, improving productivity, better technology, and other strategies designed to achieve cost-efficient objectives. Further, if losses have to be subsidised for the benefit of citizens who are users of the postal service, ultimately such losses have to be met out of the taxes paid by them and their fellow-citizens. A policy decision that those citizens who use the postal services should themselves directly meet the cost of the services they use, without requiring other citizens to meet a part of those costs indirectly, through a process of cross-subsidisation, cannot be regarded as unconstitutional.

The two decisions cited held that the total withdrawal of the exemption from customs duty and the imposition of a high rate of import duty on newsprint imported from abroad, and the drastic reduction in the allocation of foreign exchange for the import of newsprint, respectively, were in violation of the freedom of speech and expression; however, both decisions recognised that a reasonable rate of import duty and a reasonable reduction in the allocation of foreign exchange, respectively, would have been permissible. Clauses 23(a) and (b) do not contemplate such drastic reductions in operational losses as would necessitate a sudden, steep escalation in prices; rather, a gradual reduction of losses over a period of five years is the stipulation; and the expectation is of structured, progressive, and therefore moderate increases in prices.

We hold that clauses 23(a) and (b) are not inconsistent with any provision of the Constitution.

However, clause 23(c) raises a different issue. Although clause 6(b) empowers the Corporation to determine the prices of postal services, in respect of the reserved services it is the Minister who would have the power (under clause 8) to determine either the prices or the formula in accordance with which the Board may determine such prices. The Minister's power in respect of the seven year period covered by clause 23(a) and (b) is subject to implied limitations; e.g. he cannot raise prices in order to eliminate operational losses in two years instead of five. But from and after the eighth year there is no such implied limitation on the Minister's power to raise prices. Further clause 28 would give the Minister power to determine what

sum shall be paid by the Corporation to the Government out of its profits (after tax), but prescribes no guidelines. Accordingly, from the eighth year onwards there would be no restraint on the Minister's power under clause 8.

Although clause 75(b) provides that one of the functions of the Regulator shall be to protect and promote the interests of consumers and other users of postal services with respect to charges for postal services, clause 74 provides that the Secretary to the Ministry shall be the Regulator. It would be an awkward task for the Secretary to question the prices fixed by the Minister, and we cannot regard this as a realistic restraint on the Minister's power to increase both prices and the contribution payable to the Government.

In these circumstances, the unbridled power of the Minister to determine prices and profits could affect the fundamental rights of users of postal services.

Clauses 23(c) and 28 are inconsistent with Articles 10 and 14(1)(a) of the Constitution.

CLAUSES 36(3) AND (5)

Clause 36 provides:

"(1) the Corporation may engage any public officer who is in the service of the Department of Posts (in this section referred to as the "Department") and who seeks employment with the Corporation, and the provisions of this section shall apply in respect of such employment.

(2) Every public officer serving in the Department who is appointed to the Corporation under subsection (1) and who has not less than ten years pensionable service on the last date of his service in the Department, shall be deemed to have retired from the public service on that date and shall be eligible for such a pension under the Minutes on Pensions, as would have been awarded to him had he retired on the ground of abolition of office on that date.

(3) Where a public officer serving in the Department who has not less than ten years pensionable service and is not appointed to the

impermissible goal for the postal service or that increasing prices is the only way to achieve financial viability. The financial objectives specified in clauses 23(a) and (b) can be achieved by more efficient utilisation of human and other resources, improving productivity, better technology, and other strategies designed to achieve cost-efficient objectives. Further, if losses have to be subsidised for the benefit of citizens who are users of the postal service, ultimately such losses have to be met out of the taxes paid by them and their fellow-citizens. A policy decision that those citizens who use the postal services should themselves directly meet the cost of the services they use, without requiring other citizens to meet a part of those costs indirectly, through a process of cross-subsidisation, cannot be regarded as unconstitutional.

The two decisions cited held that the total withdrawal of the exemption from customs duty and the imposition of a high rate of import duty on newsprint imported from abroad, and the drastic reduction in the allocation of foreign exchange for the import of newsprint, respectively, were in violation of the freedom of speech and expression; however, both decisions recognised that a reasonable rate of import duty and a reasonable reduction in the allocation of foreign exchange, respectively, would have been permissible. Clauses 23(a) and (b) do not contemplate such drastic reductions in operational losses as would necessitate a sudden, steep escalation in prices; rather, a gradual reduction of losses over a period of five years is the stipulation; and the expectation is of structured, progressive, and therefore moderate increases in prices.

We hold that clauses 23(a) and (b) are not inconsistent with any provision of the Constitution.

However, clause 23(c) raises a different issue. Although clause 6(b) empowers the Corporation to determine the prices of postal services, in respect of the reserved services it is the Minister who would have the power (under clause 8) to determine either the prices or the formula in accordance with which the Board may determine such prices. The Minister's power in respect of the seven year period covered by clause 23(a) and (b) is subject to implied limitations; e.g. he cannot raise prices in order to eliminate operational losses in two years instead of five. But from and after the eighth year there is no such implied limitation on the Minister's power to raise prices. Further clause 28 would give the Minister power to determine what

sum shall be paid by the Corporation to the Government out of its profits (after tax), but prescribes no guidelines. Accordingly, from the eighth year onwards there would be no restraint on the Minister's power under clause 8.

Although clause 75(b) provides that one of the functions of the Regulator shall be to protect and promote the interests of consumers and other users of postal services with respect to charges for postal services, clause 74 provides that the Secretary to the Ministry shall be the Regulator. It would be an awkward task for the Secretary to question the prices fixed by the Minister, and we cannot regard this as a realistic restraint on the Minister's power to increase both prices and the contribution payable to the Government.

In these circumstances, the unbridled power of the Minister to determine prices and profits could affect the fundamental rights of users of postal services.

Clauses 23(c) and 28 are inconsistent with Articles 10 and 14(1)(a) of the Constitution.

CLAUSES 36(3) AND (5)

Clause 36 provides:

"(1) the Corporation may engage any public officer who is in the service of the Department of Posts (in this section referred to as the "Department") and who seeks employment with the Corporation, and the provisions of this section shall apply in respect of such employment.

(2) Every public officer serving in the Department who is appointed to the Corporation under subsection (1) and who has not less than ten years pensionable service on the last date of his service in the Department, shall be deemed to have retired from the public service on that date and shall be eligible for such a pension under the Minutes on Pensions, as would have been awarded to him had he retired on the ground of abolition of office on that date.

(3) Where a public officer serving in the Department who has not less than ten years pensionable service and is not appointed to the

Corporation under subsection (1), he shall be deemed to have retired from the public service on the last date of his service in the Department and shall be eligible for such a pension under the Minutes on Pensions as would have been awarded to him had he retired from the public service on the ground of abolition of office on that date and may be paid an additional bonus of the prescribed amount.

(4) Where a public officer who has less than ten years pensionable service is appointed to the Corporation under subsection (1), he shall be deemed to have left public service on the last date of his service in the Department and shall be eligible for such gratuity as would have been awarded to him under the Minutes on Pensions had he retired on the ground of abolition of office on that date and may be paid an additional bonus of the prescribed amount.

(5) Where a public officer has less than ten years pensionable service and is not appointed to the Corporation, under subsection (1), he shall be deemed to have retired from the public service on the last date of his service in the Department and he shall be eligible for such a gratuity as would have been awarded to him under the Minutes on Pensions had he retired on the ground of abolition of office on that date and may be paid an additional bonus of the prescribed amount ..."

The effect of clauses 36(2) and (4) is that public officers serving in the Department of Posts may apply for employment in the Corporation. If the Corporation accepts them, they will thereupon become employees of the Corporation, and will be deemed to have retired from, or to have left, the public service, depending on whether or not they had ten years pensionable service. They would be entitled to a pension or a gratuity (computed as if they had retired upon abolition of office) depending on the length of their period of service. Clause 36(6) makes consequential provisions.

However, clauses 36(3) and (5) provide that those who are not appointed to the Corporation will also be deemed to have retired from, or to have left, the public service - even though they may have no wish to leave the public service - with a pension or a gratuity computed on the same basis; and they "may be paid an additional bonus of the prescribed amount." If these provisions become law, the employment of such public officers would be terminated by virtue of an exercise of legislative power, namely the enactment into law of

clauses 36(3) and (5); and not by reason of any decision by the Executive to terminate their services.

Under chapter IX of the Constitution, the power to dismiss public officers is vested in the Cabinet of Ministers (Article 51(1); and in the Public Service Commission insofar as the Cabinet has delegated that power (Article 55(3); and in public officers to whom the Commission may have delegated that power (Article 58(1)). Further, Article 55(4) empowers the Cabinet of Ministers to determine the procedure for the exercise of the powers of dismissal of public officers.

Mr. Sripavan conceded that neither the Establishments Code nor any other rules made under Article 55(4) provide for the automatic termination of the services of a public officer when the Department in which he is working ceases to function, or when his post is abolished. He also drew our attention to section 14(f) of the Interpretation Ordinance.

Learned Counsel for the Petitioners also referred to Part IV of the Sri Lanka Telecommunications Act, No. 25 of 1991, by which Sri Lanka Telecom was established. That Act did not provide for a legislative termination of the services of the public officers serving in the Department of Telecommunications.

Under chapter IX, the power of dismissal is neither unfettered nor unreviewable. In particular, it is subject to the fundamental rights jurisdiction of this Court under Article 126. Clauses 36(3) and (5) would not only treat public officers serving in the Department of Posts differently to other public officers in regard to dismissal, and would also deny them the protection of that jurisdiction, for which Article 15(7) affords no justification.

Clauses 36(3) and (5) are inconsistent with Articles 12(1), 55 and 58 of the Constitution.

CLAUSE 51

Clause 51 provides:

"(1) A director or an officer or servant of the Corporation or any other person shall not disclose any information concerning commercial

dealings of the Corporation, employee records, plans, finances or performances of the Corporation to any person, except under the following circumstances -

- (a) where it is his official duty to do so;
- (b) where he is compelled under any law to furnish such information;
or
- (c) where he is compelled as a witness in any court proceedings to furnish such information.

(2) Where a director or officer or servant of the Corporation acts in contravention of subsection (1), the Minister in the case of a director or the Board in the case of any officer or servant, may take such disciplinary action as the Minister or the Board as the case may be seems [sic] fit and proper.

(3) Where a person other than a director or an officer or servant of the Corporation acts in contravention of the provisions of subsection (1), he shall be guilty of an offence under this Act and shall on conviction after summary trial before a Magistrate be liable to a fine not exceeding fifty thousand rupees or to imprisonment for a term not exceeding six months or to both such fine and imprisonment."

Clause 51 prohibits (subject to very limited exceptions) the disclosure of any information pertaining to an extremely wide range of matters concerning the affairs of the Corporation.

Counsel for the Petitioners contended that clause 51 is inconsistent with Articles 10, 12(1) and 14(1)(a).

A distinction is made between "directors, officers and servants" and "other persons."

In regard to "other persons," the prohibition is plainly too wide, and the exceptions much too narrow. The Corporation is intended to be a public Corporation, with capital provided out of public funds (clauses 24 and 25), whose principal object is to provide a reliable and efficient, and viable,

service. It is an institution that must necessarily be regarded as publicly accountable. The public has a legitimate interest, and indeed a right, to know about the activities of the Corporation - its commercial transactions and activities, its finances, its plans, and its past performance. Certainly, there can be, and perhaps should be, certain restrictions on that right, as, for instance, where the disclosure (or premature disclosure) of information might prejudice the successful operation of the Corporation or affect its competitiveness. But the prohibition imposed by clause 51 goes far beyond that. Clause 51 makes not even a pretence of identifying what should reasonably be kept confidential, and instead would impose virtually a total prohibition on disclosure of information; not only of innocuous information, but even of information concerning unlawful and improper acts and omissions, corruption and inefficiency, extravagance and waste, and the like; e.g. borrowing contrary to clause 27; the grant to directors of excessive remuneration contrary to Schedule, Rule 10, or of improper financial benefits, by way of gifts, loans and other accommodation; the participation of directors and others in decisions notwithstanding financial interest (clauses 48 and 72); unsatisfactory performance below the required standards or adverse to the interests of consumers (clauses 5(1) and 75); and the formulation of plans which would result in any of the foregoing. The prohibition on the disclosure of information would effectively inhibit transparency and discussion, and would consequently prevent or frustrate investigations of wrongdoing and misconduct.

Even disclosure to the Commission to Investigate Allegations of Bribery and Corruption, the Auditor-General, the Parliamentary Committee on Public Enterprise, the Parliamentary Commission for Administration, or a Presidential Commission of Inquiry, would be prohibited, on pain of prosecution. The exceptions are so narrowly framed that disclosure would cease to be a criminal offence only if it is under compulsion - arising from official duty, or an express statutory provision, or a summons issued by a Court. A witness giving evidence or information to a tribunal which is not a Court - such as the institutions mentioned above - would not be exempt; not even a party to legal proceedings in a Court, or a witness in such proceedings, giving evidence without a summons would be exempt. Thus a former employee, dismissed by the Corporation for reporting corruption to his superiors, would not be entitled to disclose such information in his own application to a Labour Tribunal, or in his own evidence in that Tribunal; nor could he furnish to the Supreme Court an affidavit in a fundamental rights

application made by him, or by another who was the immediate victim of such corruption. The Corporation's competitors, customers, and ex-employees, journalists, political parties, taxpayers, trade unions, and ordinary citizens, have a legitimate interest in disclosing and receiving such information. Mr. Sripavan was unable to cite any comparable prohibition in any other statute.

Finally, an outsider who discloses information would be liable to a fine not exceeding Rs. 50,000 and/or to imprisonment for a term not exceeding six months. But a director (or employee) who is guilty of an identical breach, commits no offence. The only sanction for them is that the Minister (or the Board, as the case may be) may take disciplinary action. If indeed the disclosure of information can be regarded as misconduct, disclosure by an "insider" would be far more reprehensible than disclosure by an "outsider" - but the latter is made liable to a criminal penalty, while the former may escape even without censure.

Even the prohibition upon disclosure by directors, officers and servants, is too wide in so far as it applies to matters which cannot reasonably be treated as confidential, and is too narrow in regard to the exceptions.

All these prohibitions do not come within the scope of the restrictions permitted by Articles 15(2) and 15(7).

Clause 51 is inconsistent with Articles 10, 12(1) and 14(1)(a) of the Constitution.

CLAUSE 70

Clause 70 provides:

"(1) Where on a Proclamation made by the President the provisions of Part II of the Public Security Ordinance (Chapter 40) are brought into operation and it appears to the President that it is expedient or necessary that any postal article or class or description of postal articles in the process of transmission by post should be intercepted or detained or should be delivered to the Government, the President may by a directive issued in writing in respect of any postal service provided in any place in Sri Lanka, prohibit the transmission or reception of any postal article or class or description of postal article

or intercept or detain any such article with the assistance of such officers of the Corporation as the Managing Director may assign for such purpose, and of any police officer.

(2) The Corporation shall provide all necessary assistance to a police officer in discharging any function under subsection (1).

(3) The provisions of this section shall apply, mutatis mutandis, to any postal article which may be in the process of transmission by any person other than by the Corporation."

Clause 70(1) empowers the President to issue a directive for the interception and detention, or the delivery to the Government, of any postal articles (widely defined in clause 84 as meaning "an article that may be carried by post") or class of postal articles, subject only to two conditions:

(a) that a Proclamation has been made bringing Part II of the Public Security Ordinance ("PSO") into operation, and

(b) that the President considers such action to be "expedient or necessary."

Clause 70(1) makes no reference to the ground on which the Proclamation has been made; does not require the President's opinion as to the expediency or necessity to be related to that ground; and does not indicate any need for a nexus between that ground and the postal articles intercepted and detained, or delivered to the Government.

Indeed, clause 70(1) would, for instance, authorise interception, etc. of a postal article despatched by a person in the Southern Province to an addressee in the Western Province, even where Part II, PSO, has only been brought into operation in the Northern Province.

Learned Counsel for the Petitioners contended that postal articles would include letters, newspapers, magazines, political pamphlets, and the like - which are all different modes of exercising the freedom of speech and expression; and that clause 70(1) purports to authorise extensive and unfettered interference with that fundamental right without any guidelines. It was submitted that such restrictions are not permitted by Articles 15(2) and

(7). Further, by preventing the receipt of information, the freedom of thought of the intended recipients would also be affected.

A Proclamation can be made under section 2 of the PSO for different reasons - not only in the interests of national security or the preservation of public order, but even on account of a natural disaster, "for the maintenance of supplies and services essential to the life of the community."

Since clause 70(1) would neither require the President's opinion as to expediency or necessity to be related to one or more of the grounds on which the Proclamation was made, nor require the specification of any ground or reason constituting the basis of such expediency or necessity, the power conferred would be unbridled and unfettered. It would be exercisable even despite the absence of any suspicion of unlawful and improper conduct, based on reasonable grounds. Clause 70(1) would thus authorise arbitrary, capricious and unreasonable interference with the right of communication, and would therefore constitute a denial of the equal protection of the law.

Since the President's opinion need not relate to any consideration of national security or public order, or any of the grounds specified in Articles 15(2) and (7), clause 70(1) cannot be treated as a permissible restriction on fundamental rights.

Presidential directives given under clause 70(1) may even affect the conveyance of postal ballot papers and poll cards under clause 7(1)(c), in which event there would be a conflict with the provisions of Article 104 (in regard to the powers, duties and functions of the Commissioner of Elections), Article 93 (the conduct of a "free, equal and secret" poll), and Article 4(e) (the exercise of the franchise). The question is not whether a President would do so, but whether a President is legally enabled to do so.

By virtue of clause 70(3) the power to issue such directives would extend, even to "other providers of postal services" besides the Corporation.

Clause 70 is therefore inconsistent with Articles 4(e), 10, 12(1), 14(1)(a), 93 and 104 of the Constitution.

DRAFTING ERRORS

The Bill contains numerous errors, omissions, ambiguities and inconsistencies, some of which we remarked upon in the course of the hearing. The brevity of the period allowed for our Determination does not permit us to make a detailed scrutiny of all these (or to suggest amendments), but the following give rise to inconsistencies with Article 12(1) of the Constitution.

Clause 48(1)(b) would make it an offence for an employee (defined as including a director, officer, servant, et al) of the Corporation to participate in a decision to award a contract where he has a direct or indirect financial interest in such contract. In regard to directors, schedule Rule 1(h), reinforces that provision by disqualifying a person from being appointed or continuing as a director if he has any financial or other interest as is likely to affect prejudicially the discharge by him of his functions as a director. These safeguards against loss, damage and harm being caused to the Corporation, and those dealing with it, by reason of a conflict of interests on the part of a director are seriously undermined by clause 72. That clause provides that a director who has a direct or indirect pecuniary interest in a matter being considered by the Board, which is of such a nature that it could conflict with the proper performance of his duties in relation to a matter about to be considered by the Board, could, upon due disclosure, be permitted to participate in that decision notwithstanding his interest. Thus notwithstanding an interest which disqualifies him from continuing as a director, and which exposes him to criminal prosecution, clause 72(2) purports to allow his colleagues to waive the rule against bias insofar as the Board decision is concerned.

Clause 59 would make the contravention of any rule made under the Act an offence, punishable with imprisonment. Some of the clauses (e.g. clauses 35(2), and 51(4)) which empower rules to be made deal with procedural matters, of such a nature that non-compliance does not warrant criminal liability; rules made by the Board are not required to be placed before Parliament or even gazetted (cf. clauses 80 and 81).

Clause 82(2)(c) makes a transitional provision which, on its face, would confer an undue advantage on the Corporation; any decree, etc. "in favour of or against" the Attorney-General as representing the Department of Posts shall be deemed to be a decree, etc., "in favour of" the Corporation.

Schedule Rule 1(g), would disqualify a person from being appointed or continuing as a director if he has been "charged or convicted of a criminal offence by a court in Sri Lanka or elsewhere" - impliedly, even if he has been charged and acquitted.

Clause 19(b) is an example which does not involve inconsistency with the Constitution. It would require that, after the "transfer date," "Managing Director" (of the Corporation) be substituted in place of the "Postmaster-General," implying that the Postmaster-General's functions should be performed by the Managing Director. However, clause 19(a) would require that all functions, etc. of the Postmaster-General be discharged by the Board. That would seem to nullify clause 19(b), but does nothing to dispel avoidable confusion.

Likewise, clause 63 defines "postage stamp," for the purpose of Part VI (which deals with offences), to include "a money order or any other postal article." "Postal article" is defined in clause 84 to mean "an article that may be carried by post." Thus "postage stamp" would include both a money order and any article that may be carried by post. The width of these definitions, which require "postage stamp" to be read as including money orders and postal articles, would give rise to unexpected consequences - e.g. in clause 41(1).

Clauses 59, 72(2), 82(2)(c), and Schedule Rule 1(g), are inconsistent with Article 12(1) of the Constitution.

CONCLUSION

We determine that:

Clause 7(1)(c) of the Bill is inconsistent with Articles 4(e), 93 and 104 of the Constitution.

Clauses 13 and 69 of the Bill are inconsistent with Article 12(1) of the Constitution.

Clauses 14 and 15 of the Bill are inconsistent with Article 12(1) of the Constitution.

Clauses 23(c) and 28 of the Bill are inconsistent with Articles 10 and 14(1)(a) of the Constitution.

Clauses 36(3) and (5) of the Bill are inconsistent with Articles 12(1), 55 and 58 of the Constitution.

Clause 51 of the Bill is inconsistent with Articles 10, 12(1) and 14(1)(a), of the Constitution,

Clause 70 of the Bill is inconsistent with Article 4(e), 10, 12(1), 14(1)(a), 93 and 104 of the Constitution, and

Clauses 59, 72(2), 82(2)(c), and Schedule Rule 1(g), of the Bill are inconsistent with Article 12(1) of the Constitution,

and may only be passed with the special majority prescribed by Article 84(2) of the Constitution.

M.D.H. FERNANDO
JUDGE OF THE SUPREME COURT

A.R.B. AMERASINGHE
JUDGE OF THE SUPREME COURT

A. DE Z. GUNAWARDANA
JUDGE OF THE SUPREME COURT

8th March 1999

**THE GAZETTE OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF
SRI LANKA**

Part II of September 11, 1998

SUPPLEMENT

(Issued on 14.09.1998)

NATIONAL COMMISSION ON WOMEN

A

BILL

to provide for the establishment of a National Commission on Women for the promotion, advancement and protection of rights of women in Sri Lanka; and to provide for matters connected therewith or incidental thereto.

Ordered to be published by the Minister of Women's Affairs

National Commission on Women

LD. - O. 13/96.

AN ACT TO PROVIDE FOR THE ESTABLISHMENT OF A NATIONAL COMMISSION ON WOMEN FOR THE PROMOTION, ADVANCEMENT AND PROTECTION OF RIGHTS OF WOMEN IN SRI LANKA; AND TO PROVIDE FOR MATTERS CONNECTED THEREWITH OR INCIDENTAL THERETO.

Preamble

WHEREAS the Universal Declaration of Human Rights affirms the principle of non discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all rights and freedoms without distinction of any kind, including distinction based on sex:

AND WHEREAS Sri Lanka has ratified the International Covenants and Convention on the Elimination of All Forms of Discrimination against Women and other relevant International Instruments:

AND WHEREAS in fulfilment of its obligation to bring National Laws and Policies in harmony with the standards, and principles endorsed by these instruments, the Government of Sri Lanka adopted in 1993 the Women's Charter of Sri Lanka:

AND WHEREAS it is necessary to make legal provision to give effect to those international obligations and formulate laws, policies and measures on gender equality within the framework of the guidelines provided by the Women's Charter of Sri Lanka:

NOW THEREFORE be it enacted by the Parliament of the Democratic Socialist Republic of Sri Lanka as follows:-

Short title

1. This Act may be cited as the National Commission on Women Act, No... of 199...

PART I

ESTABLISHMENT OF THE NATIONAL COMMISSION ON WOMEN

Establishment of the National Commission on Women

2. (1) There shall be established a Commission called the "National Commission on Women" (hereinafter referred to as the "Commission.")

(2) The Commission shall, by the name assigned to it by subsection (1), be a body corporate with perpetual succession and a common seal and may sue and be sued in such name.

Members of the Commission

3. (1) The Commission shall consist of sixteen members constituted as follows:-

- (a) one *ex-officio* member namely, the Secretary or Additional Secretary to the Ministry of the Minister incharge of the subject of Women's Affairs nominated by the Minister;
- (b) two members respectively from each of the following fields being persons who have distinguished themselves in their respective fields;
 - (i) Law,
 - (ii) Health,
 - (iii) Economic Development, Business, Public Administration and Management,
 - (iv) Education,
 - (v) Science and Technology,
 - (vi) Environment and Media,
 - (vii) Women's issues and activities;

(c) the Executive Director of the National Commission of Women.

(2) The members of the Commission other than the members referred to in paragraphs (a) and (c) of subsection (1) shall be appointed by the Minister in charge of the subject of Women's Affairs with the concurrence of the President.

A member so appointed is hereinafter referred to as "an appointed member."

(3) The Executive Director shall be a person of a rank not lower than Class I of the All Island State Services or at equal or like rank in the Non-Governmental Sector and having experience in work related to women and development, and shall be appointed by the Commission with the concurrence of the Secretary to the Ministry of the Minister in charge of the subject of Women's affairs.

Term of office of appointed members

4. Every appointed member shall, unless he vacates office earlier by death, resignation or removal, hold office for a period of four years from the date of his appointment and shall unless he has been removed from office be eligible for re-appointment for a consecutive period of four years.

Chairman

5. (1) The Minister shall with the concurrence of the President appoint a Chairman of the Commission from among the appointed members of the Commission.

(2) The Minister may remove the Chairman from the Office of Chairman with the concurrence of the President for cause assigned.

(3) The Chairman may at any time resign from the office of Chairman by letter to that effect addressed to the Minister,

(4) Subject to the provisions of subsection (2) and (3), the term of office of the Chairman shall be his period of membership of the Commission.

Removal and resignation of members

6. (1) The Minister may, remove any appointed member from office with the concurrence of the President for cause assigned.

(2) In the event of the vacation of office by death, resignation or removal of any appointed member, the Minister may, having regard to the provisions of section 3, appoint any other person to succeed such member. Any member so appointed shall hold office for the unexpired term of office of the member whom he succeeds.

(3) Any appointed member may at any time resign from office by letter to that effect addressed to the Minister.

(4) Where an appointed member, by reason of illness, infirmity or absence from Sri Lanka for a period of not less than three months, is temporarily unable to perform his duties, it shall be the duty of such member to inform the Minister in writing of such inability. Thereupon, the Minister may, having regard to the provisions of section 3, appoint some other person to act in his place.

Remuneration of members

7. All or any of the members of the Commission may be paid such remuneration as the Minister may determine in consultation with the Minister in charge of the subject of Finance.

The chairman and the conduct of business

8. (1) The Chairman shall preside at all meetings of the Commission at which he is present in the absence of the Chairman from any meeting of the Commission, the Members present at such meeting shall choose from among themselves another member to preside at that meeting.

(2) The quorum for any meeting of the Commission shall be five members.

(3) The Commission shall meet as often as necessary, and in any case at least once in each month, at such time and place as the Commission may

determine, and may, subject to the other provisions of this Act and any regulation made thereunder, regulate the procedure in regard to its meetings and the transaction of business at such meetings.

(4) The Chairman may designate an employee of the Commission appointed under section 16 of this Act to be in charge of the day to day administration of the affairs of the Commission.

Acts not invalidated by reason of a vacancy

9. No act, decision or proceeding of the Commission shall be deemed to be invalid by reason only of the existence of any vacancy in the Commission or any defect in the appointment of any member thereof.

Delegation of powers to members

10. The Commission may delegate to any member of the Commission, any power, duty or function conferred or imposed on, or assigned to, the Commission by this Act, and in the exercise, performance or discharge of such power, duty or function such member shall be subject to the general or special directions of the Commission.

Secretary to the Commission

11. There shall be a Secretary to the Commission who shall be a full time officer appointed by the Commission with the concurrence of the Secretary to the Ministry of the Minister incharge of the subject of Women's Affairs.

Seal of the Commission

12. (1) The seal of the Commission may be determined and devised by the Commission, and may be altered in such manner as may be determined by the Commission.

(2) The seal of the Commission shall be in the custody of such person as the Commission may decide from time to time.

(3) The seal of the Commission shall not be affixed to any instrument or document except with the sanction of the Commission and in the presence of the Chairman and one member of the Commission who shall sign the instrument or document in token of their presence.

(4) The Commission shall maintain a register of the instruments and documents to which the seal of the Commission has been affixed.

Principal function of the Commission

13. The principal function of the Commission shall be the promotion, advancement and protection of the rights of women within the framework of the guidelines provided by the Women's Charter of Sri Lanka.

Other functions of the Commission

14. Without prejudice to the generality of section 13, the other functions of the Commission shall be -

- (a) to entertain, consider and mediate complaints, regarding a denial or violation of women's rights with the consultation of the relevant Ministry where the woman is employed and refer such complaints to the relevant authorities for investigation and redress;
- (b) to advise the Government on the promotion of the welfare of, and the protection and advancement of the rights of, women;
- (c) to take all such measures as are necessary, in consultation with the relevant Ministries of Local Authorities, District and Divisional Secretariats, Public and Private Sector Organisations, to further and safeguard, the interests and rights of women;
- (d) to initiate and recommend schemes for, the promotion of the welfare of, and protection of the rights of women;
- (e) to ensure the adoption of, and compliance with, the relevant international declarations and conventions relating to women, by the Government;

- (f) to maintain accurate statistics relating to women and the services available to women;
- (g) to make the public aware of the conditions and needs of women through publications and other programmes;
- (h) to monitor programmes and schemes formulated, initiated and implemented by the Government and by voluntary organisations and bodies for the upliftment of women;
- (i) to do all such other acts or things as may be necessary for the discharge of all or any of the above functions.

Powers of the Commission

15. The Commission may exercise all or any of the following powers:-

- (a) acquire, hold, take or give on lease or hire, mortgage, pledge and sell or otherwise dispose of, any movable or immovable property;
- (b) employ such officers and employees as may be necessary for the purpose of discharging the functions of the Commission;
- (c) enter into and perform directly or through any officer employee or agent authorised in that behalf, all such contracts as may be necessary for the discharge of the functions of the Commission;
- (d) open and maintain current, savings or deposit accounts in any bank or banks;
- (e) borrow such sums of money as may be necessary for the purpose of discharging its functions;
- (f) accept grants, donations and bequests both movable and immovable, from sources in Sri Lanka and abroad and apply them for the discharge of its functions;

- (g) make rules in respect of the management of the affairs of the Commission;
- (h) generally, to do all such other things as are necessary or incidental to the proper discharge of the functions of the Commission.

PART II

STAFF OF THE COMMISSION

Staff of the Commission

16. (1) The Commission may appoint such officers and employees as the Commission may deem necessary for the proper and efficient discharge of its functions with the concurrence of the Secretary to the Ministry of Minister in charge of the subject of Women's Affairs.

- (2) Subject to the other provisions of this Act, the Commission may -
 - (a) exercise disciplinary control over or dismiss, any officer or employee of the Commission;
 - (b) fix the wages or salaries or other remuneration of such officers and employees;
 - (c) determine the terms and conditions of service of such officers and employees;
 - (d) establish and regulate a provident fund and any other welfare schemes for the benefit of the officers and employees of the Commission and make contributions to any such fund or scheme.

Appointment of public officers to the staff of the Commission

17. (1) At the request of the Commission, any officer in the public service may, with the consent of that officer and the Secretary to the Ministry under which that officer is employed and the Secretary to the Ministry of the

Minister in charge of the subject of Public Administration be temporarily appointed to the staff of the Commission for such period as may be determined by the Commission with like consent, or be permanently appointed to such staff.

(2) Where any officer in the public service is temporarily appointed to the staff of the Commission, the provisions of subsection (2) of section 14 of the National Transport Commission Act, No. 37 of 1991 shall, *mutatis mutandis*, apply to, and in relation to, such officer.

(3) Where any officer in the public service is permanently appointed to the staff of the Commission, the provisions of subsection (3) of section 14 of the National Transport Commission Act, No. 37 of 1991 shall, *mutatis mutandis*, apply to, and in relation to, such officer.

(4) Where the Commission employs any person who has entered into any contract with the Government by which he has agreed to serve the Government for a specified period, any period of service to the Commission by that person shall be regarded as service to the Government for the purpose of discharging his obligations under such contract.

PART III

FINANCE

The Fund of the Commission

18. (1) There shall be established a Fund to be called the National Fund for Women (hereinafter referred to as the "Fund").

(2) There shall be paid into the Fund -

- (a) all such sums of money as may be voted from time to time by Parliament for the use of the Commission;
- (b) all such sums of money as may be received by the Commission by way of aid, grants, donations or bequests from any source whatsoever, whether in Sri Lanka or abroad;

- (c) all such sums of money as may be received by the Commission by way of proceeds from the sale of any movable or immovable property of the Commission.
- (3) There shall be paid out of the Fund -
 - (a) all such sums of money as are required to defray any expenditure incurred by the Commission, in the exercise, performance and discharge of its powers, duties and functions under this Act;
 - (b) all such sums of money as are authorised by the Commission to make any *ex-gratia* payment to any individual or organisation in recognition of any exceptional or outstanding contribution made by such individual or organisation towards the upliftment or improvement of the status of women;
 - (c) all such sums of money as are required to be paid out of such fund, by or under this Act.

Audit and accounts

19. (1) The Commission shall cause proper accounts to be kept of the income and expenditure, assets and liabilities and all other transactions, of the Commission.

(2) The financial year of the Commission shall be the calendar year.

(3) The provisions of Article 154 of the Constitution relating to the audit of accounts of public corporation shall apply to the audit of the accounts of the Commission.

Investment money of Commission

20. Any sum of money belonging to the Commission may be invested by the Commission in such manner as the Commission may determine.

PART IV

MISCELLANEOUS

Regulations

21. (1) The Minister in charge of the subject of Women's Affairs may make regulations in respect of matters required by this Act to be prescribed or in respect of which regulations are authorised to be made.

(2) Every regulation made by the Minister shall be published in the Gazette and shall come into operation on the date of publication or on such later date as may be specified therein.

(3) Every regulation made by the Minister, shall as soon as convenient after its publication in the Gazette, be brought before Parliament for approval. Every regulation which is not so approved shall be deemed to be rescinded as from the date of disapproval but without prejudice to anything previously done thereunder.

(4) The notification of the date on which any regulation is deemed to be so rescinded shall be published in the Gazette.

Power of Commission to make rules

22. (1) The Commission may make rules in respect of all matters for which rules are required or authorised to be made.

(2) Every rule made by the Commission shall be approved by the Minister and notification of such approval shall be published in the Gazette.

Officers and servants of the Commission deemed to be public servants within the meaning of the Penal Code

23. All officers and employees of the Commission shall be deemed to be public servants within the meaning and for the purposes of the Penal Code.

Commission deemed to be a Scheduled Institution within the meaning of the Bribery Act.

24. The Commission shall be deemed to be a Scheduled Institution within the meaning of the Bribery Act, and the provisions of that Act shall be construed accordingly.

Protection of members and officers of the Commission for action taken under this Act on the direction of the Commission

25. (1) No suit or prosecution shall lie against the Commission or any member of the Commission or any officer or employee thereof, for any act which in good faith is done by him under this Act or on the direction of the Commission.

(2) Any expense incurred by the Commission in any suit or prosecution brought by or against the Commission before any court shall be paid by the Commission, and any costs paid to, or recovered by, the Commission in any such suit or prosecution shall be credited to the Fund.

(3) Any expense incurred by any such person as is referred to in subsection (1) in any suit or prosecution brought against him before any court, in respect of any act which is done or purported to be done by him under this Act or on the direction of the Commission shall, if the court holds that the act was done in good faith, be paid by the Commission, unless such expense is recovered by him in such suit or prosecution.

No writ to issue against person or property of a member

26. No writ against person or property shall be issued against a member of the Commission in any action brought against the Commission.

Furnishing of information to and appearance before Commission

27. (1) The Commission may, for the purpose exercising and discharging its powers and duties under the Act, require any person by notice in writing, to furnish such information or returns as is or are specified in such notice on or before such date as may be specified in such notice or to appear in person before the Commission on such date as may be specified in such notice.

(2) It shall be the duty of any person to whom any such notice is issued to comply with the requirements of such notice unless such person is prohibited from disclosing the information required under the provisions of any law.

Offences

28. Any person who -

- (a) fails to furnish any information or return in compliance with any requirement imposed on him under this Act;
- (b) knowingly makes any false statement in any information or return furnished by him;
- (c) wilfully omits any matter in any information or return furnished by him;
- (d) contravenes the provisions of this Act or any regulation or rule made thereunder,

shall be guilty of an offence under this Act and shall on conviction after summary trial before a Magistrate be liable to a fine not exceeding ten thousand rupees or to imprisonment for a term not exceeding one year or to both such fine and imprisonment.

Offence by bodies of persons

29. In the case of any offence under this Act committed by a body of persons, then -

- (a) where such body of persons is a body corporate, every director, secretary and officer of that body corporate shall each be deemed to be guilty of that offence;
- (b) where that body of persons is a firm, every partner of that firm shall be deemed to be guilty of that offence.

Provided that, no such person shall be deemed to be guilty of an offence under this Act, if he proves that the offence was committed without his knowledge or that he exercised all diligence to prevent the commission of the offence.

Information to be furnished by the Commission

30. The Commission shall furnish all such information in relation to its activities, as it may be required to furnish by the Minister.

Sinhala text to prevail in case of inconsistency

31. In the event of any inconsistency between the Sinhala and Tamil texts of this Act, the Sinhala text shall prevail.

HER Commission

*Dr Mario Gomez**

1. Introduction

Gender equality lies at the core of human rights and the recent Sri Lankan government proposal to set up a separate statutory body to pursue this goal must be welcomed. Thanks largely to a vibrant women's rights movement, gender equality has been placed at the forefront of the international human rights agenda. Despite the international concern and rhetoric, however, the women have a long way to go to achieve an equality of status with the other sex. National institutions that address gender inequality have been considered as one way of pursuing this objective. This paper seeks to look at the recent proposal to set up a National Commission on Women as laid down in its Bill of September 1998, and consider some options with regard to the proposed law and the law making process.

2. National Institutions for Women

In September 1998 the Government released a Bill which seeks to establish a National Commission on Women.¹ The existing National Committee on Women set up under the Women's Charter will be replaced by an institution with a statutory basis.

National institutions for women have been set up in many parts of the world. The Beijing Platform for Action notes that by 1995 almost all countries had set up national institutions though in many cases they were marginalised,

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¹ A Bill to provide for the establishment of a National Commission on Women for the promotion, advancement and protection of rights of women in Sri Lanka, issued on 14th September 1998.

lacked adequate staff and were under funded.² India, the Philippines and South Africa, are among some of the countries which have established such national institutions.

As far back as 1988 the Committee on the Elimination of Discrimination against Women (CEDAW) adopted a recommendation which called upon governments to establish or strengthen their national machineries.³ Most national mechanisms have been established within government. On the other hand, some have been set up as independent entities, while still others have combined autonomy with limited government involvement. National institutions include bodies such as an Ombudsman or an Equal Opportunity Commission, with responsibility for ensuring compliance with gender equality legislation.⁴ They may also include bodies such as autonomous 'think tanks' supporting the gender mainstreaming process through research, analysis and evaluation activities.⁵

3. National institutions as conceptualised in Beijing

National mechanisms or "institutional mechanisms for the advancement of women," as they were termed, was one of the twelve critical areas identified in the Beijing Platform for Action. According to the Beijing Platform for Action:

*A national machinery for the advancement of women is the central policy coordinating unit inside government. Its main task is to support government wide mainstreaming of a gender equality perspective in all policy areas.*⁶

² Beijing Platform for Action para 196.

³ General Recommendation No 6, adopted by CEDAW at its Seventh Session (1988).

⁴ The Law & Society Trust has been involved in the preparation of draft legislation for an Equal Opportunities Commission, at the request of the Ministry of Justice.

⁵ Report of the Expert Group Meeting on National Machineries for Gender Equality, Santiago, Chile, 31 August - 4 September 1998, organised by the United Nations Division for the Advancement of Women (DAW) and the Economic Commission for Latin America and the Caribbean (ECLAC), paras 48 and 49.

⁶ Beijing Platform of Action, paragraph 201.

The document further states that governments should ensure that national machinery is located at the highest possible level of government, preferably at the level of a Cabinet Minister.⁷

Although the Platform for Action focused on the role of national institutions within government, a survey carried out by the Division for the Advancement of Women showed that one third of all national institutions are either a non governmental organisation or have a mixed structure.⁸

4. CEDAW'S Vision

CEDAW's conceptualisation of national machinery in its Sixth General Recommendation was similar to that adopted by the Beijing Platform for Action. In its Sixth Recommendation CEDAW called upon States to:⁹

Establish and/or strengthen existing national machinery institutions and procedures at a high level of Government, and with adequate resources, commitment and authority to:

- (a) advise on the impact on women of all government policies;
- (b) monitor the situation of women comprehensively;
- (c) help formulate new policies and effectively carry out strategies and measures to eliminate discrimination.

Thus national institutions, as envisioned by both the Beijing Platform for Action and CEDAW's Sixth Recommendation, are entities located at the highest level of government with sufficient resources and visibility.

5. The Proposed National Commission on Women

The Bill that was released in September 1998 is also structured along the

⁷ Ibid, para 203.

⁸ Supra n 5, para 16.

⁹ General Recommendation No 6, adopted by CEDAW at its Seventh Session (1988).

Beijing model. It envisages an institution that will function under the control of the Ministry and work in close consultation with the Ministry.¹⁰ According to the Bill the main function of the Commission will be:

*the promotion, advancement and protection of the rights of women within the framework of the guidelines provided by the Women's Charter of Sri Lanka.*¹¹

However, the Women's Charter, which is only a policy document, is not incorporated as part of the legislation. Apart from this general function, the Commission will have the power to:¹²

Entertain, consider and mediate complaints, regarding a denial or violation of women's rights with the consultation of the relevant Ministry where the woman is employed and refer such complaints to the relevant authorities for investigation and redress (Emphasis added);

Advise the government on the promotion of the welfare of, and the protection and advancement of the rights of women;

Take all such measures as are necessary, in consultation with the relevant Ministries, local authorities, district and divisional secretariats, public and private sector organisations, to further safeguard the interests and rights of women;

Initiate and recommend schemes for the promotion of the welfare of and protection of the rights of women;

Ensure the adoption of, and compliance with relevant international declarations and conventions relating to women;

¹⁰ A Bill to provide for the establishment of a National Commission on Women for the promotion, advancement and protection of rights of women in Sri Lanka, issued on 14th September 1998.

¹¹ Section 13.

¹² Section 14.

Maintain accurate statistics relating to women and the services available to women;

Make the public aware of the conditions and needs of women through publications and other programmes;

Monitor programmes and schemes formulated, initiated and implemented by government and by voluntary organisations and bodies for the upliftment of women.

In addition, the Commission is given the power to require any person to provide information or appear before the Commission.¹³ Failure to comply is an offence and is punishable after trial before a Magistrate.¹⁴ The Commission is given the power to raise funding from sources other than the government, both in Sri Lanka and abroad.

However, the Bill does not provide for the security of tenure for the Commission's members. The members and the chairperson are to be appointed by the Minister of Women's Affairs with the concurrence of the President.¹⁵ The members could be removed by the Minister with the concurrence of the President for 'cause assigned.'¹⁶ Moreover, it is the Minister who is given the power to make regulations and not the Commission.¹⁷ The Commission is given the power to make rules which have to be approved by the Minister.¹⁸ The Commission is also required to furnish 'information in relation to its activities' to the Minister whenever the Minister makes such a request.¹⁹

¹³ Section 27(1).

¹⁴ Sections 28 and 29.

¹⁵ Section 3(2). The Commission will also include one *ex officio* member who shall be the Secretary or Additional Secretary of the Ministry, see section 3(1)(a).

¹⁶ Sections 5(2) and 6(1).

¹⁷ Section 21.

¹⁸ Section 22.

¹⁹ Section 30.

6. The South African Commission on Gender Equality

By way of contrast, the South African Commission on Gender Equality (CGE) has been established by that country's Constitution and is an autonomous body. It is one of the six 'state institutions supporting constitutional democracy' recognised by that country's Constitution.²⁰ The Constitution declares that all these institutions, including the CGE, are to be independent institutions and must exercise their powers impartially and perform their functions without fear, favour or prejudice.²¹

According to the South African Constitution the CGE must promote respect for gender equality and the protection, development and attainment of gender equality.²² The functions of the Commission are broader than the proposed Sri Lankan Commission. They include the power to:²³

- * Monitor and evaluate the policies and practices of government, the private sector and other organisations to ensure that they promote gender equality;
- * Engage in public education;
- * Investigate inequality;
- * Commission research and make recommendations to Parliament or other authorities;
- * Investigate complaints on any gender related issue;
- * Monitor and report on compliance with international instruments;

²⁰ Article 181 of the Constitution of South Africa (1996). The other five are the Public Protector, the Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Auditor General and the Electoral Commission.

²¹ Article 181 (2).

²² Article 187(1).

²³ Article 187(2) of the Constitution and Act No 39 of 1996.

The Commission on Gender Equality has recently been involved in a pioneering initiative. Together with the South African Human Rights Commission and the South African National NGO Coalition (SANGOCO), the Commission on Gender Equality has been conducting countrywide hearings on poverty. These 'Poverty Hearings' resulted in a report titled 'Poverty and Human Rights' which has identified the main obstacles to poverty and gaining access to economic and social rights. The National Poverty Forum – a government cum civil society grouping - which was established after the hearings, is now developing a National Programme of Action to Eradicate Poverty.²⁴

This initiative highlights at least two things. First, the range of possible initiatives a Women's Commission can engage in, if it is prepared to be creative and dynamic. Secondly, the willingness of the South African Commission to interact with civil society in the pursuit of its objectives.

7. Sri Lankan institutions for the advancement of women

Sri Lanka currently has three institutions dealing with women: the Ministry of Women's Affairs, the Women's Bureau and the National Committee on Women. All three institutions are located within government although the National Committee on Women, because it comprises some leading members from the women's movement, has in practice operated with a little more autonomy. The Ministry has also established a network of gender focal points in different ministries and government agencies.

The Women's Bureau

The Women's Bureau was established in 1978 and given the ambitious mandate of formulating, initiating and co-ordinating government policies in relation to women. It is also required to stimulate research, build networks and act as a watchdog with regard to discrimination against women.²⁵

²⁴ 'Poverty and Human Rights' A report of the South African Poverty Hearings organised by the South African Human Rights Commission, the Commission on Gender Equality and the South African National NGO Coalition (SANGOCO).

²⁵ Gerd Holmboe-Ottesen and Sissel Salomon, 'Plan for Future Activities and Reorganisation of the Women's Bureau,' a consultancy report commissioned by NORAD (November, 1985) and Radhika Coomaraswamy, 'Report on the Women's

The Bureau functioned initially from the Ministry of Plan Implementation, directly under the President. It was moved to the Ministry of Women's Affairs in 1983 and continues to function from within that institution.

Ministry of Women's Affairs

A Ministry of Women's Affairs was established as a division of the Ministry of Teaching Hospitals and Women's Affairs in 1983. In 1997 a separate ministry was established with a Minister and Deputy Minister.

The National Committee on Women

The Women's Charter adopted by the government in 1993 established a National Committee on Women which was mandated to examine the progress made in the realisation of the Charter obligations and to monitor the achievement of the Charter objectives. The Committee is located within the Ministry of Women's Affairs.

The Committee was given the power to receive complaints alleging gender discrimination and to direct them to the appropriate authorities for action, or refer them to non-governmental organisations for legal aid or other supporting services. The Committee can monitor the action taken by the administration and also require them to submit 'annual reports of progress.' The Committee has recently set up a complaints mechanism and begun to receive complaints, although public awareness on the mechanism is still inadequate. The proposed Women's Commission will take over from this Committee.

8. An Independent Entity or an Entity within Government?

There are three possible options with regard to national institutions for women:

1. First, to have an institution located within government which will interact with government institutions and organisations to ensure that these institutions integrate gender into their programmes and policies.

Bureau, Sri Lanka: An Agenda of Issues,' a report commissioned by NORAD (July 1983).

2. A second model would be to have an institution independent of government with the freedom and capacity to act on its own initiative in advancing women's rights.
3. A third alternative would be to combine limited autonomy with limited state involvement.

Given that Sri Lanka already has two institutions located within government, (the Ministry of Women's Affairs and the Women's Bureau), with the capacity to interact with government institutions, it is submitted that an independent institution outside government should be created that will be able to engage in a variety of initiatives to achieve gender equality.

9. Possible activities for a Commission on Women

There are many activities a Commission on Women could carry out:

1. Examine proposed legislation, policies and budgets to see that they are consistent with international standards on women, and ensure that the impact they will have on both women and men have been taken into account.
2. The reform of existing legislation and policies to ensure that they operate in a non discriminatory manner.
3. Advise government departments and institutions on ways to integrate gender equality into their administrative practices, budgets, policy and legislation.
4. Advise the private sector on the integration of gender into their work including advice on how to set up mechanisms to deal with sexual harassment and other forms of sex based discrimination in the workplace.
5. Conduct public inquiries in cases where there is evidence of systemic or widespread discrimination.

6. Engage in programmes of awareness raising and education for the public at large, and also for specific groups such as the judiciary, the media, the public service and the private sector.
7. Inquire into and resolve complaints of sex discrimination brought by members of the public.
8. Inquire into issues pertaining to sex discrimination on its own initiative.
9. Litigate before the courts in appropriate cases.
10. Collect materials, facilitate the creation of documentation centres and engage in or promote research.
11. Develop national action plans for the advancement women.
12. Facilitate the preparation of the country report, in consultation with civil society groups, for submission to the CEDAW.
13. Prepare an Annual Report to be submitted to Parliament and be placed before the public.
14. Write periodically to government institutions and request them to submit information on how they have integrated gender into their policies and programmes.
15. Conduct periodic consultations with the public and private sectors on the progress achieved in realising women's rights.
16. Interact regularly with the media to see that gender concerns figure in media reports and analysis.
17. Establish regional or provincial sub commissions to facilitate public access and help the Commission conduct the abovementioned activities.

An independent entity established under an Act of Parliament with security of tenure for its members, would be better located to perform all these functions.

It will have greater freedom to engage in education and awareness raising activities and more importantly be better situated to monitor and evaluate government policies and laws and recommend change. Autonomy would also be important to get the government to honour its international commitments.

An independent body will also be better situated to interact more closely with civil society groups and would have the freedom to choose more effective strategies and programmes of action. In the case of resolving and mediating complaints of sex discrimination, independence from government would be essential, especially in those cases where the complaint is against a government entity.

In the current Sri Lankan context, locating the National Commission within government would have the effect of duplicating an already existing institution. A better approach would be to strengthen the existing capacities of the Ministry of Women's Affairs and the Women's Bureau, and create an independent Women's Commission outside government.

Unfortunately, the government has chosen to locate the proposed Women's Commission within government. Under the proposed legislation the Commission would have to work very closely with the Ministry of Women's Affairs and as conceptualised in the September 1998 Bill, it will function as an appendage of the Ministry.

10. Incorporating a Statement of Women's Rights

While the proposed law makes a reference to the Women's Charter it does not incorporate this document as part of the legislation. The Women's Charter currently has no legal status in Sri Lanka and could only have some status if a court chooses to use it in one of its judgments.

It would be extremely helpful if the law that sets up the Women's Commission contains a statement of women's rights. The Women's Charter is one of the best statements of women's rights in the local context and the incorporation of a revised version of the Charter in the legislation would considerably strengthen the work of the proposed National Commission on Women. It is understood that the Attorney-General's Department is opposed to the incorporation of the Women's Charter in the proposed legislation.

It is proposed that a smaller commission of 5 - 7 members, of whom at least two should function as full time members, be established.²⁶ Appointment could be by the President after a consultative process with women's groups. Since the legislation deals with women's rights, it would be appropriate if gender neutral language could be employed in the legislation.

11. The Law Making Process

'Women have the right to participate in the formulation of laws and polices that will affect them.'

This principle is contained in many human rights documents and is too fundamental to be re-iterated. Yet, in many cases the principle is flouted and laws and polices are framed with little input from those who are supposed to be its beneficiaries.

Given the importance of the proposed law, the law making process clearly needs to be transparent and as participatory as possible. Women and women's groups, not just in the urban centres, but also in the rural areas, should be given an opportunity to comment on the proposed law.

A process that would enable as many women and women's groups to comment on the proposed law could be an empowering experience and help in creating awareness about the law's potential. It will be a process that will create awareness, not just about the proposed law, but about women's rights in general. Another useful initiative prior to the final drafting of the law would be a consideration of how national machinery in other parts of the world has functioned. A consultation that would bring together members from a few representative commissions would help strengthen the proposed legislation.

12. Moving forward

CEDAW requires governments to take all appropriate means to eliminate discrimination against women including the adoption of legislative and other measures.²⁷ The Convention also requires governments to abolish laws,

²⁶ According to the September 1998 Bill, there will be 16 members, section 3.

²⁷ Article 2.

practices and customs which are discriminatory of women and to establish adequate legal protection for women.²⁸ CEDAW further requires governments to ensure that public authorities and institutions do not discriminate against women.²⁹ The objective of the government in establishing the National Commission on Women would be to discharge these obligations.

In many parts of the world national institutions for the protection and promotion of human rights, not just women's rights, have been established. Unfortunately, the debate with regard to national machinery for women does not seem have been influenced by the developments that have occurred with regard to 'national institutions for human rights.' Although the Sri Lankan Human Rights Commission has had limited impact during the past two years, the legal framework setting up the institution is very good.³⁰ It is proposed that those drafting the law on the Women's Commission take a look at the Human Rights Commission Act and consider some of the global developments that have occurred in this area.

As was observed in Beijing, many of the national institutions for women set up in different parts of the world have had limited impact.³¹ Institutions do not function in a vacuum. If Sri Lanka does obtain an independent Commission on Women, then its impact on the rights of women would depend not only on how dynamic and creative the Commission is, but on civil society groups as well. Civil society groups will need to interact closely with the Commission and monitor its performance if the Commission is to have a significant impact.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Human Rights Commission Act, No 21 of 1996.

³¹ Beijing Platform for Action para 196.

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