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PROTECTION OF WOMEN AND CHILDREN

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Editor's note .....

This issue of the LST Review is devoted to Women and Children. In her paper on Child Labour in Sri Lanka, Ms Lalani Perera looks at the situation in Sri Lanka in the light of the international instruments that Sri Lanka has ratified. The writer proposes several recommendations to improve the situation including the provision of an effective monitoring procedure to ensure proper enforcement of the law, and providing adequate and suitable institutions to detain victims of child labour.

We also publish the recently passed law on maintenance and the amendment to the Evidence Ordinance to allow evidence by children on video tape. The Maintenance Act is an innovative piece of legislation which allows even adult children and disabled adults to claim maintenance. The second piece of legislation seeks to protect children from the stern environment of a court room and allows them to testify out of court.

A symposium on "Violence Against Women" was organised in March at the Trust to coincide with the International Women's Day. We publish the presentation made at this symposium by Mr Yasantha Kodagoda on "Substantive and Procedural Criminal Law Relating to Violence Against Women." He proposes several amendments to the existing law and procedure including, the need to enact a specific law on domestic violence; doing away with the need to have a preliminary inquiry in all cases of rape; and the necessity to have all victims of sexual abuse examined by a psychologist whose evidence will be admissible in a court of law.

We have also published the Summary of Findings of the International Council on Human Rights on the performance of human rights institutions and a case note prepared by Ruskshana Nanayakkara on the recently decided case of *Perera* v. *Rajitha Senaratne* which involved a conflict between the Constitution and another statute.

ILO STANDARDS AND SRI LANKAN LAWS REGULATING CHILD LABOUR

Lalani S. Perera[*]

INTRODUCTION

Reliable statistical data on the situation of child labour in Sri Lanka was not available until the conduct of a Child Activity by the Department of Census and Statistics in 1999. This survey is not limited to child labour, but deals with other forms of child economic activity and covers the age group 5 - 17 years. Studies carried out in the 1990's have revealed varying figures on child labour. While the National Planning Department suggested the figure to be between 100,000 - 500,000 (1990), the Quarterly Report of the Sri Lanka Labour Force Report suggested 40,000 (1998). It is also encouraging to observe that according to the Labour and Economic Surveys and Demographic Surveys there have been decreasing trends in child labour since 1985/1986. The actual figures, however, may be higher than these official surveys since they did not cover the Northern and the Eastern Provinces.

The 1999 Child Activity Survey conducted by the Department of Census and Statistics using a sample of 14,400 housing units (in the areas other than the Northern and Eastern Provinces) provides a more reliable and comprehensive analysis of the situation. This survey, in addition to the economic activities in which children are engaged, collected information also on their other activities, such as education and leisure activities. The survey reveals that 21% of children in the age group 5 - 17 years is engaged in some form of economic activity.

Percentage distribution of working children (5-17 years)
By occupation (economic activity)

Occupation	Number	%
Total	926038	100.0
Sales and service workers	88238	9.5
Craft and related workers	145887	15.8
Unskilled workers		
i. Agricultural workers	589024	63.6
ii. Street and mobile vendors, etc.	10429	1.1
iii. Domestic workers	19110	2.1
Others	73350	7.9

Source: Department of Census and Statistics

[*] Additional Secretary (Legal), Ministry of Justice, Constitutional Affairs, Ethnic Affairs, and National Integration.

According to the survey, 58.3% of the parents/guardians interviewed get their children to assist in their own household enterprises and another 28% send them for employment to supplement the household income.

It is important to note that since this Survey deals with various forms of child economic activity and not only child labour and it has also taken into account an age group above the minimum ages recognised under our laws, certain total figures would reflect children engaged in permitted economic activity as well.

While the problem of child labour in Sri Lanka is minimal in the organised sector, as compared to the situation in the South Asian region, its prevalence in the informal sector is a matter for much concern. Children are drawn into the informal labour force mainly from rural areas, urban slums and plantation areas.

SRI LANKA AND ITS INTERNATIONAL OBLIGATIONS

These obligations arise mainly under:

* ILO Conventions

* UN Convention on the Rights of the Child.

ILO ACTIVITIES

Sri Lanka has been a member of the ILO since 1948.

The first Convention adopted by the ILO in respect of child labour was the Minimum Age (Industry) Convention of 1919. This was followed by the Minimum Age (Sea) Convention of 1920, the Night Work of Young Persons (Industry) Convention 1919 and the Minimum Age (Agriculture) Convention of 1921 all ratified by Sri Lanka. Nationally, legislation was enacted to give effect to these Conventions with the enactment of the Employment of Women, Young Persons and Children Act of 1956 (EWYPC Act).

In 1973 the ILO adopted Convention No. 138 on Minimum Age for Admission to Employment (ILO C.138) which sought to establish a general instrument on the subject which would gradually replace the existing Conventions applicable to the different economic sectors. This Convention deals with minimum ages, hazardous work, light work and effective enforcement of Convention obligations. The need to ratify this Convention was approved by the Sri Lankan government in 1999 and initial steps have been taken to complete the procedure.

The most recent ILO Convention concerning children is the one on Worst or Extreme Forms which was adopted after the 86th Session of the ILO Conference held in 1999. The Sri Lankan authorities are in the process of discussing this Convention with a view to its ratification.

Adopting ILO Conventions/Recommendations:

ILO standards take the form of Conventions and Recommendations. Conventions are international treaties which are binding on ILO Member States which ratify them. Recommendations are non-binding guidelines which seek to facilitate the formulation of national policy and action.

The process leading to the formulation and adoption of a Convention is as follows:

* The ILO Governing Body decides that a particular subject is appropriate for standard setting.

* That subject is discussed at the annual International Labour Conference (ILC).

* The draft standards are sent to governments of member countries who are then required to discuss these standards with employer and worker organisations in their countries.

* The ILC at its meeting appoints a tripartite committee of governments, employers and workers to discuss the Proposed Conclusions which have been prepared by the ILO office having regard to the replies received.

* The committee examines the Proposed Conclusions by considering amendments submitted by delegates and adopts a report which includes a summary of its discussions and conclusions concerning a proposed Convention.

* The draft Convention and Recommendations are put to the full Conference for adoption. Adoption is by 2/3 majority of the delegates who are present.

After the adoption, all Member States are required to submit the Convention to their competent national authority for examination and determination whether to ratify it. Once a country ratifies a Convention, it agrees to implement it and to submit to supervision of its implementation by the ILO. A ratifying country is required to report periodically on the steps taken by it to implement the Convention. The country reports are examined by a Committee of Experts appointed by the ILO Governing Body. Copies of a government country report must be sent to employer and worker organisations whose comments may be included in the government report or directly addressed to the ILO. Comments from employer or worker organisations can prompt the Committee of Experts to request a report from the government even before a subsequent report is due.

The ILO monitoring mechanism is that if the Committee of Experts finds that a government is not complying with its obligations under the Convention, it addresses a comment to the government, drawing attention to its shortcomings and requesting that steps be taken to eliminate them. The Committee's comments are published in its report.

International Programme on Elimination of Child Labour (IPEC):

The ILO's International Programme on the Elimination of Child Labour (IPEC) - the largest technical co-operation programme on child labour - operates in more than 60 countries. IPEC works towards the elimination of child labour by strengthening national capacities to combat the problem. IPEC commenced its activities in Sri Lanka in 1996 and has been supporting many programmes as a partner organisation both of the government and the non-governmental sector. An IPEC National Steering Committee headed by the Secretary to the Ministry of Labour is the co-ordinating mechanism. IPEC activities conducted so far in Sri Lanka include technical training programmes for police, labour and probation officers, discussions with judges on effective law enforcement, awareness raising programmes for particular sectors, such as the media, as well as the general public, conduct of surveys, funding projects to wean children away from employment and directing them towards education, initiating legal reform to strengthen the law, facilitating legal aid for victims of child labour, funding publications on child labour and media campaigns to deter the employment of children.

UN CONVENTION ON THE RIGHTS OF THE CHILD (CRC)

This Convention, adopted in 1989, re-iterates broadly the ILO standards on child labour. For the purposes of this Convention a child is defined as a person under the age of 18 years.

Thus when Sri Lanka ratified the UN Convention on the Rights of the Child in 1991, it recognised the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development. With this recognition came the obligation of the State to take all measures to ensure the implementation of this Article, and in particular:

(a) provide for minimum ages for admission to employment;

(b) provide for appropriate regulation of the hours and conditions of employment; and

(c) provide for appropriate penalties or other sanctions to ensure the effective enforcement of this Article.

NATIONAL POLICIES

Our current national policies and laws can be said to be in conformity with the standards required by international standards to a commendable extent. However there is yet more to be done, especially in the field of effective enforcement of these principles and laws.

Confining these standards to the statute books is insufficient. Our national policies are primarily reflected in the:

* Constitution	One of the Directive Principles of State Policy is that the State shall promote with special care the interests of children and youth, so as to ensure their full development, physical, mental, moral, religious, and social, and to protect them from exploitation and discrimination.
* Children's Charter	Re-iterates Article 32 of the Convention on the Rights of the Child.

NATIONAL LEGISLATION

The main enactment is the Employment of Women, Young Persons and Children Act of 1956 (EWYPC Act). In addition, certain provisions of the Factories Ordinance of 1942, Shop and Office Employees Act of 1954, Minimum Wages (Indian Labour) Ordinance of 1927 and the Mines (Prohibition of Female Labour Underground) Ordinance of 1937 are also applicable. These provisions relate to minimum ages for employment in the relevant sectors and also lay down the precautions to be taken in the employment of young persons. The relevant Regulations made under the EWYPC Act are contained in the Employment of Children Regulations of 1958, the Employment of Young Persons at Night in Industrial Undertakings Regulations of 1956 and the Employment of Young Persons at Sea Regulations of 1957.

MAIN FEATURES OF THE EWYPC ACT IN RELATION TO CHILDREN AND YOUNG PERSONS

Definition of "child" and "young person"

For the purposes of the EWYPC Act, a "child" is defined as a person under 14 years and a "young persons" as a person between 14 and 18 years.

The Act deals mainly with three areas:

* By prescribing minimum ages for different types of employment.
* By requiring certain conditions to be followed in the employment of children and young persons.
* By prohibiting "hazardous labour."

Minimum ages:

The minimum age for admission to employment as prescribed by ILO Convention No.138 is 15 years and, in any case not less than the age of completion of compulsory education.

However, a flexible age of 14 years is also recognised in the case of a Member State whose economy and educational facilities are insufficiently developed.

The minimum ages recognised in our national legislation are in conformity with ILO Convention No.138 standards to a considerable extent, but not in its entirety. Those minimum ages are as follows:

* Employment in industrial undertakings (public and private) - 14 years *[EWYPC Act, section 7(1)]*.

* Employment at sea - 15 years *[EWYPC Act, section 9(1)(a)]*.

* Employment in undertakings other than industrial undertakings - 14 years (from December 1999 - it was 12 years prior to December 1999) *[EWYPC Act, section 13 and Employment of Children Regulations, 1957 as amended in 1999]*.

* Street trading - 14 years [*EWYPC Act, section 13(2)]*.

* Employment in a shop or office - 14 years [*Shop and Office Employees Regulation of Employment and Remuneration Act, 1954, section 10]*.

* Employment in a factory - 14 years *[Factories Ordinance, 1942, section 137]*.

* Estate labour - 10 years [*Minimum Wages (Indian Labour) Ordinance, 1927, section 4]*.

* Night work - 18 years *[EWYPC Act, section 2]*.

One area of inconsistency was where children below 14 years (but above 12 years) could be employed in non-industrial undertakings, subject to certain conditions, such as:

* restrictions on the types of employment
* conditions of employment (such as hours of work, hours of rest).

However, in December 1999 the law was amended to prohibit the employment of children under 12 years in all spheres. Prior to the amendment, children between 12 and 14 were, therefore, permitted to work in the domestic service, subject to laid down conditions which were perhaps always observed in the breach. Such children were often vulnerable to other forms of extreme abuse such as sexual abuse, physical and emotional cruelty and deprivation of education - in fact, a denial of their very childhood.

Further, according to the current law, we see that children above 10 years can be employed in the plantation sector. Conformity to ILO Convention No.138 standards

would require that age to be raised to at least 14 years. It is understood that the Ministry of Labour has already initiated action to raise this age.

FAMILY WORK/LIGHT WORK

The ILO definition of "light work" is work not likely to be harmful to health or development and will not prejudice a child's attendance in school or his participation in vocational orientation or training programmes. Here the concept of "work" is distinguished from the concept of "labour."

This is especially important in the context of our agricultural background. The EWYPC Act permits children under 14 years to be employed in industrial undertakings or at sea in which only family members are employed. Our law also permits parents or guardians to employ children in light agricultural or horticultural work, but only outside school hours.

The EWYPC enables Regulations to be made authorising children under 14 years to be employed in any school or other institution supervised by public authority and imparting technical education or other training for the purposes of any trade or occupation.

Although Sri Lanka has had a high literacy rate for several decades without a legal obligation on compulsory education, the requirement of compulsory education for children between the ages of 5 and 14 was legally recognised in 1998 with the enactment of the Compulsory School Attendance Regulations. There is an important link between the reduction of child labour and compulsory education since the latter necessarily prevents children between the compulsory education ages being employed since they have to be sent to school.

HAZARDOUS WORK

The minimum age for "hazardous employment" recognised under our law is 14 years. The Mines (Prohibition of Female Labour Underground) Ordinance of 1927 prohibits the employment of females of any age in underground work in mines.

The minimum age prescribed by ILO Convention No.138 is 18 years; but a flexible age of 16 years is recognised, provided the health, safety and morals of the persons are fully protected.

The "Top Hazards" identified by the ILO are:

* Mining, quarries, underground work
* Maritime work
* Machinery in motion and dangerous machinery
* Explosives
* Weights and lead
* Construction and/or demolition

* Noxious and radioactive agents or substances
* Lead/Zinc metallurgy
* Transportation
* Entertainment, alcohol production and/or sale.

Here too it would be necessary to consider the need to raise the age under our laws at least to 16 years and also examine "hazardous labour" in the local context with a view to conforming to required standards.

The need for special protection measures for young persons employed in factories is recognised in the Factories Ordinance. It prohibits a young person working at a dangerous machine, unless he has been fully instructed as to the dangers arising in connection with the machine, the precautions to be observed and has received sufficient training to operate the machine or is supervised by a person who has a thorough knowledge and experience of the machine. An effective monitoring mechanism will ensure the proper enforcement of these safety measures.

ENTERTAINMENT/PERFORMANCES

The minimum ages prescribed under the EWYPC Act are:

* Taking part in entertainment where a charge is made to the audience - 14 years [EWYPC Act, section 18(1)]

* Performances endangering life or limb - 16 years [EWYPC Act, section 19(1)]

* Training of a dangerous nature - 14 years [EWYPC Act, section 20(1)].

The law, however, permits a child under 14 years to take part in entertainment where without fee or reward and where its proceeds are devoted to charitable or educational purposes or which is presented by a school or by an amateur dramatic society or as part of any training in a school.

As regards artistic performances/entertainment which may have dangerous consequences, it would be appropriate to adopt standards similar to those relating to hazardous work. Thus the question of raising the minimum age and the conditions subject to which such activities should be undertaken would require to be considered from the point of view of legal reform.

PENALTIES FOR VIOLATION OF THE LAW

Deterrent punishments are necessary to combat the problem effectively.

The penalties for the violation of the provisions of EWYPC Act have not been revised since its enactment in 1956. They are extremely inadequate in the present circumstances.

For example, the penalty for employing a person under the minimum age in an industry or at sea is a mere Rs. 1000/= or a jail term extending to six months. Employment of a person under the minimum age in a shop or office carries a penalty of only Rs. 500/= or a jail term up to six month. Rs. 50/= is the prescribed fine for failing to keep registers containing details of persons under 16 years who are employed in an industrial undertaking or at sea.

There is an urgent need not only to enhance these punishments substantially, but also to provide for the mandatory payment of compensation to victims of child labour. The Labour Ministry has now proposed amendments to the EWYPC Act which seek to enhance the fines up to Rs. 10,000/= and the jail terms up to 12 months and also requiring a court to order the employers to mandatorily pay compensation to the victim.

CONVENTION ON EXTREME OR WORST FORMS OF CHILD LABOUR

This is the most recent ILO Convention relating to child labour. The Convention adopted in 1999, defines "extreme forms" to cover:

* all forms of slavery;

* engaging children in illegal activities, for prostitution, production of pornography or pornographic performances;

* any other type of work or activity which is likely to jeopardise the health, safety or morals of children.

CONCLUSION

The objective of any law, however comprehensive or in conformity with all international standards, can be realised only through its effective implementation. Most often we find model legislation failing to have the desired impact because of enforcement inadequacies or a failure to view it in the spirit in which it was enacted.

It is also necessary that all sectors concerned in the administration of criminal justice including the investigative, prosecution, labour department, probation and child care services and legal aid services act in a co-ordinated manner with a view to facilitating the courts to dispense justice effectively. Some of the measures that can be taken to improve the system are:

* Improving infrastructural requirements such as adequate personnel who are well aware of the laws and with sufficient training;

* Providing adequate and suitable institutions to detain victims of child labour pending conclusion of trials (sometimes they are completed to remain with the offenders);

* Overcoming difficulties faced by labour officers who have no direct access to premises where children are employed. They have to obtain the services of the police and the attendant delays can have negative consequences;

* Facilitating the determination of victim's age which is crucial for a child labour prosecution. It is reported that there is a general reluctance on the part of the medical profession to issue probable age certificates in view of the difficulties that may be encountered in participating in a lengthy court trial as a witness;

* Providing an effective monitoring procedure to ensure proper enforcement of the law.

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PARLIAMENT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

EVIDENCE (SPECIAL PROVISIONS) ACT, NO. 32 OF 1999

[Certified on 7th October, 1999]

LD. - O. 18/97.

AN ACT TO MAKE PROVISION FOR A COURT TO RECEIVE EVIDENCE OF A CHILD WITHOUT CAUSING AN OATH OR AN AFFIRMATION TO BE ADMINISTERED TO SUCH CHILD; AND TO AMEND THE EVIDENCE ORDINANCE

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 Evidence (Special Provisions) Act, No. 32 of 1999.

PART 1

Child to testify without causing an oath or affirmation to be administered.

2. (1) Where a court is satisfied that a child is competent, as required by the Evidence Ordinance, to testify in any proceedings but is not able to understand the nature of an oath or an affirmation, the court may receive the evidence of such child without causing an oath or an affirmation to be administered to such child, and any unsworn testimony given by such child in such proceeding shall be deemed not to be inadmissible by reason only of the fact that such testimony was not given on oath or affirmation and the proceeding in which such testimony was given shall not be invalidated by reason only of the fact that such testimony was not given on oath or affirmation.

(2) Where a child is permitted, under subsection (I), to testify without taking an oath or making an affirmation, the child shall be bound to state the truth on all matters to which his testimony relates, and the court shall explain this to the child.

PART II

Insertion of new section 38A in Chapter 14.

3. The following new section is hereby inserted immediately after section 38 of the Evidence Ordinance (hereinafter in this Part referred to as the "Principal enactment") and shall have effect as section 38A of the enactment:-

'Statement as to age in a certificate of a Medical Practitioner when relevant.

38A (1) Where is a court is required to form an opinion as to the age of a person, a statement in a certificate purporting to be issued by a Medical Practitioner as to the probable age of such person is relevant.

(2) In this section, "Medical Practitioner" means a Medical Practitioner registered under the Medical Ordinance.

Insertion of new section 163A in the principal enactment.

4. The following new section is hereby inserted immediately after section 163 and shall have effect as section 163A of the principal enactment:-

'Video recorded interview with a child may be given in evidence.

163A (1) In any proceedings for an offence relating to child abuse a video recording of a preliminary interview which -

(a) is conducted between an adult and a child who is not the accused in such proceeding (hereinafter referred to in this section as "a child witness"); and

(b) relates to any matter in issue in those proceedings,

may notwithstanding the provisions of any other law with the leave of the court, be given in evidence in so far as it is not excluded by court under subsection (2).

(2) where a video recording is tendered in evidence in any proceedings referred to in subsection (1) the court shall give leave under that subsection unless-

(a) it appears to court, that the child witness will not be available for cross examination in such proceedings; or

(b) any rule of court requiring the disclosure of the circumstances in which the video recording was made have not been complied with to the satisfaction of the court.

(3) Where a video recording is given in evidence under this section -

(a) the child witness shall be called by the party who tendered the video recording in evidence;

(b) such child witness shall not be examined in chief on any matter which, in the opinion of the court, has been dealt with in his recorded testimony.

(4) Where a video recording is given in evidence under this section any statement made by the child witness which is disclosed by the video recording shall be treated as if given by that child witness in direct oral testimony and accordingly, any such statement shall be admissible evidence of any fact of which direct oral testimony from him would be admissible.

(5) Where the child witness, in the course of his direct oral testimony before court, contradicts, either expressly or by necessary implication, any statement previously made by him and disclosed by the video recording, it shall be lawful for the presiding judge, if he considers it safe and just in all the circumstances of the case, to act upon such previous statement as disclosed by the video recording, if such previous statement is corroborated in material particulars by evidence from an independent source.

For the purposes of this section -

(a) "an offence relating to child abuse" means an offence under sections 286A, 308A, 360A, 360B, 360C, 363, 364A, 365, 365A or 365B of the Penal Code when committed in relation to a child;

(b) "child" means a person under eighteen years of age, at the time when the preliminary interview is video recorded;

(c) "video recording" means any recording in any medium, from which a moving image may by any means be produced and includes the accompanying sound track.

PARLIAMENT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

MAINTENANCE ACT, NO. 37 OF 1999

[Certified on 22nd October, 1999]

L.D.O - 35/98

AN ACT TO PROVIDE FOR THE MAINTENANCE OF CHILDREN, ADULT OFFSPRING, DISABLED OFFSPRING AND SPOUSES UNABLE TO MAINTAIN THEMSELVES; TO ENSURE COMPLIANCE OF THE LAW RELATING TO MAINTENANCE WITH THE PROVISIONS OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD; AND FOR MATTERS CONNECTED THEREWITH OR INCIDENTAL THERETO.

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 Maintenance Act, No. 37 of 1999.

PART I

APPLICATION FOR MAINTENANCE

Order for maintenance of a spouse of a spouse or child or adult offspring or disabled offspring.

2. (1) Where any person having sufficient means, neglects or unreasonably refuses to maintain such person's spouse who is unable to maintain himself or herself, the Magistrate may, upon an application being made for maintenance, and upon proof of such neglect or unreasonable refusal, order such person to make a monthly allowance for the maintenance of such spouse at such monthly rate as the Magistrate thinks fit, having regard to the income of such person and the means and circumstances of such spouse;

Provided however, that no such order shall be made if the applicant spouse is living in adultery or both the spouses are living separately by mutual consent.

(2) Where a parent having sufficient means neglects or refuses to maintain his or her child who is unable to maintain himself or herself, the Magistrate may upon an application being made for maintenance and upon proof of such neglect or refusal, order such parent to make a monthly allowance for the maintenance of such child at such

monthly rate as the Magistrate thinks fit, having regard to the income of the parents and the means and circumstances of the child;

Provided however, that no such order shall be made in the case of a non-marital child unless parentage is established by cogent evidence to the satisfaction of the Magistrate.

(3) Where a parent having sufficient means neglects or refuses to maintain his or her adult offspring who is unable to maintain himself or herself, the Magistrate may upon an application being made for maintenance and upon proof of such neglect or refusal, order such parent to make a monthly allowance for the maintenance of such adult offspring at such monthly rate as the Magistrate thinks fit, having regard to the income of the parents and the means and circumstances of the adult offspring;

Provided however, that no such order shall be made in the case of an non-marital adult offspring unless parentage is established by cogent evidence to the satisfaction of the Magistrate.

(4) Where a parent having sufficient means neglects or refuses to maintain his or her disabled offspring who is unable to maintain himself or herself, the Magistrate may upon an application being made for maintenance and upon proof of such neglect or refusal, order such parent to make a monthly allowance for the maintenance of such disabled offspring at such monthly rate as the magistrate thinks fit, having regard to the income of the parents and the means and circumstances of the disabled offspring;

Provided however, that no such order shall be made in the case of a disabled non-marital offspring unless parentage is established by cogent evidence to the satisfaction of the Magistrate.

(5) Where an order is made by a Magistrate for the payment of an allowance pursuant to an application made under subsection (1) or (2) or (3) or (4), such allowance shall be payable from the date on which the application for maintenance was made to such court, unless the Magistrate, for good reasons to be recorded, orders payment from any other date.

(6) Where an application is made for the maintenance of a child, adult offspring or disabled offspring, as the case may be, under subsection (2), (3) or (4), as the case may be, the court may, either on the application of the parties or of its own motion, add the other parent as a party to such application and make such order as is appropriate against one or both such parents.

Period of validity of Order.

3. No Order for an allowance for the maintenance of any child, adult offspring or disabled offspring made under this Act shall, except for the purpose of recovering money

previously due under such Order, be of any force or validity after the person in respect of whom the Order is made ceases to be a child, adult offspring or disabled offspring, as the case may be, within the meaning of this Act.

Application for maintenance.

4. (1) An application for maintenance may be made -

(a) where such application is for the maintenance of a child or disabled offspring, by such child or disabled offspring or by any person who has custody of such child or disabled offspring;

(b) where such application is for the maintenance of an adult offspring, by such adult offspring or where such adult offspring is incapable of making such application, by any person on his or her behalf; and

(c) where such application is for the maintenance of a spouse, by such spouse or where such spouse is incapable of making such application, by any person on his or her behalf.

(2) An application for maintenance may be made to the Magistrates Court within whose jurisdiction the applicant or the person in respect of whom the application is made or the person against whom such application is made, resides.

PART II

ENFORCEMENT OF ORDER FOR MAINTENANCE

Enforcement of orders.

5. (1) Subject to the provisions contained in section 10, where any person against whom an order is made under section 2 or the proviso to section 11 (I) (hereinafter called the "respondent") neglects to comply with such order, the Magistrate may, for every breach of the order, sentence such respondent for the whole or any part of each months allowance in default, to simple or rigorous imprisonment for a term which may extend to one month.

(2) The Magistrate may, if an application is made in that behalf by any person entitled to receive any payment under an order of maintenance, before passing a sentence of imprisonment on the respondent, issue a warrant directing the amount in default to be levied in the manner provided by law for levying fines imposed by Magistrates in the Magistrate's Courts.

Attachment of salary of respondent.

6. (1) If on the application of a person entitled to receive any payment under an order of maintenance, it appears to the Magistrate that the respondent has defaulted in the payment of maintenance due for a period exceeding two months, the Magistrate may, after inquiry, by an order (hereinafter referred to as an "attachment of salary order") require the person to whom the order is directed, being a person appearing to the Magistrate to be the respondent's employer, to deduct, for such period as may be specified in the order, such amount from the respondent's salary as may be specified in the order and forthwith to remit that amount to the applicant in the manner directed by Court.

(2) (*a*) Before an order is made under subsection (1) of this section, the Magistrate shall notice the person on whom he proposes to serve such order, to show cause, if any, why an order should not be made under that subsection, and to require him to furnish to the court, within such period as may be specified in such order, the salary particulars of the respondent. Any order made under subsection (1) of this section may be the subject of an appeal to a High Court established by Article 154P of the Constitution by any person aggrieved by such order, but notwithstanding such appeal, the Magistrate may decide to continue proceedings under this Act. The provisions of section 14 of this Act shall, *mutatis mutandis*, apply to, and in relation to, every such appeal.

(*b*) The Magistrate may also by an order served on the respondent, require him to furnish to the Court within such period as may be specified in such order, a statement specifying -

(i) the name and address of his employer or employers as the case may be, if he has more than one employer;

(ii) such particulars as to his salary, inclusive of deductions, as may be within his knowledge; and

(iii) any other particulars as are required or necessary to enable his employer or employers to identify him.

(3) A statement furnished in compliance with an order made under paragraph (*b*) of subsection (2) of this section shall, in any proceedings in any court, be received as evidence and be deemed to be *prima facie* proof of the particulars referred to in the said paragraph, unless the contrary is shown.

(4) The Magistrate shall not make an attachment of salary order, if it appears to him, that the failure of the respondent to make any payment in accordance with the order of maintenance in question, was not due to his wilful refusal or culpable neglect.

(5) In determining the amount to be deducted from the respondent's salary in terms of subsection (1) of this section, the Magistrate shall have regard to the resources and needs of the respondent, and the needs of the person, the payment of whose maintenance is in default.

(6) An attachment of salary order shall not come into force until the expiration of fourteen days from the date on which a copy of the order is served on the person to whom the order is directed.

(7) An attachment of salary order may on the application of the respondent or the person entitled to receive payment under the order of maintenance, be discharged or varied.

(8) A person to whom an attachment of salary order is directed shall, subject to the provisions of this Act, comply with the order or, if the order is subsequently varied under subsection (7), with the order as varied.

(9) Where, on any occasion on which any deductions have to be made from the salary of a respondent in pursuance of an attachment of salary order, there are in force, two or more orders for attachment of salary, relating to such salary, made under this Act or other written law, then, for the purposes of complying with this section, the employer shall, notwithstanding anything to the contrary in any other written law, first give effect to an order of attachment made under this Act and deal with any other order in respect of the residue of the respondent's salary according to the respective dates on which they came into force.

(10) An employer who in pursuance of an attachment of salary order makes any payment shall forthwith give to the respondent a statement in writing specifying the amount deducted from his salary in pursuance of such order.

(11) Any employer who fails or neglects to comply with an attachment of salary order shall be liable on conviction by a Magistrate's Court to a fine not exceeding five hundred rupees and in the case of a second or subsequent conviction in respect of the same attachment of salary order, to a fine not exceeding one thousand rupees;

Provided however, it shall be a defence for an employer charged with failing or neglecting to comply with an attachment of salary order, to prove that he took all reasonable steps to comply with such order.

(12) The provisions of this section shall, notwithstanding anything to the contrary in any other written law, have effect in relation to an attachment of salary that may be made by a Magistrate under this Act.

(13) For the purposes of this action -

(*a*) where the respondent is a public officer or an officer of a provincial public service, the head of the department to which he is for the time being attached shall be deemed to be his employer;

(*b*) where the respondent is a member of the Local Government Service and employed in any local authority, the Commissioner if it be a Municipal Council, or the Chairman if it be an Urban Council or a Pradeshiya Sabha, as the case may be, shall be deemed to be his employer;

(*c*) where the respondent is a person employed in any Corporation, Statutory Board or Company, the principal officer of such Corporation, Statutory Board or Company, as the case may be, shall be deemed to be his employer;

(*d*) where the respondent is a person employed in any partnership, the Managing partner or the Manager of such partnership shall be deemed to be his employer; and

(*e*) where the respondent is a member of the armed forces, the commander of the unit to which he is attached shall be deemed to be his employer.

Payment of maintenance through Post Office or Bank.

7. (1) Where an order for maintenance is made under the provisions of this Act, the Magistrate may direct the respondent, that the amount of the payment due under such order, shall be deposited each month on or before such date as may be specified in such order in favour of the person entitled to such payment, at such post office or a bank as may be specified in such order, and the amount so deposited may be drawn by such person from such post office or bank. It shall be the duty of such officer for the time being in charge of such post office or bank to pay that amount to the person entitled thereto upon application made in that behalf.

(2) Where a direction has been made under subsection (1) of this section and there has been default in the deposit of payments as specified in such direction, the person entitled to receive payment may report such default to the Court, and the Magistrate may in such event, notice the respondent to show cause why he should not be dealt with for such default, and if satisfied after due inquiry that there has been any default, impose such punishment as is provided for by this Act for such default.

Application for cancellation of order or alteration in amount of allowance.

8. On the application of any person receiving or ordered to pay a monthly allowance under the provisions of this Act and on proof of a change in the circumstances of any person for whose benefit or against whom an order for maintenance has been made

under this Act, the Magistrate may either cancel such order or make such alteration in the allowance ordered as he deems fit;

Provided that such cancellation or alteration shall take effect from the date on which the application for cancellation or alteration was made to such Court, unless the Magistrate for good reasons to be recorded, orders otherwise.

Copy of order to be given to party, and where order enforceable.

9. A copy of the order of maintenance certified under the hand of the Magistrate shall be given without payment to the person in whose favour it is made, or to his or her guardian or a person having actual custody of such person, if any, or to the person to whom the allowance is to be paid, and the Court making such order or any Magistrate having jurisdiction over the place where any such person or the respondent may be, shall, on the production of such order and on being satisfied as to the identity of the parties and the non-payment of the allowance due, proceed under section 5 or section 6.

Application to be in writing and process to be free of stamp duty.

10. Every application for an order of maintenance or to enforce such an order, shall be in writing and shall be signed by the applicant or the person making the application on his behalf and shall be free of any stamp duty. Every summons to a respondent or a witness shall also be free of stamp duty.

Commencement of Inquiry.

11. (1) Every application for an order of maintenance or to enforce an order of maintenance shall be supported by an affidavit stating the facts in support of the application, and the Magistrate shall, if satisfied that the facts set out in the affidavit are sufficient, issue a summons together with a copy of such affidavit, on the person against whom the application is made to appear and to show cause why the application should not be granted;

Provided however, the Magistrate may in his discretion at any time make an interim order for the payment of a monthly allowance which shall remain operative until an order on the application is made, unless such interim order is earlier varied or revoked, and such interim order shall have effect from the date of the application or from such later date as the Magistrate may fix.

(2) The Magistrate shall, after such inquiry as he may consider necessary, make order allowing or refusing the application, and if necessary, may make an order under section 5 or section 6;

Provided however, an application under this Act shall not be rejected on account of any error, omission or irregularity in the application, or affidavit required to be filed in

terms of subsection (1) of this section, or in the summons issued thereunder, or in other proceedings before, or during, an inquiry under this Act, unless such error, omission or irregularity has caused material prejudice to a party.

Attendance of respondent and witnesses.

12. (1) The Magistrate may proceed in the manner provided in Chapter V and VI of the Code of Criminal Procedure Act, No. 15 of 1979 to compel the attendance of the person against whom the application is made and of any person required by the applicant or the person against whom the application is made or by the Magistrate to give evidence, and the production of any document necessary, for the purposes of the inquiry.

Proceedings in absence of respondent.

(2) When the person against whom the application is made is absent, the provisions of section 192 of the Code of Criminal Procedure Act, No. 15 of 1979 shall, *mutatis mutandis*, apply.

Form of Proceedings.

13. Subject to subsection (2) of section 12 all evidence taken by a Magistrate under this Act shall be taken in the presence of the person against whom the application is made or, when his personal attendance is not required by the Magistrate, in the presence of his attorney-at-law, if any, and shall be recorded in the manner prescribed for trials in the Magistrate's Court;

Provided further, that in any proceedings under this Act it shall be competent for the person against whom the application is made to give evidence upon oath or affirmation as an ordinary witness, and each spouse shall be a competent witness against the other spouse.

Right of Appeal.

14. (1) Any person who shall be dissatisfied with any order made by a Magistrate under section 2 or section 11 may prefer an appeal to the relevant High Court established by Article 154P of the Constitution in like manner as if the order was a final order pronounced by Magistrate's Court in a criminal case or matter, and sections 320 to 330 (both inclusive) and sections 357 and 358 of the Code of Criminal Procedure Act, No. 15 of 1979 shall, *mutatis mutandis*, apply to such appeal;

Provided however, notwithstanding anything to the contrary in section 323 of the Criminal Procedure Code Act, No. 15 of 1979 such order under section 2 shall not be stayed by reason of such appeal, unless the High Court directs otherwise for reasons to be recorded;

Provided further that the Magistrate in forwarding the record to the High Court shall retain a copy of his order for purposes of enforcement.

(2) Any person dissatisfied with an order made by a High Court in the exercise of its appellate jurisdiction under this section, may prefer an appeal therefrom to the Supreme Court, on a question of law, with the leave of the High Court, and where such leave is refused, with the special leave of the Supreme Court, first had an obtained.

Forms.

15. The forms specified in the Schedule to this Act,* with such variations as the circumstances of any case may require, shall be used for the respective purposes therein mentioned.

Costs.

16. When disposing of any application or appeal under this Act, a court may order either party to pay all or any part of the costs of such application or the costs of such application and appeal, as the case may be, and the amount due under any such order shall be recoverable as if it were a fine and in default of payment, simple imprisonment may be imposed for a period not exceeding one month.

Other actions not barred.

17. Nothing in this Act shall be construed as depriving a person including a child, adult offspring, disabled offspring, spouse or parent of the right, if any, to maintain a civil action for maintenance.

Amendment of Chapter 56.

18. The Married Women's Property Ordinance is hereby amended by the repeal of section 26 and section 27 of that Ordinance.

Repeal of Chapter 91.

19. The Maintenance Ordinance is hereby repealed.

Transitional provision.

20. (1) Notwithstanding the repeal of the Maintenance Ordinance -

(a) all proceedings instituted under that Ordinance; and

(b) all appeals from orders made under that ordinance,

* The schedule is not reproduced here.

and pending on the day preceding the date of commencement of this Act shall be heard and disposed of, in all respects, as though such Ordinance had not been repealed.

(2) Every order made under the Maintenance Ordinance and pending on the day preceding the date of commencement of this Act, shall be deemed to be an order made under this Act and may be enforced accordingly.

Sinhala text to prevail in case of inconsistency.

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

Interpretation.

22. In this Act, unless the context otherwise requires -

"adopted" when used in relation to a child or offspring means a child or offspring adopted under the provisions of the Adoption of Children Ordinance or the Kandyan Law Declaration and Amendment Ordinance;

"adult offspring" means any marital or non-marital or adopted offspring, who is eighteen years of age or is over eighteen years of age and under twenty five years of age;

"child" means any marital or non-marital or adopted offspring who has not reached eighteen years of age;

"disabled offspring" means any marital or non-marital or adopted offspring of whatever age, who is or becomes physically or mentally disabled so as to render such offspring incapable of earning a livelihood or of adequately supporting himself or herself;

"marital" when used in relation to a child or offspring means a child or offspring born to parents who are married;

"non-marital" when used in relation to a child or offspring means a child or offspring born to parents who are not married;

"parent" includes an adoptive parent;

"salary" includes all allowances and wages.

The Substantive and Procedural Criminal Law Relating to Violence Against Women*

*Yasantha Kodagoda***

1. Introduction

Increasing the awareness of civil society, and developing sensitivity on important matters such as violence against women, would have a positive effect on society. Civil society has an important role to play in social phenomena such as this. On the one hand, NGOs and the public at large, could help in the prevention of acts of violence being perpetuated on women. They can also assist in providing support and counselling to victims of such crimes. In today's context, civil society can also be of assistance to law enforcement agencies, in the enforcement of the law of the land relating to violence against women. Above all, you have also the duty of acting as pressure groups, and motivating the executive, policy makers and legislators, to take correct and useful decisions in this regard. However, in order for you to perform any of those functions or duties, you need to be aware of the correct position relating to the relevant phenomena. It is only then that one could make a useful contribution. Therefore, my aim today is to attempt to increase awareness of the substantive and procedural criminal law relating to violence against women.

2. Definition of Violence Against Women

In order to properly understand the topic, we need to initially define the scope of the phenomenan "Violence against Women." In other words, what is meant by 'violence against women'? In lay usage, 'violence' denotes a criminal act of a serious nature, having drastic consequences not only to the victim, but also to society at large. One generally associates acts of violence with the use of sophisticated weapons by organised gangs, in an organised manner. However, according to modern international legal thinking, 'violence' has a much wider meaning. 'Violence against women' means any gender based crime that results in or is likely to result in, physical, sexual, or psychological harm or suffering to any woman, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.

According to this definition, the following three categories of offences could be recognised as, 'acts of violence against women.'

(a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation.

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* Presented at the symposium on "Violence Against Women" held at the Trust to coincide with the International Women's Day. Edited for publication.

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(b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment, and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution, and

(c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.

However, it must be added that this categorisation is based on a universal consideration of acts of violence perpetuated on women. In the Sri Lankan context, some of these offences would have no relevance. For example, you would agree that in Sri Lanka, there are hardly any significant cases of female genital mutilation, or acts of violence on women that are condoned by the State.

There are other acts of violence against women that may not be covered by these three groups. Some of them are:

* violation of human rights of women during an armed conflict, such as abduction, torture, rape, forced pregnancy, and murder;
* forced sterilisation and forced abortion;
* forced use of contraceptives, and
* female infanticide.

There are certain groups of women who are more vulnerable to acts of violence against women. Some of them are, women belonging to ethnic minorities, refugee women, migrant women worker, women in poverty, destitute women, women with physical and psychological disabilities, and women living in areas where there is an armed conflict.

3. The position under Sri Lankan Criminal Law

Unlike in certain other countries (particularly of the western world), in Sri Lanka, there is no 'subject specific law', relating to offences against women. Acts of violence against women are basically criminal offences committed against the human body. Such offences are primarily defined in the Penal Code. The Penal Code, which was enacted during the colonial period, is the main legal instrument relating to criminal offences. Basic criminal offences defined in the Penal Code such as causing hurt and grievous hurt, abduction, wrongful confinement, rape, sexual harassment, abortion, and murder, would cover most of the main acts of violence against women, discussed earlier. Penal sanctions or punishments that a court should impose on a person found guilty of having committed such offences, are also listed in the Penal Code. They range from the imposition of the death sentence, to various terms of imprisonment, and fines.

Since the Penal Code is more than one hundred years old, certain definitions of criminal offences do not match present day trends, nature of current human behaviour and social

needs. Therefore, in 1995, the legislature (that is the Parliament) introduced certain important amendments to the Penal Code. These amendments led *inter alia* to a re-definition of the offence of 'rape' and an increase in the corresponding minimum penal sanctions. The amendment increased the age of 'statutory rape' from 12 to 16 years. Hence, any person who has sexual intercourse or inter-labial penetration with his male organ, with a female who is not more than 16 years of age, with or without her consent, commits the offence of rape. Further, according to the amended law, any person who against her consent, has sexual intercourse with his wife, with whom he is judicially separated, also commits the offence of rape. However, other forms of 'marital rape' have not been classified as being forms of committing the offence of rape. The amendments to the Penal Code also led to the introduction of a new offence to the body of the criminal law of this country, named 'sexual harassment.' This offence has been widely defined, and could even include forms of harassment leading to sexual embarrassment, that involves only verbal communication by the offender and not associated with any form of physical conduct. In most other countries, such conduct would only expose the offender to a civil action for damages, and would not make him liable to face a criminal prosecution. However, what is important to note in this context is that, the legislature and policy makers have been in the recent past sensitive to the nature of the problems faced by the female population.

However, given the nature of the relevant social problem, the increase in the incidence of acts of violence being perpetuated on women, and Sri Lanka's obligations to the international community, the time has now come to give consideration to the enactment of a subject specific law, containing, *inter alia* offences relating to violence against women. In this regard, it is pertinent to note that according to Article 4 of the United Nations Declaration on the Elimination of Violence against Women, Governments should, *inter alia,* develop penal sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence.

4. Some procedural issues

We need to at this stage, consider briefly certain criminal procedural aspects. As mentioned earlier, since acts of violence against women are recognised as normal criminal offences, with regards to the administration of justice relating to the commissioning of such offences, the normal procedural steps would apply. Having regard to the nature of the problem, it may be appropriate to reconsider some of these procedural aspects relating to the administration of justice. I wish to cite one example. In cases of rape, prior to the commencement of the main trial in the High Court, the procedural law requires that a Preliminary Inquiry (or a Non Summary Inquiry) be conducted in the Magistrate's Court, with a view to considering whether the prosecution is in a position to adduce adequate evidence against the accused, to try him on Indictment in the High Court. In 1998, the law was amended, doing away with such a requirement in cases of rape committed on a female who is under 16 years of age. However, considering the trauma that a rape victim has undergone (at the time of being raped and thereafter), it appears to be unfair to put such a person through the ordeal of testifying in courts of law

twice over. Therefore, the requirement of having a Preliminary Inquiry prior to the main trial, should be done away with in all cases of rape.

Finally, I wish to raise another point. As you are aware, a female who has been either sexually abused or in any other manner traumatised may develop certain psychological states of mind, that would have a direct bearing on how she reacts to the relevant incident. For example, a victim of grave sexual abuse may develop 'Post Traumatic Stress Disorder' as a result of having experienced the relevant traumatic incident. Her subsequent conduct would thereafter, to a considerable extent, depend on her state of mind. If the law enforcement personnel were to interview the victim with regards to the relevant incident, her testimony would, to a great extent, depend on her state of mind. There may be instances where the victim may initially deny having been subjected to the relevant offence. In the circumstances, if she had been interviewed by a psychologist, and diagnosed to having been affected by Post Traumatic Stress Disorder, the Psychologist's expert evidence at the subsequent trial would be of value in the assessment of the credibility of the victim's testimony. However, as the principles of the Law of Evidence stand today, such evidence from an Expert, may be ruled inadmissible by a court of law.

4. Conclusion

I intended to briefly explain to you the nature of criminal conduct associated with acts of violence inflicted on women, and describe some of the salient features of the relevant criminal procedural and substantive law. Having regard to the nature of the problem, there appears to be a social need to review all legal aspects relating to violence against women.

INTERNATIONAL COUNCIL ON HUMAN RIGHTS

Performance and legitimacy: national human rights institutions
Summary of Findings - 2000

THE FINDINGS

National human rights institutions (NHRIs) take many forms, as ombudsmen, defensores del pueblo, procurators, and advisory and anti-discrimination commissions. Their authority may be constitutionally entrenched or they may have merely advisory powers with little legal protection from executive interference. They also operate in widely different political contexts – industrial democracies, poor societies, states in transition from oppressive regimes. This project defines them as autonomous quasi-governmental or statutory institutions with human rights in their mandate.

In 1991, minimum standards for NHRIs were agreed of an international workshop in Paris. The "Paris Principles" recommended that states should establish independent national institutions to (i) promote human rights, (ii) advise governments on human rights protection, (iii) review human rights legislation, (iv) prepare human rights reports, and (v) receive and investigate complaints from the public. Under their influence, many national institutions were formed during the 1990s and NHRIs now play a role in the protection and promotion of human rights in numerous countries.

Are they effective? Their diversity, and also the range of political contexts in which NHRIs function, make this question difficult to answer. Why have some made little impact although they apply the Paris Principles? "Why are others widely respected though they appear compromised or constitutionally defective? Most research on these institutions has focused on normative and legal issues – how they were set up and what their objectives are, in the end, however, an organisation's usefulness is determined by what it does and by how it is perceived by those it serves. This study therefore focuses on what NHRIs do and on their treatment of vulnerable groups.

It is a study of several real cases, chosen not because they are "best" or "worst" examples but because they are representative of various kinds of experience. Though generalisations taken out of context will be unhelpful, in general we found that the most successful NHRIs operate well at several levels. In particular, they are perceived to be legitimate, make themselves accessible, and build good working links with relevant institutions in civil society and government.

THE RESEARCH PROCESS

This study of national human rights institutions (NHRIs) was undertaken between October 1998 and November 1999. It assesses how effectively they promote and protect human rights. The researchers examined the mandate of NHRIs; investigation techniques; legitimacy and level of commitment; ability to handle cases; formation and

history; and how they have applied international human rights norms. The research team considered three main questions:

* Under what conditions do NHRIs acquire public - not just constitutional - legitimacy?

* How far do vulnerable social groups have effective access to their services?

* To what extent do other bodies in and outside government influence their work?

The principal researcher, Richard Carver, undertook first-hand research in Ghana, Indonesia and Mexico. Local research consultants guided and advised him in each country. He also made short visits to South Africa and Zimbabwe and did secondary research on NHRIs in Canada, Guatemala, India, Latvia, New Zealand, Nigeria, the Philippines, Spain and Togo.

The selection of commissions took account of regional differences, political and legal systems, context (states in transition, states that abuse human rights), institutional form (commission, ombudsman), legal foundation (constitution, statute, presidential decree), and record of activity. In each country, the research team met national human rights institutions, government and judicial officials, NGOs, and community-based organisations. Interviews drew on a list of core questions covering the legal basis of the institution, its accessibility, structure, mandate and jurisdiction, powers (investigations, enforcement, education, training), and relationship to civil society, government and international bodies.

In August 1999, the Council sent a draft of the report for comment to 250 individuals and institutions in 59 countries. The 77 responses received were collated and integrated into a final draft completed in November 1999. The Council published *Performance and Legitimacy: National Human Rights Institutions* in March 2000. This Summary of Findings has been produced simultaneously in English, French, Spanish and Bahasa Indonesian.

Acquiring Legitimacy

A sound constitutional foundation is the best guarantee of legitimacy. NHRIs acquire most public legitimacy when they are legally well entrenched. It is better to be formed by law of parliament than by presidential edict and better still to have constitutional protection. Nevertheless, legitimacy still has to be won.

Quality of a staff is a key factor. Senior staff tend to be appointed from government and many are lawyers. Few commissions have recruited significantly from NGOs or vulnerable groups (such as women and minorities). Broadening the base of appointments would sharply enhance the credibility and appeal of some NHRIs.

Credibility also depends directly on how complaints are managed. An efficient complaint mechanism - low cost, swift, understandable, not bureaucratic - wins public trust. It is vital to monitor compliance, especially in cases that result in prosecution.

Many NHRIs treat complaints in isolation and their caseload is unsustainable as a result. Individual complaints can be addressed in ways that have a wider educational and preventive function. Many NHRIs would be more effective if they concentrated on key problem areas identified vulnerable groups (i.e. children, women, minorities, prisoners, people with disabilities, etc.) It is important to communicate chosen priorities to government, the public and vulnerable groups.

Some NHRIs settle cases by conciliation while others have a more prosecutory approach. The most respected commissions handle sensitive political issues, such as political corruption and social taboos. It seems that such interventions establish credibility and a reputation for independence.

Accessibility

Wherever NHRIs have made efforts to be accessible, for example, by opening district and local offices, especially in remote rural areas, public awareness of NHRIs and the services they provide is higher.

Successful NHRIs communicate what they stand for and offer in simple and understandable terms. This enables them to build good links with vulnerable groups and civil society institutions as well as with the wider public. Effective use of the media is also important. To be accessible NHRIs need to work in local languages. This implies recruiting staff with language skills, publishing documents in local languages and enabling complaints to communicate in their own vernacular. Some NHRIs do this well, others do not.

Linkages

NHRIs stand at the crossroads of government and civil society. They need to define and delimit space they occupy in relation to other institutions that protect human rights, within and outside government. To operate well, NHRIs need to be truly independent of the executive and other institutions of government, including the judiciary, but they must have access to and influence within those institutions.

Effective NHRIs also co-operate with the civil society institutions, while remaining independent of them. NGOs play a vital role in identifying and channelling complaints.

Many NHRIs are poorly financed and this reduces both their independence and their effectiveness. International organisations have an important role to play in strengthening NHRIs financially and organisationally. NHRIs should manage their own budgets, which

should be voted by institutions independent of the executive. They should be subject to regular financial scrutiny.

In the end, it seems that NHRIs work most effectively when they operate within a functioning democratic framework. The absence of political and ethnic violence, acceptance of the rule of law, judicial independence, and a democratic or democratising framework create the most favourable conditions for efficient national institutions. Those who work within NHRIs, and those who support them financially and institutionally, need to focus on creating these conditions if they want NHRIs to flourish and be effective in the long term.

The following recommendations are designed to be of use to national institutions in the countries studied and more widely. The Report contains a more detailed list of recommendations.

RECOMMENDATION ONE

National human rights institutions should define their role clearly in relation to government and judicial institutions and in relation to voluntary organisations and vulnerable communities.

NHRIs stand between government and civil society. They should complement rather than displace the work of other bodies.

In particular, they should not displace the functions of courts. Where they take on investigative functions, either they should have power to initiate prosecutions or cases they raise should automatically be prosecuted through the courts.

NHRIs should show consistently that they are independent of the executive. Public understanding of their status can easily be confused by the many links that NHRIs have with government (on appointments, financing, prosecutions, etc.)

NHRIs should not speak for their governments at international meetings. The international status of NHRIs should be distinct from that governments and that of NGOs.

NGOs and civil society organisations should be represented in NHRIs and consulted regularly. They are an essential source of information and play a valuable practical role in identifying issues and cases. NGOs should not confuse their role with that of NHRIs.

RECOMMENDATION TWO

National human rights institutions should move from a complaints-led to a programme-led approach.

For many NHRIs a complaints-led approach will not be sustainable. A thematic approach will enable NHRIs to concentrate their resources on areas of acute need, while improving accountability and communication with the public. Individual complaints should not be ignored but the objective should be to focus resources where need is greatest. Staff should link actions to resolve individual cases with general policies of prevention.

Priorities should be identified in consultation with government. Because NGOs have specialised expertise and close links with vulnerable groups, NHRIs should be prepared to take advice from NGOs when they set priorities and during investigations.

Over time, NHRIs might usefully develop models of public inquiry. These can highlight and analyse serious human rights issues, put key subjects on the national agenda via reports to parliament and the media, and generate political and public pressure for action.

RECOMMENDATION THREE

National human rights institutions should encourage consultation and participation.

NHRIs should consult publicly on important decisions such as the appointment of senior executives and selection of programme priorities. Particular effort should be made to consult vulnerable groups and NGOs with expertise in human rights.

NHRIs should generally recruit more women and representatives of vulnerable groups (notably minorities) to senior executive posts and staff positions. They should also recruit more staff from human rights NGOs.

Multi-member institutions promote diversity and help to increase the legitimacy of NHRIs. A strong and diverse governing council is recommended.

Governments should consult widely, particularly with NGOs, before defining the mandate, membership and structure of new NHRIs.

RECOMMENDATION FOUR

National human rights institutions should ensure that senior executives and staff are qualified, committed, representative and independent.

Commissioners should have security of tenure. Procedures should avoid conflicts of interest during and also after commissioners' term of office.

The executive branch should not control appointment procedures, which should be seen to involve open and fair consultation with civil society.

RECOMMENDATION FIVE

International bodies that co-ordinate or finance the work of national human rights institutions should assist them to perform effectively.

During the 1990s, donors and the United Nations High Commissioner for Human Rights encouraged the creation of many new NHRIs. Many are nevertheless underfunded and cannot work effectively. It is not wise to promote the creation of new institutions while many existing bodies are not able to function well. Reliable funding is essential.

When they fund NHRIs, donors should ensure that resources are not diverted from other institutions that protect human rights, notably the judiciary.

Before they support new NHRIs, donors should ensure that governments establish adequate financing arrangements for them as well as transparent reporting procedures. They should also ensure that governments consult publicly before creating new NHRIs.

When giving advice or training to national institutions, donors should draw on expertise available in countries that have similar economic, social, and political experiences.

RECOMMENDATION SIX

National human rights institutions should address economic, social and cultural rights.

Poverty and unequal access to educational, housing and health provisions, increasingly determine social progress and quality of life. NHRIs cannot meet the needs of vulnerable groups without addressing economic, social and cultural rights (ESC). Some do so already, but many have yet to put resources into ESC rights or take them seriously.

New NHRIs should include economic, social and cultural rights in their mandate. NHRIs whose mandate does not already include ESC rights should consider redrafting their mandate to do so.

Practical strategies might include:

* identifying areas of exclusion and developing policy proposals to deal with them;

* monitoring government policies in relation to ESC rights;

* taking cases that extend access to ESC rights; and

* identifying ways of making ESC rights justiciable.

RECOMMDNATION SEVEN

National human rights institutions should become more accessible

NHRIs should improve public access by locating offices in provincial towns and in poor or neglected regions. As far as possible, NHRIs should avoid locating offices in exclusive areas or government buildings when to do so might deter vulnerable groups.

NHRIs should create simplified procedures to ensure access by vulnerable groups. They should be able to receive complaints orally and communicate in minority languages.

Access will be improved where NHRIs publicise their priorities and casework effectively.

RECOMMENDATION EIGHT

National human rights institutions should evaluate their performance

NHRIs should annually declare their priorities and identify vulnerable groups who will have first call on their services. They should explain how women's rights will be addressed and how policy will be developed in consultation with all relevant actors, including civil society organisations.

NHRIs should keep casework statistics disaggregated to demonstrate how the institution has dealt with its priorities and with the vulnerable groups identified.

NHRIs should evaluate their work annually, against their programme goals, including their success in meeting the needs of the vulnerable grounds identified.

CONCLUSIONS

The rapid - sometimes disorderly - proliferation of NHRIs during the 1990s seems set to continue. Much has been expected of them and they have sometimes disappointed and sometimes surpassed expectations. Many operate in markedly unfavourable institutional environments. Many are cash-strapped, insufficiently representative or subject to political influence. Yet the evidence suggests that, even when they were established for cosmetic purposes, NHRIs can transcend the political limitations that were initially imposed on them. Though some have failed, others have proved their ability to deepen public and official respect for human rights.

To fulfil their responsibilities well, they need to establish bonds of loyalty and co-operation with the wider public particularly with groups they are trying to assist and with civil society organisations that work to the same ends. Effectiveness depends equally on the ability of NHRIs to complement and strengthen - not displace or compete with - official institutions, notably the judiciary, that provide other services essential to the protection of human rights.

These different actors need to have realistic expectations of what NHRIs can achieve. They have a special and complementary role. Sometimes it is argued that industrial democracies do not need to create NHRIs because such societies more rarely violate human rights and their judicial systems can handle such problems as arise. In fact, the mechanisms that national human rights institutions offer are as useful in the developed economies as elsewhere.

The Paris Principles set essential minimum standards. In coming years, these will need to be deepened and extended as NHRIs evolve in a changing environment. Financially, they must become more self-sustaining. Many need to acquire deeper social legitimacy. This research has shown that they can do much more than investigate and resolve complaints successfully. They have a vital role to play in legitimacy and communicating human rights values in society and in extending protection and assistance to vulnerable groups.

Case Note
Perera v. *Rajitha Senaratne*[*]

Rukshana Nanayakkara[**]

Background

In this case the petitioner challenged the first respondent's continuance as a Member of Parliament,[1] on the around that the first respondent, Rajitha Senaratne, has entered into various contracts with government institutions to supply dental equipment and material. Further, he has tendered for several contracts, some of which were awarded to him. He has entered into these contracts as a partner of a business and a director of a company, in which he was involved.[2] In proof, the petitioner has produced several documents to show the first respondent's involvement with the government institutions. The first respondent's partnership and the company have entered into these contracts while he continued to remain as a Member of Parliament. In some of the contracts he has used his abbreviated designation MP, which stands for Member of Parliament. Due to these reasons the petitioner has alleged that the first respondent is guilty of having entered into such contracts with state institutions or public corporation as contemplated by the Article 91(1) (e) of the Constitution.

The Article 91(1)(e) reads as follows:

> 91(1) No person shall be qualified to be elected as a Member of Parliament or sit and vote in Parliament...
>
> (e) if he has such interest in any such contract made by or on behalf of the state or a public co-operation as Parliament shall by law prescribe.

Contentions of the parties

The main point that was strenuously argued by the senior counsel for the first respondent was the absence of any law prohibiting a Member of Parliament from entering into contracts with any government institution; therefore, there was no possibility of taking any action against the first respondent.

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[*] C.A. Application No. 1164/98.

[**] Researcher, Law & Society Trust.

[1] The petitioner was a Member of Parliament from the Badulla District representing the People's Alliance Party. There were five respondents in the case. The first respondent, Rajitha Senaratne, was a Member of Parliament nominated through the National List from the United National Party. The other respondents were - Gamini Athukorala, the General Secretary of the United National Party, Betram Tittawella, Secretary General of the Parliament, Dayananda Dissanayake, the Commissioner of Elections, and the Attorney General.

[2] According to the averments of the petitioner the first respondent has a partnership business called M/S Senaratne Suppliers and a company named Senaratne Dental Supplies (Pvt) Ltd.

It is clearly laid down in both the 1972 and 1978 Constitution that no one shall be qualified to be elected as a Member of Parliament (the National State Assembly in the case of the 1972 Constitution) or sit and vote in Parliament if he has an interest in such contracts made by or on behalf of the State or a public corporation as Parliament by law may prescribe. Therefore, unlike under the Donoughmore Constitution and the Soulbury Constitution where there were self-contained disqualifications in regard to the contracts with the State or State institutions, 1972 and 1978 Constitutions required the legislature to specify by law enacted by the National State Assembly or Parliament to lay down the prohibited types of contracts and interests of such contracts. However, it is common knowledge that neither the National State Assembly nor the Parliament had passed the necessary law to give effect to the disqualification referred to above.

The argument of the counsel of the first respondent was that the Soulbury Constitution was repealed by the 1972 Constitution which, in turn, was repealed by Article 171 of the 1978 Constitution. Further, he contented that Parts II and III of the Ceylon (Parliamentary Elections) Order in Council 1946, were repealed by Parliamentary Elections Act, No.44 of 1980 and Parts IV to VI of the same Act were repealed by the Parliamentary Elections Act, No. 1 of 1981. Therefore, in view of the repeal of the Soulbury Constitution, the 1972 Constitution and the Ceylon Parliamentary Order in Council, there is no law applicable, which would prohibit a Member of Parliament from entering into contracts at the time of the elections or while sitting and voting in the Parliament.

Article 91(1)(e) of the 1978 Constitution covers both points of time: the qualification to be elected as a Member of Parliament, as well as the period of sitting and voting in Parliament. However, the counsel for the first defendant argued that this provisions does not incorporate or keep alive the provisions of the Ceylon (Parliamentary Elections) Order in Council, 1946 or Section 13(3)(c) of the Soulbury Constitution until such time Parliament passed the necessary law.

Article 101(1) of the 1978 Constitution empowers the Parliament to make provisions by law in respect of elections:

> "The parliament may by law in respect make provisions for (i) The manner of determination of disputed elections and such other matters as are necessary or incidental to the election of Members of Parliament."

Article 101(2) keeps alive the Ceylon (Parliamentary Elections) Order in Council. Article 101(2) reads as follows:

> "Until Parliament by law makes provisions for such matters, the Ceylon (Parliamentary Elections) Order in Council, 1946 as amended from time to time, shall, subject to provisions of the Constitution, *mutatis mutandis,* apply."

But the contention of the counsel for the defendant was that although Article 101 keeps alive the Ceylon (Parliamentary Elections) Order in Council, it only deals with two specific matters namely the registration of electors and the election of members to Parliament. As referred to in sub Articles (a) to (d) of Article 101(1) it deals with the preparation of the registration of electors and sub Articles (e) to (i) of the same Article deals with the conduct of the elections, election petitioners and such other matters as are necessary or incidental to the election of Members of Parliament.

Therefore, the counsel for the defendant submitted that Article 101 in no way applies to the post election period or to the period of an MP sitting and voting in Parliament. Further, he contended that the marginal note and the wording of the Article and its contents all make that clear. He stated that the reference to "such matters" contained in Article 101(2) is clearly a reference to the matters covered by Article 101(1) only and the Parliament passed the necessary laws to provide for such matters when it enacted the Registration of Elections Act No. 44 of 1980 and the Parliament Elections Act No. 1 of 1981.

Decision of the Court

With regard to the submissions of the defence counsel, the Court observed that to place such a restriction on Article 101(1) would be to do violence to the intention of the framers of the Constitution. Basically the Court relied on the judgment of *Dahanayake v. de Silva*[3] delivered by the Supreme Court under the first Republican Constitution of Sri Lanka. It was clearly laid down in this case that sitting and voting in Parliament is a necessary or incidental consequence of the election of members to the National State Assembly. On the reasoning of the Supreme Court, the Court of Appeal rejected the contention of the defence counsel on Article 101(1) namely; it deals only with the point of time of the election. Therefore, the court held that the Parliament has the power to impose laws necessary in respect of disputed elections and such other matters as are necessary or incidental to the election of the Members of Parliament.

It would appear that the framers of the constitution had in mind the need to act to implement Article 91(1)(e) in the terms of Article 101(1)(i). The term "necessary or incidental to the election" is wide enough to empower the Parliament to pass the necessary laws as required by Article 91(1)(e) to cover not only the point of time of the election but also the subsequent period of sitting and voting in Parliament. Further, it would be seen that Article 101 is the empowering provision for the Parliament to pass the necessary law in order to implement the provisions of Article 91(1)(e).

Considering the submission made by the defence counsel with regard to the marginal note to Article 101[4] the Court of Appeal contended that marginal notes are not a proper guide

[3] 1978-80, 1 SLR p 41.

[4] The marginal note states that the Parliament may make provisions in respect of elections.

to the interpretation of statutes. The Court quoted Maxwell on *The Interpretation of Statutes*:[5]

> *The notes often found printed at the side of a section in an Act, which purported to summarize the effect of the sections, have sometimes been used as an aid to construction. But the weight of the authorities is to the effect that they are not parts of a statute and so should not be considered, for they are not inserted not by the Parliament nor under the authority of Parliament, but by irresponsible persons.*

In the view of the above reasoning it follows that the Ceylon (Parliamentary Elections) Order in Council would apply not only to the point of time of elections but also to the subsequent period of sitting and voting in Parliament as Parliament is empowered to prescribe by law "such interest" in any "such contract" for the purpose of the disqualification contemplated by Article 91(1)(e), in terms of Article 101(1)(i). Even though the Parliament has passed necessary laws in respect of some of the matters required under Article 101(1) such as sub articles (a) to (h), Parliament has not provided for some of the matters as required by Article 101(1)(i), more specifically such other matters as are necessary or incidental to the election of the Members of Parliament, which would cover the point of time of election and sitting and voting in Parliament.

Therefore, when Ceylon (Parliamentary Election) Order in Council was repealed by the Registration of Elections Act and Parliamentary Elections Act, it was repealed for a limited purpose and only to the extent of the operation of the said two statutes and no further. This is mainly because the Parliament has passed the said two Acts providing for some of the matters required under Article 101(1) and, therefore, it became necessary to repeal the Ceylon (Parliamentary Elections) Order in Council in order to avoid any conflict with the said two statutes. However, the Ceylon (Parliamentary Elections) Order in Council will continue to apply in respect of the matters not provided for by Parliament, namely the laws that are necessarily as incidental in order to provide for the matters required under Article 101(1)(i). Therefore, until the Parliament performs its obligation of passing the necessary laws in terms of Article 101(1)(i) to comply with the requirement of Article 91(1)(e), the Ceylon (Parliamentary Elections) Order in Council will continue to operate.

Further the Ceylon (Parliamentary Elections) Order in Council is kept alive through a constitutional provision. Therefore, an ordinary Act such as Registration of Electors Act cannot repeal Ceylon (Parliamentary Elections) Order in Council entirely, if there are such other matters like what is required to be done to comply with Article 91(1)(e) has not been done by the Parliament in terms of Article 101(1)(i).[6] The framers of the 1978 Constitution have endeavoured to make Article 101(1) the empowering provision for the Parliament to pass laws and retained Ceylon (Parliamentary Elections) Order in Council

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[5] Maxwell on *Interpretation of Statutes*, 12th edition by P.St.J. Langan at p 9.

[6] Registration of Electors Act and Parliamentary Elections Act provide regulations only to fulfil the requirements laid down in Article 101(1)(a) to (h).

under Article 101(2) until such time Parliament makes provisions for such matters. The court clearly mentioned that such matters in Article 101(2) are wide enough to cover the law necessary to decide the question of a person to be elected as a Member of Parliament or to sit and vote in Parliament.

As the Parliament has not prescribed the law necessary under Article 91(1)(e), Ceylon (Parliamentary Elections) Order in Council will continue to operate subject to the provisions of Acts No. 44 of 1980 and No. 1 of 1981. As the Ceylon (Parliamentary Elections) Order in Council continues to operate, Section 13(3)(c) of Ceylon (Constitution) Order in Council 1946 the Soulbury Constitution comes into operation for the purpose of considering any disqualification by reason of contract.

The reason being that section 77 of the Ceylon (Parliamentary Election) Order in Council 1946 refers to the grounds for avoidance of Elections and more specifically Section 77(e) gives the disqualification for election as one of the grounds. In these circumstances, the Court of Appeal considered Section 13(3)(c) of the Soulbury Constitution for any disqualification by reason of any contract.[7] This is due to the reason that section 101(1) and (2) and Article 168(1)[8] of the Constitution keep alive section 13(3)(c) of the Soulbury Constitution. Further, the Court of Appeal observed that the definition of "law" in Article 170 of the 1978 Constitution includes an Order in Council.[9]

As the Court of Appeal derived its authority from the Supreme Court judgment in *Dahanayake* v. *de Silva*, the counsel for the first defendant challenged this authority that section 13(3)(c) of the Soulbury Constitution was not in force immediately before the commencement of the 1978 Constitution, since Soulbury Constitution had been repealed by the 1972 Constitution. But the counsel for the petitioner contended that section 13(3)(c) of the Soulbury Constitution has been kept alive and in force now in view of the decision of the Supreme Court in the case of *Dahanayake* v. *de Silva.* Therefore, he submitted that section 13(3)(c) of the Soulbury Constitution should be considered for the purpose of giving effect to Article 91(1)(e) of the 1978 Constitution.

The Court of Appeal considered this argument in relation to Article 168(1) of the Constitution. In other words, the Court had to decide whether Article 168(1) would permit the Supreme Court decision, *Dahanayake* v. *de Silva*, to be treated as unwritten law in force. Deriving its authority from a five bench Supreme Court decision, *Walker Sons & Co. (U.K.) Ltd.* v. *Gunatillake.*[10] The court stated that the *ratio decidendi* of

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[7] The same view was taken by the Supreme Court in the case of *Dahanayake* v. *de Silva.* In that case Samarakoon CJ considered the scope of Articles 73, 75 and 12(1) of the 1972 Constitution and held that Article 75 kept alive the election laws that were in operation on 21st May 1972 and Section 13(3)(c) of Soulbury Constitution was one such law.

[8] Article 168(1) of the Constitution reads as follows: "Unless Parliament otherwise provides, all laws, written laws and unwritten laws, in force immediately before the commencement of the Constitution, shall, *mutatis mutandis,* and except as otherwise expressly provided in the Constitution, continue in force."

[9] Article 170 states "law means any Act of Parliament, and any law enacted by any legislature at any time prior to the commencement of the Constitution and includes an Order in Council.

[10] 1978-80, 1 SLR p 231.

judicial decisions belongs to the category of unwritten laws within the meaning of Article 168 (1).

The position regarding the contracts under the Soulbury Constitution is laid down in the section 13(3)(c) of the said Constitution. Section 13(3)(c) provides as follows:

> *13(3) A person shall be disqualified from being elected or appointed as a Senator or Member of House of Representatives or sitting and voting in the Senate or House of Representative -*
>
> *(c) if he directly or indirectly, by himself or any person on his behalf, or for his use or benefit, holds or enjoys any right or benefit under any contract or made by or on behalf of the crown in respect of the Government of the Island, for the furnishing or providing money to be remitted abroad or of goods or services to be used or services to be used or employed in the service of the Crown of the Island.*

From the examination of the provisions of Section 13(3)(c) of the Soulbury Constitution it seems that a member could be withheld at the point of election (by an election petition) and thereafter (by quo warranto) from sitting and voting in the Parliament if he has entered into prohibited contracts after his election. Therefore, section 13(3)(c) would apply to both situations namely, at the point of election and also when an MP is sitting and voting in Parliament.

The Court of Appeal in this case observed that the contracts entered into by the first respondent with the government departments and institutions are contracts entered into by the said institutions as agents of the state.

Therefore, the first respondent while being a Member of Parliament has been a party to several contracts entered into with him by several government departments and institutions on behalf of the state.

They are the contracts prohibited by the Soulbury Constitution. Therefore, the Court of Appeal decided that the respondent by holding the contracts referred to above with the Republic of Sri Lanka,[11] has disqualified himself from sitting and voting in Parliament. In other words, the first respondent is disqualified to function or sit and vote as a Member of Parliament of Sri Lanka and his office as a member of Parliament become vacant in terms of Article 66(d) of the 1978 Constitution.[12]

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[11] The term "Crown" under the Soulbury Constitution has been replaced by the term "Republic of Sri Lanka" under the 1978 Constitution.

[12] Article 66(d) of the Constitution reads as follows: "The seat of a Member shall become vacant, if he becomes subject to any disqualification specified in Articles 89 or 91."

Comment

This judgment delivered by the Court of Appeal is significant in the Sri Lankan Context as many people enter into politics to fulfil their own agenda. However, the United National Party re-appointed Rajitha Senaratne through the National List after a few weeks after the judgment was delivered. The argument of the UNP was that Rajitha Senaratne has registered his partnership as a company and he has no private dealings with the alleged contracts since a company has separate legal identity. The reappointment has to be considered in the light of the Court of Appeal's decision regarding the *locus standi* of the petitioner.

The Court of Appeal observed that the writ of quo warranto is a remedy available to call upon a person to show by what authority he claims to hold such office. Therefore, the basic purpose of the writ is to determine whether the holder of public office is legally entitled to that office. If a person who is disqualified by law to hold statutory office the writ is available to oust him. Therefore, in these proceedings it would appear that any person can challenge the validity of an appointment to a public office irrespective of whether any fundamental or other legal right of that person is infringed or not. The only requirement is that the person so applying is bona fide in his application and there is a necessity in the public interest to declare judicially that there is a usurpation of public office. Therefore, any person, though not personally affected, can apply for a writ of quo waranto.

It also alleged on behalf of the first respondent that there has been a delay in making this application by the petitioner. In respect of the question of delay, the Court of Appeal observed that there can be no delay in this case for the reason that the mischief complained of is a continuing one. In other words, the respondent's continuance in the Parliament affords a fresh cause of action each day until he is removed.

Based on this reasoning of the Court of Appeal[13] it can be argued that the re-appointment of the first respondent gives rise to another cause of action in this regard. The Court of Appeal in its judgment had not discussed whether the first respondent as a director of a company has separate legal capacity distinct from his company. On the other hand, in constructing their judgment the Court considered both the partnership and his post as a director in his company. Therefore, it has again opened the doors to seek a writ of quo waranto on the ground that it would affect the public interest of the people of the country. However, the action of the main opposition party of the country undermines the rule of law, and is a in blatant disregard of a judicial decision given by the second highest court of the country.

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[13] On this matter, the counsel for the petitioner referred to the case of *Sonu Sampat* v. *Jalgaon Borough Municipality* cited in V.G.Ramachandran's Law of Writs (Fifth Edition) page 798, where it was observed that "if the appointment of an officer is illegal every day that he acts in that office a fresh cause of action arises; there can, therefore, be no question of delay in presenting a petition for a writ of quo warranto in which his very right to act in such a responsible post has been questioned."

FORTHCOMING .....

PEOPLE'S CHOICE

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Part III consists of the election manifestos of some of the candidates as well as the relevant official documents relating to the elections.

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