LST REVIEW

Volume 13 Issue 180 October 2002

Determinations on the 18th & 19th Amendments

Gender Sensitive Justice

LAW & SOCIETY TRUST

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 .....

This month's issue of the LST Review carries the full texts of the Supreme Court determinations on the 18th and 19th Amendments to the Constitution (1978) of Sri Lanka.

Both determinations are issued in terms of Article 123 of the Constitution in respect of two Bills to amend the Constitution ie. the Eighteenth and Nineteenth Amendment to the Constitution. The Eighteenth Amendment Bill was challenged in the Supreme Court for its alleged inconsistency with Article 3 read with Article 4 of the Constitution. These Articles deal with the sovereignty of the people and the exercise of such sovereignty respectively. It was therefore argued that if the Bill was to become law, it had to be passed by a two-thirds majority in Parliament and thereafter by the people at a Referendum in terms of Article 83 of the Constitution. The determination on the Nineteenth Amendment dealt broadly with four matters:

1. *The appointment of the Prime Minister –Article 43 (1) of the Constitution*
2. *The dissolution of the Cabinet of Ministers –Article 49 of the Constitution*
3. *The dissolution of Parliament –Article 70 of the Constitution*
4. *The conferment of an immunity from disciplinary action that may be taken against Members of Parliament by recognised political parties or independent groups in respect of speaking, voting or abstaining from voting on any amendment to the Constitution contained in the Bill.*

The determinations became the subject matter of numerous public debates and discussions, in view of the overwhelming public interest involved and the impact that such matters have on the civil and political rights and the sovereignty of the people. Hence, they are reproduced in this month's issue with a view to making them accessible to a wider audience.

This month's Review also includes a contribution by ***Ms. Sheila Varadan,*** an undergraduate from the McGill University, Canada who served a brief internship period at the Trust this year. Her article deals with the evolution of gender sensitive justice in the ad hoc tribunals in Rwanda and the Former Yugoslavia and the possibility of it having a positive influence on the jurisdiction of the International

Criminal Court which came into force in July, 2002. The author draws extensively from the case law that evolved in the ad hoc tribunals while comparing and critically analyzing the applicable principles of law with jurisdictions from all around the world. The article reveals the results of a comprehensive research on the subject which is enhanced by the author's observations on emerging trends in gender sensitive justice which may be useful leads in the domestic sphere as well.

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

A Bill titled "**EIGHTEENTH AMENDMENT TO THE CONSTITUTION**"

In the matter of applications under Article 121(1) of the Constitution

PRESENT	Sarath N. Silva	Chief Justice
	S.W.B. Wadugodapitiya	Judge of the Supreme Court
	Dr. Shirani A. Bandaranayake	Judge of the Supreme Court
	A. Ismail	Judge of the Supreme Court
	P. Edussuriya	Judge of the Supreme Court
	H.S. Yapa	Judge of the Supreme Court
	J.A.N. De Sillva	Judge of the Supreme Court

S.D. No. 12/2002	Petitioner	Koggala Wellala Bandula
	Counsel	Dr. Jayampathy Wickremaratne, P.C. With Gaston Jayakody
S.D. No. 14/2002	Petitioner	Parakrama Agalawatta
	Counsel	Manohara de Silva
S.D. No. 22/2002	Petitioner	Suranjith Richardson Kariyawasam Hewamanne
	Counsel	J.C. Weliamuna with Lilanthi de Silva And Chrismal Warnasooriya and Sanath Jayawardene
S.D. No. 23/2002	Petitioner	Centre for Policy Alternatives (Guarantee) Limited
	Counsel	M.A. Sumanthiran with Viran Corea Renuka Senanayake
S.D. No. 24/2002	Petitioner	Dr. Piyasena Dissanayake
	Counsel	Manohara de Silva with W.D. Weeraratne
S.D. No. 29/2002	Petitioner	Mangala Pinsiri Samaraweera
	Counsel	Wijayadasa Rajapakse, P.C. with Kapila Liyanagamage and Ranjith Meegaswatte

S.D. No. 36/2002	Petitioner	Galaboda Devage Piyasiri
	Counsel	Dr. Jayampathi Wickramaratne, PC, With S. Gaston Jayakody and Pubudini Wickramaratne
		K.C. Kamalasabeysan, PC, AG with S. Marsoof P.C ASG, Uditha Egalahewa, SC, and Harsha Fernando, SC, for State

Court assembled at 10.15 a.m. 03rd October, 2002

A Bill bearing the title "18th Amendment to the Constitution" was placed on the Order Paper of Parliament for 18th September 2002. Seven petitions, numbered as above have been presented invoking the jurisdiction of this Court in terms of Article 121 (1) for a determination in terms of Article 123 of the Constitution in respect of the Bill.

Upon receipt of the petitions the Court issued notice on the Attorney-General as required by Article 134(1) of the Constitution.

The Counsel representing the petitioners and the Attorney-General were heard before this Bench at the sitting held on 03.10.2002.

The petitioners' contended that Clauses 2,4 and 5 of the Bill are inconsistent with Article 3 read with Article 4 of the Constitution and that if they require to become law, they must be passed by a two-thirds (2/3) majority in Parliament and thereafter be approved by the people at a Referendum, in terms of Article 83 of the Constitution.

Since extensive references were made to Clause 4 of the Bill, we would consider this first.

CLAUSE 4

Clause 4 of the Bill seeks to amend Article 41 (H) of the Constitution and is in the following terms:

Article 41 (H) of the Constitution is hereby amended by the substitution for the words and figures "subject to the provisions of paragraphs (1), (2), (4) and (5) of Article 126, no Court shall" of the words "No Court, including the Supreme Court acting under Article 126 shall"

Counsel for the Petitioners argued that by the amendment to Article 41 (H) of the Constitution, the power of the Supreme Court to exercise its jurisdiction over any "decision, recommendation and approval of the Constitutional Council", set up by Article 41 (A) of the Constitution, is taken away.

The Constitution inter alia, provides for the amendment or repeal of the provisions of the Constitution. Provision is made in regard to such amendments or repeals in Articles 82 and 83 of the Constitution.

Article 83 of the Constitution refers to the approval of certain Bills at a Referendum. This Article reads as follows:

"Notwithstanding anything to the contrary in the provisions of Article 82 –

(a) a Bill for the amendment or for the repeal and replacement of or which is inconsistent with any of the provisions of Article 1,2,3,6,7,8,9,10 and 11, or of this Article, and

(b) a Bill for the amendment or for the repeal and replacement of or which is inconsistent with the provisions of paragraph (2) of Article 62 which would extend the term of office of the President or the duration of Parliament, as the case may be, to over 6 years,

shall become law if the number of votes cast in favour thereof amounts to not less than two-thirds of the whole number of Members (including those not present), is approved by the People at a Referendum and a certificate is endorsed thereon by the President in accordance with Article 80"

It is not disputed that Article 83 makes no reference to proposed Articles 41(F), 41(H), 41(J) and 41(K), which respectively are mentioned in Clauses 2,4 and 5 of the Bill. However, the arguments put forward by the petitioners were to the effect that although the aforementioned Articles are not referred to in Article 83, the provisions in the proposed Articles are inconsistent with Article 3 read with Article 4, which is specifically mentioned in Article 83 of the Constitution.

Article 3 of the Constitution, which is an entrenched provision, deals with the sovereignty of the People and reads as follows:

"In the Republic of Sri Lanka sovereignty is in the People and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise".

It was the unanimous contention of all the petitioners that Article 4 is complementary to Article 3 of the Constitution. In fact this court has ruled in a series of cases that Article 3 is linked up with Article 4 and that these two Articles must be read together (Vide S.D. 5/80, 1/82, 1/83, 1/84 and 7/87)

Article 4 of the Constitution deals with the exercise of sovereignty and provides that,

"The Sovereignty of the People shall be exercised and enjoyed in the following manner: -

(a) the legislative power of the People shall be exercised by Parliament, consisting of elected representatives of the People and by the People at a Referendum;
(b) the executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People.
(c) The judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised directly by Parliament according to law;

(d) The fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government, and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided; and

(e) The franchise shall be exercisable at the election of the President of the Republic and of the Members of Parliament, and at every Referendum by every citizen who has attained the age of eighteen years, and who, being qualified to be an elector as hereinafter provided, has his name entered in the register of electors"

Thus in terms of Articles 3 and 4 of the Constitution, fundamental rights and franchise constitute the sovereignty of the People, and is inalienable. The Constitution does not attribute any unfettered discretion or authority to any organ or body established under the Constitution. Even the immunity given to the President under Article 35, has been limited in relation to Court proceedings specified in Article 35(3). Moreover, the Supreme Court has entertained and decided the questions in relation to Emergency Regulations made by the President [Joseph Perera v. Attorney-General – (1992 1 Sri L.R. pf 199] and Presidential appointments (Silva v. Bandaranayake, 1997 1Sri L.R. pg 92)

By the envisaged 18th amendment, the Constitutional Council is clothed with unlimited and unfettered immunity on their decisions, recommendations and approvals. If such immunity were given to the Constitutional Council, it would in effect be elevated to a body that is not subject to law, which is inconsistent with the Rule of Law. The Rule of Law means briefly the exclusion of the existence of arbitrariness and maintaining equality before the Law. (A.V. Dicey, Law of the Constitution, pg 120)

Hitherto without exception, executive and administrative action has been subjected to the jurisdiction enshrined in Article 126 of the Constitution. The total immunity expected in terms of the proposed amendment to the Constitution would effectively shut out the justiciability of actions of the Constitutional Council in the exercise of the fundamental rights jurisdiction by the Supreme Court.

The Constitutional Council established under the 17th Amendment, is part of the Executive and is attributed executive power. Thus the Council would come within the executive organ of the Government in regard to Article 4(d) of the Constitution, referred to above. It is therefore the duty of the Constitutional Council to respect, secure and advance the fundamental rights, which are declared and recognized by the Constitution. The functions of the Constitutional Council would come within the framework of executive action as provided for in terms of Article 17 of the Constitution. Article 17 enables every person to apply to the Supreme Court in respect of the infringement or imminent infringement of a fundamental right.

The effect of the amendment in Clause 4 is to introduce a different class of people whose actions are not subject to judicial review. There is no justification for such immunity to be granted, which is contrary to Article 12 (1) of the Constitution and the basic principles of Rule of Law.

The concept of judicial review of administrative action, being a predominant feature of Constitutional jurisprudence, prevents total immunity being given to any body, created under the Constitution as such restriction of judicial scrutiny, would impair the very foundation of the Constitution and the Rule of Law. The total immunity contemplated by the amendment,

taking away the judicial review of the actions of the Constitutional Council out of the fundamental rights jurisdiction, in effect would alienate the judicial power from the people in contravention of Article 3 and 4 of the Constitution. It is to be noted that Article 3 of the Constitution specifically refers to the following:

(A) the sovereignty is in the people and that it is inalienable; and

(B) the sovereignty includes the powers of Government, fundamental rights and franchise.

For the aforementioned reasons we determine that Clause 4 of the Bill is inconsistent with Articles 3 and 4 of the Constitution. We also state that the Bill in its present form therefore require to be passed by the special majority in terms of the provision of paragraph (2) of Article 84 and be approved by the people at a Referendum by virtue of the provisions of Article 83.

CLAUSE 2

Clause 2 of the Bill is to amend Article 41 (F) of the Constitution and to insert a new Article, namely, Article 41 (FF) which would deal with the Rule making powers of the Constitutional Council. This new Article is in the following terms:

"(1) The Council may from time to time make rules setting out the procedure and guidelines to be followed by it, in the performance and discharge of the duties and functions assigned to it under the Constitution, or by any other law.

(2) Every rule made under paragraph (1) of this Article, shall be published in the Gazette and shall come into operation on the date of such publication.

(3) The Council shall, before the publication of any rule formulated in terms of this Article in the Gazette, communicate such rule to Parliament."

The Petitioners submitted that these Rules would be for the purpose of setting out the procedure and guidelines to be followed by the Constitutional Council itself. It was also pointed out that no provision has been made in the Amendment that these Rules must be approved by Parliament. The amendment merely requires the Constitutional Council to communicate such Rules to Parliament.

The Constitutional Council, as pointed out earlier is established by the 17th Amendment. The proposed Amendment enables the Council to exercise legislative power, which according to Article 4 (a) of the Constitution, is reposed in the People and is exercised by Parliament. In terms of Article 76 (1) of the Constitution, Parliament cannot abdicate or alienate its legislative power.

The Rule making power of the Constitutional Council is derived from the Constitution. The Amendment shows that this power is not subjected to any kind of control. However, the other organs, which are created by the Constitution, and thus have the power to make Rules, are quite correctly subjected to the accepted norms of Parliamentary control. For instance, the Rules of the Supreme Court made under Article 136 of the Constitution, should as soon as convenient after their publication in the Gazette, be brought before Parliament for approval.

The proposed Amendment thus undermines the Parliamentary control over the Rule making powers of an institution established by the Constitution, which in turn is an abdication as well as an alienation that affects the sovereignty of the People, which is inconsistent with Articles 3 and 4 of the Constitution. Hence this Clause requires approval by the People at a Referendum in addition to a two-thirds majority votes (including those not present) in terms of Article 83 of the Constitution.

We are of the opinion that if Clause 2 is amended by incorporating the requirement for the Rules prepared by Constitutional Council to be placed before the Parliament in order to obtain approval or the power of the Council is restricted to the formulation of guidelines only, the inconsistency with Articles 3 and 4 of the Constitution would cease and the approval by the People at a Referendum in terms of Article 83 of the Constitution would not be necessary.

CLAUSE 5

Clause 5 of the Bill consists of 2 Articles, namely, 41J and 41K(1) and (2), which are proposed to be inserted immediately after Article 41H of the Constitution. While 41J refers to immunity from suit, 41K (1) and (2) deal with the interference with the Council. These two Articles are in the following terms:

> "41J. No suit or proceedings shall lie against the Council, the Chairman, a Member, the Secretary or an officer of the Council in respect of anything done or omitted to be done by the Council, the Chairman, a Member, the Secretary or any officer of the Council in the performance or discharge of any duty or function conferred or assigned in terms of the Constitution or by any other law.
>
> 41(K)(1) Every person who, otherwise than in the course of such persons lawful duty, directly or indirectly by himself of by or with any other person, in any manner whatsoever influences or attempts to influence or interferes with any decision or recommendation of the Council, shall be guilty of an offence and shall on conviction be liable to a fine not exceeding one hundred thousand rupees or to imprisonment for a term not exceeding seven years, or to both such fine and imprisonment.
>
> (2) A High Court established under Article 154P of the Constitution shall have jurisdiction to hear and determine any matter referred to in paragraph (1)"

Learned Counsel in petitions No. 14/2002 and 24/2002 contended that the proposed Article 41 (K) (1) would have implications, violative of Article 12 (1) of the Constitution. His submission was that Article 41 (3) of the Constitution provides for the mandatory appointment of 3 persons from the minority communities to represent their interest, whereas the majority community as such is not represented in the Constitutional Council to safeguard their interest. Accordingly, any representation made in respect of the majority community, would entail the consequences of prosecution. Whilst the minority communities could communicate with their representatives in the Constitutional Council, the majority community would be denied such opportunity in the absence of any specific representation, which in turn would be violative of Article 12 (1).

Article 3, referred to above, specifically mentions that sovereignty includes fundamental rights and which is "in the people and is inalienable". Article 4(d) which refers to the exercise of sovereignty specifies that the fundamental rights which are declared and recognized by the Constitution must be "respected, secured and advanced" by all the organs of the Government. This Article further contemplates that the fundamental rights cannot be abridged, restricted or denied.

In such circumstances the proposed Article 41(K) is inconsistent with Article 3 read with Article 4 of the Constitution.

The Attorney-General conceded that there is much merit in these submissions and suggested in his written submissions tendered after the hearing was concluded, the following to be considered.

(a) an appropriate definition to be included in the proposed Article to exclude any representation that may be made to the Council by any person or in the alternative

(b) The words "otherwise than in the class of such persons lawful duties directly or indirectly by himself or by or with any other persons in any manner whatsoever influence or attempt to influence or" be deleted from the proposed Article to ensure protection to persons making representation to the Council

Since the suggestions were not made at the time of the hearing these applications, which would have given an opportunity for the petitioners also to consider the views expressed by the Attorney-General, it would not be possible for this Court to consider them.

We therefore determine that the proposed Article 41 (K) is inconsistent with Article 3 and 4 of the Constitution. The proposed Article therefore is required to be passed by the special majority in terms of paragraph 2 of Article 84 and approved by the people at a Referendum by virtue of the power of Article 83.

The proposed Article 41J referred to above, which grants an immunity to the Constitutional Council, the Chairman, a Member, the Secretary or an officer, from judicial proceedings in respect of anything done or omitted to be done, attracts both objections dealt with, in the proceeding paragraphs of this determination. They are;

(1) that it would alienate the judicial power from the people;

(2) that it creates a special class of people in violation of Article 12(1) of the Constitution, who would not be subjected to judicial review.

For the reasons stated above we determine that there is merit on both grounds of objections and the proposed Article 41J is therefore inconsistent with Article 3 read with Article 4 of the Constitution.

For the reasons stated above, the Bill, in its present form, requires approval by People at a Referendum in addition to a two-thirds majority vote (including those not present) in terms of Article 83 of the Constitution.

We shall place on record our deep appreciation of the assistance given by Attorney-General and all the other learned Counsel who made submissions in this matter.

Sarath N. Silva,
Chief Justice

S.W.B. Wadugodapitiya,
Judge of the Supreme Court

Dr. Shirani A. Bandaranayake,
Judge of the Supreme Court

A. Ismail,
Judge of the Supreme Court

H.S. Yapa,
Judge of the Supreme Court

J.A.N. de Silva,
Judge of the Supreme Court

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

A Bill titled "**NINETEENTH AMENDMENT TO THE CONSTITUTION**"

In the matter of applications under Article 121 (1) of the Constitution.

PRESENT:	Sarath N. Silva	Chief Justice
	S.W.B. Wadugodapitiya	Judge of the Supreme Court
	Dr. Shirani A. Bandaranayake	Judge of the Supreme Court
	A. Ismail	Judge of the Supreme Court
	P. Edussuriya	Judge of the Supreme Court
	H.S. Yapa	Judge of the Supreme Court
	J.A.N. De Silva	Judge of the Supreme Court

S. D. No. 11/2002	Petitioner	1. Lanka Samasamja Party 2. Batty Weerakone 3. Baddegama Samitha Thera, M.P.
	Counsel	Mr. Batty Weerakone for Petitioners
S.D. No. 13/2002	Petitioner	W.A. Sarath Kumara Weragoda
	Counsel	Sarath Weragoda (in person)
S.D. No.15/2002	Petitioners	Champani Pathmasekera M.S. Aub Khan
	Counsel	D.P. Mendis, P.C. with Nadeera Gunawardene & Keerthi Segara
(Intervenient)	Counsel	Shilby Aziz P.C. with L.C. Seneviratne P.C. Daya Pelpola, S.G. Mohideen, Ronald Perera, Chandimal Mendis and Rohana Deshapriya
S.D. No. 16/2002	Petitioner	Mohan Saliya Elawala
	Counsel	S.S. Sahabandu, P.C. with Keerthi Segara Situge and S.D. Yogendra
S.D. No. 17/2002	Petitioner	Janaka Bandara Tennakon
	Counsel	A.A. de Silva P.C. with A.W. Yusuf, Prasanna Obeysekera & Chaminda Weerakkoddy
S.D. No. 18/2002	Petitioner	V. Puththrasigamoney

	Counsel	R. I. Obeysekera, P.C. with A.W. Yusuf, P. Liyanaarachchi, Chaminda Weerakkody and Piyal Ranathunga
S.D. No. 19/2002	Petitioner	W.H. Piyadasa
	Counsel	B. Jayamanna with Swintha Gunaratne
S.D. No. 20/2002	Petitioner	Mahinda Tissa Athukorala
	Counsel	L.V.P. Wettasinghe with Swintha Gunaratne
S.D. No. 21/2002	Petitioner	Centre for Policy Alternatives (Guarantee) Ltd
	Counsel	M.A. Sumanthiran with V. Corea & Renuka Senanayake
S.D. No. 25/2002	Petitioner	B.D.P.A. Perera
	Counsel	Anil Obeysekera, P.C., with Palitha de Silva and Bandula Wellala
S.D. No. 26/2002	Petitioner	E.P. Wickremasekera (in person)
S.D. No. 27/2002	Petitioner	Piyasena Dissanayake
	Counsel	A.A. de Silva, P.C. with Piyatissa Abeykoon & Kanishka Witharana
S.D. No. 28/2002	Petitioner	Tilvin Silva
	Counsel	Manohara de Silva
S.D. No.30/2002	Petitioner	Mangala Pinsiri Samarawera
	Counsel	Wijedasa Rajapakse, P.C. with Kapila Liyanagamage & Ranjith Meegaswatta
S.D. No. 31/2002	Petitioner	Shantha Niriella
	Counsel	Neville Jayawardene with P.D.R.S. Panditharatne
S.D. No. 32/2002	Petitioner	D.M. Jayaratne
	Counsel	H.L. de Silva, P.C. with Nigel Hatch
S.D. No. 33/2002	Petitioner	Maithripala Sirisena

	Counsel	R.K.W. Gunasekera with Gaston Jayakody
S.D. No. 34/2002	Petitioner	Prof. Ranjith Amerasinghe
	Counsel	Dr.Jayampathy Wickremaratne with Gaston Jayakody
S.D.35/2002	Petitioner	Prof. Ranjith Amerasighe
	Counsel	Dr. Jayampathy Wickremaratne with Gaston Jayakody
S.D. No. 37/2002	Petitioner	Kamal Nissanka
	Counsel	A.R.I. Athurupana with R. Edirimane
S.D. No. 38/2002	Petitioner	K.R.M.A. Raheem
	Counsel	A.W. Yusuff with Piyal Ranatunga
S.D. No. 39/2002	Petitioner	Somaweera Chandrasiri
	Counsel	A.A. de Silva, P.C. with P. Abeykoon & Kanishka Witharana
S.D. No.40/2002	Petitioner	B.A. Victor Perera
	Counsel	Petitioner absent & unrepresented
		K.C. Kamalasabayson, P.C. Attorney-General, with S. Marsoof, P.C. Addl. Solicitor General, Uditha Egalahewa, S.C. and Harsha Fernando, S.C. for State
	Intervenient	Shilby Aziz, P.C. with L.C. Seneviratne P.C. Daya Pelpola, S.G. Mohideen, Ronald Perera, Chandimal Mendis & Rohana Deshapriya

Court assembled at 10.15 a.m. on 01st and 03rd October 2002.

A Bill bearing the title "19th Amendment to the Constitution," was placed on the Order Paper of Parliament for 19.9.2002. Twenty-four petitions, numbered as above have been presented invoking the jurisdiction of this court in terms of Article 121(1) for a determination in terms of Article 123 of the Constitution, in respect of the Bill.

Upon receipt of the petitions the Court issued notice on the Attorney General as required by Article 134(1) of the Constitution.

The Petitioners or Counsel representing them, the Intervenient Petitioner and the Attorney General were heard before this Bench at the sittings held on 1.10.2002 and 3.10.2002.

The proposed 19th Amendment to the Constitution as contained in the Bill deals with broadly four matters: -

1. the appointment of the Prime Minister, an amendment to Article 43(1) of the Constitution, as contained in clause 2;
2. the dissolution of the Cabinet of Ministers, an amendment to Article 49 as contained in clause 2.
3. the dissolution of Parliament, an amendment to Article 70 as contained in clauses 4 and 5
4. the conferment of an immunity from disciplinary action that may be taken against Members of Parliament by recognized political parties or independent groups in respect of speaking, voting, or abstaining from voting on any amendment to the Constitution contained in the Bill, as set out in clause 6 of the Bill.

Since the Bill taken as a whole hinges on the provisions contained in clauses 4 and 5 with regard to the dissolution of Parliament we would consider this matter first.

DISSOLUTION OF PARLIAMENT

The provisions presently in the Constitution regarding dissolution of Parliament are contained in Article 70(1). The main paragraph in Article 70(1) reads as follows:

> "The President may, form time to time, by Proclamation Summon, Prorogue and Dissolve Parliament"

The broad power thus attributed in the President is subject to certain limitations and clarifications as are specified in provisos (a) to (d) of the sub-article. The contents of these provisos may be summarized as follows:

(a) where a General Election has been held consequent upon a dissolution of Parliament by the President, the President shall not thereafter dissolve Parliament until the expiration of one year from the date of such election unless Parliament by resolution requests the President to do so.

(b) The President shall not dissolve Parliament on the rejection of the statement of government policy at the commencement of the first session of Parliament after a General Election.

(c) Restriction on the power of dissolution where a motion for the impeachment of the President has been entertained by the Speaker.

(d) Where the President has not dissolved Parliament upon the rejection of the Appropriation Bill, Parliament shall be dissolved if the next Appropriation Bill is rejected.

It is seen that provisos (a), (b) and (c) are specific restrictions on the power of dissolution, whereas proviso (d) is mandatory, and requires dissolution.

THE CONTENTS OF THE BILL WITH REGARD TO THE DISSOLUTION OF PARLIAMENT

The amendments in the Bill in this regard are contained in clauses 4 and 5. Clause 4 repeals proviso (a) of Article 70 (1), referred to above and substitutes a new proviso with two-sub paragraphs. As noted, proviso (a) is a restriction on the powers of the President. The effect of the amendment is two fold: -

(i) the proviso will apply irrespective of the circumstances that caused the General Election. That is, whether it resulted from a dissolution by the President or by the expiration of the term of Parliament being 6 years, as contained in Article 62 (2).

(ii) the residuary power which in terms of the present proviso (a) lies in the President not to dissolve, even where the Parliament by resolution requests the same, is removed and it becomes mandatory on the President to dissolve within 4 days of the resolution being communicated by the Speaker. However, the period of 1 year from the General Election during which the proviso will apply, remains.

Clause 5 seeks to add a new provision as Article 70A immediately after Article 70. The new Article will have four sub articles, the provisions of which can be grouped as follows:

(1) Article 70 A (1) (a) which deals with a situation "where the majority of the Member of Parliament belong to a recognized political party or parties or an independent group or groups of which the President is not a member". In such event after the expiration of one year from the General Election the President shall not dissolve Parliament unless upon a request by Parliament supported by a resolution passed by not less than two thirds of the whole number of members, including those not present.

(2) Article 70A (1) (b) and 70A(2) are linked. Paragraph (b) provides that where the Parliament passes a resolution that the Government no longer enjoys the confidence of the Parliament, the President shall dissolve Parliament. However, as stated in paragraph (2) , if such a resolution identifies a Member of Parliament who enjoys the confidence of Parliament and the resolution is passed by not less than one half of the whole number of members(including those not present) the President shall not dissolve Parliament but shall appoint such person as Prime Minister.

(3) Article 70A(3) and (4) are consequential provisions contents of which need not be referred to for the purpose of this determination.

Considering the somewhat diffused picture that comes to mind when the amendment is read into the existing provision, we would summarize the situation that will emerge as follows:

(1) the main provision in Article 70(1) referred to above, which broadly attributes the power of dissolution of Parliament to the President, remains;

(2) the substituted proviso (a) which applies in relation to the first year after the General Election remains. The discretion that now lies with the President not to dissolve even if the Parliament requests such dissolution is removed and such dissolution is mandatory on the part of the President.

(3) There is a bifurcation in the provisions that will apply in respect of the period after the lapse of 1 year from the date of the General Election. These provisions are: -

(a) where the majority of the Members of Parliament belong to a recognized political party or independent group or groups of which the President is not a member, the power of dissolution is totally removed from the President and can be exercised by the President only upon a resolution passed by not less than two thirds of the whole number of members (including those not present) request such dissolution.

(b) If the President is a member of the majority party or group in Parliament, the power of dissolution will remain as it presently stands, subject to the provisions in Article 70A(1) (b) and (2) referred to above.

THE GROUND OF CHALLENGE

The Petitioners challenged the provisions contained in clauses 4 and 5 on the basis that they constitute an erosion of the Executive power of the President, which is inconsistent with Article 3 read with Article 4 (b) of the Constitution and urge that the inconsistency is aggravated by the criterion upon which the power of the President in this regard is reduced to nothing, viz., the absence of membership in a particular political party or group.

ANALYSIS OF THE GROUND OF CHALLENGE AS TO CLAUSES 4 & 5

The Court has to consider whether the said clauses require to be passed by the special majority provided in Article 84(2) and approved by the People at a Referendum by virtue of the provisions of Article 83. The Petitioners contend as noted above that these provisions require to be approved at a Referendum in terms of Article 83(a), as they are inconsistent with Article 3 read with Article 4 (b) of the Constitution. Since extensive references were made to Articles 3 and 4 of the Constitution, we reproduce the respective Article in full.

3. "In the Republic of Sri Lanka sovereignty is in the People and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise"

4. The sovereignty of the People shall be exercised and enjoyed in the following manner.

(a) the legislative power of the people shall be exercised by Parliament, consisting of elected representatives of the People and by the People at a Referendum;

(b) the executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People;

(c) the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and its Members, wherein the judicial power of the People may be exercised directly by Parliament according to law;

(d) the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government, and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided; and

(e) the franchise shall be exercisable at the election of the President of the Republic and of the Members of Parliament, and at every Referendum by every citizen who has attained the age of eighteen years, and who, being qualified to be an elector as hereinafter provided, has his name entered in the register of electors"

These Articles relate to the sovereignty of the People and the exercise of that sovereignty. Mr. H.L. de Silva, P.C. submitted and correctly so, that the two Constitutions of Sri Lanka of 1972 and 1978 are unique in proclaiming that sovereignty is in the People and specifically elaborating the content of such sovereignty, whilst in most Constitutions the term "sovereignty" is used only as descriptive of the power of the State, similar to Article 1, which states that – *"Sri Lanka (Ceylon) is a Free, Sovereign, Independent, and Democratic Socialist Republic and shall be known as the Democratic Socialist Republic of Sri Lanka."* This submission was further developed by Mr. Batty Weerakone from the perspective of political theory and he submitted that in terms of Articles 3 and 4, sovereignty is transmuted from a "grim reality" to something that is *"tangible"* or *"palpable"* without being elusive or visionary. It was the common submission of counsel for the Petitioners that sovereignty conceptualized in Article 3 is given a practical dimension in Article 4. Although Mr. Shilby Azis, P.C., counsel for the Intervenient Petitioner sought in a brief argument to delink the two Articles, the Attorney General submitted that they are linked together and should be read together. Indeed, the Attorney-General's submission has been the constant trend of decisions of this Court that date back to the year 1980. Whilst the previous decisions relate to alleged instances of the erosion of judicial power, fundamental rights/franchise or devolution of power to sub-ordinate (or as alleged coordinate bodies), we are presently confronted with an alleged erosion which involves the Legislative organ of Government and the Executive organ of Government. Hence, it is necessary to examine the concept of the sovereignty of the People and the working thereof, as set out in Articles 3 and 4 from a slightly different perspective.

Sovereignty, which ordinarily means power or more specifically power of the State as proclaimed in Article 1 is given another dimension in Article 3 from the point of the People, to include;

(1) The powers of Government;
(2) The fundamental rights; and
(3) The franchise.

Fundamental rights and the franchise are exercised and enjoyed directly by the People and the organs of government are required to recognize, respect, secure and advance these rights.

The powers of government are separated as in most Constitutions, but unique to our Constitution is the elaboration in Article 4 (a), (b) and (c) which specifies that each organ of government shall exercise the power of the People attributed to that organ. To make this point clearer, it should be noted that sub paragraph (a), (b) and (c) not only state that the legislative power is exercised by Parliament; executive power is exercised by the President and Judicial

power by Parliament through Courts, but also specifically state in each sub paragraph that the legislative power *"of the People"* shall be exercised by Parliament; the executive power *"of the People"* shall be exercised by President and the judicial power "*of the People*" shall be exercised by Parliament through the Courts. This specific reference to the *power of the People* in each sub paragraph which relates to the three organs of government demonstrates that the power remains and continues to be reposed in the People who are sovereign, and its exercise by the particular organ of government being its custodian for the time being, is for the People.

Therefore the statement in Article 3 that sovereignty is in the People and is "inalienable", being an essential element which pertains to the sovereignty of the People should necessarily be read into each of the sub paragraphs in Article 4. The relevant sub paragraphs would then read as follows:

(a) the legislative power of the People *is inalienable* and shall be exercised by Parliament:
(b) the executive power of the People *is inalienable* and shall be exercised by the President and
(c) The judicial power of the People *is inalienable* and shall be exercised by Parliament through Courts.

The meaning of the word "alienate" as a legal term, is to transfer anything from one who has it for the time being to another, or to relinquish or remove anything from where it already lies. Inalienability of sovereignty, in relation to each organ of government means that power vested by the Constitution in one organ of government shall not be transferred to another organ of government or relinquished or removed from that organ of government to which it is attributed by the Constitution. Therefore, shorn of all flourishes of Constitutional Law and of Political theory, on a plain interpretation of the relevant Articles of the Constitution, it could be stated that any power that is attributed by the Constitution to one organ of government cannot be transferred to another organ of government or relinquished or removed from that organ of government; and any such transfer, relinquishment or removal would be an "alienation" of sovereignty which is inconsistent with Article 3 read together with Article 4 of the Constitution. It necessarily follows that the balance that has been struck between the three organs of government in relation to the power that is attributed to each such organ, has to be preserved if the Constitution itself is to be sustained.

This balance of power between the three organs of government, as in the case of other Constitutions based on a separation of power is sustained by certain checks whereby power is attributed to one organ of government in relation to another. The dissolution of Parliament and impeachment of the President are some of these powers, which constitute the checks incorporated in our Constitution. Interestingly, these powers are found in chapters that contain provisions relating to the particular organ of government subject to the check. Thus, provision for impeachment of the President is found in Article 38(2) contained in Chapter VII titled, "The Executive, President of the Republic". Similarly, the dissolution of Parliament is found in Article 70 (1), which is contained in Chapter XI titled, "The Legislature, Procedure and Powers"

Mr. H.L. de Silva, P.C., submitted forcefully that they are "weapons" placed in the hands of each organ of government. Such a description may be proper in the context of a general study of Constitutional Law, but would be totally inappropriate to our Constitutional setting where

sovereignty as pointed out above, continues to be reposed in the People and organs of government are only custodians for the time being, that exercise the power for the people. Sovereignty is thus a continuing reality reposed in the People.

Therefore, executive power should not be identified with the President and personalized and should be identified at all times as the power of the People. Similarly, legislative power should not be identified with the Prime Minister or of any party or group in Parliament and thereby be given a partisan form and character. It should be seen at all times as the power of the People. Viewed from this perspective it would be a misnomer to describe such powers in the Constitution as "weapons" in the hands of the particular organ of government. These checks have not been included in the Constitution to resolve conflicts that may arise between the custodians of power or, for one to tame and vanquish the other. Such use of the power, which constitutes a check, would be plainly an abuse of power totally antithetic to the fine balance that has been struck by the Constitution.

The power that constitutes a check, attributed to one organ of government in relation to another, has to be seen at all times and exercised, where necessary, in trust for the People. This is not a novel concept. The basic premise of Public Law is that power is held in trust. From the perspective of Administrative Law in England, the "trust" that is implicit in the conferment of power has been stated as follows:

"Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely – that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended."

(Administrative Law 8th Ed. 2000 – H.W. R. Wade and C.F. Forsyth p, 356)

It has been firmly stated in several judgments of this Court that the 'rule of law' is the basis of our Constitution (Visuvalingam vs Liyanage 1983 1 SLR at 236, Premachandra vs. Jayawickrema 1994 2 SLR p 90)

A.V. Dicey in "Law of the Constitution" postulated that 'rule of law' which forms a fundamental principle of the Constitution has three meanings, one of which is described as follows:-

"It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness of prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law, and by the law alone..."

The Attorney- General has appropriately cited the dictum of Bhagwati J. (later, Chief Justice of India) in the case of Gupta and others vs. Union of India 1982 AIR (SC) 197, where he observed;

"If there is one principle that runs through the entire fabric of the Constitution, it is the principle of the Rule of Law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the Rule of Law meaningful and effective."

To sum up the analysis of the balance of power and the checks contained in the Constitution to sustain such balance, we would state that the power of dissolution of Parliament and the process of impeachment being some of the checks put in place, should be exercised, where necessary, in trust for the People only to preserve the sovereignty of the People, and to make it meaningful, effective and beneficial to the People. Any exercise of such power (constituting a check), that may stem from partisan objectives would be a violation of the rule of law and has to be kept within its limits in the manner stated by Bhagwati J. There should be no bar to such a process to uphold the Constitution.

Our conclusion on the matters considered above can be stated as follows –

(1) The powers of government are included in the sovereignty of the People as proclaimed in Article 3 of the Constitution.

(2) These powers of government continue to be reposed in the People and they separated and attributed to the three organs of government; the Executive, the Legislative and the Judiciary, being the custodians who exercise such powers in trust for the People.

(3) The powers attributed to the respective organs of government include powers that operate as checks in relation to other organs that have been put in place to maintain and sustain the balance of power that has been struck in the Constitution, which power should be exercised only in trust for the People.

(4) The exercise of the sovereignty of the People can only be perceived in the context of the separation of powers as contained in Article 4 and other connected provisions of the Constitution, by the respective organs of government.

(5) The transfer of a power which attributed by the Constitution to one organ of government to another; or the relinquishment or removal of such power, would be an alienation of sovereignty inconsistent with Article 3 read with Article 4 of the Constitution.

CONCLUSIONS APPLIED TO THE PROVISIONS OF THE BILL

Conclusions arrived at in the foregoing analysis have now to be applied to the provisions of the bill, the constitutionality of which should be examined in the light of the ground of challenge.

It is clear that according to the framework of our Constitution, the power of dissolution of Parliament is attributed to the President, as a check to sustain and preserve the balance of power that is struck by the Constitution. This power attributed to the President in broad terms in Article 70 (1) is subject in its exercise to specifically defined situations as set out in provisos (a) to (c) referred to above. Even in these situations, the final say in the matter of dissolution remains with the President. The only instance in which dissolution is mandatory, is contained in proviso (d), in terms of which, if the Appropriation Bill is also rejected, the President shall dissolve Parliament. This is a situation of a total breakdown of the government machinery, there being no money voted by Parliament for the government to function. In such an event dissolution is essential and the Constitution removes the discretion lying in the President by requiring a dissolution. As the Constitution now stands this is the

only instance where Parliament could enforce a dissolution by the President and that too through the oblique means of rejecting the Appropriation Bill twice. This demonstrates the manner in which the Constitution has carefully delineated the power of dissolution of Parliament. The People in whom sovereignty is reposed have entrusted the organs of government, being the custodians the exercise of the power, as delineated in the Constitution. It is in this context that we arrived at the conclusion that any transfer, relinquishment or removal of power attributed to an organ of government would be inconsistent with Article 3 read with Article 4 of the Constitution. The amendments contained in clauses 4 and 5 of the Bill vest the Parliament with the power, to finally decide on the matter of dissolution by passing resolutions to that effect in the manner provided in the respective sub clauses set out above. The residuary discretion that is now attributed to the President (except in Article 70 (1) (d) – Appropriation Bill being rejected for the second time) is removed and it becomes mandatory on the part of the President to dissolve Parliament within four days of the receipt of the communication of the Speaker notifying such resolution.

The provisions which attracted most of the submissions of the Petitioners who opposed the bill, is the proposed Article 70A(1) (a) referred to above, which totally removes the power of the President to dissolve Parliament, if the majority of the members of Parliament belong to a political party or independent group of which the President is not a member. In such event the President shall not dissolve Parliament unless upon a resolution passed by Parliament by a two-thirds majority. Significantly, there were no submissions in support of this provision. Article 4 (b) of the Constitution provides that the executive power of the People shall be exercised by the, President of the Republic, elected by People. Thus upon election the incumbent becomes the "President of the Republic", who in terms of Article 30(1) is "the Head of the State, the Head of the Executive and of the Government, and the Commander-in-Chief of the Armed Forces". The power attributed to such an office cannot possibly be different, dependent on the absence of membership of a political party or group. The Constitution conceives of a President, who is the "Head of the State" and who would stand above party politics. This provision moves in the opposite direction. There may be practical considerations that led to this provision being conceived, of which we cannot be unmindful. However, the Constitution is the "Supreme Law" of Sri Lanka and should not be seen only from the perspective of such considerations that arise in the moment, but as a body of law, which we could uphold according to the oath that we have taken. It is unnecessary to dwell on this matter any further since the Attorney General in his written submission tendered after the hearing in Court was concluded, suggested an amendment of this provision deleting the portions that include references to the absence of membership in a political party or group and the requirement for the resolution to be passed by a two thirds majority.

We would now consider the amendment suggested by the Attorney General according to which the proposed Article 70A(1) (a) is replaced with a provision stating that after the lapse of one year from a General Election, the President shall not dissolve Parliament unless upon a resolution passed by not less than one half of the whole number of members of Parliament, including those not present. It has to be noted that this amendment does not address the inconsistency with Article 3 and 4, dealt with in the preceding sections of this determination. We have stated clearly, on the basis of a comprehensive process of reasoning, that the dissolution of Parliament is a component of the executive power of the People, attributed to the President, to be exercised in trust for the People and that it cannot be alienated in the sense of being transferred, relinquished or removed from where it lies in terms of Article 70(1) of the Constitution. Therefore, the amendments contained in clauses 4 and 5 of the Bill, even as further amended, as suggested by the Attorney General, constitute in our view such

an alienation of executive power, inconsistent with Article 3 read with Article 4 of the Constitution and require to be passed by the special majority required under Article 84(2) and approved by the People at a Referendum, by virtue of the provisions Article 83.

Article 123(2) (c), empowers this Court when making a determination in the manner set out above, to specify the nature of the amendments that would make the provisions in question cease to be inconsistent with the Constitution. Whilst the hearing was in progress, the Court, from time to time, posed questions to learned Counsel to evoke a response on possible amendments. When questioned about an increase of the period of one year from a General Election during which the President shall not dissolve Parliament unless upon a resolution to that effect passed by Parliament, Mr. H.L. de Silva, P.C. firmly submitted that even the slightest increase of that period would be an erosion of the executive power and be inconsistent with Article 3 read with Article 4(b). Questions were posed on the basis of similar provisions in other Constitutions, being mindful at all times of the diversity in the particular structure of such Constitutions. More specifically, attention of the Counsel was drawn to the 1996 Constitution of the Republic of South Africa, which has a fixed term for the duration of the National Assembly without a broad power of dissolution, as contained in Article 70 (1) of our Constitution but includes a provision for dissolution after three years if there is a resolution to that effect, supported by a majority of the Members of the Assembly. This is one of the more recent Constitutions, put in place after an extensive process of consultation and which contributed to the transformation of a conflict-ridden country to a unified Nation. However, we noted that Counsel were slow to respond to these questions. We are mindful of the position that they have to be guided by instructions received from the persons whom they represent. The lines of division were manifestly sharp and the arguments were addressed from polarized perspectives. It is our view that an amendment of the Constitution cannot be looked at in this manner. Dr. Wickremaratne in a submission, replete with facts and instances, cited previous amendments to the Constitution that were alleged to have been done with partisan objectives. These related to a period where the political party in power had a two-thirds majority in Parliament. He may be correct in the sharp criticisms made of such instances. However, partisanship of one side cannot be pitted against partisanship of the other. In the process of enacting law, especially in amending or reforming the Constitution, the sharp edges of the divide should be blunted and we have to seek common ground bearing uppermost in mind the interests of the People who are sovereign.

It is obvious that the proposed amendment has been conceived due to certain difficulties that are envisaged. Although, those who framed the Constitution are presumed to have looked to the future, it may be that they did not fully visualize the stress on the machinery of State that would build up, when there is a divergence in policies between the President who exercises executive power on a mandate of the People, and the majority in the Parliament exercising legislative power also on a mandate of the People. Article 70(1) (a) is intended to provide for such a situation in terms of which during the first year after a General Election held pursuant to a dissolution of Parliament by the President, Parliament could be dissolved only if there is a resolution requesting such dissolution. Thus, in effect during this period the matter of deciding on the dissolution of Parliament becomes a responsibility shared by the President with Parliament. There is no alienation of the power of dissolution attributed to the President. Any extension of this period of one year may be seen as a reduction or as contended by Mr. H.L. de Silva an erosion of that power. However, we are of the view that on an examination of the relevant provisions in the different contexts in which they have to operate, that every extension of such period would not amount to an alienation, relinquishment or removal of that power. That would depend on the period for which it is extended. If the period is too

long, it may be contended that thereby the power of dissolution attributed to the President to operate as a check to sustain the balance of power, as noted above, is by a side wind, as it were, denuded of its efficacy. But, if we strike middle ground, the balance of power itself being the overall objective would be strengthened especially in a situation of a divergence of policy, noted above. We are of the view that if Clauses 4 and 5 of the Bill, dealt with in the preceding portion of this determination are removed and replaced with a clear amendment to proviso (a) of Article 70 (1), whereby the period of one year referred to therein is extended to a period to be specified not exceeding three years (being one half of the period of Parliament as stated in Article 62(2)) that would not amount to an alienation, relinquishment or removal of the executive power attributed to the President. The inconsistency with Article 3 read with 4(b) would thereby cease. The substituted clause should be passed by the special majority provided in Article 84(2) and not require approval by the People at a Referendum.

We would now move to the other clauses of the Bill that will be dealt with in the light of the conclusions stated above.

CLAUSES 2 AND 3(1) OF THE BILL

These provisions relate to the dissolution of Parliament and the amendments contained in Clauses 4 and 5. They attract the determination stated above, based on the inconsistency with Article 3 read with Article 4(b) and require the approval by the People at a Referendum. This inconsistency would cease, if these provisions are removed and replaced with an amendment to proviso (a) of Article 70 (1), as stated above.

CLAUSE 3(2) OF THE BILL

This provision contains an amendment to Article 49(2) of the Constitution which sets out certain situations in which, "the Cabinet of Ministers shall stand dissolved." The sub-Article now specifies three such situations, viz. where the Parliament;

(i) rejects the Statement of Government Policy or,
(ii) rejects the Appropriation Bill or,
(iii) passes a vote of no confidence in the Government.

The amendment removes situation (iii). Taken by itself, this amendment would not make any sense whatever. It appears that this amendment has to be read in the light of the proposed Article 70A (1) (b) which states that, where Parliament passes a resolution declaring that the Government no longer enjoys the confidence of Parliament the President shall, dissolve Parliament. The resulting position is that where Parliament passes a motion of no confidence in the Government, instead of the Cabinet standing dissolved, as presently provided, the Parliament itself which passed the motion will be dissolved. As submitted by Dr. Wickremaratne P.C. the resulting position is illogical and arbitrary. In the context of the framework of the Constitution dealt with above, the matter is more serious. Article 43(1) of the Constitution states as follows:

> 43 (1) "There shall be a Cabinet of Ministers charged with the direction and control of the Government of the Republic, which shall be collectively responsible and answerable to Parliament"

This is a check put in place by the Constitution relevant to the executive organ of government, whereby it is made collectively responsible and answerable to Parliament. The check is enforced, inter alia, by the provision in Article 49(2), which empowers the Parliament to pass a vote of no confidence in the Government, resulting in the dissolution of the Cabinet of Ministers. We are of the view on the application of the reasons set out in the preceding sections of this determination with regard to the exercise of the sovereignty of the people relevant to executive power, that this amendment would amount to an alienation, relinquishment or removal of the legislative power of the People. The amendment as contained in Clause 3(2) would then be inconsistent with Article 3 read with Article 4(a) of the Constitution and require to be passed by the special majority provided in Article 84(2) and approved by the People at a Referendum.

CLAUSE 6 OF THE BILL

In view of the nature of the submissions and the amendment suggested by the Attorney General, we reproduce this clause in full:

6. "A member of Parliament who speaks or votes or abstains from voting on any amendment to the Constitution contained herein, according to his own belief or conscience or free will, shall not be expelled or suspended from membership or be subjected to any disciplinary action by the recognized political party or the independent group as the case may be on whose relevant nomination paper his name appeared at the time of his becoming such Member of Parliament for having so spoken or voted or abstained from voting, and the provisions of sub paragraph (a) of paragraph (13) of Article 99 shall not apply to such member; and the seat of such Member in Parliament shall not thereby become vacant."

All Counsel and petitioners in person, made submissions regarding this Clause. The grounds of objection can be summarized as follows:

(i) That the clause does not satisfy the requirements of Article 82(1) of the Constitution. This Article which states that any amendment of the Constitution must be express, requires that a Bill for the amendment of any provision of the Constitution shall not be placed on the Order Paper of Parliament, "unless the provision to be repealed, altered or added and consequential amendments, if any, are expressly specified in the Bill..." It was submitted that the provision of the Constitution sought to be amended is not expressly stated.

(ii) That the clause is outside the legislative power of Parliament in view of Article 75 of the Constitution which empowers Parliament to make laws but lays down a specific limitation to that power in the following terms –

"Provided that Parliament shall not make any law –

(a) suspending the operation of the Constitution or any part thereof

It was submitted that this clause has the effect of suspending the operation of Article 99(13) (a), being a part of the Constitution.

(iii) That the clause erodes the franchise, which forms part of the sovereignty of the People. It was submitted that the People exercised the franchise at the election of the Members of Parliament, by casting a vote for a recognized political party or an independent group and preference votes were cast to particular candidates, on the premise that they would be subject to disciplinary control by the party or group and in the event of expulsion, be replaced by another candidate. This submission was further developed in relation to Members of Parliament elected on the "National List" as provided in Article 99A. It was further submitted that the franchise has a continuing effect inter alia through Article 99(13) (b) (which provides for the candidate securing the next highest number of preferences to be declared, without a fresh recourse to the electorate) and that clause is thereby an erosion of franchise, forming part of the sovereignty of the People and is inconsistent with Article 3 read with Article 4(e) of the Constitution, as would require the approval by the People at a Referendum.

(iv) That the clause denies to Members of Parliament equality before the law and the equal protection of the law being the fundamental right to equality guaranteed by Article 12(1) of the Constitution. It was submitted that this clause which confers an immunity from disciplinary action that may be taken by a political party or group, only in the instance specified in the clause, is a denial of the right to equality which is thereby an erosion of the People inconsistent with Article 3 read with Article 4(d) of the Constitution as would require the approval by the People at a Referendum.

We would deal with grounds (1) and (2) which are connected in certain respects. Article 82(1), referred to in ground (1), requires that any Bill for the amendment of any provision of the Constitution should expressly specify the provision of the Constitution if that is sought to be 'repealed, altered or added and the consequential amendments, if any'. This manifests a cardinal rule that applies to the interpretation of a Constitution, that there can be no implied amendment of any provision of the Constitution. The Attorney General submitted that in view of the reference to the particular provisions of Article 99(13) (a), the clause should be considered as an 'addition' to that Article and be read as a 'proviso'. In view of ground (2), which goes to the root of the matter, we do not have to deal with this aspect further.

Mr. R.K.W. Gunasekera, who made submissions on this ground of challenge, submitted that proviso (a) and (b) to Article 75 contains specific limitations on the legislative power of Parliament. Proviso (a) cited above, contains a bar on the making of any law, which suspends the operation of the Constitution or any part thereof. That, clause 6 in effect suspends the operation of Article 99(13) (a) in the situation specified in the clause which therefore cannot be validly included in the Bill. It was further submitted that the Court should in such event, give effect to the provisions of Article 75 by declaring that the particular clause has not been validly included in the Bill. Since it is outside the legislative power of Parliament no further question arises as to compliance with the requirement for the clause to be passed by the special majority or be approved by the People at a Referendum that constitutes stages of a process of making law.

The submission in our view raises a very important question of Constitutional Law and of the legislative power of Parliament. In terms of the preamble, the Constitution has been adopted and enacted as the Supreme Law of the Democratic Socialist Republic of Sri Lanka. All State authority flows from the Constitution, which establishes the organs of government; declares

their powers and duties; proclaims the sovereignty of the People, which is inalienable, declares and specifies the fundamental rights and the franchise that form part of the sovereignty of the People. It necessarily follows that the Constitution should apply equally in all situations that come within the purview of its provisions. It is in this context that a strict bar has been put in place in Article 75 on the suspension of the operation of the Constitution or any part thereof. We have to give effect to this provision according to the solemn declaration made in terms of the Fourth Schedule to the Constitution, to "uphold and defend the Constitution"

There are two principal questions that arise in considering the objection that has been raised. They are;

(i) whether the provisions of clause 6 have the effect of suspending the operation of Article 99(13) (a) as contended by Counsel, and,
(ii) whether Article 99(13) (a) could be considered as being a part of the Constitution, so as to attract the bar in Article 75(a)

The phrase, "suspending the operation", would in plain meaning encompass, a situation in which the clause contained in the Bill has the effect of keeping the relevant provision of the Constitution in an inoperative state for a time. The test would be to place clause 6 and 99(13) (a), side by side, and ascertain whether they could apply equally to a given situation, which comes within their purview. Article 99(13) (a) recognizes the right of a political party or of an independent group to expel a member, who is a Member of Parliament; the consequence of such expulsion being the loss of the seat of such Member of Parliament; the review of the validity of such expulsion by this Court; and the process by which the vacant seat is filled. It is manifest that clause 6 strikes at the very root of the process set out in Article 99 (13) (a) in stating that a Member of Parliament "shall not be expelled or suspended from membership or subject to any disciplinary action by the recognized political party...". If clause 6 is enacted in this form, being the later in point of time, it would have the effect of suspending the operation of Article 99 (13) (a). We have to state that the question would have been different, if clause 6 was sought to be enacted as an amendment to Article 99(13) (a) as contended by the Attorney-General. In such event the clause would have to be of general application and not limited to a single instance. The grounds of objection (iii) and (iv) stated above would then have to be considered in relation to such amendment.

We now move to the second question stated above whether, Article 99 (13) (a) the operation of which is sought to be suspended could be considered as being a part of the Constitution so as to attract Article 75.

The Constitution is divided into Chapters, Articles, sub-Articles, Schedules and so on. It is significant that Article 75 does not refer to any of these divisions, but refers to a "part" of the Constitution. This is an indication that we have to look to the functional aspect of the provision that is being suspended and ascertain whether such provision is necessary for the working of the Constitution. To ascertain this matter we have to examine the provisions from three perspectives, viz:

(i) the content of the provision
(ii) the context in which the provision is included;
(iii) the implication of the provision.

As regards (i), we have in the preceding paragraph, set out the content of Article 99(13) (a) by separately identifying its component elements.

As regards (ii) we note that Article 99(13) (a) is found in the Chapter titled "The Franchise and Elections" and significantly that the Article itself deals with proportional representation, being a novel feature in the present Constitution.

As regards (iii), we note that Article 99(13) (a) has implications on the exercise of the franchise as set out in relation to ground (iii) of the objections referred to above and the exercise of Judicial power. The clause has the effect of distorting the former and removing the latter. On the basis of the foregoing analysis, we have no difficulty in concluding that Article 99(13) (a) is a part necessary for the working of the Constitution.

Accordingly, we hold that clause 6 of the Bill has the effect of suspending the operation of a part of the Constitution and cannot be validly enacted by Parliament.

Therefore clause 6 has to be deleted from the Bill.

After the hearing was concluded, the Attorney-General tendered a further written submission requesting us to consider the amendment of clause 6 by the deletion of the words "... and the provision of sub-paragraph (a) of Paragraph 13 of Article 99 shall not apply to such member; and the seat of such Member in Parliament shall not thereby become vacant."

It appears that this amendment has been suggested to overcome the objection referred to above, based on the suspension of Article 99(13)(a). However, we note that the main portion of clause 6 yet remains in terms of which it is specifically provided that a member "shall not be expelled or suspended from membership or be subject to any disciplinary action by the recognized political party..." So long as that portion remains the consequences that would otherwise flow in terms of Article 99 (13) (a) would remain inoperative. Therefore the proposed amendment seeks to achieve by indirect means what cannot be done directly.

The objection referred to above would be applicable in its entirety even if the clause is amended as suggested by the Attorney General.

SUMMARY OF DETERMINATION

1. That clause 6 of the Bill has the effect of suspending the operation of a part of the Constitution and cannot be validly enacted by Parliament in view of the specific bar contained in Article 75 of the Constitution.

2. Clauses 2, 3, 4, and5 contain provisions inconsistent with Article 3 read together with relevant provisions of Article 4 and as such have to be passed by a special majority required under the provisions of Article 84(2) and approved by the People at a Referendum.

3. The inconsistency with Article 3 read with the relevant provisions of Article 4 would cease if clauses 2, 3, 4 and 5 are deleted and substituted with an appropriate

amendment to proviso (a) to Article 70(1) of the Constitution by removing the period of one year in the proviso and substituting that with a period not exceeding three years.

Sarath N. Silva
Chief Justice

S.W.B. Wadugodapitiya
Judge of the Supreme Court

Dr. Shirani A. Bandaranayake
Judge of the Supreme Court

Ameer Ismail
Judge of the Supreme Court

P. Edussuriya
Judge of the Supreme Court

Hector S. Yapa
Judge of the Supreme Court

J.A.N. de Silva
Judge of the Supreme Court

Evolution of Gender Sensitive Justice in the Ad Hoc Tribunals of Rwanda and Former Yugoslavia

*Sheila Varadan**

Introduction

> *Crimes of sexual violence against women in an international context have always occurred. Whether seen as an unavoidable consequence of war or as international conduct, rape and other acts of sexual violence date back as far as war.*
>
> Judge Gabrielle Kirk McDonald,
> Friedman Award Address, Columbia University, March 2, 2000.

Until the early 1990s, sexual violence was perpetrated during conflict with relative impunity. 'If not invisible, it was trivialised...'[1] Although, rape is prohibited in military codes dating as far back as 1385,[2] it has been systematically used as a weapon in conflict since time immemorial.[3] Only in the last decade, has there been any real acknowledgement of gender justice in international criminal law. The creation of and subsequent decisions from the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) marked the first recognition of gender violence as a war crime and a crime against humanity. The influence of these decisions fuelled a global mobilization that culminated in the *Statute of the International Criminal Court*, heralded as a 'landmark' in gender sensitive justice.[4]

In many respects, the ICTY and ICTR initiated the gender-sensitive justice movement. The ICTY and ICTR were initially created in response to the widespread and systemic rapes occurring in Rwanda and Bosnia. The result was the recognition for the first time of rape as a crime against humanity and as an element of genocide. The statutes were also the first to establish mechanisms to protect and provide counselling to victims of sexual violence. Secondly, the cases of Akayesu and Furundzija entrenched a broad and gender neutral

---

* BA (Hons), University of Guelph, Intern at Law & Society Trust from McGill University, Canada

[1] Copelon, R. "International Conference: Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law" 46 McGill L.J. 217.

[2] Nahapetian, K. ***"Selective Justice: Prosecuting rape in the International Criminal Tribunals for the Former Yugoslavia and Rwanda"*** 14 Berkeley Women's L.J. 126; See also **Military Codes of Richard III** (1385) which called for capital punishment of anyone convicted of rape, and rape was prohibited by the military code of Henry V in 1419. Rape was also prohibited by the **Lieber Code**, which was published during the American Civil War to regulate armed conflict.

[3] *Ibid,* "For example, the world passively watched as over 200,000 Bengali women were raped by Pakistani soldiers in Bangladesh's war for independence in 1971. Between 1932 and the end of World War II, the Japanese Imperial Army raped and enslaved over 200,000 Korean, Filipino and other Asian Women."

[4] Copelon, *supra note* 1 at p 233.

definition of rape, focusing on the violation of the individual's sexual autonomy as opposed to a loss of chastity. Thirdly, the Tadic, Furundzija, and Celibici case explicitly abolished evidentiary rules regarding corroboration and the victim's prior sexual history. Fourthly, the Akayesu and Celibici case recognised rape as a form of torture. The significance of these decisions is felt in the Rome Statute, which relied heavily on the ICTY and ICTR statutes, judgements and evidentiary rules. This paper intends to examine the evolution of gender sensitive justice by noting its achievements in the ICTY and ICTR.

The evolution of the definition of 'rape' under the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda

Prior to the atrocities in Yugoslavia and Rwanda, the international community largely saw sexual violence as a tolerable and inevitable consequence of war.[5] The widely publicised rape of 20,000 women in the former Yugoslavia in the early 1990s shocked the international community and spurred the creation of the international tribunals to address these blatant human rights abuses.[6]

The ICTY and ICTR were both created under United Nations Security Council Resolutions.[7] However, neither of the UN Security Council resolutions specified how the tribunals would be set up or on what legal basis. Unlike the Nuremburg tribunal[8], there was no convention between state parties. The treaty approach was not favoured because it would require time to draft the provisions, and then additional time to sign and ratify them. Even then, at the end of this process, there would be no guarantee that the tribunal would come into force. In light of such uncertainties, it was argued that the Security Council should exercise its power under Chapter VII of the United Nations Charter to establish the tribunal in the name of restoring international peace and security. The advantages were the expeditious establishment of the tribunal coupled with its immediate binding effect on all UN members pursuant to Chapter VII of the United Nations Charter.[9]

---

[5] Nahapetian, *supra note* 2 at p.128.
[6] Nahapetian, *supra note* 2 at p.128.
[7] The ICTY was formed under United Nations Security Council Resolution 808 and 827. Resolution 808 declared "that an international tribunal ...be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the former Yugoslavia since 1991." The ICTR was established under United Nations Security Council Resolution 955 (1994) with the same terms, "to prosecute persons responsible for genocide and other serious violations of international humanitarian law." **Security Council Resolution on the Establishment of an International Tribunal for the Former Yugoslavia**, reprinted in (1993) 14 Hum Rts. L. J. 197, **Security Council Resolution on the Establishment of an International Tribunal for Rwanda**, reprinted in (1994) 16 Hum Rts. L.J. (1994).
[8] The Nuremberg Tribunal was established under the **Nuremberg Charter, 1945 Charter of the International Military Tribunal**. The Charter was an agreement among the allied Powers. However, the tribunal was not an international criminal tribunal in that only a select group of states participated in its formation, and it was established as a military tribunal – not a criminal tribunal.
[9] **Report of the Secretary-General under the Security Council Resolution 808**, Doc. S/2504, 3 May 1993, reprinted in (1993) 14 Hum Rts. L.J. 198.

Circumventing the treaty process meant that there was no international consensus over the subject-matter jurisdiction of the court. In other words, there was no forum (e.g. a conference) to discuss and establish the specific crimes over which the tribunal would have jurisdiction to prosecute. This posed a problem under the principle of *nullum crimen sine lege* ie. a person cannot be punished for a crime that is not already established law.[10] To get around this problem, the Security Council looked to customary international law for the purposes of the subject-matter jurisdiction of the ICTY.[11] 'Through the use of customary international law, the ICTY would avoid creating new offences, applying law established a posteriori, (and) confronting the problem of the adherence of some but not all states to specific conventions.'[12] The same reasoning was then applied to the ICTR. The result of the Security Council decision is that all tribunal judgements are based on and justified under customary law.

A gender sensitive definition of 'rape'

Three cases specifically deal with the definition of rape, *Akayesu*,[13] *Furundzija*[14] and *Foca.*[15] *Akayesu* was handed down from the ICTR in September 1998. The judgement was seminal in two respects. *Akayesu* was the first judgement to hold that rape and sexual violence could constitute the factual elements of genocide, 'in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such.'[16] Secondly, *Akayesu* was the first Tribunal judgement to define rape. The Tribunal noted that 'there is no commonly accepted definition of this term [rape] in international law.'[17] It was also acknowledged that 'while rape has been defined in certain national jurisdictions as non-consensual intercourse'[18], there are considerable variations in the definitions of this act. To avoid creating a restrictive and mechanical definition, the Tribunal concluded that;

> *rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body*

---

[10] Bassouini, M. C. Crimes Against Humanity in International Law (1992) at p.281.

[11] Mettraux, Guénaël ***'Crimes Against Humanity in the Jurisprudence of the International Tribunals for the Former Yugoslavia and for Rwanda'*** (2002) Harvard L J, Winter.

[12] *Ibid.*

[13] ***Prosecutor*** **v.** ***Akayesu***, Case no. 96-4-T (International Criminal Tribunal for Former Rwanda, Trial Chamber, 2 September 1998) accessed at http://www.ictr.org/ENGLISH/judgements/AKAYESU/akay001.htm [hereinafter refered to as *Akayesu*].

[14] ***Prosecutor*** **v.** ***Furundzija***, Case No. IT-95-17/1 (International Criminal Tribunal for Former Yugoslavia, Trial Chamber, 10 December 1998) accessed at http://www.un.org/icty/furundzija/trialc2/judgement/fur-tj981210e.htm [hereinafter refered to as *Furundzija*].

[15] ***Prosecutor*** **v.** ***Kunarac***, Case No. IT-96-23-I (International Criminal Tribunal for Former Yugoslavia, 22 February 2001) accessed at http:///www.un.org/icty/foca/trialc2/judgement/index.htm [hereinafter refered to as *Foca*].

[16] *Akayesu, supra note* 13 at para 731.

[17] *Ibid.*

[18] *Ibid* at para 596.

> *parts. The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment does not catalogue specific acts in its definition of torture, focusing rather on the conceptual framework of state sanctioned violence. This approach is more useful in international law... The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances, which are coercive. Sexual violence, which includes rape, is considered to be any act of a sexual nature, which is committed under circumstances, which are coercive. [...]*[19]

Because the judgement emphasized rape as a violation of personal dignity, it was also able to find that 'rape (did) in fact constitute torture.'[20] The Trial Chamber went further and held that 'such acts (rape) are not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.'[21] The Tribunal crafted a broad definition of rape, freeing it from 'mechanical descriptions that required penetration of the vagina by the penis.'[22] The effect of *Akayesu* was to entrench the first clear definition of rape into international customary human rights law.

In November 1998, the Chamber revisited the *Akayesu* definition in the case of *Celibici*, holding that, 'this Trial Chamber agrees with the above reasoning, and sees no reason to depart from the conclusion of the ICTR in the *Akayesu Judgement* on this issue.'[23] The effect of *Celicibi* was to adopt the *Akayesu* definition in the ICTY.

Shortly after, in December 1998, the ICTY provided its most substantive discussion on rape thus far, in *Furundzija*. The Trial Chamber argued that the definitions of rape in *Akayesu* and *Celibici* suffered from a lack of specificity and they did not adhere to the maxim, *nullum crimen sine lege stricta*.[24] To remedy their concern, the Chamber looked to expand the definition by examining, 'the principles of criminal law common to the major legal systems of the world.'[25]

The Trial Chamber examined the provisions on rape of thirteen common law and civil law jurisdictions.[26] They argued that 'these sources ... disclose general concepts and legal

---

[19] *Ibid* at para 597-8
[20] Campanaro, J. ***"Women, War and International law: The Historical Treatment of Gender-Based War Crimes,"*** (August 2001) Georgetown L.Jat 2584.
[21] *Akayesu*, *supra note* 13 at para 688.
[22] Copelon, *supra note* 1.
[23] ***Prosecutor* v. *Delalic***, Case No. IT-96-21 (International Criminal Tribunal Former Yugoslavia, Trial Chamber, 16 November 1998) accessed at http://www.un.org/icty/celebici/trialc2/judgement/main.htm [hereinafter *Celebici*].
[24] Judge Gabrielle Kirk McDonald, "The International Criminal Tribunals: Crime & Punishment in the International Arena" 25 Nova L. Rev. 463 at 477.
[25] *Furundzija*, *supra note* 14 at para 177.
[26] *See* Section 361(2) of the Chilean Code, Art. 236 of the Chinese Penal Code (Revised) 1997; Art 177 of the German penal Code; Art 177 of the Japanese Penal Code; Art 179 of the SFRY Penal Code; Section 132 of the Zambian Penal Code; Art 201 of the Austrian Penal Code; French Code Pénal Arts. 222-23; Art 519 of the Italian Penal Code (as of 1978); Art 119 of the Argentian Penal Code; Section 375 of the Pakistani Penal Code 1995 and Art. 375 of the Indian penal Code; The Law of South Africa.

institutions which, if common to a broad spectrum of national legal systems, disclose an international approach to a legal question which may be considered as an appropriate indicator of the international law on the subject.'[27] Irrespective of the considerable differences among the jurisdictions,[28] the Chamber held that 'most legal systems in the common and civil law worlds considered rape to be the forcible sexual penetration of the human body by the penis or the insertion of any other object into either the vagina or the anus'.[29] The Tribunal also noted that 'a trend can be discerned in the national legislation of...States of broadening the definition of rape so that it now embraces acts that were previously classified as comparatively less serious offences.'[30] With that, the Trial Chamber sought to include forced penetration of the mouth by the male sexual organ as part of the rape definition. It was argued that such an act constituted, 'the most humiliating and degrading attack upon human dignity.'[31] And because 'human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law'[32], it should clearly fall within the ambit of rape. Thus, the Trial Chamber concluded that

> *The objective elements of rape [are]:*
>
> *(i) the sexual penetration, however slight :*
>
> *(a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or*
> *(b) of the mouth of the victim by the penis of the perpetrator;*
>
> *(ii) by coercion or force or threat of force against the victim of a third person.*[33]

The *Furundzija* decision is critical because it entrenches a precise definition of rape within international law that is divorced from historical notions of chastity, focusing instead on the violation of sexual autonomy.

In 2002, the ICTY handed judgement on *Foca*. The *Foca* judgement was the first international customary law case to deal with the aspect of consent in sexual offences. While

---

[27] *Foca, supra note* 15 at para 390.
[28] In some countries, rape was strictly defined as the penetration, however slight, of the female sex organ by the male sex organ, (***Furundzija***, at para 180); See also Section 375 of the Pakistani Penal Code (1995); Art. 375 of the Indian Penal Code; The Law of South Africa; Art. 364 of the Sri Lankan Penal Code. While in other jurisdictions, there was a requirement that the victim be female. See Section 361(2) of the Chilean Code, Art. 236 of the Chinese Penal Code (Revised) 1997; Art 177 of the German penal Code; Art 177 of the Japanese Penal Code; Art 179 of the SFRY Penal Code and Section 132 of the Zambian Penal Code.
[29] *Furundzija, supra note* 14 at para 181.
[30] *Ibid* at para 179.
[31] *Ibid* at para 183.
[32] *Ibid.*
[33] *Furundzija, supra note* 14 at para 185.

the Trial Chamber agreed with the *Furundzija* definition, they found it necessary to broaden the definition in respect of the circumstances under which sexual acts are criminalized as rape. In *Furundzija*, the Trial Chamber focused primarily on 'coercion or force or threat of force against the victim or a third person.'[34] In *Foca* it was argued that the second part of the definition was too narrow with respect to what was stated in international law. 'In stating that the relevant act of sexual penetration will constitute rape *only if* [emphasis added] accompanied by coercion or force or threat of force against the victim or a third person, the *Furundzija* definition does not refer to other factors which would render an act ...*non-consensual or non-voluntary* which...is...the accurate scope of this aspect of the definition in international law.'[35] In reconsidering the definition, *Foca* looked at a broad spectrum of national legal systems to ascertain the 'common denominators' which embody the *principles* which must be adopted in the international context. In doing so, the Trial Chamber argued that the unifying trait was not only the sexual penetration under coercion or threat, but also a broader and more basic principle of 'penalising violations of sexual *autonomy'*.[36] The judgement created three broad categories of circumstances in which a sexual act will be criminalised:

> a) *the sexual activity is accompanied by force or threat of force to the victim or a third party ;*
> b) *the sexual activity is accompanied by force or a variety of other specified circumstances which made the victim particularly vulnerable or negated her ability to make an informed refusal ; or*
> c) *the sexual activity occurs without consent of the victim.*[37]

In *Foca*, the Trial Chamber considered the scope of consent from the national laws of eleven countries. Under the English Statute on the subject, a man commits rape if at that time he 'knows that she does not consent to the intercourse or he is reckless as to whether she consents to it ...'[38] In the other Common Law jurisdictions, specifically Canada,[39] New Zealand[40] and Australia,[41] recklessness and wilful blindness as to consent is also sufficient

---

[34] *Foca, supra note* 15 at para 389.
[35] *Ibid.*
[36] *Ibid* at para 391.
[37] *Ibid* at para 393.
[38] ***Foca***, *supra note* 15 at para 404; see also Sexual Offences (Amendment) Act of 1976, amending s.1 of the Sexual Offences Act 1956, (U.K)
[39] Canada Criminal Code, s. 273.2(a)(ii), "accused cannot argue consent where it arises out of recklessness or wilful blindness"; s.273.2 (b) "accused cannot argue consent where the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting."
[40] The New Zealand Crimes Act (1961), s.128 (1) defined 'rape' as penetration of the woman, "(a) Without her consent; and (b) Without believing on reasonable grounds that she consents to that sexual connection."
[41] Crimes Act, 1958, Victoria, s.38, "A person commits rape if (a) he or she intentionally sexually penetrates another person without that person's consent while (b) being aware that the person is not consenting or might not be consenting;;" See also Crimes Act 1900 of New South Wales, s.611; Crimes Act 1900 of Australia Capital Territory s.92D; Criminal Code of South Australia, s.48.

to establish rape. In distilling common principles from these jurisdictions, the Trial Chamber concluded that,

> *consent ...must be given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The mens rea is the intention to effect this sexual penetration, and the* ***knowledge*** *[emphasis added] that it occurs without the consent of the victim.*[42]

Foca deals with the responsibility of the accused in ascertaining the requirement of the knowledge of non-consent. If the accused is aware that the victim has not consented, then the *mens rea* is fulfilled. England, among other common law jurisdictions[43] imposes a legal obligation on the accused to take reasonable steps to ascertain consent where there is doubt as to the victim's consent. Canadian law explicitly spells out such an obligation under s.273 of the Canadian Criminal Code where it is stated that;

> *It is not a defense...that the accused believed the complainant consented...where*
>
> *(a) the accused`s belief arose from*
> *[...]*
> *(iii) recklessness or wilful blindness ; or*
>
> *(b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.*[44]

If there is no duty imposed on the accused, then a legal loophole is created. For example, if the prosecution cannot prove the victim's non-consent beyond a reasonable doubt then the rapist will be acquitted, even though *the accused* might have been fully aware of the victim's non-consent and consciously acted with that knowledge. Although the laws of most Common Law jurisdictions, including England, have provisions to address the issue of recklessness and wilful blindness in rape, international criminal law still remains ambivalent over whether such a duty should be imposed on the accused.

The effect of *Akayesu*, *Furundzija* and *Foca* decisions was to entrench a broad and gender sensitive definition of rape in international customary law. Moreover, the Tribunal judgements became a resource on which the drafters of the *Rome Statute* relied in establishing the International Criminal Court. The Preparatory Commission for the International Criminal Court mirrored the ICTY and ICTR definition of rape in their final

---

[42] ***Foca***, *supra note* 15 at para 411.
[43] Eg. Canada, New Zealand, Australia.
[44] Section 273.2 of the Criminal Code of Canada.

draft text of the Elements of Crime. Under article 7(1)(g)-1 and article 8(2)(b)(xxii)-1, rape is defined as;

> *The perpetrator invad[ing] the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.*[45]

The elements of the crime of rape are drawn almost exclusively from the judgements in *Akayesu* and *Furundzija*. In this sense, the ICTY and ICTR were instrumental in redefining the crime of rape, creating a gender neutral and expansive definition centering around the violation of the victim's sexual autonomy and dignity.

Rape as Torture

In *Akayesu* and *Celibici*, the tribunals also held that rape constituted a form of torture. These judgements were seminal in the gender sensitive justice movement because they constituted the first international acknowledgement that, rape was more than just a private act of sexual violence. They recognised that rape could be a tool, deliberately employed to inflict punishment during conflict. *Akayesu* was first to consider the question of rape as torture. The Trial Chamber took an emphatic position claiming that,

> *Like torture rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment control or destruction of a person. Like torture rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.*[46]

The ICTY in *Celibici* offered a more extensive discussion on the notion of rape as torture. The Trial Chamber began by surveying the various international instruments dealing with torture in order to ascertain a definition of torture. Although torture was prohibited in numerous international instruments[47], the Trial Chamber argued that only three instruments attempted to articulate a legal definition of torture, the Declaration on Torture, the Torture

---

[45] **Report of the Preparatory Commission for the International Criminal Court: Finalized Draft Text of the Elements of Crimes,** United Nations Preparatory Commission of the International Criminal Court, PCNIC/2000/INF/3/Add.2.

[46] ***Akayesu***, *supra note* 13 at para 597.

[47] Torture is expressly prohibited in humanitarian law under the Geneva Conventions of 1949. Likewise, it is also prohibited under the Universal Declaration of Human Rights – Art. 5, and the International Covenant on Civil and Political Rights – Art. 7. In addition, regional human rights instruments have prohibited torture, including the European Convention on Human Rights – Art. 5(2), the American Convention on Human Rights – Art.3, the Inter-American Convention to Prevent and Punish Torture – Art. 1, and the African Charter on Human and People's Rights – Art.5.

Convention, and the Inter-American Convention. The Chamber ultimately adopted the definition in the *Torture Convention* claiming that 'it include[d] the definitions contained in both the Declaration on Torture and the Inter-American Convention and thus reflect[ed] a consensus which the Trial Chamber considers to be representative of customary international law.' Thus the definition of torture was articulated as:

> *'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.*[48]

In applying this definition to rape, the Trial Chamber considered two things. Firstly, whether rape met the threshold of 'severe pain or suffering.' Secondly, whether rape was used as a form of punishment which is intentionally inflicted upon a person for the purposes of soliciting a confession by coercing or intimidating for any reason based on discrimination of any kind.

With respect to the first requirement, the Chamber looked to the recent judgements in the European Court of Human Rights and the Inter-American Court of Human Rights. In 1996, the Inter-American Commission decided in *Fernando and Raquel Meija*, that rape did infact constitute torture and was in breach of article 5 of the *Inter-American Convention of Human Rights*. The Commission held that, '[r]ape causes physical and mental suffering in the victim. In addition to the violence suffered at the time it is committed, the victims are commonly hurt or, in some cases, are even made pregnant.'[49]

The European Court issued a judgement affirming the Inter-American Court position in *Aydin* v. *Turkey*. The Court distinguished rape from ill-treatment by stating that,

> *Rape...must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute physical pain of forced*

---

[48] ***Celibici***, *supra note* 23 at para 465.

[49] **Annual Report of the Inter-American Commission on Human Rights**, Report No. 5/96, Case No. 10.970, 1 March 1996 at p. 187.

penetration, which must have left her feeling debased and violated both physically and emotionally.[50]

Additionally, the Trial Chamber looked at the 1992 report of the UN Special Rapporteur on Torture which stated that 'rape or other forms of sexual assault against women in detention were a particularly ignominious violation of the inherent dignity and the right to physical integrity of the human being, they accordingly constituted an act of torture.'[51] In light of this overwhelming evidence in international law, the Trial Chamber concluded that 'rape and other forms of sexual violence...constituted torture, in the same manner as any other acts that meet the...criteria'[52] of torture outlined in the Torture Convention. *Celibici* and *Akayesu* are landmark judgements in international criminal law because they mark the first recognition of state-sanctioned rape as torture in international customary law where formerly rape was seen as a random act of sexual violence perpetrated by an individual.

The Rule on Corroboration

The rule on corroboration has long since been deemed a form of discrimination against women. The requirement evolved as a common law rule in English Law, that was then adopted by many common law traditions. Formerly 'corroboration was required as a rule of practice. The corroborative evidence [had] to show the absence of consent....[and] the nature of the corroboration in rape cases must necessarily depend on the facts and circumstances of each case.'[53] The rule has since been relaxed, only requiring the trier of fact to warn the jury that it is unsafe to convict an accused on the unsupported testimony of the victim alone.[54]

The rule on corroboration implies that the victim's testimony is less credible than the testimony of other victims. The reasoning behind the corroboration rule is set out in *Coomaraswamy on Evidence* where it states that,

... corroboration is required...because cases of sexual offences are particularly subject to the danger of deliberately false charges, resulting from sexual neurosis, fantasy, jealousy, spite or simply a girl's refusal to admit that she consented to an act of which she is now ashamed. The distinctive reason for the warning in sexual cases is that experience shows

---

[50] ***Aydin v. Turkey***, ECHR Judgement of 25 Sept. 1997,
[51] **Report of the Special Rapporteur, Mr. Nigel S. Rodley**, submitted pursuant to Commission on Human Rights Resolution 1992/32, E/CN.4/1995/34, para. 16
[52] ***Celebici,supra note*** 23 at para 496.
[53] Coomaraswamy, E.R.S.R. **The Law of Evidence (with Special Reference to the Law of Sri Lanka)**, Vol. II, Lake House Investment Limited Book Publishers: Colombo, Sri Lanka, 1989 at p.637.
[54] Gomez, M. & S. **From Rights and Shame to Remedies and Change,** 1999 (Shakti: Colombo, Sri Lanka) at p.1.

that the complainant's evidence may be warped by psychological processes which are not evident to the eye of common sense.[55]

Clearly this rule is founded on sexist and stereotypical attitudes which presume that female victims of rape are inherently more dishonest and more likely to falsify allegations than victims of other crimes.

The ICTY, ICTR and the ICC have taken active steps to eradicate such discriminatory rules. The Tribunals categorically stated that corroboration was not part of customary law, abolishing the requirement in the ICTY and the ICTY Rules of Evidence and Procedure. The first case handed down by the ICTY quickly and effectively dispelled the myth on corroboration. In *Tadic*[56] the defense argued for the requirement of corroboration, or the rule of *unus testis, nullus testis* (one witness is no witness). The Trial Chamber rejected the requirement for corroboration, citing three reasons. First, under evidence sub rules 89 (C) and (D), only evidence that is relevant and has a probative value will be introduced. By definition, evidence of one witness is legitimate and probative evidence, otherwise it would not be admitted under sub rule 89. So, to argue that one witness is no witness is to argue contrary to evidence sub rules 89(C) and (D). Second, rule 96 (i) of the ICTY Statute explicitly states that in sexual offenses, 'no corroboration is required.'[57] Third, and more importantly, the Trial Chamber emphasised the need to afford the testimony of victims of sexual assault the same presumption of reliability as the testimony of victims of other crimes, something long denied to victims of sexual assault by the common law.'[58] The ICTY concluded that corroboration is not part of customary law.[59] As a result of the *Tadic* decision and rule 96 (i) the ICC also abolished the requirement for corroboration.

Prior Behaviour of the Victim – History of Sexual Conduct of the Victim

Evidence of prior sexual conduct has been restricted (to some degree) in almost all Common Law jurisdictions.[60] At the international level, evidence of prior sexual conduct is inadmissible under rule 96 (iv) of the ICTY Statute and ICTR Statute. The ICTY examined rule 96 (iv) in *Celicibi*, concluding that 'such evidence is specifically excluded by virtue of sub-Rule 96 (iv)' and that there is a 'need for protecting the privacy of witnesses and the necessary balancing between such considerations and the general principle of public proceedings.' [61] The ICC Rules of Evidence largely mirrored the ICTY and ICTR evidence

---

[55] S*upra note* 53
[56] ***Prosecutor* v. *Tadic***, Opinion and Judgement, No. IT-94-1-T (May 7, 1997) [hereinafter referred to as *Tadic*].
[57] ICTY Rules of Evidence
[58] ***Tadic***, *supra note* 56 at para 536.
[59] *Ibid*, at para 539.
[60] H.R. Gavin, ***"Shielding Rape Victims in the State and Federal Courts: A Proposal for the 2nd Decade,"*** 70 Minn. L. Rev. 763.
[61] ***Celibici***, *supra note* 23 at para 70.

rules. As a result, under rule 71 of the ICC Rules of Evidence the admission of the 'evidence of prior or subsequent sexual conduct is prohibited.'[62]

Gender Sensitive Mechanisms in the ICTY, ICTR and the ICC

What was particularly laudable about the ICTY and ICTR were their efforts to ensure a minimum degree of gender sensitivity throughout the process involved in the tribunal. Specifically, the ICTY and ICTR were the first judicial body to offer a built-in system of protection and counselling for victims and witnesses of sexual violence. Rule 34 of the ICTY Rules on Evidence established a Victims and Witnesses Support Unit providing 'counselling and support for sexual assault survivors and witnesses.'[63] One of the objectives of the counselling is to 'encourage the reporting of incidents of sexual violence, and as such the counselling is meant to give a supportive and legally responsive ear.'[64] What makes the process particularly unique is section 34(B) which requires, 'that due consideration be given, in the appointment of staff, to the employment of qualified women.'[65]

The ICC mirrored the ICTY and ICTR in many respects. The ICC Rules on Evidence also established a Victims and Witnesses Support Unit, outlining their responsibilities under rules 16 and 17. Under rule 17(2)(a)(iii), the Unit ensures that the victim obtains the medical, psychological and other appropriate assistance they may require. Rule 16(1)(d) explicitly requires the Unit to take a gender-sensitive approach to facilitate the participation of the victim at all stages of the proceedings.

The ICC and the ICTY have also taken measures to ensure the safety and confidentiality of the complainant. Under the ICC and ICTY Rules of Procedure and Evidence, the Victims and Witnesses Support Unit is specifically designated with the task of providing witnesses with short-term and long-term protection. Likewise, the Unit is charged with protecting the confidentiality of the victim before, during and after proceedings. These measures are taken in order to encourage the reporting of incidents sexual violence. While these initiatives are bold and precedent-setting steps, there is debate as to their adequacy. In the words of one author, the Unit 'does not sufficiently alleviate the fears... many charges have been withdrawn because women, fearful for their safety have refused to testify against their assailants.'[66] However, irrespective of these short-comings, the ICTY and ICC have initiated measures that no other legal institution has taken thus far.

The emphasis on gender sensitivity, first in the ICTY, and now also in the ICC is a precedent-setting initiative in the prosecution of sexual violence. The importance given to counselling,

---

[62] Rule 71, ICC Rules of Procedure and Evidence
[63] *Supra note* 20 at 2574.
[64] *Ibid.*
[65] *Ibid* at 2575.
[66] *Ibid* at 2575.

encouraging the report of incidents of rape and ensuring privacy, all contribute to assist the victim's process of recovery from this traumatic experience, while also strengthening the prosecution of sexual violence. Also, these support systems highlight the unique and horrific nature of sexual crimes, something that has been long denied to victims in the common law.

Conclusion

The ICTY, ICTR and the subsequent ICC Statute have in many ways, broke new ground in gender-sensitive justice. The creators sought to dispel the sexist myths and ideologies that have long since plagued victims of gender violence. The ICTY, ICTR and ICC established rules of evidence that afforded victims of rape the same credibility as victims of other crimes, abandoning the long-standing Common Law rule on corroboration. Furthermore, they eradicated the right of the defense to question the veracity of the victim's complaint, based on her prior sexual conduct. However, what was most significant were the judgements relating to rape and sexual violence. The Tribunal established a definition of rape that was gender-neutral and free of the mechanical requirement of penetration. The definition characterised rape as a violation of human dignity, and not a loss of chastity. The Tribunals were also the first to recognise rape as a form of torture under customary international law. The ensuing effect has been to shift the paradigm in international criminal law, making sexual violence a serious war crime onto itself as opposed to a manifestation of yet another war crime. In this respect, the Tribunals have advanced gender justice to a new level in international criminal law.

This paper also looked at gender sensitive mechanisms that have been put in place to aid victims and witnesses to sexual violence. The ICTY and ICTR created the Victims and Witnesses Support Unit which is specifically designed to provide counselling, legal support and safety to victims of sexual violence. The objective of the Unit is to encourage the reporting and prosecution of such offences. In addition, the ICTY and ICTR also took active steps to protect the victim's privacy and to ensure their safety. Moreover, there is particular emphasis on the need to employ staff that are gender sensitive. The ICC mirrored these procedures and adopted many of these mechanisms into its own Rule of Procedure. Although it has been argued that these initiatives still fall short of adequately addressing the need for gender sensitive justice, the mere act of entrenching such procedures into the Statutes of Establishment is a first step in recognising the importance of gender sensitivity in the prosecution of sexual violence.

In closing, it should be noted that gender violence is not a recent problem; nor is it restricted to one regional. It has plagued every society in every part of the world, in every period of history. It was formerly tolerated during war and largely seen as an inevitable consequence of conflict. Only in the past decade, has there been an awakening in the effort to find justice for the victims of gender violence. First in the establishment of ad hoc Criminal Tribunals, then in the establishment of the permanent International Criminal Court. This mobilisation of

NGOs, legal scholars, and judicial experts has culminated in a system of justice that attempts to recognise gender and gender related violence. While it can be said that international law still has a considerable way to go before gender sensitive justice becomes an accepted and entrenched reality, the creation of the ad hoc Criminal Tribunals and the International Criminal Court marks the beginning of a movement to recognize the need for justice and relief that victims of sexual violence have long been denied.