LST REVIEW
Volume 12 Issue 166 August 2001

A Brief Overview of the Japanese Constitution: Need for Reflection

Sustainable Development and the Role of NGOs in Sri Lanka

Rights of Tenant Cultivators in Sri Lanka

Computer Crimes Bill

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ISSN - 1391 - 5770

Editor's note .....

In this issue we publish an article by Dr Jayantha de Almeida Guneratne on the Japanese Constitution and the lessons that Sri Lanka can draw from the Japanese experience. He looks at the structure of governance in Japan as well as the fundamental rights chapter therein. He highlights the unique nature of the Japanese Constitution by referring, *inter alia*, to the provisions on fundamental duties of people. He also notes some of the negative features in the Japanese Constitution, particularly in relation to the independence of the judiciary.

We also publish an article on Sustainable Development and the Role of NGOs where the writer looks at the principles of sustainable development and the role that NGOs have played and should paly in relation to sustainable development. The writer stresses the need for greater co-operation between grassroot-level NGOs and national level NGOs as well as between governmental institutions and NGOs. She also notes the importance of environmental education and awareness raising, in order to ensure that day to day practices of people are sustainable. She also calls upon NGOs to operate in a responsible manner and not agitate for the sake of agitating.

Mr M.C.M. Iqbal in his article looks at the Agrarian Development Act of 2000 and its impact on tenant cultivators in Sri Lanka. Tracing the evolution of tenant cultivation in Sri Lanka he notes that this law, which was hurriedly passed by Parliament without a process of consultation, would deal a heavy blow to tenant cultivation and may every sound the death knell for tenant cultivators.

We also publish the latest version of the Computer Crimes Bill in an effort to attract comments from the wider public on the provisions of the Bill. We welcome any comments on the Bill from any interested party which may form part of a lobby document being prepared by the Trust on this Bill.

A brief Overview of the Japanese Constitution: Need for Reflection

Jayantha de Almeida Guneratne[*]

1. Introduction

There are several countries around the world that recognise the concept of the sovereign power of people. While some expressly recognise the concept[1], some impliedly regard it as the pivotal feature of the Constitution either through the express grant of power of judicial review of legislation and recognition of basic human rights[2] or through an implied doctrine to a like effect[3]. Yet some others may achieve the same objective through the interaction of their Constitutional Structures[4]. Japan belongs to that category. Bearing in mind also that some countries by definition cannot recognise such a concept[5] while some others may merely pay lip service,[6] it is proposed to reflect briefly on some of the salient provisions in the Constitution of Japan which have resulted in transforming the people of Japan to be the political sovereign of that nation with a view to exploring the possibility of borrowing some ideas in that Constitution that may prove to be useful in the Sri Lankan context.

2. The Origin of the Present Constitution of Japan

Japan has a written constitution as the term is understood in the classification system of modern constitutions. The present Constitution was promulgated in 1946 replacing its imperial precursor of 1889, which had come in the wake of the Meiji Restoration in 1867.

With the Meiji restoration in 1867 the first major transformation had taken root in the Japanese political culture. A system based on feudalism was transformed into a system of centralised authority with the Emperor as the symbol of all authority and sovereignty. The invasions by Japan of China, Korea and other neighbouring nations eventually followed. The next major transformation came with the defeat of Japan in World War II and the influence of American ideas superstructured on a parliamentary system similar to that of Great Britain. The interaction of these two influences catalysed by a growing awareness of the concept of human rights[7] may be regarded as

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[1] Sri Lanka, Article 3 of the Constitution.

[2] Article 14 of the Indian Constitution.

[3] Preamble to the U.S. Constitution read with Article III as judicially interpreted.

[4] Constitution of Japan.

[5] U.K. by reason of the fact that sovereignty resides in the Monarch.

[6] Article 3 of the 1972 Constitution of Sri Lanka.

[7] See for an incisive analysis of the origins, causes therefore and the resulting notions, C.G. Weeramantry, *Human Rights in Japan*, Lantana, Melbourne (1985).

the primary motivating influences behind the present Constitution of Japan. This has resulted in characteristics of a somewhat unique flavour. These institutions and characteristics are discussed briefly here.

3. The Principal Political Institutions of Japan

3.1 The Legislature

Japan's Parliament (or Diet) comprises a bi-cameral legislature namely, the House of Representatives and the House of Councillors.

3.2 The House of Representatives (The Lower House)

This is composed of 512 members drawn from 130 electoral districts nation wide, each containing two to six representatives and elected by males and females who have attained the age of twenty years[8] for four year terms.

3.3 The House of Councillors

The House of Councillors or the second (upper) House of Parliament enjoys the power to recrutinise legislative measures initiated in the House of Representative. It has the power of implied veto and effect amendments to legislative bills initiated in the House of Representatives. The House consists of 252 members drawn on a combination of nation wide based proportional representation and regional districts with each member serving six year terms with half of them elected once every three years.

4. The Law Making Process

Legislative bills are introduced in the House of Representatives either by a "dietman" (that is, a Member of Parliament)[9] or by the Cabinet.[10] The Speaker of the House then refers them to several Committees of the House consequent to whose deliberations and a full session of debate in the House, they are referred to the Speaker of the House of Councillors. A process similar to what takes place in the House of Representatives ensues with the Speaker referring the Bills to the Committee Stages. After a full session of debate in the House followed thereafter by vetoes or amendments to the original initiatives of the House of Representatives, the Bills are referred back to the House of Representatives. Upon Cabinet signatures and the formal signature of the Emperor the Bill is promulgated as law.

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[8] Japan's election system which began in 1889 originally permitted only males of 25 years of age the right to vote. There was a further restriction in that, to claim the right to vote they had not only to be tax payers but also paying taxes for at least 15 years. (The equivalent of approximately Rs. 12/- calculated in relation to the present U.S. dollar rate.)

[9] Smilar to Private Member's bills in Sri Lanka

[10] *Infra.*

5. The Role of the Emperor

The position of the Emperor is largely that of a symbolic Monarch. The nations of "a living God" and "repository of all power" which had been associated with him were jettisoned following World War II.[11] Under the present Constitution, while the Emperor's signature to legislative bills is merely a formality[12], (the Emperor has no veto power), even his functions in regard to international relations and diplomatic initiatives are really the work of the Minister of Foreign Affairs thus reducing him to the status of a symbolic head or a figure head of the nation.

6. The Executive or Administrative Branch of Government and the Office of the Prime Minister.

The executive or administrative branch of government is composed of a Cabinet of State Ministers headed by the Prime Minister. The nomination to the Cabinet must be approved by the Diet (Parliament) and has been influenced, like most countries, by the British Cabinet system of government. The Cabinet is the core institution that is in control of the organisational structure of the government. Besides the twelve ministries[13] and the Prime Minister's office, the Cabinet also has five other link bodies namely, the Board of Audit;[14] National Defence Council;[15] National Personnel Authority;[16] the Legislation Bureau[17] and the Secretariat.[18] Given the fact that the Prime Minister, who is elected from the political party in power, is possessed with the power to co-ordinate the work of all the Ministries and administrative agencies and the power to dissolve the House of Representatives at any time, there is no doubt that the Prime Minister is the most powerful political personality and is the real Executive head in Japan. His powers vis-à-vis the judiciary will be discussed later.

7. The Judiciary

The highest court, the Supreme Court, is conferred with the power of judicial review of legislation and elections, and the parliament has the power to move a resolution to impeach any judge of the Supreme Court, a constitutional provision similar to that of

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[11] It is said that following Japan's War debacle, the Emperor made a statement to the public not only relinquishing real power but also announcing that he is a human being – thus signifying the symbolic transformation of the very foundation of the Japanese political structure.

[12] *Cf.* the Queen's assent to Parliamentary bills in the United Kingdom where the system operates on the convention that Queen will not refuse her assent although on paper she has the authority to do so.

[13] Justice, Foreign Affairs, Finance, Education, Culture and Science, Health and Welfare, Agriculture, Forestry and Fisheries, Construction, Transport, Posts and Telecommunications, Labour, International Trade and Industry and Home Affairs are the subject areas.

[14] Which investgates Japan's Settlement of Accounts.

[15] Which provides opinions to the Prime Minister on National defence matters.

[16] Deals with personnel affairs pertaining to the Civil Service.

[17] Responsible for the drafting of laws and treaties similar to the Office of the Legal Draftsman in Sri Lanka.

[18] Which bears responsibility for co-ordination of administrative agencies, collection of data and the examination and conducting of policy studies.

most countries with written constitutions. The Cabinet (headed by the Prime Minister), however, makes judicial appointments.

8. A Brief Analysis of the Political Institutions of Japan in the light of Modern Constitutional values

The existence of two elected bodies of Parliament and the House of Councillors power of veto and amendment to legislative bills initiated by the House of Representatives provide more opportunities than the political system of most other developed countries for public awareness of national issues with the attendant consequence of strengthening public opinion and its reflection. The existence of the Committee system in both houses strengthens this further. The requirement that Parliament must approve nominations to the Cabinet of Ministers and the Prime Minister (as the Head of the Cabinet) possessing power to dissolve the House of Representatives presents a constitutional balance of power. This, however, is weakened by the political reality that the Prime Minister is in essence the head of both legislative bodies and the Cabinet. Likewise, the power of judicial review of elections and legislation and the provision for impeachment of judges by Parliament represents a checks and balances system between the legislature and the judiciary. However, the power possessed by the Prime Minister to make judicial appointments weakens that initial impression and runs counter to the concept of the independence of the judiciary. As noted earlier, the Emperor is a mere symbolic head. The interaction of these several aspects has had the effect of transferring sovereignty from the Emperor to the people. How that sovereignty manifests and is guaranteed in the Constitution is discussed in the next section.

9. Constitutional Guarantees of People's Sovereignty

9.1 Fundamental Human Rights (including Social Rights)

The Japanese Constitution guarantees freedom, suffrage and fair legal treatment. The influence of the Magna Carta (1215) and the 14th Amendment to the U.S. Constitution is unmistakable in the several provisions of the Constitution dealing with those constitutional guarantees. They are also approximate to the rights and freedoms guaranteed by the Constitution of Sri Lanka. A significant advancement seen in the Japanese Constitution is the constitutional guarantee of social rights which include the right to an adequate standard of living,[19] right to cultural opportunities, right to education, right to practise any religious faith[20] and the right to a clean environment. Barring the right to practise any religious faith, other rights which may be regarded as social rights hardly find expression in an affirmative form in other developed

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[19] It is said that the majority of the Japanese consider themselves "middle-class" thus carrying the implication in the context of the Constitution that "adequate standard of living" would mean a "middle class level lifestyle."

[20] The native religion shintoism; Buddhism since 6th country A.D. and the Christian faith with its several denominations owing to the work of missionaries since the 16th century A.D. are the three major religious faiths in the country.

countries. In Sri Lanka they are reflected in Directive Principles of State Policy and are not accorded the status of justiciable fundamental rights.[21] "Equality before the law" and the "equal protection of the law" do not necessarily imply "providing equal opportunities." Although there is a trend in recognising such social rights as the right to a clean environment through judicial initiatives,[22] the Constitution of Japan must rank as one of the most progressive documents in recognising and guaranteeing affirmatively social rights which other countries have been slow to adopt. What is apractical fact to Japan is at present a constitutional ideal to countries like Sri Lanka.[23]

9.2 Fundamental Human Obligations

An express obligation is imposed on all parents to provide their children with education. Given the fact that suffrage is determined at 20 years which corresponds with the age of majority, this duty on the part of parents may be presumed to continue until the child reaches that age. The obligation to provide education to their children until then is thus constitutionally imposed. By first guaranteeing social rights in all their aspects (a State duty) and then imposing obligations on those to whom such rights are guaranteed in relation to children the Constitution creates a social culture which gives a unique flavour to the Japanese Constitution. This is further exemplified by the fact that the Constitution imposes a fundamental obligation "to work", the creation of opportunities for work being a constitutional duty imposed on the State.[24] This stands in contrast to the mere non-justiciable declarations in the Constitution of Sri Lanka[25] including the duty to respect the rights and freedoms of others,[26] which at the most is only a negative obligation, an aspect brought out in the Supreme Court decision in *Dissanayake* v. *Sri Jayawardenapura University*.[27]

Another feature that merits closer scrutiny is the obligation imposed on citizens to pay taxes. Given the fact that it is a constitutionally imposed duty, what consequences would flow upon a failure to discharge that duty? Would such a defaulter lose the right to vote (besides other legal consequences)?[28] This query stems from the fact that the duty to pay taxes stands on a different basis to such duties as the duty to educate (and the implied broader duty to support) children and the duty to work. In regard to the former if a parent makes all reasonable efforts within his or her means to discharge that duty and in regard to the latter if a citizen makes all reasonable and practical efforts to procure employment, the duty might be deemed to have been discharged. The notion of suitable employment or employment commensurate with a person's qualifications would no doubt be read into the framework of the latter duty referred to

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[21] See Article 27(2) read with the Article 29 of the Constitution of Sri Lanka.
[22] Notably in jurisdictions such as the United Kingdom, New Zealand and Australia.
[23] *Supra* n.21.
[24] *Supra* n. 19.
[25] See Article 28 of the Constitution of Sri Lanka.
[26] Article 28 (e), *ibid.*
[27] 1986 (2) Sri LR 254.
[28] See the 24th Amendment to the U.S. Constitution, Section 1, which specifically states that the right to vote shall not be denied by reason of failure to pay any poll tax or other tax.

above. In those circumstances, the overriding duty imposed on the State (as opposed to mere Directives of State Policy as in the Sri Lankan Constitution) to create conditions to enable the citizen to discharge those duties would come into play thereby exculpating the citizen who might *prima facie* otherwise appear to be in breach of his obligations. Consequently, what results is a unique constitutional ethos. The Kennedian rhetoric "Ask not what the country can do for you, but what you can do for the country" appears to have been somewhat modified in the Japanese Constitution to read as "Ask what the country can do for you in order to do what you should do for the country."

10. Conclusion: Lessons for Sri Lanka

On the Bicentennial of the United States Constitution Warren E. Burger[29] wrote thus: "The work of 55 men at Philadelphia in 1787 was another blow to the concept of the divine right of kings. The freedoms flowing from this Constitution created a land of opportunities..... This is the meaning of our Constitution ..... the first of its kind in all human history." The present Constitution of Japan is 55 years old and the foregoing brief analysis shows that it can well afford to echo the American boast. The sweeping changes Japan's political ethos had undergone following World War II under the U.S. initiated democratic rule had sparked off the beginning of a "new book" nation with the emphasis on economic development, a fact reflected in the concept of Pacifism which finds expression in the Constitution namely, the renunciation of War and military force.[30] In contrast, it was around the same time as Japan was beginning to rise from the ashes it had been reduced to after World War II that Sri Lanka gained independence. If that was the promise, the 1st Republican Constitution of 1972 was thought to be its enforcement and the 2nd Republican Constitution of 1978 the fulfilment. Barring some advances made in relation to fundamental rights jurisprudence of the Supreme Court that promise has been reduced to a mere vision in Arcadia in the areas of constitutional government in general and economic development in particular and just about holds out the same hope as some of other Articles in the Constitution do, such as the provision empowering the President "to declare War."[31] Indeed, there are some lessons to be learnt from the Japanese experience. The well structured cabinet portfolios based on the actual needs of society,[32] the practical rationale behind the House of Councillors[33] thus justifying the case for a second house, perhaps breaking up the present single house to two so that the number of representatives will not exceed an amount that is absolutely essential,[34]

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[29] Chairman of the Commission and Chief Justice of the United States, 1969-1986.

[30] Article 9 cf. the Swiss Constitution which is similar. While in both countries there is no permanent military force, in Japan, the military self defence force is made up by volunteers.

[31] Article 33(e) of the Constitution. There is no comparable provision in the Japanese Constitution.

[32] Fourteen compared to the staggering amount in Sri Lanka.

[33] See *supra* at p. 9.

[34] The 512 seats in the House of Representatives and 252 in the House of Councillors are in relation to a population of 130 million people and a land area of 377,000 square kilometres compared to the 225 members in Parliament and a President who respond to a population of 18 million people and a land area of a mere 63,000 square kilometres in Sri Lanka.

the requirement of Parliamentary approval of nomination to the Cabinet of Ministers are some of the salient features of the Japanese Constitution that require closer consideration.[35] The constitutional guarantee of social rights and the concept of fundamental human obligations are two strikingly progressive provisions that warrant a detailed study in the light of judicial decisions in Japan. As the events of the recent past have revealed the path of constitutional reform in Sri Lanka has been arduous and non-productive. Perhaps the time has come to concentrate on pragmatic reforms rather than on over reaching changes. In that regard the Constitution of Japan holds out a few lessons for Sri Lanka.

[35] The objectionable provisions relating to the office of the Prime Minister were commented on earlier.

Sustainable Development and the Role of NGOs in Sri Lanka*

*Sumudu Atapattu***

1. Introduction

The last few decades have witnessed an unprecedented level of activity in relation to environmental law at both national and international level. While there is still a long way to go, these developments would not have been possible without the contribution and involvement of civil society groups. This is true for Sri Lanka and many other countries. This paper seeks to discuss the contribution that civil society groups, particularly NGOs, have made to sustainable development in Sri Lanka. Having made a brief discussion of the concept of sustainable development and its normative status under international law, the provisions in the National Environmental Act of Sri Lanka relevant to sustainable development will be discussed. Section 3 discusses the role that NGOs have played in Sri Lanka and finally, section 4 will embody recommendations for future action.

2. What is sustainable development?[1]

The term "sustainable development" has become a much used as well as a much criticised concept both internationally and nationally. Strict environmentalists reject the concept on the ground that the term digresses attention from environmental protection, dilutes its importance and places too much emphasis on economic development. Others reject it on the ground that the term is too vague. While there is some merit in these arguments, there is no denying that economic development is necessary as many environmental problems are caused by under-development, and poverty places a heavy burden on the environment. The environmental problems caused by over-consumption of resources practised to a large extent in many developed countries are self-evident; those issues, however, will not be addressed here as the emphasis will be on the role of NGOs in Sri Lanka.

Since under-development can lead to many environmental problems and many environmental problems are caused in the development process itself, it has become clear that a way must be found to reconcile environmental protection with economic development. Until recently, the norm was to "develop first, clean up later." This

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* This article is based on a background paper prepared for the Conference on *Building the Model South Asian Law Firm*, organised by the South Asian Law Students Association, Washington DC., on 17th February 2001at the George Washington University Law School, Washington DC, at the time when the writer was a Visiting Fulbright Scholar there.

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[1] It must be noted that an indepth analysis of the concept is not possible within the confines of a paper of this nature. There is a considerable amount of literature on the subject and no attempt is made here to analyse such literature. Only a brief summary will be provided here in order to put the discussion in perspective.

approach, however, has proved to be myopic. While it is possible to repair some kinds of environmental problems, very often than not, repercussions are long-term and irreversible, and cleaning up is prohibitively expensive, if it is possible at all. The phenomenon of ozone depletion is a good example. Developing CFC substitutes has been a very costly exercise which has proved to be beyond the capacity of many a developing country.

The World Commission on Environment and Development (WCED), appointed by the UN General Assembly in 1983 to ascertain whether environmental protection and economic development could be reconciled, was of the view that sustainable development was the answer. The report of the Commission called *Our Common Future* defined sustainable development as: "Development which meets the needs of the present without compromising the ability of future generations to meet their own needs."[2]

It must be noted that this definition makes no reference to environmental protection at all. In fact, it stresses the need for development. However, by incorporating an inter-generational dimension into development, the WCED has implicitly stressed the need for environmental protection: development cannot be sustainable if environmental protection is not integrated into the development process.[3]

There are various views about the normative status of sustainable development, and these views are as varied as the definition of the term itself. At the one end of the spectrum there are those who assert that it is nothing more than a mere concept. At the other end of the spectrum, there are those who contend that it is part of international law with normative status. The majority falls somewhere between these two extremes who argue that sustainable development has been widely accepted by various actors in the international community and is a tool to guide decision making.[4] They, however, contend that it falls short of an international legal principle, binding on states.

Justice Weeramantry noted in his separate opinion in the *Hungary* v. *Slovakia* case[5] that the concept of sustainable development is now part of contemporary international law.[6] If this were indeed the case, it would be binding on all states. Many argue that

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[2] *See, Our Common Future*, Report of the World Commission on Environment and Development (1987) p 43.

[3] The modern thinking is to include social factors (like human rights issues) and cultural factors into the development process. In other words, development must be environmentally, socially and culturally sound and acceptable to the community or country in question. See the current debate on the right to development.

[4] McGoldrick, for example, is of the view that "sustainable development has become a central part of economic and environmental thinking at all levels," see "Sustainable Development and Human Rights: An Integrated Conception," ICLQ Vol 45 (1996) p 796 at p 799.

[5] ICJ Reports (1997).

[6] In order for a practice to become part of customary international law, that practice must be consistent, and be accompanied by the conviction that that practice is binding (*opinio juris*). See Article 38(1) of the Statute of the ICJ. When both these elements are satisfied (consistent practice and *opinio juris*), every state becomes bound by that customary international law rule, irrespective of whether that state actually followed that practice.

this concept has not acquired the normative quality required for a customary international law principle;[7] nonetheless, at the same time, states have not ignored the concept either.

Despite uncertainty about its precise legal status, there is no doubt that sustainable development has come to stay and would continue to influence the decision-making process. Perhaps it may not be long before it does become part of customary international law. Since its "creation" by the WCED, sustainable development has been specifically included in both binding and non-binding instruments on environmental protection. The fact that it has not been completely disregarded by states indicates that it has some influence in the development of international environmental law. Thus, in summary, the concept of sustainable development seems to have attained something more than a mere "concept."

Sustainable development also has human rights implications. It embodies rights of future generations and also the right of the present generation to develop in a sustainable manner. Despite criticisms that this is a vague term, the concept of sustainable development is, in the opinion of the author, an important development of recent years. While it may not have attained the status of a customary international law principle, and its legal status remains questionable, almost all recent international environmental instruments make specific reference to it and states seem to have accepted it as a norm which should be taken into account when taking decisions affecting the environment. It has at least encouraged states to evaluate their development activities for their environmental impact by adopting the Environmental Impact Assessment (EIA) process which is participatory, transparent, and provides access to information. The importance of this development should not be undermined.

3. Environmental Law in Sri Lanka

The term "environmental law" gained recognition in Sri Lanka only in recent years. Prior to 1980, no reference was made to environmental law, although statutes which governed some segments of the environment were enacted as early as the beginning of the 20th century. The Forest Ordinance of 1907 is a good example.

Despite the growing number of environmental problems, laws were adopted on a piece-meal basis and this fragmented approach to environmental protection continued until 1980 when the National Environmental Act (NEA) was adopted. Despite providing a holistic approach to environmental protection and establishing a central,

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Customary international law is an important source of international law. See Brownlie, *Principles of Public International Law* (1990) 4th ed.

[7] For a rather harsh criticism of this concept and particularly of the fact that it has become part of customary international law, see Lowe, "Sustainable Development and Unsustainable Arguments," in Boyle and Freestone (eds) *International Law and Sustainable Development: Past Achievements and Future Challenges* (1999)(Oxford University Press, New York), p 19. *Cf* Sands, "Sustainable Development: Treaty, Custom, and the Cross-fertilization of International Law," *ibid*, p 39.

apex body to implement the Act, the provisions of the Act left many disappointed: what finally ensued was a weak statute and a body lacking regulatory powers. The law was amended in 1988 giving the Central Environmental Authority (CEA) regulatory powers and considerably strengthening the legal provisions on environmental protection.

Several statutes in Sri Lanka endorse the concept of sustainable development implicitly, the most important being the National Environmental Act No 47 of 1980 (as amended by Acts Nos 56 of 1988 and 43 of 2000) which has extensive provisions on pollution control, regulation of development activities and preparation of management plans for the protection of the environment. It contains two tools to achieve sustainable development, although the NEA does not refer to the concept specifically.

As noted earlier, sustainable development envisages a balancing process between economic development and environmental protection. It embodies an inter-generational dimension, as decision-making should take into account rights of future generations as well as intra-generational equity. In other words, it seeks to integrate environmental protection into the economic development process. The two tools in the NEA are: the environmental protection licence process (EPL); and the environmental impact assessment process (EIA).

Other relevant statutes include the Coast Conservation Act of 1981 (amended in 1988), the Urban Development Authority Law of 1978 (as amended from time to time), Greater Colombo Economic Commission Law (as amended from time to time) and the Southern Development Authority Act of 1996. All these laws endorse and embody provisions on EIAs, discussed below.

3.1 EPL process

The NEA provides that no "prescribed activity" can, after the relevant date (which is 1st July 1990), emit waste[8] into the environment[9] which will cause pollution except under the authority of a licence and under such terms and criteria to be prescribed under the Act. This provision requires all prescribed activities to be licensed under the Act. Before the amendment of 2000, the law required all industries to be licensed which became a huge administrative burden on the CEA. Hence, in order to streamline the process and to make the CEA more efficient, the law was amended to confine the EPL process to selected activities.[10]

This provision enables industries to operate, but under strict terms and conditions. Under the new amendment, all prescribed activities have to be licensed. Industrial

[8] Defined in the Act.
[9] Defined in the Act.
[10] A list of prescribed activities has now been gazetted.

development is necessary for developing countries such as Sri Lanka, and particularly due to international trade, they must remain competitive in the international market.

A considerable amount of case law has emerged in relation to the EPL process. The Supreme Court has also noted in an application involving an EPL that public participation and transparency are essential if sustainable development is to be achieved. The Court further stated that before issuing an EPL, objections from the public must be considered, although the Act itself does not impose such an obligation on the CEA.[11] It was refreshing to note that the Court referred to sustainable development, the first reference to it by the Court, although the case could have been decided without referring to the concept. This case heralded in a new era in which sustainable development was recognized as a concept to be applied in relation to environmental issues.

3.2 The EIA process

The NEA regulates certain types of development activities identified according their location,[12] magnitude[13] or the type of the project.[14] Called prescribed projects, these require approval under the NEA. The preparation of an EIA[15] or an Initial Environmental Examination (IEE) report[16] for such projects is mandatory under the Act.

Put simply, an EIA is a document which seeks to predict the environmental impact of a proposed development activity. It enables us to evaluate a project for its viability from an economic, sociological and environmental point of view. If used properly, it enables us to choose the best project and the best locality for that project. It also enables us to reduce the impact on the environment as once the possible consequences are identified, it becomes possible, through various devices, to mitigate the impact.

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[11] *V.D.S. Gunaratne* v. *Homagama Pradeshiya Sabha and five others* SAELR 5(2) and (3), 1998, p.28. The Court, however, did not define sustainable development.

[12] Thus, activities which borders fragile eco-systems or a protected area. Activities which fall within a one mile radius of an area protected under the Fauna and Flora Protection Ordinance require the preparation of an EIA. See discussion, supra.

[13] Some projects have been identified according to their size. Thus, for example, a highway exceeding a length of 10 kilometres, hotels exceeding 99 rooms or 40 hectares in extent; hydroelectric power stations exceeding 50 megawatts etc.

[14] Some projects by their very nature require the preparation of an EIA. Construction of ports, airports, harbours and nuclear power plants are examples.

[15] Defined in the Act as a written analysis of the predicted environmental consequences of a proposed prescribed project and containing such information as are required under the Act. Very importantly, it must contain an analysis of alternatives which are less harmful to the environment together with reasons as to why such alternatives were rejected. That the discussions of alternatives lies at the heart of the EIA process was recognised by the Court in the *S.C. Amarasinghe and three others* v. *The Attorney general and three others (Katunayake Colombo Expressway case)* SAELR 1(1), 1994, p.23. As it provides the decision-maker with options to choose the best project which is environmentally, socially and economically viable, an EIA can be rejected if alternatives are not adequately discussed. However, only reasonable alternatives need to be discussed. See *NRDC* v. *Morton* in which this principle was laid down.

[16] An initial environmental examination report has been defined in the Act as a preliminary report which seeks to ascertain whether the impacts on the environment are significant and hence, requires the preparation of an EIA. The Act does not, however, define "significant impact on the environment."

While an EIA is an invaluable tool, our experience with the EIA process has shown a negative side of EIAs.[17] The main objective of the EIA is to integrate environmental protection into the economic development process, which principle also underlies the concept of sustainable development and is embodied in the Rio Declaration on Environment and Development.

The EIA report is a public document which must be made available for public inspection at a pre-determined location for a period of thirty days. Any member of the public can, during this period, make his/her comments to the relevant project approving agency. In certain instances, the relevant project approving agency can hold a public hearing. Public hearings have been held in relation to various projects in Sri Lanka. While the latter is not a mandatory requirement under the NEA, if a decision is made to hold a public hearing, rules of natural justice must be followed. This public participation procedure has been used extensively by environmental NGOs to make representations to the project approving agency to ensure that the EIA conforms to the legal requirements. In several cases EIA documents have been challenged in courts by the NGOs.

The importance of the EIA process is that it is participatory and transparent and provides access to information. These principles, which are human rights guaranteed under international law, are increasingly being recognised in relation to environmental issues as well. The Rio Declaration on Environment and Development of 1992 embodies these principles in relation to environmental issues. Principle 10, in particular, is relevant in this regard:

> *Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.*

This provision mandates states to facilitate public participation by making information widely available. The mere provision of information is not sufficient. It must also be noted that the public participation procedure in Sri Lanka is tied to the EIA process. The public participation process envisaged under the Rio Declaration, above, is much wider and is not restricted to the EIA process.

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[17] Thus, it is often criticised for coming too late in the decision-making process; using it to justify a decision already made; being too technical; being only in English; and being project-oriented, therefore, overlooking the cumulative impact of projects.

4. The role of NGOs[18]

The role of civil society particularly in relation to human rights and environmental protection is well recognized worldwide. They have influenced policy, intervened in law reform as well as engaged in creating awareness in the community. Due to their flexibility of approach and lack of bureaucracy, NGOs have played a vital role in relation to environmental protection in Sri Lanka. The Sri Lankan Constitution recognises, *inter alia*, freedoms of association, assembly and expression, vital for the functioning of NGOs.

Without the help of civil society and two national level NGOs in particular, environmental law would not have developed to this extent in Sri Lanka. We owe much to Environmental Foundation, the first NGO in Sri Lanka to specialise in environmental law and Mihikata, which also specialised in environmental law and environmental education, particularly among school children. These organisations, first started by a few committed individuals many of whom were practising lawyers, have come a long way, and have professional staff. They have filed many law suits, helped thousands of victims through their legal aid clinic and have also carried out education programmes on environmental law and environmental protection. They have also produced many publications and have campaigned vigorously on various issues, including law reform. These organisations have had an uphill task in putting environmental law on the legal and particularly, the litigation map of Sri Lanka. This journey of evolution, however, would not have been possible for these groups without the support of the judiciary, which has been receptive to the novel idea of "environmental litigation" from the very beginning.

In addition to these national level NGOs, there are thousands of NGOs working at the grassroots level without whose help the national level NGOs would not have been successful. These NGOs work on local issues of concern and have made a significant contribution to environmental protection in the country. The advantage they have over national level NGOs is their expert knowledge on local environmental problems as they are very familiar with the ground situation. What they may lack is an avenue to bring their grievances to the notice of the policy maker, for which national level NGOs would be invaluable. The fact that they are familiar with the ground situation could also make them more sensitive and subjective. Here too, the national level NGOs can be invaluable as they would be in a better position to evaluate the situation and articulate the problems in a more objective manner.

The NEA itself has provided an avenue to NGOs to influence policy and the work of the CEA. The 1980 Act provides for the establishment of an Environmental Council to, *inter alia*, advise the CEA. This Council consists of various governmental officials

[18] This section draws from the author's article on "Wither Environmental Law in Sri Lanka: Tracing Fifty Years of Environmental Law in Sri Lanka," in *Fifty Years of Law, Justice and Governance in Sri Lanka* (Law & Society Trust, Colombo)(forthcoming).

as well as two NGO representatives. The number of NGOs was increased to seven by the 1988 amendment. Thus, NGOs have official standing in the CEA with the law establishing the CEA recognizing their important role. These NGOs are chosen from among the NGOs that are registered with the CEA.[19] EFL is represented on the Environmental Council.

In *Rupasinghe's case*,[20] the Supreme Court recognised the importance of freedom of association in relation to environmental protection. In this case, the petitioner, the Chairman of a community based NGO, was prevented from attending a workshop at the CEA, to which he had been invited by the Chairman of the CEA. He had been assaulted by the 1st – 5th respondents and intimidated into leaving the premises.

The Court held that not only did the actions of the 1st to the 5th respondents prevent the petitioner from exercising his freedom of speech, but they also violated his associational rights: "The particularly controversial ones, is undeniably enhanced by group association .... Indeed, freedom of association is an indispensable means of preserving their individual liberties like free speech. It has been described as the matrix, the indispensable condition of nearly every other form of freedom."[21]

EFL runs a legal aid clinic to which any aggrieved party can complain about an environmental problem. If the organization is satisfied that a public nuisance exists, it will take up the claim on behalf of the aggrieved party. Legal action is taken as a measure of last resort and very often cases are settled on the undertakings given by the perpetrator and/or the CEA. Site visits are carried out and often, a considerable amount of money is expended on laboratory testing.

In the event that a determination is made that no public nuisance exists, the complainant is advised that the organisation is unable to take up his claim due to *locus standi* problems. *Locus standi* remains a problem to these NGOs as the NEA does not recognise citizen suits.[22] Although courts have been willing to relax this rule and have shown a flexible attitude, nonetheless, these NGOs have had to prove *locus standi* in every case they file. For this flexible approach we must be thankful to the judiciary, which has in its own way contributed to the development of environmental law, although it has not demonstrated as much a bold approach to environmental issues as its counterpart in India. The recent trend in Sri Lanka has been encouraging and the judiciary must be congratulated for its path breaking judgment in the *Eppawala*

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[19] The CEA adopts a certain procedure to register these NGOs and certain criteria have to be satisfied. Some may, however, criticize this provision on the ground that it jeopardises the integrity and independence of environmental NGOs. On the other hand, it is possible to argue that this provision recognises the important role played by NGOs by granting them official status under the Act.

[20] M.V.L. Peiris v. Neil Rupasinghe, MP and six others, SC Application No. 126/99 , SC Minutes 9.12.1999.

[21] See Atapattu, "Judicial Protection of Human Rights" in *Sri Lanka: State of Human Rights 2000* (Law & Society Trust, Colombo, 2000), p. 100.

[22] Citizen suits is where the law recognises the right of every citizen to bring an action under a particular law in the event the law is being violated irrespective of whether the applicant's rights have been violated. This is an exception to the *locus standi* principle. The NEA allows standing only to the CEA.

case.[23] This was the first case that dealt with international environmental instruments and their significance for Sri Lanka, and the Court also stressed that the yardstick to measure development activities should be the principle of sustainable development. Furthermore, the Court stressed the importance of following the provisions in the NEA on EIA and the need to make the relevant documents available for public inspection. Although not going as far as recognising a distinct right to a healthy environment, the judgment is significant for its discussion of sustainable development, the novel way of incorporating international law through judicial pronouncements and for developing new principles of environmental law like guardianship which the court felt was wider in scope than the public trust doctrine.

Environmental groups have also played a particular role in relation to law reform. Environmental Foundation played a leading role when the NEA was being amended in the mid 1980s. Several of the amendments drafted by them were included in the NEA. The provision on citizens' suits, however, proposed by EFL, was not included as the CEA feared opening a pandora's box that would result in the proliferation of environmental law suits.

5. What are the lessons to be learnt?

The lessons to be learnt from our rather short history of environment law[24] are many. The most important lesson to be learnt is that environmental protection requires a ***balancing*** of competing interests. There is no such thing as a pristine environment where no development activity takes place as *any* activity will have *some* impact on the environment. Some environmentalists in Sri Lanka have been branded as "anti-developmentalists," sometimes with good reason. Several development activities have been stalled due to environmental lobby, the coal power plant being the most controversial. That Sri Lanka needs an additional source of energy was recognised at least 10 years ago and the energy crisis in 1996 sounded a good warning.[25] Even now Sri Lanka is experiencing prolonged power cuts. But what action was taken, five years since, to establish an alternative source of energy? The option that was available was to develop coal power, given that other sources of energy may not be economically viable for Sri Lanka. While accepting that coal power has its own environmental problems, what we need to do is to ensure that these problems are minimised. Technology is available to minimise environmental risks of coal power plants. Thus, as environmentalists, we need to take a realistic and pragmatic stand in relation to development activities as well as environmental protection. Poverty itself has a severe impact on the environment and every effort must be made to achieve

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[23] *T.B. Bulankulama and six others* v. *The Secretary, Ministry of Industrial Development and seven others*, SC Application No 884/99 (FR), SC Minutes 2.6. 2000.

[24] "Environmental law" here is used to mean environmental statutes adopted after 1980 and the jurisprudence of the courts after that date.

[25] The power cuts during 1996 also saw the President promulgating emergency regulations to suspend the operation of environmental statutes, including the NEA, relating to power and energy projects. Needless to say that this is a very dangerous approach. See also Wickremasinghe, "Emergency Rule" in *Sri Lanka: State of Human Rights 1997* (Law & Society Trust, Colombo, 1997), chapter 3.

development in a sustainable manner. Attempts to stall development allegedly on environmental issues which are baseless and short-sighted are, indeed, irresponsible.

The converse of this scenario should also be considered. Very often, politicians try to push development activities forward without considering their environmental impact. This again is dangerous and short-sighted and will jeopardise the future of our children and grandchildren. Thus, the way forward would be for policy-makers to join hands with environmentalists and take an integrated approach to environment and development, which principle underlies the concept of sustainable development. It is also embodied in the Rio Declaration of 1992[26]. The EIA process which integrates environmental protection with the development process, should be pursued without exceptions and should not be used to justify a decision that has already been made.

Education and awareness will go a long way in changing attitudes and unsustainable practices. How many of us are guilty of wasting water, dumping garbage, throwing away plastic containers and bags and engaging in other unhealthy practices? We need to change ***now***, and unless and until ***all*** of us do so, environmental degradation would continue. Similarly, training and awareness raising is necessary for policy makers and enforcement agencies and co-ordination among various institutions charged with, *inter alia*, environmental protection, finance, foreign affairs, industry and trade is crucial for an integrated approach to environmental protection as well as to appreciate the multi-disciplinary nature of the subject. NGOs will continue to play an important role in this area. This does not, however, absolve the state of its obligation to carry out educational and promotional activities and it is suggested that, rather than eyeing NGOs with suspicion and criticizing their activities, government agencies should join forces with NGOs and contribute to the activities of NGOs. This way, it would be possible to pool scarce resources and avoid duplication of activities: the government would be able to benefit from the experience of NGOs which have, over the years, acquired expertise in environmental law and protection; and NGOs would benefit from governmental resources and gain easy access to different target groups that the government would be able to provide. This government-NGO relationship with regard to education is taking place to a limited extent in the human rights field where the Human Rights Commission is seeking the assistance of NGOs for their training activities. While the NGOs should be wary of being branded as "spokespersons" for the government, this should not be an insurmountable problem if certain ground rules are followed by both parties. Mutual respect for each other's views as well as the right to dissent should form part of these ground rules. It is important to realise that the government agencies themselves are working amidst intense pressure from various sources and are trying their best to please all the parties concerned.

The NGOs themselves should become more professional, back up their arguments

[26] Principle 4 provides that "In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation."

with scientific data (and not with sentiment) and place the facts as they are before the public and the government. They should hire professional staff, train their own staff members on the need to adopt a holistic and an integrated approach to environmental problems and become more acquainted with international developments (with information technology today this should not be a problem). They should appreciate the multi-disciplinary nature of environmental problems and become familiar with the input of other disciplines to environmental issues. They should liaise closely with other disciplines and seek their expertise whenever necessary.

They should continue to play a catalytic role and to influence policy. They should act as a watch-dog for the environment and bring to the notice of the government any problems that arise. They should be prepared to compromise in certain instances and to adopt a pragmatic approach to environmental protection. Being too rigid in their approach can lead to many problems, particularly in a developing country like Sri Lanka. NGOs should continue their lobby and advocacy work adopting a flexible approach to environmental protection.

Networking with other NGOs in the country is also important given that resources are scarce and manpower is limited. The proliferation of NGOs in Sri Lanka has led to duplication of activity and wastage of scare resources. Petty rivalry and competition should be put aside and NGOs should get together to work on issues of common concern. Although a clear link exists between environmental issues and human rights, and environmental NGOs have used human rights machinery in relation to environmental problems, it is very rarely that these two groups have come together to work on issues of mutual concern.

Furthermore, linking with grassroots environmental organizations is crucial. While it is important to work at the national level and to influence policy, not understanding or appreciating the ground situation leads to problems. Certain NGOs have been branded as "elitists" for this reason. The picture at the grassroots level may be very different to the picture at the national level, and grassroots organisations have often criticised national level NGOs for not listening to their voice and for living in "ivory towers." The grassroots-national level NGO relationship can be mutually beneficial, similar to the NGO-government relationship referred to above. The national level NGOs need information and data about the ground situation and the grassroots level NGOs need to get their voice heard by the policy makers. Thus, linking up with grassroots NGOs would be mutually beneficial and should be a priority for national level NGOs.

Networking with civil society groups in the region, particularly with those in South Asia, is also important. The advantages of this are mainly two-fold: since the region shares similar economic and environmental problems, as well as political and cultural similarities, the NGOs in Sri Lanka can learn from the experience of the NGOs in the

region. Furthermore, the South Asian (or the regional) NGO network would provide a strengthened voice at international fora for advocacy and negotiations.

Time has also come to take stock of the cases that have been filed by NGOs to see whether the cases have really made an impact on society. Granted that they have served an important role – namely that the cases have highlighted the role law and litigation can play in relation to environmental issues. The question has arisen whether this tradition of litigation should be continued or whether time has come to adopt other strategies. The real impact of litigation must be assessed in order to ascertain whether it serves a useful purpose or whether it has resulted in prolonging issues and stalling development projects. Moreover, litigation is costly and protracted and these must be borne in mind when deciding on appropriate strategy. It must be noted that the "stick" method, particularly litigation, should be used sparingly and for environmental issues, the "carrot" method (or a combination of the two) often works best.

International law has played a major role in shaping international obligations in relation, *inter alia*, to human rights and environmental protection, which, in turn, have had an impact on national law. Regional developments in relation to environmental protection are also important, particularly since much can be learnt from the experience of states which share similar socio-economic and geo-political situations. Civil society groups have a particular role to play in lobbying the government to ratify relevant international conventions and then to adopt enabling legislation to give effect to those international obligations at the national level.

RIGHTS OF TENANT CULTIVATORS IN SRI LANKA

*M.C.M. Iqbal**

1. Introduction

It was during the reign of King Devanampiya Tissa in the 5th Century B.C. that a system of land tenure with the King as the owner of all land gradually began to evolve in Sri Lanka.[1] Lands were then given to communities or castes of people who were generally engaged in a particular type of vocation. As this system continued, the kings began to impose taxes on those who made use of the lands to fill the royal coffers. In order to promote these lands being used for agricultural purposes, the king is said to have made grants on more generous terms when requests for land for such purposes were made. Charters conferring rights to tenants had also been issued.[2] Agricultural activity was also encouraged by giving financial support to construct private reservoirs where necessary and private ownership of tanks was permitted.[3] The owners of these tanks were allowed to levy a fee from those who utilised the waters of such tanks.

This system of land tenure and agricultural activity by tenant cultivators became refined with successive regimes. However, there was a set back to this system with the advent of the South Indian rulers during the Polonnaruwa period. But when the capital shifted to the central and southern regions in the 14th century, a major portion of the land was held by the people under service tenures. When the Portuguese took over the administration of the maritime provinces in Sri Lanka in 1505, the tenant cultivation system was well established in the country.[4]

2. Types of Land Tenure

Land tenures were classified according to the nature of the land concerned. *Kumburus* were lands which depended on rain water for irrigation; fallow agricultural lands were called *Puran* or *malan* lands; lands cultivated intermittently were called *oviti*; those near a *oya* or river were called *deniya* or *vilhadu*; lands newly brought under paddy cultivation were called *aswadduma* or *dalupata*; home gardens were called *gewatu*; cultivations on cleared stretches of jungle were called *chena*. Besides these tenures a system of land tenure called *ande* cultivation was prevalent in many parts of Sri Lanka. Under the *ande* cultivation system a tenant cultivator had to provide all the

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[1] H.W. Tambiah, Q.C *Sinhala Laws and Customs.* [1968] p. 170.

[2] *History of Ceylon,* Ceylon University Press, Vol.1 p. 240.

[3] The Kantakarama Inscriptions.

[4] H.W. Codrington,. *Land Tenure in Ceylon* [1947] p. 59.

inputs needed for the cultivation and had to give at least one half of his produce to the owner of the land who, in turn, allowed him to use the land for his cultivation. Often they had to give a bigger share of the produce and also render other services to the land owners.

3. Tenant Cultivations during Colonial days

When the Portuguese took over the administration of the maritime provinces of Sri Lanka in 1505, they continued the existing system of land tenure.[5] The Dutch who followed the Portuguese also found it convenient to allow the system to continue. However, when the British East India Company took over the administration in 1797 they abolished the prevailing land tenure system and introduced the Madras revenue system. This proved to be unpopular among the cultivators and the British were compelled to restore the earlier system of land tenure by the Proclamation of 1800.[6]

During the colonial administration under the British, influential local citizens and officials were gifted land in return for services rendered. Even officials such as *mudalis, muhandirum, arachchis* and *vel vidanes* became landowners. Meanwhile thousands of peasants who had no land of their own became tenant cultivators or agricultural coolies in the lands of such officials and the landowning class. These peasants were virtual slaves and were at the mercy of their landowners. This system continued even after Sri Lanka became independent.

4. The Paddy Lands Act and its aftermath

The Paddy Lands Act was enacted in 1958 dealing a heavy blow to the owners of the lands of tenant cultivators. This Act assured the rights of thousands of tenant cultivators and protected them from exploitation by their landlords. The landlords were made entitled only to a limited share in the paddy produced by the tenant cultivators and deprived them of the power to evict tenant cultivators according to their whims and fancies. Any disputes arising out of the tenancy could be referred to the Commissioner of Agrarian Services for settlement. Farmers' Committees were formed to protect the interests of the farmers. This Act faced the wrath of the landowners who began scheming to get it repealed.

Despite this, the government that came to power in 1972 enacted the Agricultural Lands Act No. 42 of 1973 which replaced the Paddy Lands Act. This Act preserved all the rights guaranteed by the Paddy Lands Act and made provision for Agricultural

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[5] *Supra* n 1, at p. 178.
6. *Ibid* at p. 179.

Tribunals to settle disputes between tenant cultivators and land owners expeditiously. Institutions called the Productivity Committees, and the Agrarian Services Centres were established to help the farmers to optimise their produce.

With the enactment of this Act it became possible for a tenant cultivator to be safeguarded from eviction from the land that was given to him to cultivate, on account of any written or oral agreement to that effect. The rent payable was determined by the Act and could not be increased. In the event of a tenant being harassed or otherwise wronged, the tenant had access to the Commissioner of Agrarian Services for relief. The provisions of this Act were made applicable to the whole country. These provisions gave a sense of security to the tenant cultivators from harassment directly or indirectly by the landowning class.

The landowners became indignant with the passage of time and were able to exert sufficient pressure on the government to enact the Agrarian Services Act No. 58 of 1979. Among other things, it limited the extent of land a tenant cultivator could obtain to a maximum of five acres. The Minister in charge was authorised to stipulate the extent of the land that could be cultivated by a tenant cultivator in each district, within the stipulated maximum. It also authorised the Commissioner of Agrarian Services to declare a person who owns a minimum of five acres of land, as ineligible to be a tenant cultivator. While the rent on the tenancy was increased, it provided for the tenancy to be terminated if the rent was in arrears. In 1991 this Act was amended on the recommendations of the World Bank imposing further curtailments on the rights of tenants. This amendment provided for the eviction of tenants to facilitate multinational companies to buy lands by the removal of paddy lands cultivated on permits issued under the Land Development Ordinance, from the operation of tenancy rights. It also denied the right of a tenant cultivator to name a successor to his tenancy. A land owner whose only source of income was from giving his land to a tenant cultivator, was allowed to seek exemption from the operation of certain provisions of this Act by appealing to the Commissioner of Agrarian Services. Thus, some of the privileges enjoyed by tenant cultivators began to be curtailed.

5. The Agrarian Development Act

In year 2000 the Agrarian Development Act (No. 46 of 2000) was hurriedly enacted by the Government without giving adequate time for debate perhaps for fear of opposition. The preamble to the Act states as follows:

> *Whereas it has become necessary to set out a National Policy in relation to the rights of tenant cultivators' and the restrictions to be imposed on persons using*

agricultural land[7] *for non-agricultural purposes in order to ensure maximum utiliszation of agricultural land for agricultural production.*

Yet, on an analysis of the relevant provisions in the Act, it appears clear that the implementation of the provisions of this Act would lead to the gradual denudation of the system of tenant cultivations and facilitate the sale of such lands to multinational companies without any hindrance from tenants cultivators.

Section 22(2) of the Act provides for regulations to be made stipulating the crops to be cultivated and the livestock to be reared by tenant cultivators. The government is also planning to impose a levy on the use of water resources. These are some of the provisions that could result in farmers giving up cultivation. It is alleged that the World Bank and the International Monetary Fund are behind this move as they feel that these lands could be used in profitable commercial ventures which would ultimately benefit the government coffers through multinationals using these lands.

Before this Act was passed its consistency with the Constitution was challenged before the Supreme Court by a Buddhist priest. It was agreed by the petitioner that the provision enabling the State to acquire the paddy lands which the tenant cultivators could not purchase was unjust. Most tenant cultivators do not have the means to purchase these lands. Consequently, it would result in almost all such lands being acquired by the State in due course. A Land Bank is to be set up under the provisions of this Act. This provision targetted only paddy lands which the tenants could not purchase. It was argued that this is a violation of the fundamental rights of equality before the law as cultivators of other crops did not run this risk. Yet the Supreme Court held that this provision is not contrary to any constitutional provisions.

Section 8 of the Act lays down elaborately the procedure to be followed in evicting tenant cultivators and the sale of paddy lands. The right of tenant cultivators to transfer the tenancy to another cultivator or even to his spouse or sibling has been removed by this Act. The Act makes it possible for him to transfer his right back to the landlord only. It is feared that this Act will result in over a hundred thousand tenants losing their tenancy and thereby their right to a livelihood. However, it is provided in the Act that if the owner of a paddy land wishes to sell his land, he should first offer to sell it to the tenant cultivator. If the tenant is agreeable, the owner must inform the price of the land to the cultivator with a copy to the Commissioner of Agrarian Services. How many tenant cultivators would be able to buy such lands, is a matter for conjecture. It is reasonable to presume that a majority of them would not be able to do so. The outcome may be that such lands will be sold to others, for other purposes and the cultivator rendered destitute with no land to till. It may ultimately result in tenant cultivators becoming an extinct community of people. On the other

[7] "Agricultural land" is defined in the Act as land used or capable of being used for agriculture within the meaning of this Act, and includes private lands, lands alienated under the Land Development Ordinance or the Crown Lands Ordinance or any other enactment.

land, if tenant cultivators became owners of the lands they cultivate, there is no guarantee that, given the prevailing high cost of paddy cultivation and the attractive prices offered for land by locals and multinationals, they would keep the land for cultivation.

6. Conclusion

In the circumstances, it makes one wonder whether there was a sinister motive in the enactment of this Act without adequate publicity and discussion on the implications of the provisions of this Act, which could eventually lead to the disappearance of the system of tenant cultivations in Sri Lanka. A process of consultation, particularly with tenant cultivators themselves would have been pertinent before the law was passed.

What is really needed is for the State to facilitate tenant cultivators to become owners of the land they cultivate and provide all the assistance necessary for them to face the market forces that inhibit profitable cultivation of paddy. Crop insurance schemes, education of the cultivators of the latest agricultural techniques, and meaningful subsidies where necessary could help to improve the profitability of paddy cultivation. The country would then be assured of a continuous supply of paddy from the traditional paddy lands of the tenant cultivators which would ultimately contribute towards the aim of making Sri Lanka self- sufficient in rice.

Fortunately, the current political and economic climate of the country is delaying the implementation of the provisions of this Act. In the meantime, it is hoped that farmers' organisations would be able to exert adequate pressure to make the government delay the implementation of the Agrarian Development Act and eventually amend or repeal it. Civil society organisations could play an effective role in raising awareness of the farming community to the potential dangers that lie hidden in the provisions of the Agrarian Development Act No. 46 of 2000.

COMMPUTER CRIMES BILL

BE it enacted by the Parliament of the Democratic Socialist Republic of Sri Lanka as follows:

1. This Act may be cited as the Computer Crimes Act, No. .... of 2001.

PART 1

2. Whoever does any act, with the intention of securing for himself or for any other person access to -

(a) any computer; or

(b) any computer programme, data or information in that computer or any other computer,

knowing or having reason to believe, that he is not authorised to secure such access, shall be guilty of an offence and shall on conviction be punished with imprisonment of either description for a term not exceeding two years or to a fine not exceeding three hundred thousand rupees or to both such fine and imprisonment.

3. Whoever does any act, with the intention of securing for himself or for any other person, access to -

(a) any computer; or

(b) any computer programme, data or information in that computer or any other computer,

knowing or having reason to believe, that he is not authorised to secure such access and with the intention of committing any other offence under this or any other law for the time being in force, shall be guilty of an offence, and shall, on conviction be punished with such term of imprisonment as is prescribed for the offence of attempting to commit such other offence, or to a fine not exceeding one hundred thousand rupees or to both such fine and imprisonment.

4. Whoever, intentionally causes a computer to perform any function with the knowledge or having reason to believe that he has no authority to cause the computer to perform such function, shall be guilty of an offence and shall, on conviction be punished with imprisonment of either description for a term not exceeding two years or to a fine not exceeding two hundred thousand or to both such fine and imprisonment.

Explanation - For the purposes of this section and sections 5 and 6,

(a) it is immaterial that the offender had authority to access the computer, computer programme, data or information; and

(b) a person who acts in excess of authority given to him or exercises that authority wrongfully, is in fact acting without authority;

5. Whoever, intentionally causes a computer to perform any function with the knowledge or having reason to believe that he has no authority to cause the computer to perform such function, with the intention of committing any other offence under this or any other law for the time being in force, shall be guilty of an offence and shall, on conviction be punished with such term of imprisonment as is prescribed for the offence of attempting to commit such other offence, or to a fine not exceeding three hundred thousand rupees or to both such fine and imprisonment.

6. Whoever, intentionally causes a computer to perform any function with the knowledge or having reason to believe that he has no authority to cause the computer to perform such function, and by so doing -

(a) impairs, the operation of any computer or the reliability of any data or information in any computer or computer programme;

(b) makes any deletion of or addition or alteration to, any programme, data or information;

(c) denies or hinders access to any person who is authorised to access any computer, computer programme, data or information;

(d) enables access to any person who is not authorised to access any computer, computer programme, data or information;

(e) denies or hinders access to any computer, computer programme, data or information;

(f) enables access to any computer, computer programme, data or information;

(g) copies or acquires the substance, meaning or purport of or makes use of in any other manner, any programme, data or information or any part thereof;

(h) moves any programme, data or information to a different location in the storage medium in which it is held or to any other storage medium;

(i) causes any programme, data or information to be output from the computer in which it is held, by display or any other manner;

(j) makes use of a computer service involving computer time, data processing or the storage or retrieval of data;

(k) intercepts, diverts or otherwise tampers with any computer programme, data or information or any part thereof;

(l) listens to or records the function of a computer;

(m) introduces any false information to any computer, computer programme, data or information;

(n) introduces to any computer or computer programme any material in any form whatsoever, which is forbidden to be distributed, circulated or published under any law,

shall be guilty of an offence and shall, on conviction be punished with imprisonment of either description for a term not exceeding five years or to a fine not exceeding five hundred thousand rupees or to both such fine and imprisonment.

Explanation - It is immaterial whether the consequences referred to in sub paragraphs (a) to (n) resulting from the function which the offender caused the computer to perform, were of a temporary or permanent nature.

7. Whoever, without lawful excuse and with intent to cause, or knowing that he is likely to cause loss or damage to any person or institution, causes a computer to perform any function, shall, if loss or damage is so caused to any person, be guilty of an offence and shall, on conviction be punished with imprisonment of either description to a term not exceeding five years or to a fine not exceeding five hundred thousand rupees or to both such fine and imprisonment.

Explanation 1 - It is immaterial that the offender had authority to access the computer or had authority to perform the function.

Explanation 2 - The offender need not have intended to cause or have had the knowledge that he is likely to cause, loss or damage to any particular person or Institution.

8. Whoever -

(a) buys, sells, trades in or deals in any manner with; or

(b) offers to buy, sell, trade in or deal in any manner with,

any data or information which has been obtained by any person in consequence of the commission of an offence under this Act, knowing or having reason to believe that the same has been so obtained, shall be guilty of an offence and shall, on conviction be punished with imprisonment of either description to a term which may extend to three years or to a fine not exceeding three hundred thousand rupees or to both such fine and imprisonment.

9. Whoever, being entrusted with information which enables him to access any service provided by means of a computer, discloses such information to any other

person without authority to do so or in breach of any legal contract expressed or implied, shall be guilty of an offence and shall, on conviction be punished with imprisonment of either description for a term not exceeding two years or with fine not exceeding three hundred thousand or with both such fine and imprisonment.

10. Whoever, being in a position of trust, commits an offence under this or any other law in force, in relation to a computer or to any computer programme, data or information to which he has obtained access using such position, shall, on conviction be punished with imprisonment of either description for a term not exceeding seven years or to a fine not exceeding seven hundred thousand rupees or to both such fine and imprisonment.

11. Whoever commits an offence under this Act and thereby endangers or causes imminent danger to the national economy or to national security, shall on conviction be punished with imprisonment which may extend to life,

12. Whoever attempts to commit an offence under sections 3 to 11 of this Act or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall on conviction be punished with imprisonment of either description for a term not exceeding one half of the maximum term provided for the offence, or with fine not exceeding one half of the maximum fine provided for the offence, or to both such fine and imprisonment.

13. (1) Whoever abets any offence under this Act shall be guilty of an offence and shall

(a) if the act abetted is committed in consequence of the abetment, be punished with the punishment provided for the offence; and

(b) if the offence be not committed in consequence of the abetment, be punished with imprisonment of either description for a term not exceeding one fourth of the maximum term provided for the offence, or with fine not exceeding one fourth of the maximum fine provided for the offence, or to both such fine and imprisonment.

(2) The term `abet' shall have the same meaning as in sections 100 and 101 of the Penal Code and the provisions of sections 101A, 103, 104, 105, 106 and 107 of the Penal Code shall apply in relation to the abetment of any offence under this Act.

14. (1) Whoever conspires to commit an offence under this Act shall be guilty of an offence and shall, on conviction be punished as if he had abetted the offence.

(2) The terms `conspire' shall have the same meanings as in section 113A(1) of the Penal Code and the provisions of section 113A(2) shall apply in relation to conspiracy to commit any offence under this Act.

15. (1) Where a court convicts any person of an offence under this Act, and it is established that as a result of the commission of such offence –

(a) loss or damage was caused to any other person or Institution; or

(b) gain accrued to the offender or some other person,

the court shall, in addition to any other punishment that may be imposed on the offender, make order for the payment by the offender,

(i) of compensation, to such other person or Institution for the loss or damage so caused ; or

(ii) of a sum equivalent to the value of the monetary gain so accrued, to the State,

as the case may be,

Provided however that, where loss or damage is caused to any person or Institution and gain has also accrued to the offender or to some other person as a result of the commission of such offence, the court shall, in addition to any other punishment that may be imposed on such offender, make order only for the payment of compensation, by the offender to such person or Institution for the loss or damage so caused.

(2) An order made under sub-section (1) for payment, shall be recovered as if such order was a decree entered by the District Court in favour of the person or Institution which suffered the loss or damage or the State, as the case may be, and. against the offender.

(3). A certificate under the hand of an expert in the panel of experts constituted under section 19 of this Act with regard to the compensation that would satisfy the loss or damage caused or the monetary value of the gain accrued, shall be admissible in evidence and shall be proof of the facts stated therein.

PART 2

INVESTIGATIONS

16. Except as otherwise provided by this Act, all offences under this Act shall be investigated, tried or otherwise dealt with in accordance with the provisions of the Code of Criminal Procedure Act, No. 15 of 1979.

17. Every offence under this Act shall be a cognizable offence within the meaning of, and for the purpose of the Code of Criminal procedure Act No. 15 of 1979.

18. (1) For the purposes of investigations under this Act, the Inspector General of Police may, in consultation with the Computer and Information Technology

Council of Sri Lanka (CINTEC) established under the Science and Technology Act, No. 11 of 1994, constitute a panel of experts from among persons who possess adequate knowledge and skill in the field of information technology and is thereby possessed of the required expertise to assist in the investigation of offences under this Act.

(2) Every expert in the panel of experts (hereinafter referred to as an `expert') shall be appointed to the panel for a period of three years and shall be eligible for re-appointment.

(3) The names of the experts shall, upon appointment be published in the Gazette.

(4) An expert may be called upon to assist any Police Officer in the investigation of any offence under this Act and it shall be the duty of such expert to render all such assistance as may be required for the purposes of such investigation and to hand over to the Officer in charge of the Police Station, any information, data, material or other matter that may be obtained by him in the course of such investigation.

(5) An expert who is called upon by any Police Officer to assist in the investigation of an offence under this Act, shall have all such powers as may be necessary to assist in the conduct of the investigation and shall, without prejudice to the generality of the powers so conferred, have the power to enter upon any premises in or upon which such offence is alleged to have been committed or is to be committed along with a Police Officer not below the rank of Sub Inspector, and to –

(i) access any computer which he suspects to be relevant to the investigation of an offence under this Act for the purposes of examining or doing any other thing in relation to any computer operation, programme, data, or information or other thing

(ii) require any person who usually has access to any computer or computer system or programme to assist in securing access thereto;

(iii) require any person to produce any document, information or other thing required for the purposes of the investigation ;

(iv) examine orally any person believed to be acquainted with the facts and circumstances of the matter being investigated ;

(v) assist in the investigation in any other manner ;

(6) An expert shall be paid such sum as may be determined by the Inspector General of Police in consultation with the .....

19. Without prejudice to the powers vested in a Police Officer under any other law, any Police Officer may, in the course of an investigation under this Law, exercise

powers of arrest, search and seizure in the manner provided for by law: Provided however that no such Police Officer shall access any computer for the purpose of an investigation unless the Inspector General of Police has previously certified that he possesses adequate knowledge and skill in the field of information technology and is thereby possessed of the required expertise to perform such a function.

20. Every Police Officer and every expert who conducts any search, inspection or does any other thing in the course of an investigation, shall make every endeavour to ensure that the ordinary course of legitimate business for which any computer may be used is not hampered thereby and shall not seize any computer, computer system or part thereof if such seizure will prejudice the conduct of the ordinary course of business for which a computer is used, unless-

(a) it is not possible to conduct the inspection on the premises where such computer, computer system or part thereof is located ; or

(b) seizure of such computer, computer system or part thereof is essential to prevent the commission of the offence or the continuance of the offence or to obtain evidence which would otherwise be destroyed.

21. (1) Every person engaged in an investigation under this Act shall maintain strict confidentiality with regard to all such matters as may come to his knowledge in the course of inspecting or accessing any computer or computer system or programme, and shall not disclose to any person or utilize for any purpose whatsoever any material or information so obtained, other than when required to do so for the purpose of performing his duties under this Act.

(2) Any person who acts in violation of sub-section (1) shall be guilty of an offence and shall on conviction be punished with imprisonment of either description for a term not exceeding two years or a fine not exceeding three hundred thousand rupees or both such fine and imprisonment.

22. (1) The provisions of sections 36 and 37 of the Code of Criminal Procedure Act, No. 15 of 1979 shall not apply in relation to persons suspected of or accused of offences under this Act.

(2) A police officer making an arrest, without a warrant, of any person suspected or accused of an offence under this Act, shall without unnecessary delay and within twenty four hours of the arrest, produce such person before a Judge of the High Court having jurisdiction in the case and such Judge may, upon a certificate being filed by a police officer not below the rank of a Superintendent of Police to the effect that it is necessary to detain such person in custody for the purpose of investigations, make an order permitting the detention of such person in police custody for a period not exceeding forty eight hours.

PART 3

GENERAL

23. The schedule to the Extradition Law, No. 8 of 1977 is hereby amended by the insertion immediately before Part B thereof, of the following:

"(4) "Computer crimes"

24. The High Court of Sri Lanka holden at Colombo or the High Court established by Article 154P of the Constitution for the Western Province, is hereby vested with jurisdiction to hear, try and determine all offences under this Act.

25. The jurisdiction vested in the High Court by section 24 shall be exercised by such High Court, where -

(a) the person alleged to have committed the offence is a citizen of Sri Lanka or is a stateless person who has his habitual residence in Sri Lanka;

(b) the act, proof of which is required to constitute the offence, was done or was to be done, in Sri Lanka; or

(c) the computer, computer programme, data or information which was affected or was to be affected, by the act was in Sri Lanka; or

(d) the facility or service, including any computer storage or processing service, which was used for the commission of the offence was provided in Sri Lanka;

(e) the person who or Institution which, suffered loss or damage, was resident in or registered in Sri Lanka, as the case may be.

26. No action or prosecution shall be instituted against any expert appointed for the purposes of this Act for any act which is done in good faith by such expert in pursuance of his duties under this Act or on the direction of a Police Officer.

27. Every expert shall, in the discharge of his duties under this Act, be deemed to be a "Peace Officer" within the meaning of and for the purposes of the Code of Criminal Procedure Act, No. 15 of 1979 and to be a "public servant" within the meaning and for the purposes of the Penal Code.

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