LST REVIEW

Volume 12 Joint Issue 172 & 173 February & March 2002

Seminar on the Protected Area Management and Wildlife Conservation Project

Terrorism and International Law

Of Elections and Birth Certificates: A Local Government Elections Case

Court of Appeal Judgement

Katugaha Ratnayaka & Others v. Returning Officer for Badulla District for Local Authorities & Others

CONTENTS

Law & Society Trust,
3, Kynsey Terrace, Colombo 8
Sri Lanka.
Tel: 691228, 684845 Telefax: 686843
e-mail:lst@eureka.lk
Website: http://www.lawandsocietytrust.org

ISSN - 1391 - 5770

Editor's note .....

In this joint issue of the LST Review, we publish the outcome of a seminar organized by the Law & Society Trust concerning the ***'Protected Area Management and Wildlife Conservation Project'*** (the Project). The Project commenced in the year 2000, with the signing of a Memorandum of Understanding (MOU) between the government of Sri Lanka and the Asian Development Bank (ADB), to give effect to Sri Lanka's international obligation under the Convention on Biodiversity to formulate a programme for Biodiversity conservation. Although prima facie initiated with good intentions, the project attracted a lot of speculation and criticism by several Non- Governmental Organisations (NGOs) and members of civil society, due to the lack of transparency in the proceedings leading to the signing of the MOU.

The seminar organized by the Law & Society Trust aimed at facilitating a forum for all concerned groups to meet and engage in discussions over the Project and its implications. Naazima Kamardeen in her introductory article provides a background to the project and its components as well as a summary of the proceedings at the seminar. The article reveals, the need for transparency in making decisions affecting public property and the need for discussion and debate amongst concerned groups to comprehend and to compromise.

The issue also includes two of the speeches delivered at this event (by Mr. Lalanath de Silva and by Mr. Sanath Ranawana). The speech delivered by Dr. Sarath Kotagama will be published in the next issue.

We also include an article on ***'Terrorism and International Law'*** by S. Nishadini Gunaratne focusing on the topical issue of terrorism, which has either willingly or unwillingly made almost every state a part of its ruthless and ferocious campaign, either as a perpetrator or a victim. In the light of recent terrorist attacks which have had socio- economic and political effects across the globe, the author attempts to provide an understanding of what terrorism is, its direct and indirect consequences, the available international laws and mechanisms for combating terrorism etc., and also highlights the need for a global commitment towards the eradication of terrorism.

Also in this issue, Naazima Kamardeen analyses a recently decided case in the Court of Appeal concerning nominations for the forthcoming local government elections ***(Katugaha Ratnayake & Others v. Returning Officer for Badulla District for Local Authorities & Others)***. The case deals with the rejection of the nomination paper submitted by the People's Alliance in respect of the Hali- Ela Pradeshiya Sabha in the Badulla District by the Returning Officer for the Badulla District (1st Respondent). The judgement according to the writer "could have some far – reaching effects, not only in Administrative Law, but in all those areas that the case has dealt with"; the areas being the Law of Evidence, the Interpretation of Statutes and the Constitutionally guaranteed - right to franchise.

The text of the judgement is also included in this issue.

Seminar on the Protected Area Management and Wildlife Conservation Project

Naazima Kamardeen[*]

When decisions are made by people who are accountable for the guardianship of public property, it is the right of the public to be informed of those decisions, and the consequences of, and rationale for, those decisions as well. As members of civil society we not only have a right of access to such information, but have also a duty to educate ourselves on issues that have the potential to impact on our lives.

In the year 2000, the Government of Sri Lanka signed a Memorandum Of Understanding (MOU) with the Asian Development Bank, for a project entitled the "Protected Area Management and Wildlife Conservation Project". This MOU provides for the formulation of a plan of action for protecting and conserving the rich biodiversity of our country. The project is financed by the Asian Development Bank (ADB), the Global Environmental Facility (GEF), which is a fund that exists to aid developing countries to carry out projects for environmental conservation, and the Government of the Netherlands. First the World Bank was involved in the project by accessing GEF funds for the project at the invitation of the ADB and the Government of Sri Lanka. Subsequently, the World Bank was invited to participate in the supervision of the project, on behalf of the donor agencies, by the ADB.

The background to this entire project can be traced back to the Rio Conference of 1992, popularly referred to as the "Earth Summit". Sri Lanka ratified the Convention on Biodiversity that was the outcome of this summit, and was then obliged to formulate a programme for Biodiversity Conservation. In 1997, the Government requested the assistance of the ADB to

[*] LL.B (Hons) [Colombo], Visiting Lecturer – Faculty of Law, University of Colombo, Research Assistant - Law & Society Trust.

help in formulating the project, which also looked at revising the National Wildlife Policy. In response, the ADB approved a technical assistance in preparing an investment project. The final report was submitted in 1999, and an ADB fact-finding mission visited Sri Lanka in April that year. It was found that the project was eligible for co-financing by the Global Environmental Facility (GEF). The World Bank, as a GEF implementing agency, agreed to jointly process the project with the ADB. Technical Assistance (TA) was then mobilized in order to modify the project design to be consistent with the eligibility criteria for GEF funding. A fifteen member task force was set up for this purpose. The TA was implemented in a participatory process involving stakeholder consultation through workshops held at community, provincial and national levels. A comprehensive sector-based programme emerged in 2000, and with the signing of the MOU, the project was declared effective.[1]

The reason for Sri Lanka receiving aid in order to protect her biodiversity stems from the fact that Sri Lanka is rich in biodiversity, but poor in the resources that are needed to protect and nurture it. It has been described as a global biodiversity "hotspot" [2] with extreme species richness. Sri Lanka also provides a critical habitat for internationally mobile species, including five species of endangered marine turtle, and 100 species of waterfowl and many other migratory birds. However, the high poverty levels[3] in the country, where over 21% of the population have incomes below the current Government Poverty Criteria, have made environmental concerns a luxury that the average person can ill-afford. This in turn has led to a pattern of life that is harmful to the conservation of the environment and the diversity of nature. The improper and badly managed use of resources has aggravated the problem. The rationale for the project was then, the fact that Sri Lanka has globally significant biodiversity values that are being threatened by deforestation, land degradation and unregulated exploitation of natural resources. According to the MOU, the Protected Area (PA) system is central to conserving wildlife biodiversity. PA's also play a significant role in supporting rural economies through watershed protection, and add

[1] Source: MOU signed by the Government of Sri Lanka in 2000, at p. 1
[2] *Ibid.* p. 2
[3] *Ibid.*

to the economic and cultural values of Sri Lanka through the provision of recreational, eco tourism, scientific and educational opportunities.[4] Therefore, that a comprehensive, well-thought out programme was sorely needed, is beyond question.

However, many aspects of the project had not been presented to the public in a clear and comprehensible manner, and this led to various allegations by several Non-Governmental Organisations (NGO's) and even members of civil society. The primary concern of these people was that there had been no transparency in the entire proceedings, with the resultant belief that the project was detrimental to the country.

The Law & Society Trust organised a seminar on the above topic, with the intention of providing a forum for interested groups to meet and come to a better understanding of the project and its implications. This seminar was held on the 1st of February 2002, at the BMICH. Rukshana Nanayakkara[5] facilitated the discussion. The three speakers each represented a core area of concern with regard to the project.

Mr. Sanath Ranawana[6] spoke from the viewpoint of the donor agencies. He outlined the developments that took place in Sri Lanka following the Convention on Biological Diversity, and focused on the Government's efforts to fulfil its obligations under the Convention. He also spoke on how the donor agencies got involved in the project, and highlighted the fact that the donor community had given priority to this particular project, considering that there were three donor agencies involved.

Mr. Ranawana described the project as consisting of four components. The first, he said, deals with the decentralizing of the entire management structure. At present, the Department is very

---

[4] *Ibid.* p. 13

[5] LL.B (Hons) [Colombo], LL.M (Hong Kong), Attorney-at-Law, Researcher – Law & Society Trust, Lecturer in Environmental Law - Faculty of Law, University of Colombo.

[6] Project Implementation Specialist from the Asian Development Bank.

centralized, with all the decisions being made only at the top. Planning and management needs to be decentralized and taken down to the level of the park wardens, who would then be responsible for their own administration, and then have to be accountable by reporting to a higher authority such as a regional head office. The second component deals with the pilot protected area programme. Under this component, seven parks would initially be selected for the protected area management planning process, and once the pilot project got underway, it would be implemented in the other protected areas as well. The third component looks at expanding the wildlife policy to areas that are outside the jurisdiction of the Department. It will aim at ultimately harmonizing the management of biodiversity in the entire country with the programmes being carried out in the protected areas. The fourth element deals with the Protected Area Management Fund. This is a fund that has been set up to help villagers in the buffer zones to initiate various grassroots level projects, which will help them to earn a living, rather than live off the precious natural resources that are in the protected areas, which is currently their only means of survival.

Mr. Lalanath de Silva[7] began his presentation by drawing attention to the fact that the documentation relating to the project had been extremely difficult to come by. He mentioned that this was the basic problem associated with all projects of this nature. The secrecy and suspicion surrounding the project invariably leads the public to believe that the project is going to ultimately be detrimental to the country. He maintained that unless there is transparency and public participation in projects of this nature, the support and confidence of the public could never be harnessed.

Another issue of concern is the entire thrust towards eco tourism. It was Mr. De Silva's opinion that eco tourism in itself was not a bad idea, but that other countries had started eco tourism up to fifteen years ago, and that we might be too late to actually reap any benefits that could have accrued to us from eco tourism. A related issue, which was the management of the tourist bungalows used for eco tourism, was also discussed. The wording of the MOU suggests that the

[7] Attorney-at-law.

management of the bungalows (currently under the management of the Department of Wildlife) is to be handed over to the local communities or the private sector. The discretion in this regard vests exclusively with the Government and the Bank. Mr. De Silva raised concern over the fact that if there was no transparency and accountability in the exercise of such discretion, there would be allegations, and justifiably so, of favouritism and rigging. Another prospective bone of contention that he identified was the fact that the handing over of the bungalows to the private sector would make those bungalows inaccessible to those who are currently able to access it, due to the costs of those bungalows rising further.

He also spoke on the Protected Area Conservation Trust (PACT), which is to be set up under this project. He drew attention to the fact that concern had been expressed by various members of the public that the Wildlife Trust could have been used instead of introducing a new Trust. Also, the Wildlife Trust, which had been founded on almost the same lines as the proposed Trust, ended up as a tool of the Government. Mr. De Silva opined that there is nothing to prevent the PACT from ending up in the same situation.

On a positive note, he felt that the project would help to address the problem of overlapping jurisdiction that currently exists in this field. There are many agencies involved in the administration of the protected areas, with the result that there can be parallel jurisdiction over the same geographical area. This can lead to bureaucratic stalemates, as a result of which no proper administration can be carried out. Since the Department of Wildlife Conservation and the Ministry of Forestry and Environment are to be the National Executing agencies, it was hoped that there would be no more overlapping jurisdiction hindering the smooth implementation of the project.

Another progressive feature of the project was the attempt to get the local communities in the buffer zones involved in the project. Mr. De Silva was of the view that unless the local

communities are made active stakeholders in the project, their support could not be harnessed, and the project might never get underway.

He further expressed satisfaction over the fact that the Department of Wildlife would finally have access to the funding needed to carry out its projects. He drew attention to the fact that the Department has had its budgets cut from time to time, and that it did not have even the basic resources to perform its duties efficiently. Therefore, he viewed the project as being beneficial on that front as well.

Dr. Sarath Kotagama[8] in his presentation, stressed on the need to manage the wildlife resources, in order to derive the maximum benefits from them. Using the example of the elephant, he showed how one may manage the habitat, and by doing so, control the elephant population. He was also of the opinion that merely allowing an area to grow into forest is not good enough, unless you manage it effectively. On biodiversity conservation, he felt that it adopted a more holistic approach to conservation, rather than species conservation, which concentrates only on one species, is very expensive, and may ignore connected species in the process. Therefore, he felt that the ecosystems approach was better. He pointed out that in some countries, the ecosystems approach was being used even in administration. Speaking of the legislation that had hitherto governed these areas, he said that the Fauna and Flora Protection Ordinance (FFPO) had done much to conserve various protected areas, but that it had been done, not under Wildlife protection, but catchment protection.

Dr. Kotagama believed that this project was trying to infuse some much-needed management into the country. He also felt that the community participation aspect of the project was a step in the right direction. However, he said there would always be concern, as to whether the project is using the right science and the right people. He also maintained that the right people were available locally, and that we don't need foreign experts, but the right people had to be used.

[8] Senior Lecturer - Faculty of Science, University of Colombo.

Even though a large percentage had to be left to the foreign experts, the locals could do something with what is left to them. Further, there has to be openness and discussion. He made the point that of all the projects relating to this topic, this particular one attracted the most amount of participatory discussion and he saw that as a positive factor towards its success. Recalling a previous GEF project that was formulated in 1993, Dr. Kotagama said that that particular project had never been presented to the public. As a result there had been a massive outcry against it. It was subsequently never implemented, and the money set aside for it was never utilised.

The participants at the discussion also raised some pertinent points. It was questioned as to why the MOU refers to the participation of foreign NGO's and excludes the local NGO's. Further, the MOU will have the effect of altering the jurisdiction as laid down by the Fauna and Flora Protection Ordinance. It is to be questioned how legitimate it is for a MOU to alter the laws of the country.

In addition, an area of concern is the privatisation of the protected areas. These areas are rich in biodiversity, and have great genetic value. They are also located in some of the most beautiful places in our country. Will this project be beneficial to the protection and development of these areas, or will it leave them in a worse state than before? Another key area of concern is eco tourism. We do not know, and we cannot predict with great accuracy the exact effects of eco tourism, and whether it will actually take off, be profitable, and be beneficial to the project as a whole. And when it is to be done in close proximity to the protected areas, the concern is much greater.

The discussion also stimulated a lot of thought amongst the audience and drew some positive responses from the presenters themselves. In fact, Mr. Ranawana, responding to some of the points raised by Mr. De Silva, stated that those ideas and suggestions could be worked into the agreement, and acted upon during the course of the project. This is an example of how important

it is to bring all the concerned groups together, and allow everyone to raise their concerns, so that some meaningful consensus may be arrived at.

In conclusion, it has to be mentioned that perhaps not all the concerns were raised, and that perhaps not all the questions were answered satisfactorily. However, there was some participatory discussion, some informed debate, and some attempt made to comprehend the project and its implications. Those who participated went away with a clearer understanding of the MOU and of what the project aimed at. As to what developments will take place in the future, we shall have to wait until the project comes into operation.

The following is a transcribed version of two of the presentations made at the discussion on the Protected Area Management and Wildlife Conservation Project:

Sanath Ranawana:[*]

When it comes to projects of this nature, it is important to conduct a discussion and address the issues and concerns that people have. It is of interest to note that this project has been presented twice to a public audience, outlining the issues involved. This presentation focuses on the viewpoint of the donor organizations, and the reasons they agreed to finance the project.

At the Earth summit held in Rio in 1992, biodiversity conservation was considered to be high-priority by the International Community. This was because of the increasing pressure on biodiversity in the world due to increased human activity. The pressures of human development resulted in many types of species being lost, and being endangered quite rapidly. The Convention on Biodiversity was one of the outcomes of the Rio Conference. This Convention laid out a framework for the international community to address problems of endangered species, and the management and conservation of biological resources. One of the financing mechanisms for financing activities relating to biodiversity conservation was the Global Environmental Facility (GEF) - a large fund created by the member countries (mainly the G7, the developed countries and the other countries as well). This fund was implemented through the World Bank, the United Nations Environmental Programme (UNEP) and the United Nations Development Programme (UNDP).

It is in this context that the Asian Development Bank (ADB) was requested by the government of Sri Lanka as far back as 1997 to assist in preparing a programme to help Sri Lanka in conserving its biodiversity and wildlife management. The ADB assisted through a Project Preparation Technical Assistance Grant. This consisted of a team of consultants working closely with key

[*] Project Implementation Specialist, Asian Development Bank

Government agencies and non-governmental agencies to develop a project which could address the key areas with concern to wildlife and protected areas in Sri Lanka. This project preparation Technical Assistance concluded in 1999. The outcome was a programme that broadly helped the Government to implement the national wildlife policy that was being revised at that time.

There was a possibility of getting the GEF to finance a part of this programme, as the GEF was set up as a financing mechanism to address biodiversity conservation. Hence, in 1999, the GEF was seen as a possible means of co-financing the project or some part of it. Therefore the project concept was developed further, to see how the GEF could get involved. While this was being formulated, the Ministry of Public Administration, Home Affairs and Parliamentary Affairs set up a fifteen-member task force. This task force not only gave assistance to the team of consultants, but also revised the National Wildlife Policy.

The second round of developing this project ended in 2000. It produced a comprehensive programme to address various interventions through the Department of Wildlife and its park system, and through the Ministry. It also recommended working with communities in the buffer zones. This was consistent with the revised Wildlife Policy, which had at that time been accepted by the Cabinet of Ministers. Since this project was not merely addressing ad hoc issues but taking a sector wide approach, the Government of the Netherlands showed interest and agreed to co-finance the project. Hence it is unprecedented as there are three (3) donors. This shows the priority given by the donor community. That having been done, the project was then declared effective. The project is now in the implementation phase.

A brief description of the project is merited at this stage. The project consists of four components. The first component looks at the Department of Wildlife Conservation, which is the key agency responsible for managing 13% of Sri Lanka's protected areas. It attempts to address the institutional and human resource capacity in the department. One of the key features of that component is to consider having a decentralized management structure. Thus the

responsibility for management would be passed down from what is now a very centralized agency to the people down at the level of the parks. This would be done by giving more responsibility, not only for the planning and management but also for the control of resources, to the level of the park wardens. They would then work through a regional office system, and report to a head office. What this component aims to do then is to lay out a decentralized management structure and then develop the necessary human resources at each level. It is not good enough to simply prescribe a decentralized structure. It has also to be equipped with the correct human resources and the suitable equipment, such as technology, computers and vehicles. Therefore, this component looks at the institutional structure.

The second component deals with the pilot protected areas. This programme is a sectoral one. The decentralized management of the Department would function mainly with the objective of improving the management of the Protected Area system. In the second component, seven pilot protected areas have been selected, in which the protected area management planning process would be started. There are management plans that have been developed for many of these parks under a previous GEF funded project. However, they have not been implemented. This component would revise those implementation plans and improve the management of the parks through them.

The management plans will encompass all kinds of interventions, from the required infrastructure to habitat management, perimeter protection and other related activities. Infrastructure would include staff quarters and basic essential requirements of the park staff. Once the management process is started in the pilot parks, it would be replicated in the other parks as well. This activity is to be done largely by the Department of Wildlife, which, under the leadership of Mr. Kariyawasam is already reviewing the previous projects in those management plans with a view to having them improved further by using the technical expertise that would be brought under the project. So this component would deal with improving the management of these seven parks.

The third component looks at moving beyond the Department of Wildlife and the area under its domain. The National Wildlife Policy stresses the need for *"ex situ"* conservation - that is looking at wildlife that is outside the existing protected area system. In this regard, the third component would assist the Biodiversity Conservation Secretariat, which is under the Ministry of Environment and Natural Resources. It has been charged with the mandate of preparing the Biodiversity Conservation Action Plan. By ratifying the Convention on Biological Diversity, Sri Lanka became internationally obligated to prepare the Biodiversity Conservation Action Plan. This looks at a systematic approach to conserving biodiversity, not just in the forest reserves and wildlife reserves, but also in the entire country. The ministry has a framework action plan, which was prepared under a previous project, but it is not a full-fledged action plan as some of the experts who were on the previous Biodiversity Steering Committee had identified. Under the ADB project, there would be some support for the Ministry to make that into a full-fledged action plan and within that action plan, to identify some key areas that need to be further supported.

Some of the concerns that will be supported in this Action Plan are the identification of certain endangered species and the preparation of an Overall Recovery Plan for those endangered species. These then tie together because such Endangered Species Recovery Plans have to be implemented not only inside the park system but also outside it and throughout the country. This third component therefore, will bridge what is being done through the first two components with what should be done outside the park system.

The fourth component of this project is the Protected Area Conservation Fund. This fund is an independent financing mechanism to support the livelihood of communities in the buffer zones. Some of the key threats to the park system are from the outside. These include poaching, illegal logging, and encroachment. The reasons for these threats are that the people who live in these buffer zones are some of the poorest people, and their livelihood depends on some extractive use

from the park. What this component aims to do is to initially work with these communities and to prepare village development plans, which would be developed at the grassroots level, using social mobilisers. Once these village development plans are developed, it is hoped to support certain key projects that are identified in those plans and then to provide some seed grants for communities to actually conduct some of these activities. It is not sufficient to simply develop a plan for them. A means of financing them has also to be found. The Protected Area Conservation Fund will provide such grants. Hence, if a community decides to operate a handicrafts stall or business which will cater to tourists coming to the parks, or a community based eco lodge to provide environmentally friendly accommodation for visitors to the parks in the buffer zone, then this fund could support those activities by providing some seed grants.

The above is a basic outline of the project, which is to be implemented over a period of six years. It started in 2001, but it is effectively starting in 2002, and it will be implemented through to the end of 2006.

Lalanath de Silva:[*]

When reading the articles that have appeared from time to time in the press, I found that there was some degree of concern in certain quarters on account of this project. At the same time there have also been some responses from the Department of Wildlife and other concerned authorities. Those responses try to dispel to some extent, the concerns that have been raised. The problem that is inherent is the lack of transparency when it comes to projects of this nature.

This is not the first time we have had projects in the forestry sector, the wildlife sector and the environmental sector. We had the Forestry Master Plan, once earlier and again in1995. We also had the GEF project. These projects have taught us lessons. However, it seems that the Government has not learned the lessons that have been taught – namely, that if you hide documentation, facts and relevant material, then it is likely that people would get an impression that the project deals with something terrible, or that the objectives or outcome of it would be terrible. Some of the non-governmental organisations (NGO's) have found great difficulty in obtaining documentation as to what this project is. Keeping that as an overall comment, I propose to address some of the positive factors as well as some of the concerns that come to mind when reading the documentation.

The first thing that we have learnt over the years, is the problem of overlapping jurisdiction. We all know that there are many agencies that are concerned with the management of State lands. The Wildlife Conservation Department manages 10 –13% of the land in this country, which fall into different kinds of protected areas, from Sanctuaries to National Reserves. The Forest Department, whose jurisdiction legally covers all of state land, has jurisdiction even over areas that have no forest, since they have been defined as "State Land"! There is also the Land Commissioner and the various Divisional Secretaries who exercise powers in respect of alienation, occupation, and user rights. In this context it is important for us to keep in mind that

[*] Attorney-at-Law

the ADB is funding not only this project, but also about three (3) other projects of some importance in related areas, one of which is the forestry sector. There is currently a project (of 5 years duration) started in 2000, which funds capacity building for the Forest Department, and deals with legislative reviews. There is another project in coastal management and yet another in upper watershed management. All of these projects in the ADB's own agenda try to address many of the difficulties that have arisen in these areas.

One of the positive things that will happen, both through this project and hopefully through the Forestry Sector Management Project, is that the problem of overlapping jurisdiction will be addressed. As to what solutions will emerge we do not know yet, but there is a great need to address that issue. Many areas which are forested sometimes fall both within the jurisdiction of the Department of Wildlife as well as the Forest Conservator. There are other areas where management becomes difficult if not impossible on account of this overlapping jurisdiction, and those will hopefully be addressed.

Another progressive development is the fact that the Department of Wildlife will have funding to develop its capacity to deal with its management. The Department of Wildlife has had its budgets cut from time to time, and it has been moved from ministry to ministry. The last time it was in the Ministry of Public Administration – what it has to do with public administration is very difficult to comprehend. At last it is now in the Ministry of Environment and Natural Resources. The Department of Wildlife manages a large segment of public lands. However, it lacks the requisite personnel, skills, training, vehicles and wherewithal. They do not have the capacity to manage this project. So, one of the positive features of this project is that there will be training components, infrastructure facilities, funding for vehicles and so on. Further, issues such as regionalisation, setting up of regional offices, and delegation of powers will be addressed by this project.

The third element which I believe to be a step in the right direction is the effort taken to get communities involved in the management of public lands. This is again a lesson that we have learned over time. Unless you have the support of the communities, and unless the communities living in and around these reserves are made stakeholders (stakeholders do not just mean people who can get up and air a view, but rather, people who have economic stakes in the project, and who share and enjoy benefits from and out of these reserves) we shall not have their support in the management of these reserves.

There are also some concerns, which have been raised in the press, as to how these communities will be mobilised and how one is to get them involved. Questions have been asked as to what kind of benefits they are to share, and how they are to be structured, and how these communities and the individuals within those communities are to be selected. That certainly is a concern, and hopefully that is something the ADB both here and its head office would keep in mind. The best solutions are through transparency and participation at the widest level in making those decisions. For instance, when selecting individuals within a community, if that decision is not transparent and is not taken in a participatory way, there will be allegations (and perhaps justifiably so), of favouritism, or that the entire process is rigged for political or other reasons.

Another concern that has been aired in the press as well is the thrust towards eco tourism. There is nothing wrong with eco tourism in itself. But there are some issues that have been addressed in other countries as well - like Costa Rica for instance, which have gone into eco - tourism. One of them is that if eco - tourism takes off, it will actually pose a threat to some of those protected areas. Another issue that obviously concerns the public is whether we are too late in this. Eco - tourism became a catchword about ten or fifteen years ago, and many countries have a lead, and have created a niche for themselves in this trade. We in Sri Lanka are starting rather late in the day. Is eco tourism really economically feasible for us to be able to make a break in the international market, or is it just a catchword for funding? Those are two important issues that need to be dealt with.

Also, with eco tourism in this project is tied the idea that visitor facilities in some of these protected areas would actually be handed over to the private sector. There is wording in the documentation which shows that it is the intent of the ADB and the Government to transfer the management and control of tourist bungalows within some of those protected areas to the private sector. As to whether those will be private firms or whether they will be communities or conglomerates of these we do not know at this stage. Yet it is one of the objectives. The wording says:

> *"within two years of the effective date, the Department of Wildlife Conservation shall have commenced implementation of contracts with local communities/ private sector for the environmentally low impact operation by such local communities and the private sector of all DWLC tourist bungalows retained for tourist purposes. Such contracts will be on an arms length basis, and on terms and conditions that are satisfactory to the Borrower and the Bank".*

The intent of this wording is to improve the facilities, to make available facilities at better prices, and certainly to improve standards to the public. But it does not necessarily follow that this objective will be met by handing over management at arms length for a period of two years to the private sector, or to the communities. This is particularly so when those decisions appear by this wording, to be entirely within the hands of the Borrower, (meaning the Government) and the Bank. This again is an area in which there are public concerns. Hence, decisions should be made in a transparent, and certainly in a participatory way. If these decisions are not made in a transparent and participatory way, there will be allegations and uproar, which is to be expected. Indeed this is an area that leaves room for concern.

Another area of concern is whether, by handing over these bungalows to the private sector, they would be affordable, particularly to the classes of society who are currently unable to use them. Even at present they are restricted to a regular group of people who keep repeatedly hiring these bungalows. So there needs to be diversification. But it is hoped that through this effort there will be more members of the public who are able to use these facilities.

Another area of concern is the Protected Area Conservation Trust (PACT). The idea of establishing a Trust Fund raises immediately the question as to why the Wildlife Trust, which is already in existence, was not used or perhaps remodeled for that purpose. We all know of course that the Wildlife Trust was originally set up with the idea that it would be independent of government but that it would still have connections with the Government. That is not how it has worked out, partly because there has been political interference and partly because the Wildlife Trust itself has gravitated towards the Government to such an extent that it has lost that independence. Of course there is still the possibility of moving it away from political interference.

The deepest concern about PACT is, firstly, that the same model is to be followed. The wording in the MOU says that it is to be set up by a trust instrument under the Trusts Ordinance. It is feared that there will be a similar gravitation of PACT towards the Government if the same mechanism as adopted in the Wildlife Trust is adopted. The intention here appears to be to establish an independent trust with an independent board. If that is the case, then there maybe other mechanisms that should be explored that might better facilitate that intent.

Also there is concern as to how the funds which would come into this trust would be used and invested, how decisions would be made, to whom these moneys would be paid and for what kinds of projects. There have been suggestions that the Trust should not be treated as an endowment. Whatever financial mechanism is used, there needs to be openness. In the absence of openness the Trust could very well be seen as a puppet of either the Bank or the Government.

It is important, if that independence is to become clear, that the Board consists of the right kind of people, and also that its decisions and transactions are transparent. These elements all centre on the issue of transparency and participation and raise issues of concern. Much of the criticisms seem to be coming from quarters in which there is a lack of information and material. Hence, the more information that can be disseminated, the better it would be.

Terrorism and International Law

S. Nishadini Gunaratne[*]

1. Introduction

Terrorism can be described as the use of violence to gain political aims. Lupis[5] categorises terrorism into state terrorism and group terrorism. State terrorism is perpetrated by a State against another State and its citizens in furtherance of its own interests. Group terrorism, on the other hand, is not perpetrated by a State but directed against it, and it may be carried out by either the State's own subjects or by groups whose political headquarters are based in another country.[6] Although it is not a new phenomenon, it is only in recent years that terrorism has been unleashed with great ferocity. Often the victims of such terrorist attacks have been innocent civilians. Terrorism becomes ruthless and diabolical in nature when the perpetrators pay scant regard to the lives of civilians. This article, though not exhaustive, seeks to enable the reader to gain an understanding of some of the problems associated with terrorism, the mechanisms/laws available for combating terrorism, the international collaboration for the eradication of terrorism in the aftermath of the attack on the Pentagon and the World Trade Centre in the United States and certain aspects of humanitarian law governing armed conflict.

2. State Practices and International Law

2.1 Defining Terrorism

One issue in defining terrorism is the question whether one terms a particular group of activists terrorists or freedom fighters. The same group of perpetrators of violence may be labelled as

---

[*] *Attorney-at-Law.*

[5] De Lupis I.D., *The Law of War (LSE Monographs in International Studies),* (Cambridge University Press, 1987),p 20.

[6] *Ibid*

terrorists by some and hailed as freedom fighters by others. A case in point is the stance taken by India and Pakistan on the issue of Kashmir: India's terrorists are regarded as freedom fighters by fundamentalist groups in Pakistan. The Kashmir issue has created a situation in which the two countries view each other with suspicion. In mid December last year, the Indian parliamentary complex in New Delhi came under attack by armed militants whom India suspects to be Kashmir separatists. The aforementioned attack resulted in confrontational strategies involving the deployment of troops on the common border.

2.2 Aid to Rebels

The 1970 Declaration on Principles of International Law states:[7]

> *No state shall organise, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another state, or interfere in civil strife in another state.*

The declaration also states:[8]

> *Every state shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other state or country.*

Although the declaration seems to be conclusive, Shaw[9] points out that state practice has been far from unanimous on this point. For instance, in the early1980 s, India trained and armed Tamil rebels[10], who were seeking to establish a separate state within the territory of Sri Lanka.

---

[7] *Supra* n 3, page 802.
[8] *Ibid.*
[9] Shaw M.N., *International Law (4th ed.)*(Cambridge University Press, 1997) p. 802
[10] Narayan Swamy M.R., *Tigers of Lanka: From Boys to Guerrillas,(2nd ed.)* (Vijitha Yapa Bookshop, Colombo, 1996- *special Sri Lanka Edition published in arrangement with Konark Publishers Pvt.,Delhi)*pp 106-114.

3. Some International Instruments that deal with Terrorism

Rules of international law have been formulated to deal with specific manifestations of terrorism. This can be illustrated by examining the available universal conventions on the prevention and suppression of terrorism (See Annex). Further, the UN Security Council (SC) has adopted resolutions dealing with the relationship between terrorism and international peace and security.[11] (A recent SC resolution will be discussed in paragraph 6.1). There are also two UN declarations on terrorism which have provided the legal framework for international action on the prevention and suppression of terrorism. They are:

(i) Declaration on Measures to Eliminate International Terrorism, 1994

(ii) Declaration to Supplement the1994 Declaration on Measures to Eliminate International Terrorism, 1996

4. Enforcement of International Law and Attitude of the World Community

The enforcement of international law has been rendered difficult by the fact that some countries have either directly or indirectly supported terrorist activities. Further, Western Powers tend to remain lethargic towards combating terrorism as long as their self- interests are not directly affected. The lack of a firm commitment on the part of the international community to the enforcement of the law was highlighted by the Sri Lankan Foreign Minister in an address delivered to the UN General Assembly on 2nd October 2001, during a debate on terrorism. In this address, two examples were cited to illustrate the attitude of the nations prior to the 11th September attack: the International Convention for the Suppression of the Financing of

[11] *Supra* n 3, p 805.

Terrorism adopted by the General Assembly on 9 December, 1999 had only 44 signatories and just 4 state parties; the International Convention against Transnational Organised Crime adopted by the General Assembly on 15 November, 2000 had only 123 signatories and just 3 state parties.[12] However, the attack on the Pentagon and the World Trade Centre in the United States, on the 11th of September 2001 made the states of the world, view terrorism from a new perspective.

5. The Attack on the Pentagon and the World Trade Centre in the United States

On 11th September, 2001, four US civilian planes were hijacked by terrorists and used as missiles. Two were rammed into the World Trade Centre; the third into the Pentagon; the fourth plane could not reach its target as it crashed before reaching its destination. Osama bin Laden who is believed to be the mastermind behind the attack, opened the eyes of the world to the fact that no state was free from the scourge of terrorism. The September 11th attack claimed the lives of more than 3,000 from different nationalities. Kofi Annan, Secretary- General of the United Nations stated that the attack, though aimed at one nation, wounded the entire world as the World Trade Centre was home to men and women of every faith from more than sixty nations.

The economic effects of September 11th attack were widespread. Companies were forced to cut down thousands of jobs, especially in air travel. New York's tourism industry suffered a severe setback where the number of visitors dropped from 37.4 million in 2000 to an estimated 32 million in 2001.[13]

6. Aftermath of the Attack on the US

---

[12] *Daily News*, 6th October, 2001.
[13] *Daily News*, 4th February 2002.

6.1 UN Security Council Resolution

On 28 September 2001, the Security Council unanimously adopted an anti- terrorism resolution. The new resolution 1373 (2001) is significant for two reasons: firstly, it is binding on all member states of the UN; secondly, it defines clearly a number of activities as acts of terrorism. The new resolution makes it compulsory for member states to report within 90 days to a Committee of the Security Council on the measures taken to: prevent and suppress financing of terrorism; freeze funds owned or controlled directly or indirectly by terrorist groups; deny support, active or passive, by eliminating the supply of weapons to terrorists; provide early warning information to prevent use of territory for terrorism against other states; deny safe havens for terrorist activities; prosecute offenders who participate in the financing, planning, preparation or perpetration of terrorist acts and to ensure that terrorist acts are established as serious criminal offences in domestic law; assist other states in connection with criminal investigations or criminal proceedings; exchange operational information against terrorist movements, trafficking in humans, arms, explosives; co-operate against possible use of weapons of mass destruction; examine asylum applications to ensure that there is no complicity in terrorist acts.

6.2 The attack on Afghanistan as an Act of Self- defence

Osama bin Laden, the prime suspect behind the September attack, took refuge in Afghanistan. The US requested the Taliban Government of Afghanistan to surrender Osama bin Laden. As the Afghanistan Government refused to comply with the request, US led forces commenced a war against Afghanistan in early October last year in order to capture Osama and members of his terrorist group- the Al Qaeda Movement.

Shaw takes the position that forceful measures may be adopted by states in response to terrorist activities, and in certain situations actions against states sponsoring terrorism may be justifiable in the context of self- defence.[14] Further, Article 51 of the UN Charter provides that:

> *Nothing in the present Charter shall impair the inherent right of individual or collective self- defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.*

6.3 Negotiations toward a New Anti- terror Treaty

Following the September 11th attack, a working group of the UN General Assembly's Legal Committee attempted to negotiate a global anti- terror treaty. It was hoped that the September attack would give an impetus for its finalisation. However, the effort broke down as no consensus was reached as to how terrorism should be defined. Though talks resumed this year, finalisation of the global anti-terror treaty was frustrated by the politics of the Middle East and Kashmir. Arab nations maintained that the treaty should exempt people struggling against "foreign occupation" whereas Pakistan wanted actions of national liberation movements excluded from the scope of the treaty. The text of the aforementioned treaty is regarded as an

[14] *Supra* n 3, p 806.

umbrella treaty that would tie together a dozen existing international agreements dealing with various aspects of terrorism.[15]

7. Humanitarian Law

The war that is being waged in Afghanistan is viewed as part of the crusade against international terrorism. In this context, it would be pertinent to examine the international law that governs both the international and non- international armed conflicts.

International Humanitarian Law seeks to regulate the conduct of hostilities mainly by the following 4 Geneva "Red Cross" Conventions of 1949 and the two 1977 Protocols to it:

- Geneva Convention (1) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field

- Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea

- Geneva Convention (III) relative to the Treatment of Prisoners of War

- Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War

- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)

[15] *Daily News*, 28th January, 2002.

- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non- International Armed Conflicts (Protocol II)

The essence of these conventions is that persons not actively engaged in warfare should be treated humanely.[16] It should be noted that a number of rules contained in the Geneva Conventions and the two Protocols are now considered to be customary international law and thus binding even on states that have not ratified the treaties.[17]

Protocol II to the Geneva Conventions focuses exclusively on non-international armed conflicts and the Common Article 3 of the Geneva Conventions requires the parties to an internal armed conflict to observe as a minimum, the following provisions:

1. Persons taking no active part in the hostilities including combatants who have laid down their arms or are sick or wounded should be treated humanely, without any adverse distinction based on race, colour, religion or faith, sex, birth or wealth.

   To this end, the following acts are prohibited at any time and in any place whatsoever:

   (a) violence to life and person, in particular murder, mutilation, cruel treatment and torture;
   (b) taking of hostages;
   (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
   (d) the passing of sentences and the carrying out of executions in the absence of due process.

2. The wounded and the sick are to be cared for.

---

[16] *Supra* n.3, p 807.
[17] Leary V. A and Wickremasinghe S., *An Introductory Guide to Human Rights Law and Humanitarian Law (2nd ed.),* (The Nadesan Centre, Colombo, 1995), p 40.

The fight against terrorism should be a call for justice, not vengeance. Prisoners of war should be treated with due consideration as required by law. Amnesty International has urged the United States to ensure respect for the human rights of all persons who have been transferred from Afghanistan to a US base in Guantanamo bay, Cuba.[18]

It should be mentioned, however, that though civilians may not be deliberately targeted, they could still undergo suffering as a result of attacks launched by parties to a conflict. When the US commenced air strikes against Afghanistan, thousands of Afghans, men, women and children, fled their homes seeking refuge in neighbouring countries. These refugees have undergone tremendous hardships for no fault of theirs.

8. Concluding Observations

The UN Declaration on Measures to Eliminate International Terrorism 1994, states:[19]

> *Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.*

Terrorism today, operates through an international network linking each and every corner of the globe. Most organisations have also established sophisticated inter-links. Terrorism could give rise to even greater disasters than the September 11th attack, if armed rebels should gain access to nuclear or biological weapons.

---

[18] *Sunday Observer*, 20th January, 2002.
[19] Provision 3.

It is imperative for states to stop the funding of terrorist organisations. In this connection, it is important to look at terrorist front organisations.

The Global War declared by the US and some Western countries and backed by the UN, should be extended to eliminate terrorism in other parts of the world as well. There should not be an ambivalent attitude towards terrorism. Terrorism wherever it occurs, should be wiped out. However, genuine grievances of parties to a conflict need to be redressed for achieving lasting peace.

International Conventions on the Prevention and Suppression of Terrorism*

1. Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963
2. Convention for the Suppression of Unlawful Seizure of Aircraft, 1970
3. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971
4. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973
5. International Convention against the Taking of Hostages, 1979
6. Convention on the Physical Protection of Nuclear Material, 1979
7. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1988
8. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988
9. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 1988
10. Convention on the Marking of Plastic Explosives for the Purpose of Detection, 1991
11. International Convention for the Suppression of Terrorist Bombings, 1997
12. International Convention for the Suppression of the Financing of Terrorism, 1999

---

* *International Instruments related to the Prevention and Suppression of International Terrorism*, (United Nations, New York, 2001) pp iii- iv

Regional Instruments on Terrorism

1. OAS Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, 1971
2. European Convention on the Suppression of Terrorism, 1977
3. SAARC Regional Convention on Suppression of Terrorism, 1987
4. The Arab Convention on the Suppression of Terrorism, 1998
5. Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism, 1999
6. Convention of the Organisation of the Islamic Conference on Combating International Terrorism, 1999
7. OAU Convention on the Prevention and Combating of Terrorism, 1999

Of Elections and Birth Certificates: A Local Government Elections Case

Naazima Kamardeen[*]

(This is a brief case note of a recently decided writ application in the Court of Appeal. The full text of the judgement appears at the end of this note.)

The 2002 Local Government election has already had its share of litigation. The recently decided case of ***Katugaha Ratnayaka and others v. Returning Officer for Badulla District for Local Authorities and others***[1] has opened up new possibilities in the field of Administrative Law. The case merits analysis as it has dealt not only with important principles of Administrative Law, but has also determined on questions of evidence, interpretation, and the constitutionally guaranteed right of citizens to exercise their Franchise.

According to the facts of the case, the Peoples' Alliance had presented its nomination paper in respect of the Hali-Ela Pradeshiya Sabha in the Badulla District for the local government elections to be held on the 20th of March 2002. This nomination paper contained the names of 22 prospective candidates for the 21 seats. Amongst them was the name of a youth candidate, who had annexed to it, proof of the candidate's date of birth by means of a Photostat copy of the Birth Certificate.

Nominations closed on the 8th of February 2002. The Returning Officer for the Badulla District (the First Respondent) made an announcement rejecting the nomination paper of the Peoples' Alliance. The reason given for such rejection was that the nomination paper did not comply with

---

[*] LL.B (Hons) [Colombo], Visiting Lecturer - Faculty of Law, University of Colombo, Research Assistant - Law & Society Trust.

[1] C.A. Application No. 309/2002

section 28 (4A) of the Local Authorities Elections Ordinance[2] and had therefore been rejected under section 31 [1] (bbb) of the same Ordinance.

The Petitioner applied to the Court of Appeal, for a writ of certiorari to quash the decision rejecting the nomination paper, and for a writ of mandamus compelling the 1st Respondent to accept the nomination paper. In considering this application, the Court dealt with several issues.

1. Performing ministerial acts as opposed to exercising judicial/quasi-judicial powers:

It was contended on behalf of the Respondents, that the Returning Officer had simply performed a "ministerial function", which did not call for the exercise of discretion, and hence that a writ would not lie. The argument for the Respondents was that the writ jurisdiction comes into play only where the legal obligation involves decision-making through the exercise of judicial or quasi-judicial powers. This reasoning proceeds on the basis that when one performs a "ministerial function", there is no decision making involved. Hence, there can be no exercise of discretion. It is simply a mechanical function.

The Court, however, considered the fact that the decision affected the rights of the franchised population of that area, and, based on that very fact alone - whether the act was a "ministerial function" or not - the Court would intervene. In other words, when the Returning Officer rejected the nomination papers of that particular party, the voters in that area were prevented from voting for any of the candidates of that party. Hence, whether the act was a purely mechanical one or not, it had the potential to impact heavily on the voting rights of a large group of people. Furthermore, the right of the candidates in that political party to present themselves

[2] As amended by Act No. 48 of 1983 and Act No. 25 of 1990

for election would also be denied by the action of the Returning Officer. Therefore, even if there was no exercise of discretion, the Court would have the authority to question the act.[3]

This judgement has affirmed the fact that Administrative Law jurisprudence has now developed to the extent that the former classifications of acts, distinguishing between those that are "ministerial" and "non-ministerial" has little significance today. Instead, the foremost consideration has been the protection of the rights of the persons affected.

2. The impact of the Ouster Clause:

It was pointed out on behalf of the Respondents that the decision of the Returning Officer is protected from judicial scrutiny, by virtue of section 31(2) of the Act, which states that the decision of the Returning Officer is "final and conclusive". However, the Court held that the words "final and conclusive" only means that there is no appeal from such a determination, but judicial review would not be excluded.

The Court held further that if it did not review the decision, there would be no other remedy available to the Petitioner. Hence, judicial review should be available where the decision has the capacity to affect the rights of the parties. The Court observed by reference to case law, that judicial review also lies in the specific area of election law. In the case of ***Joseph v. The Returning Officer of the Municipality of Colombo***[4], writ jurisdiction was successfully invoked in very similar circumstances.

---

[3] See, however, the discussion at page 5, where her Ladyship takes the position that the decision of the Returning Officer involved the exercise of discretion.
[4] 26 CLW 79

3. Whether the Elections Law mandates the rejection of a nomination paper for non-compliance with section 31 [1] (bbb):

Section 31 [1] of the Local Authorities Election Law specifies that a nomination paper shall be rejected by the Returning Officer, for any of the reasons stated in the sub-paragraphs to the section. The wording states;

> *"The Returning Officer shall[5] immediately after the expiry of the nomination period ... ...reject any nomination paper... ... "*

The word "shall" usually indicates a mandatory course of action. Therefore it would seem that if the Returning Officer found that a nomination paper did not comply with any of the requirements in the sub-paragraphs to section 31[1], he had no other course of action to follow, than to reject the nomination paper. However, the rules of interpretation do not lay down absolutely, the proposition that every time the word "shall' is used, it indicates a mandatory act. Tilakawardane J. upheld the principle that the word "shall" is not necessarily mandatory or always mandatory.

> *"Whether the matter is mandatory or directory only depends upon the real intention of the legislature, which is ascertained by carefully attending the whole scope of the statute to be construed."*[6]

4. The Intention of the Legislature:

Tilakawardane J. then went into the issue of the intention of the legislature with regard to this particular piece of legislation. It was her Ladyship's opinion that the legislature clearly intended

---

[5] Emphasis added.
[6] At page 5 of the judgement.

for youth participation. This is clearly reflected in section 3 of Act No. 25 of 1990, which provides that forty percent (40%) of the total number of candidates nominated shall consist of youth. Her Ladyship held that,

> *"The rejection of the said nomination paper for the reason that the birth certificate attached was not a certified copy, clearly defeats the purpose of the legislation which is intended for youth participation..... "*[7]

Therefore, having considered the intention of the legislature, her Ladyship held that the Returning Officer, by rejecting the nomination, had not used his discretion in the manner best suited to give effect to the intention of the legislature.

The reasoning of her ladyship then, clearly indicates that the decision of the Returning Officer involved the exercise of discretion. In other words, it was not a "ministerial act". Therefore, it follows that in any event the act of the Returning Officer was amenable to the writ jurisdiction of the Court.[8]

5. The Evidence (Special Provisions) Act No. 14 of 1995:

The Evidence (Special Provisions) Act No. 14 of 1995[9] places a Photostat copy of a document on par with a certified copy. Further, a legal presumption arises with regard to its content.

In this context, the copy of the birth certificate that was attached to the nomination paper could be considered to be an authentic document. In addition, all the other requirements, (including the certificate from the Secretary of the Party that all the youth candidates whose names appear in the nomination paper are within the age group) had been complied with. All this amounted to

---

[7] At page 6 of the judgement.
[8] *Infra*, at note 3.
[9] In section 9.

"substantial compliance" with the provisions of the Local Authorities Elections Ordinance, which, the Court held, the Returning Officer should have considered in the circumstances.[10] Further, no other party had even objected to the nomination paper.[11] Hence, the genuineness of the document had never been in question. The Court held that, in these circumstances, the Returning Officer should have accepted the nomination paper.

This reasoning marks an important step forward in the admission of documentary evidence. A photocopy, though not an original, is (presumably) taken from the original, and would therefore contain the same information as the original. In the case under discussion, the photocopy of the candidate's birth certificate would have conveyed the exact date of birth as appeared in the original. It would have proved, as well as any original, that the candidate was within the age limit qualifying him to be a youth candidate (which was the purpose for which the birth certificate was required).[12]

6. The legality of the appointment of the Returning Officer:

There was another issue, unconnected to the facts of the case, which dealt with the legality of the appointment of the Returning Officer. District Returning Officers are appointed in terms of section 4 (1) of the Local Authorities Elections Ordinance, while Returning Officers for a special electoral area (a much smaller geographical area) are appointed in terms of section 27 (1) of the

---

[10] At page 9 of the judgement

[11] The Court also went on to hold that if no objections were made to a nomination, then it must be taken to be a valid nomination. In the case of ***Joseph v. The Returning Officer of the Municipality of Colombo*** (26 CLW 79) Jayetileke J. cited the dictum of Lord Watson in ***Pritchard v. Mayor, Alderman and citizens of Borough of Bangor*** (1889-13 Appeal Cases, at p. 252) which stated "If no objection is made, or if objections stated are repelled by the Mayor, then the nomination becomes a valid nomination. I do not mean to suggest that it is final and conclusive upon questions of disqualification or other similar objections which may be taken to it, but I think it was intended to be conclusive to this effect, that the nomination paper so sustained as valid should form the basis of the election, and that the nominee in that paper should be treated as a person for whom votes could be given before the returning officer".

[12] It is here that the Returning Officer has to be satisfied (thereby exercising his discretion) that the candidate is within the age limit.

same Ordinance. Her Ladyship held that the appointment of the Returning Officer for the entire district, as it had been done in terms of section 27 (1) of the Ordinance,

> *"could be interpreted to be ultra vires."*[13]

If the appointment is indeed *ultra vires*, it could have untold ramifications for the future. Would it not mean then, that the appointment is void *ab initio*, resulting in the nullification of all acts done by the Returning Officer in that capacity? However, her Ladyship refrained from launching into a full-scale discussion of the implications, as it would have been akin to stirring up the proverbial hornets' nest. It must be noted that she did not even hold the appointment to be *ultra vires*. Instead, she merely maintained that it "could be interpreted to be *ultra vires*".

Conclusion

This judgement has stressed on the importance of the citizens' right to franchise - granted to them in terms of Article 3 of our Constitution. It is also pertinent to refer to the judgement of Mark Fernando J. in a recent Fundamental Rights case[14], where it was held that the freedom of "speech and expression" guaranteed by Article 14 of the Constitution should be broadly construed to include the exercise of the right of an elector to vote at an election. Hence, where that opportunity was denied, it amounted to an infringement of the rights granted under Article 14 (1) of the Constitution.

This shows how judicial thinking has, over the years, been influenced by the considerations of broader aspects of peoples' rights. Tilakawardane J.'s verdict is commendable as it could have some far-reaching effects, not only in the field of Administrative Law, but in many other areas of law.

---

[13] At page 9 of the judgement.

[14] ***Karunathilaka and Another v. Dayananda Dissanayake, Commissioner of Elections and Others*** [1999] 1 Sri L.R 157

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

C.A:Application No.309/2002.

In the matter of an application for mandates in the nature of a Writ of Certiorari and a Writ of Mandamus under Article 140 of the Constitution.

1. Katugaha Ratnayaka,
   Paranakatugaha,
   Pattiyagedera.

   and 27 others.

   Petitioners.

v.

1. Returning Officer for Badulla District for Local Authorities,
   District Secretariat,
   Badulla.

   And 115 others.

Before : MS. SHIRANEE TILAKAWARDANE, J

Counsel : Faiz Musthapha PC., with Dr. Jayampathi Wickramaratne PC and Faizer Marker for the Petitioner.

Wijedasa Rajapaksa PC with

D. Abeygunawardena for the 4th respondent.

A.Gnanadasan, D.S.G., for the 1st to 3rd Respondents.

Argued on: 26.02.2002.

Decided on: 28.02.2002.

Ms. SHIRANEE TILAKAWARDANE, J.

The Petitioners, have preferred this application seeking a writ of certiorari to quash the decision of the 1st Respondent rejecting the nomination paper of the Peoples' Alliance in respect of the Hali-Ela Pradeshiya Sabha which has been conveyed by letter dated 9th of February 2002 marked as P3. The Petitioners also sought a writ of Mandamus directing the 1st Respondent to accept the nomination paper, P2, of the Peoples' Alliance in respect of the Hali-Ela Pradeshiya Sabha.

After the closing of the nominations on 08/02/2002, although no objections were raised to the aforesaid nomination paper by any of the contesting rival parties, the 1st Respondent made an announcement stating that the said nomination paper was rejected. The reason adduced was that the said nomination paper contained the name of a youth candidate for whom had been annexed a Photostat copy of the Birth Certificate instead of a certified copy. The petitioners had been informed by the aforesaid letter marked P3 that the nomination paper had been rejected in terms of section 31(1)(bbb) of the Local Authorities Elections Ordinance as amended by Act No. 25 of 1990 for non-compliance with section 28(4A) of the said Ordinance as amended.

The first matter that has to be determined is whether the writ jurisdiction of this court could be

invoked, as the Deputy Solicitor General has submitted that the Returning Officer merely performed a ministerial function and therefore no writ would lie. In making his submissions the Deputy Solicitor General stated that writ jurisdiction lies only with regard to decisions made in the exercise of judicial or quasi-judicial powers involving a legal right and/or a concomitant legal duty. The Deputy Solicitor General further submitted that the functions performed by the Returning Officer were 'ministerial' in nature and that there was no discretion exercised by him as he merely performed a rubber stamp duty in accord with a 'check list' in either accepting or rejecting the nomination paper. Therefore there was no decision or determination before this court that was amenable to the writ jurisdiction of this court. In other words he merely acted as a rubber stamp in carrying out certain directions given to him by the Commissioner of Elections.

It is important to observe that the 'ministerial function' performed by the Returning Officer rejecting the nomination paper affected the rights of the franchised population of that area. The power to reject the nomination papers, is conferred upon the Returning Officer by section 31 of the Local Authorities Elections Ordinance as amended. The approach taken in the past in both the English and the Sri Lankan Courts in looking at the type of functionary exercising power and holding that no writ lies because the functionary was not a public or administrative officer has now been rejected. (**Ridge v. Baldwin** 1964 AC 40, **Jayasena v. Punchiappuhamy** (1980) 2 Sri Lanka Law Reports 44).

The Returning Officer's decision to reject the nomination paper affected not only the rights of all the candidates of the political party in question, but also the rights of the voters who exercise their franchise for that party and for the particular candidate of that political party. Several authorities reflect that, in the specific context of election law itself, judicial review lies. (**Wijesuriya v. Moonesinghe** - 64 NLR 180; **Joseph v. The Returning Officer of the Municipality of Colombo** - 26CLW 79). In any event section 31(2) which states that the Returning Officer's decision is 'final and conclusive' only implies that there is no appeal but judicial review will not be excluded. (H.W.R Wade Administrative Law 7th Edition pages 729 - 731). It is clear that when the Returning Officer made the 'ministerial decision' to reject the

nomination paper on the basis that no certified copy of the Birth Certificate of the youth candidate had been attached, his decision affected the rights of several candidates of the said party. Even where the Returning Officer performed a 'check list function' the propensity to err was intrinsic and any error would put in jeopardy or put in peril the rights of the affected parties adverted to above.

As for instance in another case before this court the Returning Officer clearly erred when he rejected the nomination paper on the basis that there had been no signature, when in fact there has been a signature. Due to human fallibility, and the propensity to err, unless the jurisdiction of the court could be invoked, there would be no remedy for the candidates listed in that nomination paper. Under these circumstances the decision in **Athukorale v. Dissanayake** (1998 3 SLR 206) cited by the Deputy Solicitor General has to be understood in the limited sense of the circumstances of that case. Therefore this court cannot accept the contention of the Deputy Solicitor General that writs would not lie against the decision of the Returning Officer who rejects a nomination paper, as such contention is untenable specially in the circumstances of the final and conclusive nature of such a decision in terms of section 31(2) of the Local Authorities Elections Law.

The next matter to be considered by this court is whether the decision of the Returning Officer rejecting the nomination paper was taken in terms of section 31 (1) and whether non-compliance with the provisions of section 31 (1) (bbb) mandated the rejection of the nomination paper.

Section 31(1) of the Local Authorities Elections Law (as amended by Act No. 48 of 1983 and Act No. 25 of 1990) states as follows;

"The Returning Officer shall immediately alter the expiry of the nomination period examine the nomination papers received by him and reject any nomination paper..." for any of the reasons stated in the sub paragraphs (a), (b), (bb), (bbb), (c), (d), (ld), and (e)..."

It is clear from P3 that the Returning Officer had acted in a manner as though it was mandatory for him to reject the nomination paper on account of the fact that a Photostat copy and not a certified copy of the youth candidate, the 22nd Petitioner, had been annexed to the nomination paper. The question that arises is whether in the light of the mandatory provision of the section, the Returning Officer had the discretion nevertheless to accept a Photostat copy despite it not being in conformity with the requirements in section 31 (1) (bbb). In this context mandatory provisions have been construed as merely directory. (**Mark v. A.G.A. Mannar** - 41 CLW 94). The word 'shall' in its ordinary signification is mandatory though there may be considerations, which influence the court in holding that the intention of the legislature was to give a directory construction. But this word 'shall' is not necessarily mandatory or always mandatory. Whether the matter is mandatory or directory only depends upon the real intention of the legislature, which is ascertained by carefully attending the whole scope of the statute to be construed. (Bindra's 7th Edition pg. 1113). In ascertaining the provisions of section 31(1) (bbb) of the Local Authorities Elections Ordinance as amended by Act No. 48 of 1983 and Act No. 25 of 1990, this court must look into the real intention of the legislature by carefully analysing the whole scope of the statute.

In the case of **Malik Mohammad Ikhtiyar v. Khana and another** [(28) A. I. R. 1941 Lahore 310] it has been stated that "the word "shall" in an Act does not always mean that compliance with the condition is obligatory - Intention of Legislature should be gathered by reference to the whole scope of the Act. The word "shall" as used in an Act of the Legislature does not always mean that compliance with the condition is obligatory. Whether the matter is imperative or directory should only be determined by the real intention of the Legislature, which should be ascertained by carefully attending to the whole scope of the Act".

In other words this court must consider the nature and design of the statute and the consequences that would follow by construing it in one way or the other with the impact of the other

provisions. Whether non-compliance is or is not visited by some penalty, the serious or trivial consequences that would flow there from has to be considered and above all whether the object of the legislation will be defeated or furthered by such construction. It is important in this context to note that the Legislature clearly intended for youth participation as is reflected in section 3 & 14 of Act No. 25 of 1990. The rejection of the said nomination paper for the reason that the Birth Certificate attached was not a certified copy, clearly defeats the purpose of the legislation which is intended for youth participation and leads furthermore to the drastic consequences to the party in question and all its candidates, preventing the franchised population of the Pradeshiya Sabha from exercising their rights in electing a candidate of their choice.

It appears that the Returning Officer had failed to have regard to this intention of the legislature, by acting as if the non production of the certified copy of the Birth Certificate made it mandatory for him to reject the nomination paper on the assumption that the word 'shall' in section 31 (1) adverted to above was intended to remove any discretion that he may have had. It was incumbent upon the Returning Officer to consider the mandatory word 'shall' contained in section 31 (1) as directory, especially in the light of the legislative intent, to encourage youth participation as explicitly set out in the amendment Act No. 25 of 1990. Under these circumstances the Returning Officer had failed to exercise his discretion in the matter, having been under the misapprehension that the mandatory provisions contained in the section did not warrant the exercise of his discretion.

In the case of **E.W Wijesuriya v. S. K. Gunasinghe** (64 NLR 180) it has been held that a public officer should not act arbitrarily or capriciously even when exercising administrative or ministerial power, which is distinct from judicial or quasi-judicial power vested in him. Where a public officer is vested with discretionary powers but if he does not exercise his discretion a writ of Mandamus would lie. The Returning Officer had clearly erred in considering the provisions of section 31 (1) as mandatory and deciding that the non-attachment of the certified copy in terms of section 31(1) (bbb) as fatal to the nomination paper in so much as he failed to take into

account the most relevant factor as contemplated by the provisions of section 3 read with section 14 of Act No. 25 of 1990 relating to youth candidates. A consideration of the salutary intention of the legislature to encourage youth participation should have caused the Returning Officer to consider this provision not as mandatory but directory.

It has been held in the case of **Givendrasinghe v. De Mel** (38 CLW 1) that where a matter was directory a substantial compliance with the provisions is sufficient.

He could have exercised his discretion and considered whether, in attaching a photocopy instead of a certified copy of the Birth Certificate, there had been substantial compliance with section 31(1) (bbb) of the Local Authorities Elections Ordinance as amended. In considering whether there had been substantial compliance on the basis that the provisions of section 31 (1) (bbb) had been merely directory several matters should have been considered in taking the ultimate decision, by the Returning Officer. In terms of the content of section 31(1) (bbb) there appears to have been the absurd interpretation given, that only a certified copy of the Birth Certificate could be accepted. This would therefore not permit even the original copy to have been accepted. In the circumstances even if a youth candidate had produced an original copy of his Birth Certificate, which should have left the Returning Officer in no doubt whatsoever that the candidate was under 35 and therefore suitable to be considered as a youth candidate, nevertheless as a certified copy of the Birth Certificate has not been produced he would be led to the absurd position where he would have to reject the nomination paper, thereby defeating the intention of the legislature, that is, the Returning Officer should be satisfied that the candidate was a youth candidate. In this context it has been held in the case of **Selliah v. De Silva** (36 CLW Pg. 17) that in reading a statute words can be rejected, transposed or even implied in order to give effect to the intention and meaning of the legislature, which has to be ascertained from a careful consideration of the entire statute. In fact where the ordinary meaning and the grammatical construction of the language of the statute leads to a manifest contradiction of the purpose of the enactment, a construction may be put on it which even modifies the meaning of the words.

(**Sahul Hameed v. Anna Malay** 34 CLW 29). Therefore the Returning Officer was under a duty to exercise his discretion specially in the light of the purport and ambit of the amendment Act to provide for youth participation, to consider whether there had been substantial compliance with the provisions of section 31(1) (bbb) and to be satisfied that the petitioner was indeed a youth candidate rather than consider the technicalities as to whether a certified copy had been produced or not. This is all the more important in the light of the fact that there had admittedly been no objections made by any of the contesting parties or their agents or representatives on the basis that the said candidate was not a youth candidate, although such opportunity was available to them as provided for by section 31(1A) of the said Ordinance as amended. Even upon notice, no objections have been filed nor have they opposed the application of the Petitioners on behalf of the youth candidate. Another factor of significance was that the 1st and the 2nd Respondents raised no objections nor was it ever disputed that the Petitioner was indeed a youth candidate. Even the authenticity or genuineness of the certified copy had never been challenged in any manner whatsoever.

The Returning Officer in this case has rejected the nomination paper only for the reason that the certified copy of the Birth Certificate had not been attached. Even though the Returning Officer was not bound by the Evidence Ordinance as amended, nevertheless as he is a statutory functionary and as his actions and decisions affect the rights of people, the principles contained in the Evidence Ordinance should guide him in taking such a decision (**David Anderson v. Ahmad Husny** [2001] 1 SLR 175). Evidence (Special Provisions) Act No. 14 of 1995 Section 9 places a Photostat copy of a document on par with a certified copy and a legal presumption arises in regard to its contents. Especially all the other salient matters discussed above would remove any doubt that the candidate was indeed a youth candidate. Admittedly the genuineness or authenticity or correctness of the photocopy tendered has not been challenged. In addition the schedule requires a certificate from the Secretary of the party that all youth candidates whose names appear in the nominations paper are in the stipulated age group. This too has been complied with. In those circumstances the Returning Officer should have considered whether

there has been substantial compliance with the provisions of section 31 (1) (bbb) of the Local Authorities Elections Ordinance as amended and accepted the nomination paper.

Counsel in this case have also raised arguments pertaining to the legality of the appointment of the Returning Officer in terms of section 27 (1) of the Local Authorities Elections Ordinance as amended. It appears that the distinction has to be drawn between the appointment of a Returning Officer in terms of section 4 (1) of the aforesaid and the appointment of Returning Officers in terms of section 27 (1) of the aforesaid. In this context the appointment in section 4 (1) pertained to a District Returning Officer whereas the appointment in terms of section 27 (1) was for a special electoral area. Therefore the appointment of the Returning Officer in terms of 3 R (1) of all the electoral areas, in other words for the district of Badulla could be interpreted to be ultra vires.

Another matter urged by the Deputy Solicitor General is the fact that the Ballot Papers have already been printed excluding the nomination paper pertaining to this application.

One of the matters to be considered by this court undoubtedly, is to see how to balance the competing interests of all parties to this case. It is to be noted that a rejection of the nomination paper of the entire party prevents youth representation and also affects the rights of the franchised population of the electoral district and this outweighs the considerations urged by the Deputy Solicitor General.

Accordingly this court issues a writ of Certiorari quashing the letter marked P3 and also issues a writ of Mandamus directing the Returning Officer to accept the nomination paper of the Peoples' Alliance in respect of the Hali-Ela Pradeshiya Sabha. I also award costs of this application.

JUDGE OF THE COURT OF APPEAL.