LST REVIEW

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FREEDOM OF EXPRESSION AND THE MEDIA

A CRITIQUE OF ELECTORAL DESIGN

THE DRAFT DOMESTIC VIOLENCE ACT; ITS SUBSTANCE AND ANALYSIS

LAW & SOCIETY TRUST

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Editor's Note......

The focus of this Issue of the Review is diverse and intentionally so. Firstly, it publishes a judgement of the Supreme Court delivered late last year *(MND Perera vs K Balapatabendi and Others,* SC (FR) No 27/2002, SCM 19.10.2004) on the request of readers who have been unable to obtain copies of the judgement as it has not, as yet, been reported in the Sri Lanka Law Reports.

The judgement is important for its majority view, (by Justice C.V. Wigneswaran with a concurring opinion by Justice Shiranee Tilakawardane) that a direction by President Kumaranatunge issued in December 2001 barring particular private media personnel, (perceived as being antagonistic to her Presidency) from being allowed into the President's House to broadcast or report the swearing in of the Premier who (at that time) came from a coalition headed by the United National Party, (UNP), the main political party opposed to the Peoples Alliance headed by President Kumaranatunge, occasioned a violation of the rights of the barred media personnel to equality before the law and freedom of speech and expression.

This refusal is held to constitute "naked discrimination" for extraneous political or personal considerations, which cannot be condoned from persons "however highly placed".

Significantly, the majority view holds that the mere directive of the President is not sufficient to justify unconstitutional action of minions. Following on previous case law, it is ruled that a Presidential directive cannot be a defence to subordinate action if it is manifestly and obviously illegal.

Thus, Justice Wigneswaran reasons that;

> *"a leader of a sovereign country is not expected to be parochial nor vindictive nor spiteful whatever the provocations of his subjects may be, real or imaginary. Leaders are no doubt, human beings. But they are humans clothed with power and privileges granted by their compatriots out of their love and respect. This power is not to be used to harass such compatriots."*

The concurring judgement by Justice Tilakawardane observes that personal preferences have to be subjugated in all public and official decision making. This must be so, indeed, not only of the substantive decision itself but also with regard to the entire process of decision making.

Justice Dissanayake, in his dissent, takes the view that public property and public place cannot be equated to each other and that while all property owned by the state is public

property, not all are public places. The official residence of the head of State is not a public place and therefore, there is no right of access.

The Issue also publishes two short discussion papers written on invitation for the Review, both of which raise the point that systemic reform whether in relation to electoral reform or gender inequality should be in the context of informed historical analysis and involve substantial questions of rights.

The first on *Electoral systems and Political Outcomes* **by Sunil Bastian** engages in a thoughtful analysis of the political outcome of the two electoral systems, ie; first past the post and proportional representation (PR), that has existed in Sri Lanka.

He questions particular assumptions often made in exercises of electoral system design and stresses that it is important to unravel the nature of the dominant political forces and their interests in order to understand why particular electoral systems emerge at a particular time.

Thus;

> *'Knowledge of these political forces is necessary for electoral system design. In order to promote electoral designs that will have positive outcomes, it is necessary to engage with these forces. Therefore, rather than some ahistorical discussion about electoral systems, engagement with political forces existing at a particular historical juncture is necessary.'*

In observations that are very relevant at this time of fluctuating electoral reform, he cautions against a process of institutional design that has the praiseworthy objective of promoting free and fair elections but perpetuate electoral processes that do not critically interrogate the histories, social structures, discourses and ideologies that prevail in post colonial societies.

Though his paper does not specifically discuss the question whether PR has helped or hindered women representation in legislative assemblies, this is also pertinent to the discussion.

The prevalence of intense levels of electoral violence heightened by the inter-party rivalry necessitated by PR, the lack of a sustained political culture, the underdeveloped if not authoritarian structures of political parties and their prevailing ignorance of women's interests have combined to make political representation of women in Sri Lankan local, provincial and national political assemblies, the lowest in South Asia. This classically illustrates the principle that PR, (generally said to benefit representation of women as exemplified by South Africa), cannot triumph over deeply ingrained factors that negative its impact

Though sporadic attempts have been made to address this deplorable under-representation of women, most recently by a proposal to bring in mechanisms ensuring that, at least one

third of the elected representatives to local councils are women, these efforts have unfortunately been overtaken by more strident party political disputes.

The closing focus of the Review is in regard to the Bill on the 'Prevention of Domestic Violence'. The draft Domestic Violence law (an outcome of years of struggle by womens' groups in the country) was presented to Parliament on the 22nd of March 2005. It provides for aggrieved persons to make an application to the Magistrate's Court for the issuance of a protection order to prevent an act of domestic violence.

An aggrieved person, (defined as a person in respect of whom an act of domestic violence has been or is likely to be committed) can make an application as can a parent or a guardian, a person with whom the child resides or a person authorised on that behalf by the National Child Protection Authority on behalf of a child. Thirdly, a police officer could intervene on behalf of an aggrieved person.

While other domestic violence acts permit a wider base of intervention in court, such as by bona fide public interest groups, it is notable that the Sri Lankan draft does not go so far. The exception where a police officer can intervene on behalf of an aggrieved person has, of course, limited value, in a context where the manner in which the police trivialise or dismiss complaints of domestic violence lodged in police stations is well documented. In that regard, the limited ambit of that clause is somewhat disappointing.

The backbone of the draft act is its provisions empowering the court to grant interim orders and protection orders where they are deemed to be necessary to prevent any act of domestic violence. Currently, the Bill remains part debated due to recommendations made during the course of debate in the House that a non adversarial mechanism be incorporated as a preparatory stage of dispute resolution before a Protection Order can be applied for. Womens' groups have argued that the incorporation of such a mechanism would result in a highly deleterious weakening of the law

Ambika Satkunthanathan provides a critical analysis of the provisions of the draft law and highlights the need to further strengthen certain of its provisions. The continuing theme informing her analysis is the acknowledgement that many acts committed against women in the home, such as physical assault etc, are illegal and would result in action being taken against the perpetrator if committed against a stranger. She contends accordingly that it is important for the law to treat all persons equally and extend the same protection to women by viewing domestic violence seriously and as a violation of human rights.

The Review also publishes supplementary material relating to the draft law issued by the Ministry of Justice and Judicial Reforms, for the benefit of its readers.

Kishali Pinto-Jayawardena

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

In the matter of an Application in terms of Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka

SC (FR) No. 27/2002

M.N.D. Perera of
No. 3, Adamally Place, Colombo 04.
Petitioner

Vs.

1. Mr. Kusumsiri Balapatabendi
   Secretary to the President,
   Presidential Secretarial,
   Secretariat Building
   Colombo 01

2. Nihal Karunaratne
   Superintendent of Police
   Director,
   Presidential Security Division
   Colombo 01

3. Ariya Rubasinghe
   Director of Information,
   Government Information Department,
   163, Kirulapone Avenue,
   Colombo 05

4. The Hon. Attorney General
   Attorney General's Department
   Hultsdorp,
   Colombo 12

Respondents

BEFORE	:	WIGNESWARAN J. MS. TILAKAWARDENA J. DISSANAYAKE J.
COUNSEL	:	Laxman Perera with J.C. Weliamuna and Anuradha Gunawardena for the Petitioner
ARGUED ON	:	28/04/04 & 08/09/04
DECIDED ON	:	19/10/04

WIGNESWARAN J.

The Petitioner was the News Editor of the Teleshan Television Network (Private) Ltd. (TNL).

After the General Election held on 5th December 2001, Mr. Ranil Wickremasinghe was appointed Prime Minister and was scheduled to be sworn in as Prime Minster at the President's House on the 9th of December 2001.

The Petitioner, as on previous occasions, faxed a letter to the Director of Information (3rd Respondent) giving the names and National Identity Card Numbers of the Petitioner and others who were to accompany him to "cover" the event.

Thereafter the Petitioner and his crew proceeded to the office of the 3rd Respondent. They were searched and identified by the officers of the Presidential Security Division. They then left for the President's House in the company of an officer of the Presidential Security Division.

At the entrance to the President's House, the Petitioner and his crew members were not allowed to enter the President's House by the officers of the President's Security Division who were in charge at the gate. The reason given for such refusal was that the 1st – 3rd Respondents had not given permission for them to enter the President's House.

Such refusal was reported on the same day in the Sinhala and English TNL news-cast. The Petitioner was compelled to borrow a video clipping from Swarnavahini (another Television Company) and telecast same over the TNL news channel.

Such discrimination had affected the standing, business and income of the company of which the Petitioner was the News Editor. The Petitioner complained of unlawful animosity, hostility and discrimination towards the Petitioner and the Company.

He alleged violation of his fundamental rights. The Supreme Court granted leave to proceed on the alleged infringement of Articles 12(1), 12(2) and 14(1)(a) of the Constitution. Leave was not granted in respect of the alleged infringement relating to Articles 10 & 14(1)(g).

The Petitioner prayed for a declaration that the 1st to 3rd Respondents were not entitled to preclude the Petitioner and other authorized employees of the TNL and their agents from entering the President's House with necessary equipment for the purpose of their legitimate business mentioned above. He also asked for compensation and costs.

Apparently admitting refusal to the Petitioner and his crew, the learned State Counsel appearing for the 2nd & 4th Respondents has submitted as follows –

1. Swearing in of the Prime Minister is not a public function.
2. The President's House is not a public place.
3. The Petitioner was not treated unequally.

His arguments summarized are as follows –

1. A public function or not

In terms of Article 30 of the Constitution, the President is the Head of the Executive and the Government and the Commander in chief of the Armed Forces.

In terms of Article 43(3), the Prime Minister is appointed by the President. Entering upon a public office, the Prime Minister must subscribe to the oath / affirmation set out in the Fourth Schedule to the Constitution. Taking or making such oath / affirmation prior to entering upon the duties of such office does not have to be at a public function. The Constitution does not specify, unlike in the case of the President (Article 32(1)) or Judges of the Higher Judiciary (Article 107 (4)), as to how a Prime Minister should take or make oath or affirm. The President and the members of the Higher Judiciary are required to take or make oath / affirmation before a certain official. Not so, the Prime Minister.

A public function is one which is open to the public to attend. Since the Prime Minister is not stipulated to take or make oath / affirmation before a particular official, he could take or make such an oath / affirmation at a non-public function. If he takes or makes oath / affirmation in a place where the public shall have general access, then it would become a public function. But since he need not take or make oath / affirmation before any official publicly, the occasion of his oath / affirmation does not become a public function.

The above said argument is connected to the next argument as to whether the President's House is a public place, which would be set out presently. What the learned State Counsel says in effect regarding his first submission is that a Prime Minister is not mandated to take or make oath / affirmation before a specific official. But he could take or make oath / affirmation in a public place but such place should be

open to the public. Since the Prime Minister in this instance took or made oath / affirmation in the President's House, it being not a public place, the swearing in of the Prime Minister was not a public function. Hence the next argument needs to be considered.

2. Is the President's House a public place

Public have no access to all properties owned by the State. Military bases, official residences are some examples mentioned where public are not allowed free access. Learned State Counsel quotes Justice Mark Fernando in *Bernard Soysa & Others* vs. *AG {(1991)2 SriLLR Reports 56 at 58}* and says :

> *"... what is permissible in a traditional public forum or a semi public forum, is not necessarily permissible in other public places."*

He submits that the President's House is public property which is not by tradition or designation, a forum for public communication. It is the official Residence of the Head of State and the public have not right of access to it without invitation and permission of access. It is, in effect, not a public place.

If it is not a public place, then the Petitioner should have had an invitation to enter the President's House. The learned State Counsel submitted that the Petitioner had no invitation to enter. There was, in fact, no obligation on the part of the President to allow access to the Petitioner. Therefore the Petitioner had no right of access to the President's House. If the general public had no right of access to the President's House, the Petitioner nor his media institution could not have had any such right. (vide *Victor Ivan* vs. *Silva*{(1998)1 SriLLR 340 at 347}.

Referring to the Indian Case of *Prabha Dutt* vs. *Union India AIR* {(1982) SC 6} the learned State Counsel pointed out that in that case, the prisoner was willing to be interviewed whereas the President in this instance, had not consented to the presence of the Petitioner nor consented to being televised by him.

3. Was the Petitioner treated unequally?

As an extension of his argument that the occasion was not a public function and that the President's House was not a public place, the learned State Counsel placed the argument that the Petitioner in any event was not treated unequally in terms of the Law, since allowing the Petitioner if at all would have been only a courtesy extended and not an obligation placed on anyone since he had no right of access. An unwanted person cannot force himself into a public property which is not a forum for public communication.

The above said submissions would presently be examined.

The powers and functions of the President of the Democratic Socialist Republic of Sri Lanka are spelt out in Article 33 of the Constitution as follows:

"In addition to the powers and functions expressly conferred on or assigned to him by the Constitution or by any written law whether enacted before or after the commencement of the Constitution, the President shall have the power –

(a) to make the Statement of Government Policy in Parliament at the commencement of each session of Parliament;
(b) to preside at ceremonial sittings or Parliament:
(c) to receive and recognize, and to appoint and accredit, Ambassadors, High Commissioners, Plenipotentiaries and other diplomatic agents;
(d) to keep the Public Seal of the Republic, and to make and execute under the Public seal, the Acts of Appointment of the Prime Minister and other Ministers of the Cabinet of Ministers, the Chief Justice and other Judges of the Supreme Court, such grants and dispositions of lands and immovable property vested in the Republic as he is by law required or empowered to do, and to use the Public Seal for sealing all things whatsoever that shall pass that Seal;
(e) to declare war and peace; and
(f) to do all such acts and things, not being inconsistent with the provisions of the Constitution or written law, as by international law, custom or usage he is required or authorized to do."

It is functionally obligatory on the President to "appoint as Prime Minister the Member of Parliament who in his opinion is most likely to command the confidence of Parliament" (Article 43(3)).

In terms of Article 43(2), the President shall be a member of the Cabinet of Ministers and shall be the Head of Cabinet of Ministers. It is because the President is deemed to be the Head of the Government and the Cabinet of Ministers that Article 32(1) refers to the Chief Justice or any other Judge of the Supreme Court as persons before whom the President is to take and subscribe the oath / affirmation set out in the Fourth Schedule to the Constitution. Article 107(4) reciprocates and reverses the roles wherein Judges of the Higher Judiciary take or subscribe to the oath/ affirmation before the President.

Because the President is constitutionally the head of the Cabinet of Ministers, the Prime Minister who is *primus inter pares* among the Ministers and such other Ministers have been referred together in Article 53. This does not in any manner detract the importance of the office of the Prime Minister. *Inter alia* Articles 37(1), 44(1), 45(1) and 46(1) confirm the importance of the Prime Minister. In fact, where the President and the Prime Minister belong to different political parties, the stature and importance of the Prime Minister who leads a party which has defeated the party led by the President, must necessarily be higher than a lieutenant of the President from the same party.

Whatever may be the contrary perceptions of the President and his party and his supporters, the leader of a different party who has received the majority of votes at a poll and whom the President per force has to appoint as Prime Minister in terms of Article 43(3) must necessarily attract public adoration and attention. Thus, the decision taken by the President in this instance to appoint Mr. Ranil Wickremesinghe to the post

of Prime Minister was a constitutionally mandated decision. It is in order to give effect to her decision that the President decided to hold the swearing in ceremony in the President's House, her official residence.

In terms of Article 33, she was again mandated to make and execute under the Public Seal, the Act of Appointment of the Prime Minister. Therefore, what was to take place in her official residence on the 9th of December 2001 was an official function, the venue for which had been decided by the President herself. Having decided that an official function is to take place in an official Residence, except for considerations of security specifically raised such as an imminent threat to life, limb or property, was it available for the President to deny that the occasion was a public function? Whether it was a public function or not has to be ascertained from all the circumstances of the occasion rather than weighing it in a water tight compartment. There has been no complaint that the Petitioner or any one in his crew was a security threat.

The swearing in of a new Prime Minister after an election was, no doubt, an occasion for rejoice to the majority of the voters in the country. The occasion was, no doubt, looked forward to be enjoyed by people at large, because the Prime Minister was a people's choice. He was, even in the President's opinion, the person most likely to command the confidence of Parliament. If the occasion was a private occasion, then none of the other Televising institutions had any business at the President's House. So long as other Televising institutions like Swarnavahini were granted permission to "cover" the event, it is to be concluded that the occasion was a public function but that discrimination had been shown probably due to some form of ill feeling. Even if private security considerations were the causes for such discrimination, such decisions cannot be made in the air. They had to be factually verifiable. Otherwise such decisions could be considered capricious.

The 2nd Respondent stated as follows in paragraph 6 (C) of his affidavit dated 09/04/2002 –

> *"Like any other person gaining entry to President's House, media personnel must also be invited. The procedure adopted with regard to the media accessing President's House is as follows: A list of names of media personnel who are to cover any event at President's House is forwarded by the Director Information of the Government Information Department. Thereafter, officers of the Presidential Security Division visit the office of the said Director off Information and check the identity of the said media personnel and also check their equipment and do a body-search. Thereafter, the said personnel are taken to President's House under the escort of the Presidential Security Division so that security is not breached."*

The above named procedure was gone through by the Petitioners and his crew according to the petition and affidavit filed by the Petitioner. The contents of paragraph 9 of the Petition has been admitted by the 2nd Respondent confirming that the said procedure was followed on that day. Though the 2nd Respondent refers to various logistical shortcomings faced on 09/04/2001, the real reason for debarring the Petitioner and his crew is set out in paragraph 6(f) as follows –

"In the meanwhile, at about 2.15 p.m. that day, the Deputy•Inspector General of Police of the Presidential Security Division, Mr. Illangakoon, spoke to me and informed me that Her Excellency the President had instructed that media personnel from "TNL", the "Ravaya" newspaper and "The Leader" newspaper should not be allowed into President's House that afternoon. I produce herewith marked 2RI, a true copy of an affidavit made by the said Deputy Inspector General of Police, in confirmation of the facts averred above."

There is no reference to any security threat anticipated from the Petitioner's quarters. On the pleadings of the Respondents themselves, the source of authority for the disallowance seems to have been the President.

Article 35 of the Constitution provides only for the personal immunity of the President from proceedings in any Court of Law and that too only during his or her tenure of office. The President cannot be summoned to Court to justify his or her action. But nothing prevents a Court of Law from examining the President's acts. Justice Sharvananda (as her then was) said as follows in the case of *Visuvalingam & Others* vs. *Liyanage and Others No: (1) a Full Bench consisting of nine Judges* {(1983) 1 Sri LLR Page 203 at Page 240 }–

"Actions of the executive are not above the law and can certainly be questioned in a Court of Law ...... Though the President is immune from proceedings in Court, a party who invokes the acts of the President in his support will have to bear the burden of demonstrating that such acts of the President are warranted by law; the seal of the President by itself will not be sufficient discharge that burden."

In this case the 2nd Respondent has relied on the purported directive of the President to justify his action.

Justice Thamotharan in *Wijesuriya* vs. *The State* {77 NLR Page 25 at 56} stated as follows:

"The law is that a soldier is bound by law to obey the orders of his superior so long as what is ordered is not manifestly and obviously illegal."

A directive from the President cannot be a defence to the 2nd Respondent if it was manifestly and obviously illegal. A leader of a sovereign country is not expected to be parochial nor vindictive nor spiteful what ever the provocations of his subjects might be, real or imaginary. Leaders no doubt are human beings. But they are humans clothed with power and privileges granted by their compatriots out of their love and respect. This power is not to be used to harass such compatriots. The Chapter on Fundamental Rights as well as Article 35 of the Constitution has been enacted to curb such harassment by the Executive which is clothed with tremendous power and privileges. Leaders in authority should not transgress the fundamental rights of their compatriots by becoming subjective in their attitudes and decisions. Complementarily, the compatriots themselves should not harass their leaders at least while

they are in office. They should be allowed to do a job of work. Nor should minions take cover under the provisions of Article 35 transgressing the law while claiming orders from "above."

The Articles under which leave to proceed was granted by the Bench of which His Lordship the Chief Justice was Chairman, related to Articles 12(1), 12(2) & 14(1)(a) which read as follows:

> *12(1) "All persons are equal before the law and are entitled to the equal protection of the law."*
>
> *12(2) "No citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds.*
>
> *14(1)(a) "Every citizen is entitled to the freedom of speech and expression including publication;"*

Article 14(1)(a) includes "publication." The rights of the media are thus included in this Article. The restrictions placed by the Constitution to the enjoyment of such Fundamental Rights are set out in Article 15(2), (7) and (8) of the Constitution. They are as follows:

15:2- The exercise and operation of the fundamental right declared and recognized by Article 14(1)(a) shall be subject to such restrictions as may be prescribed by law in the interests of racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence.

15:7 The exercise and operation of all the fundamental rights declared and recognized by Article 12, 13(1), 13(2) and 14 shall be subject to such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society. For the purposes of this paragraph "Law" includes regulations made under the law for the time being relating to public security.

15:8 The exercise and operation of the fundamental rights declared and recognized by Articles 12(1), 13 and 14 shall, in their application to the members of the Armed Forces, Police Force and other Force charged with the maintenance of public order, be subject to such restrictions as may be prescribed by law in the interests of the proper discharge of their duties and the maintenance of discipline among them.

Justice Amerasinghe in *Sunila Abeysekera vs. Ariya Rubasinghe, Competent Authority & Others {(2000)1 SriLLR Page 314 at 361}* stated as follows –

> *"In addition to being "presented by law", restrictions on the Constitutional right of freedom of speech, in order to be valid, must have a legitimate aim recognized by the Constitution. No doubt after balancing interests, albeit at a very general, wholesale level, the makers of our Constitution have in Article 15 made a threshold categorization, inter alia, of the varieties of speech that are not protected absolutely, but which may be limited by law."*

Article 15(7) refers to 'restrictions as may be prescribed by law' and the Supreme Court has interpreted that in addition, restrictions must have a legitimate aim recognized by the Constitution. Restrictions placed arbitrarily by those in authority for subjective reasons or on account of personal selectivity or idiosyncrasies as in this case, not appreciating the type of journalism or televising style of selected media organizations, cannot be considered as either restrictions "prescribed by law" or restrictions having a "legitimate aim recognized by the Constitution."

Freedom of speech and expression entails recognition of diverse views and perceptions can be reversed and the victim might one day become the vanquisher. It was Voltaire who said that though he would not agree with anything someone said he would yet fight with all at his command to establish that other's right to say so. Rights of the millions in this country should not be compromised at the altar of personal preferences and prejudices of the Executive.

The very reason trotted out by the learned State Counsel to prevent the public from attending a function at the President's House is the reason which favours media coverage of such an event. The public and the media are entitled to know the events as they occur at the swearing-in ceremony of their Prime Minister. The journalists cover such events to impart such information through their respective media.

Though the President's House is no doubt within the control and direction of the President and the public at large cannot all be accommodated for a public function of such a nature, yet all recognized media personnel after checking on their identities and also after body checks if necessary have been conducted, could have been allowed in order to 'cover' the event for publication or telecasting to the people at large. After all, the fundamental right of freedom of speech not only protects individuals but also the society at large. Societal functions to preserve free public discussion of Governmental affairs are also included under Article 14(1)(a). The press and the televising institutions under these circumstances act as agents of the public at large. They disseminate free flow of information and ideas. They function as surrogates for the public in the modern context. Perception of fairness towards the new Government formed by a party different from the party to which the President belonged, would have been possible for the public to gather only if there was openness in dealing with a media identified by the President as adversative. The concept of democracy demanded transparency, openness and fair play. Any reservations against the Petitioner or his employer on the grounds of political opinion should not have come between the President and the People.

As pointed out by the learned Counsel for the Petitioner, the President's House is not exclusively a living quarters. It has an area for public meetings and an office complex. The living quarters no doubt should

have been restricted for understandable reasons. The arguments of the learned State Counsel that the whole of the President's House should be considered as her living quarters and such restrictions be made to cover the entire building is unacceptable.

No questions of security or privacy arose. In fact, the Petitioner and his crew had been subjected to body checks and their identities ascertained. They were accompanied by a member of the Presidential Security Division. And in fact, other media personnel had been allowed. If considerations of privacy prohibited outsiders, Swarnawahini (from whom the Petitioner obtained clippings later) and other televising institutions should not have been allowed entry. There was no question of the President choosing who she wanted, to attend the swearing-in ceremony. Having chosen the Prime Minister herself, having chosen the venue for swearing-in herself, having decided on the time of swearing in with her approval, the question of who should attend the function and who should not have, would have been best left to the Presidential Security Division and her Director of Information (2nd Respondent was the Director of the PSD and the 3rd Respondent was the Director of Information). Decisions with regard to the personnel to be allowed to enter, the number to be accommodated, the area where they had to be seated and so on should have been professionally decided, not on the pique and punctilio of the President.

Once the occasion has been identified as a public function, restriction to enter could only have been for acceptable reasons such as considerations of security, logistical constraints and similar reasons recognized in Article 15(7). If the President considered the President's House inconvenient for a public function of such a nature as the swearing-in of newly elected and appointed Prime Minister, nothing prevented her to have had it in some other venue where her security as well as the right of the public to view the event, both, could have been professionally balanced.

The Petitioner and his crew have been singled out for discrimination for extraneous political or personal considerations and that from persons however highly placed cannot be condoned. In any event, the 2nd and 3rd Respondents cannot take over under directions which are manifestly illegal. Such directions are illegal because the law does not condone vindictiveness and spitefulness in official acts, more so, on the ground of political opinion. If the entire media personnel were restricted for security considerations which were immediate, imminent and real the Petitioner may not have been able to show discrimination against him. But in this instance, there was naked discrimination as reflected in the affidavits filed. There were no reasonable nor valid grounds for refusal. I am unable to accept that the swearing-in ceremony of the Prime Minister of this country was not a public function. I am unable to accept, under given circumstances, the President's House cannot be considered a public place. I am unable to accept that the Petitioner in this instance was not treated unequally.

I hold that inasmuch as the Petitioner and his crew were unreasonably and without any valid reasons refused permission to "cover" the swearing-in ceremony of the Prime Minister on 09.04.2001 there has been a violation of the Petitioner's entitlement to the freedom of speech and expression including publication (by telecasting and also a violation of the Petitioner's right for equality before the law and equal protection of the law. I hold and declare that the 1st and 2nd and 3rd Respondents individually and /

or collectively have violated the Fundamental Rights of the Petitioner enshrined in Articles 12(1), 12(2) and 14(1)(a) of the Constitution.

In my opinion, the transgression of the Petitioner's right would be sufficiently compensated and the ends of justice met if he is awarded Rs. 5,000/- and accordingly award same. He would also be entitled to costs in a sum of Rs. 2,500/-. This is a liability to be incurred by the State and payable by the State.

JUDGE OF THE SUPREME COURT

Ms. Tilakawardene J.

I agree with the pith and substance of the judgment of my brother judge Justice Wigneswaran. I also wish to add that in all public and official decisions, personal preference has to be subjugated, and must accord with the high standards of just decision-making based on the fundamental principles of impartiality, equality and objectivity. To act otherwise would be to act unreasonably, to open doors to arbitrary, capricious and subjective decision making which must necessarily eventually erode the fundamentals of a free and democratic society, as well as pave the way for gross injustices, especially in an environment where political parties are polarized.

This must not only apply to the substantive decision itself but equally apply to the process, where the highest and best standards such as reasoned, transparent, clear and intelligible principles and values must apply. By this, not only would the recipient of a decision know that justice has been rendered to him or her, but it would be manifest and apparent to him or her to see and understand that the decisions is just. These standards would also prevent and bar other persons from even unconsciously perverting, misleading or even indirectly manipulating those in authoritative positions.

JUDGE OF THE SUPREME COURT

N.E. Dissanayake, J.

I have had the advantage of reading the Judgment, in draft of my brother Wigneswaran, J with which I find myself unable to agree.

The Petitioner by way of his petition and affidavit, complained to Court that on 9th December 2001; he was refused entry to President's House to report on and cover the swearing in of the Prime Minister, Mr. Ranil Wickramasinghe consequent to the Parliamentary Election held on 5th December 2001. The Petitioner claimed that such refusal of entry to the President's House, constituted a violation of his fundamental rights in terms of Articles 10, 12(1), 12(2), 14(1) (a) and 14(1)(g) of the Constitution. Leave was granted only in respect of the alleged infringement of Articles 12(1)(2) and 14(1)(a).

The 2nd Respondent, the Director Presidential Security Division, in his affidavit, has set out the facts and circumstances with regard to how the Petitioner was not allowed access to President's House. The facts set out in the said affidavit have not been controverted by the Petitioner.

According to the contents of the affidavit of the 2nd Respondent, access to President's House is by invitation only.

The Petitioner's petition and affidavit does not speak of any invitation received by him to be present at the swearing in of the Prime Minister on 9th December 2001, at President's House.

The pith and substance of the position taken up by the Petitioner is that, the swearing in of the Prime Minister was a public function and that it was held in a public area of President's House and therefore as a media personnel he had a right of access to cover the aforesaid occasion.

I shall now examine the question whether swearing in of the Prime Minister is a public function.

In terms of Article 30 of the Constitution, the President of the Republic is the Head of State, Head of the Executive and the Government and Commander in Chief of the Armed Forces.

The President assumes office in terms of Article 32(1) by taking an oath before the Chief Justice. Except in one instance where President Jayawardane took his oaths at a public place i.e, when he took oaths before the then Chief Justice at Galle Face Green, at other times this oath has been taken within the precincts of the President's House.

In terms of Article 43(3) of the Constitution, the Prime Minister is appointed by the President and in terms of Article 44(1)(b) of the Constitution, Ministers are appointed by the President. The mode of appointment is not specified save that Article 53 of the Constitution states that a person appointed to any office referred to in Chapter VIII of the Constitution shall not enter upon the duties of that office until he takes and subscribes to the oath/affirmation in the fourth schedule of the Constitution.

Article 107(4) of the Constitution with regard to appointment of the Judges of the Superior Courts is more specific in that it states that any person appointed to be or act as Chief Justice, President Court of Appeal or a Judge of the Supreme Court or Court of Appeal shall not enter upon the duties of his office until he takes and subscribes to the oath/affirmation in the fourth schedule before the President.

In terms of Article 63 of the Constitutions, no member shall sit and vote in Parliament (except to elect the speaker) until he takes and subscribes to the oath stated thereon.

This is so even for members of the public service. In terms of Article 61D (17th amendment) of the Constitution, a person appointed to any office in terms of Chapter IX of the Constitution is required to take and subscribe the oath in the fourth schedule.

All the aforesaid persons have to take and subscribe the oath in the fourth schedule. It does not necessarily follow however that taking of the oath in the fourth schedule to the Constitution, prior to entering upon the duties of that office, has to be at a public function.

It is only with regard to the President who is the Head of the Executive {Article 32(1)} and the member of higher Judiciary {Article 107(4)} that there is any mention of the manner in which this oath is taken.

A public function is one which is open to the members of the public to attend, and it is held at a place to which the public have access.

In the case of *Azam Khan* vs. *State of Andra Pradesh* {(1972(2) Andh WR 288}, it was stated that the word "public is ordinarily used with reference to a joint body of citizens. It means that it is shared in or participated in or enjoyed by the people at large. Otherwise it is common to all the people."

In Stroud's Judicial Dictionary (3rd ed p 19), the meaning of the words public access to a place means a place open to all public in fact, whether by right or permission" *State of Maharasthra* vs. *Namdeo Dhannu* {(1972) Bom L.R. 583}

The above passages are found at page 796 of K. J. Aiyar's Judicial Dictionary (13th edition).

In Dr. Sir Hari Singh Gour's work on "Penal Law of India", (11th edition Vol 2), in reference to the charge of Affray, a public place has been defined at page 1479 as follows:

> *"4. What is a Public Place? A Public place is a place where the public go no matter they have a right to go or not. If the public resort to a place without let or hindrance, it is a public place, though strictly speaking, they may be trespassing. Whether a place is public or not depend on the right of the public as such to go to the place, though of course a place to which the public can go as of right must be a public place. The place where the public are actually in the habit of going must be deemed to be public for the purpose of the offence of affray, for instance, places like railway platforms, theatre halls, and open spaces resorted to by the public for purpose of recreation amusement etc ……"*

It is to be observed that in the case of the President and members of the Superior Courts, the only requirement is that the persons assuming office must take oath/affirmation before the Chief Justice and the President respectively. There is no doubt that it is of public importance. However whether it takes place at a public function depends on where it is held. If it is held at Galle Face Green or Independence Square or any such other place to which the public have access, which is a public place, then the swearing in becomes a public function.

In the case of the Prime Minister, Ministers of the Government and Public Officials, there is no stipulation as with the President and members of the higher Judiciary as to before whom the oath shall be

taken. Article 53 of the Constitution is silent on this point. It therefore connotes that such an oath could be taken at a non-public function. Once again, the place at which the oath is taken, if it is a place to which the public have access as of right, would determine whether it is a public function.

However by the very fact of Article 53 of the Constitution being silent on the point as to how the oath should be taken, implies that intrinsically, the swearing in does not take place at a pubic function.

Is the President's House or a part of it a public place?

This question assumes importance as the position taken by the Petitioner by way of his written submissions that the aforesaid swearing in, is a public function held in a public area of the President's House which can be accessed by the Public, and the counter submissions made on behalf of the 2nd and 4th Respondents to the effect that a ceremony, or event will be a public function only if it is held in a public place to which the members of public have access.

In the US case of *Perry Education Association* vs. *Perry Local Educators Association et al* {(46) U.S. 37, 74 L.Ed 2d 794} it was held in determining First Amendment rights (the right to free speech) that the existence of right of access to public property and the standard by which limitations on such right must be evaluated, differ depending on the character of the property in issue.

It was held in that case that –

> *"in places which by long tradition or government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed. At one end of the spectrum, are streets and parks which have immemorially been held in trust for the use of the public and ……"*

A second category consists of public property which the state has opened for use by the public of expressive activity. The Constitution forbids a state to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place.

We have recognized that the First Amendment does not guarantee access to property simply because it is owned or controlled by the Government. *United States Postal Services* vs. *Council of Greenburgh Civic Assns.* { Supra 453 U.S., at 129, 101 S.Ct},

The said case of Perry was quoted by Fernando, J at page 58 in *Bernard Soysa and Others* vs. *AG* {(1991) 2 SLR 56} He identities three categories of public places:-

I. Traditional public fora,
II. Limited purpose-semi public fora,
III. Public property which is not by tradition or designation a forum for public communication.

At page 58, he states –

> *"It is unnecessary to consider whether such a classification is applicable in Sri Lanka. However, it demonstrates that what is permissible in a traditional public forum, or a semi public, is not necessarily permissible in other public places."*

Public property and public place do not have the same meaning. Property owned by the state is public property. However, it does not mean that the public have access to all property owned by the State. Military bases, official residences, certain government buildings and offices are off limits to the general public or have restricted access. Similarly official residences of the Chief Justice and other judges are public property but not public places and therefore not accessible to the general public.

It has been contended on the written submissions tendered on behalf of the Petitioner that areas of President's House where she holds public meetings and the office complex are in the category of public places and no restrictions can be placed on members of public accessing the said areas.

It is to be observed that there is no material before this Court to indicate that the swearing in of the Prime Minister was held at an office complex of the President or in an auditorium. As a matter of fact by paragraph 6 (ii) and 7 of the petition, the petitioner reiterated that the swearing in function was held at the President's House, which was concerned by him to be the official residence of the President. (emphasis added)

It is to be observed that the President's House is dedicated as a building or property which is the official residence of the Head of State. It may have function rooms and office rooms of the Head of State. However, the character of the building remains unchanged. It admittedly is the official residence of the Head of State. Therefore it would appear that the members of the public would have no right of access to it, without invitation and permission of access, as it is not a public place.

Out of the 3 categories of public places enunciated by Fernando, J in *Bernard Soysa and Others* vs. *AG (Supra)* the President's House falls into the 3rd category; i.e public property which is not by tradition or designation a forum for public communication. It is not in the same category as a street or a park which falls into the first category nor a public institution to which the public have restricted access as to time and purpose which is the second category. The third category encompasses places to which the public have no right of access, Military bases, high security prisons, official residences and certain other government or public buildings come within this category.

It is of significance to note that the Petitioner has failed to provide any proof that he possessed an invitation to enter President's House. The 2nd Respondent had denied that the Petitioner had an invitation and this position is accepted by the fact that no counter affidavits or documents have been filed to show that the Petitioner was invited.

The Petitioner has a right to use a public such as roads and parks. However, in places where access is restricted he does not have right to extract an invitation.

The Petitioner has failed to establish an obligation on the part of the President who was performing an official function in her official residence, to allow access to the President's House to the Petitioner. The Petitioner's right of access would necessarily correspond to such an obligation on the part of the President.

Therefore it is clear that the Petitioner had no right to be at the President's House on the aforesaid date.

If the general public had no right of access to President's House then the petitioner can claim no more merely because he represents a media institution.

In the case of *Victor Ivan* vs. *Silva* {(1998) 1 SriLLR 340 at 347} Fernando J said;

> *"I don't think that a newspaper enjoys any greater privileges of speech, expression, and publication, or immunity from prosecution, than the ordinary citizen. The freedom of the press is not a distinct fundamental right, but is part of the freedom of speech and expression, including publication which article 14(1)(a) has entrenched for everyone alike."*

Let me now consider the question whether the Petitioner was treated unequally by the 2nd and 4th Respondents and thereby violated Article 12(1) of the Constitution.

It is significant to observe that Article 12 has to be referable to a right as distinguished from a privilege or a courtesy which is extended. An invitation to attend a function in a non-public forum/place to which access is restricted or prohibited to the general public is a privilege or courtesy that extended. Equality or unequal treatment can be claimed for a right but not for a privilege or courtesy.

As access to the President's House is not available to the general public and access is only on invitation, the petitioner can have no right to be present thereat. There can therefore be no unequal treatment when there is no corresponding right of the Petitioner. The Petitioner can have no right to a privilege or courtesy or invitation.

I reject the contention of the Petitioner that there was unequal treatment in violation of Article 12(1) discriminatory treatment in violation of Article 12(2) and his freedom of speech and publication guaranteed under Article 14(1)(a) have been violated by the Petitioner not being among the invitees and other persons to whom the courtesy of participation at the aforesaid function has been extended.

I dismiss the application of the Petitioner with costs fixed at Rs. 5000/-

JUDGE OF THE SUPREME COURT

Electoral Systems and Political Outcomes

Sunil Bastian[*]

In the current atmosphere of liberal triumphalism and globalisation, there are many efforts to establish electoral institutions and promote free and fair elections in post colonial societies. This is based on a belief that the establishment of liberal democratic institutions will be an answer to many problems faced by these countries including internal conflicts. Some of these efforts are supported by invading armies as in the case of Afghanistan or Iraq, which has prompted some commentators to argue that we are entering a period of liberal imperialism.

One of the characteristics of liberal imperialism[1] is the attempt to impose institutions without taking into account the histories and specificities of these societies. It propagates liberal meta-narratives as answers to problems faced by very different societies. The imposition of these meta-narratives is taking place in many spheres including politics and economics. On the one hand, this is a denial of the histories of these societies. On the other hand, they propagate easy answers to complex questions faced by the people of these societies.

Unfortunately, this ahistorical mode of operation is also shown by some of the well meaning attempts at establishing such institutions through donor supported projects. There are many efforts at institutional design with the objective of establishing electoral institutions that do not go deeply enough into the histories, social structures, discourses and ideologies that prevail in these societies. There is little effort to understand the historical process that is implied when there are attempts to establish these institutions. There is also no long term commitment. What we have is an attempt to implement blue-print type of projects which sound very similar whether they are implemented in Sri Lanka or Botswana, consultants that run around the world and NGOs of the so called partner countries who become mere implementers without critically engaging with these outside interventions.[2]

The purpose of this article is to explore the political outcome of two electoral systems, first past the post and proportional representation (PR) that has existed in Sri Lanka. Universal adult franchise was established in Sri Lanka in 1931, fourteen years before independence from British colonial rule, and just three years after Britain began to enjoy universal adult franchise. From this point onwards, Sri Lanka has

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[1] Liberal imperialism has many other characteristics like serving the strategic and economic interests of the only superpower.

[2] I make these comments after having been engaged as a consultant to many donor funded projects during the last twenty years. My main area of theory and practice has been in the area of development. During this period I have tried to convince donor funded projects that they can achieve very little unless they understand social and political processes in society that happen outside these projects. Within the field of development, there are many years of learning on these issues. Unfortunately very little of this learning seem to be percolating to donor funded projects that are now trying to tackle much more complex issues and sometimes the total transformation of societies.

maintained universal adult franchise with all its limitations. This is not the case even in some developed countries. For 46 years, or for a period of little less than half a century, the first past the post system electoral system operated in Sri Lanka. The first election under PR was held in 1989. Therefore, for about 15 years PR has been the electoral system under which the legislature was chosen.

The principal argument that this article wants to make is that anybody or any project that is interested in establishing or improving electoral institutions in Sri Lanka has to take a close look at this history if they are seriously interested in contributing to the establishment of these institutions in this country. Rather than an ahistorical discussion that confines itself only to the basic characteristics of the electoral systems and tries to manipulate them, one needs to know how the systems interact with social structures, ideologies and discourses of a society, in order to make the modest contribution that donor supported projects can hope to make.

The article begins with some theoretical points on institutions in general and electoral institutions in particular. This theoretical understanding is important because it is this theoretical position that demands a much more historically nuanced approach to the institution designing process. Then it goes on to analyse the political outcomes of the first past the post system and PR. The article ends with some concluding remarks.

Some theoretical issues

Below we summarise a few conceptual points that underlie the rest of the article.

- In societies, electoral systems do not appear out of nothing. They are established in a particular conjuncture of social and political forces. If we define politics broadly as an interaction and a competition between interests, values and ideas, we need to look carefully at the balance of forces between these factors if we want to understand why a particular type of electoral system was established at that moment of history.

- The electoral systems which are established in a particular context limit the alternatives with which voters are confronted during elections. In other words, they have a 'constraining' effect on the choice of voters. There are no free individuals making choices even if all the conditions for free and fare elections are ensured. Voters make choices within constraints set by electoral institutions.

- However, as many social scientists who emphasise the role of human agency would argue, institutions also have an enabling function. While institutions will structure choices, they also have a function of providing space for various forms of actions of a conscious human agency.

- In social science literature these constraining and enabling functions of institutions are depicted as the 'duality of institutions'. This has been an effort to bring together both structure and agency in understanding institutions.

- Another interesting development in the study of institutions, including electoral institutions, is the focus on the discursive elements that accompany institutions, that here the argument is institutions are not simply mechanisms and procedures, but they also generate particular discourses. Institutions can set limits to discourses that are being generated. But human agency is also capable of generating new discourses in the context of these institutions.

- Reflecting on this notion of the 'duality of institutions' is important for those interested in electoral system design, because what most electoral design efforts try to do is to set limits through institutional design so as to enable certain outcomes. If we put this in another way, what we want to do is to put in place constraints in choice so that certain desirable outcomes are enabled. This is the first level of theoretical assumptions in designing electoral systems.

- Other than this basic level of conceptual assumptions, there is another level of theoretical assumptions related to the specific questions that we are dealing with. Electoral design efforts try to resolve many different problems in society. Hence, there are assumptions that link electoral system designs and the resolution of these problems. For example, a basic theoretical assumption often made by those who want to resolve identity based conflicts through electoral system design, is that the lack of adequate representation of identity groups is a major factor behind these conflicts. Therefore electoral systems are designed to ensure adequate representation hoping it will contribute towards conflict resolution.

However both these conceptual assumptions, i.e.

- We can put in place constraints in choice through institutional design so that certain desirable outcomes are enabled, and

- If we ensure adequate representation of identity groups we can contribute towards conflict transformation, are not self evident. History teaches us differently.

Achieving a close fit between the dual aspects of institutions, in the way electoral institutional designers hope to achieve, is a product of a long historical process. It involves a process of consolidating these institutional structures through various means, the emergence of actors and processes that reproduce them, developing behavioural patterns and norms in society which consolidate them and finally establishing legitimacy of these institutions in society. Social science teaches us that such consolidation of institutions is a long historical process with a lot of pitfalls. In fact many social scientists will use the term 'institutions' only to those institutional arrangements that have been consolidated in this fashion. For example caste is such a social institution that has been consolidated in South Asian societies in this fashion.

The other assumption about adequate representation and conflict resolution is also not self evident. When we design electoral institutions in order to improve representation of an identity group, we expect those elected to represent the interests of the community as whole. But there can be many other variables between this expectation and what really happens.

Hence, there are many other variables that come between the electoral systems and political outcomes. One needs to have a good understanding of these variables before trying to dabble with problems faced by these societies. In my view, there is no way of doing this without understanding how electoral institutions have actually behaved in concrete societies with all this complexities. Therefore, what we need is not the blueprint type of approaches and short term projects that are expected to fit into all societies, but a much more serious engagement with these societies. In fact, we would even go so far as to say we need a historical sense of these societies because what the projects are trying to do is to step into a process of fundamental historical transition of these societies.

Therefore, the objective of this conceptual foray is not to discourage the idea of institutional design *per se*. In fact in some situations, such as when countries are torn apart by conflicts, not engaging in institutional design can be worse. But its objective is to discourage attempts at tampering with our societies without the historical sense and commitment that is necessary.

First past the post system and political outcomes

As already mentioned, universal adult franchise was established in Sri Lanka in 1931. At the time of establishing the electoral system, there was no discussion of anything other than the first past the post system. What prevailed in England determined the limits of the discourse of the Sri Lanka elite, the most influential group other than agents of the colonial master, in designing the electoral system.

The future elite leadership of the country actually opposed the establishment of universal franchise. The usual argument of the masses not being ready to exercise franchise was put forward. It was the liberal attitude of the British commissioners and Sri Lankan labour leaders that helped to establish universal franchise. This reflected the class dimensions of universal franchise.

The other major issue was the discussion on 'communal electorates' versus 'territorial electorates'. This was an issue which has a relevance to the question of minority representation or the issue of ethnic relations. The minorities demanded separate electoral registers and representatives elected on this basis, so that in a parliament that is bound to be dominated by the Sinhala majority they could have adequate representation. The territorial argument opposed this and asked for a common electoral register.

The territorial argument won mainly because the British favoured it. British commissioners who came to the country took the view that the establishment of 'communal' electorates would entrench 'communalism', which according to them was not a desirable status for the future of Sri Lanka. On the other hand, 'territorial' electorates' would motivate the electorate to get over these traditional backward features like 'communal identities' and exercise franchise as individuals. As often happens nowadays, this was a conceptual assumption of electoral designers influenced by liberalism. It was a vision of a social transformation that dominated the modernisation theory later and an idea which still dominates the minds of advisors on electoral design. Sri Lankan history has proved these assumptions to be totally wrong.

In order to ensure minority representation, the delimitation process divided the electorates so that roughly 60% of the parliament would represent the majority Sinhala community and 40% shared between all the minorities. The mechanism of multimember constituencies was used to achieve this.[3]

The first act of independent Sri Lanka, which defined the citizenship of the newly independent country, shattered this scheme. This happened because the new citizenship laws made the bulk of the working class in the plantation sector, belonging to the Indian Tamil community, stateless and therefore they lost the right to vote.

The fear of the growing influence of the working class parties within this population and politics of Sinhala nationalism contributed to this development. Hence for the ruling Sinhala elite, the motivations had both a class and an ethnic dimension. But what is interesting to note is the major political party of the Sri Lankan Tamil minority, which by now was a coalition partner of the UNP government, supported this act of disenfranchising the plantation population. Clearly, class was the determining factor in this outcome. This is an example of how minority representation does not necessarily ensure the intended outcome.

Thereafter two delimitation commissions, in 1959 and 1976, skewed the representation even more in favour of Sinhalese. As it is seen in many other parts of the world, the first past the post system allowed ruling parties to obtain a much greater share of seats than their voter base warranted. This produced governments with large majorities, totally unrelated to the electoral base of the ruling parties.

The politics of governments elected in this manner in 1956, 1970 and 1977 are significant for the history of the first past the post period. There are several key political and economic outcomes as a result of this power enjoyed by these governments that contributed to conflict and instability in Sri Lanka. These are,

- These majorities allowed the governments to ignore rights of minorities. The parties that had the support of the majority community could bring about changes without considering minority demands. The 1956 election contributed to the entrenchment of the Sinhala-Buddhist hegemony in the structures of the state. Making use of the majority in 1970, the government of the day enacted a new constitution that made the conditions of the minorities even worse. In 1978, although the government had five sixths majority and ethnic relations had deteriorated to the extent of Sri Lankan Tamils asking for a separate state, the government ignored it and went on to make use of the majority to make institutional designs for the purpose of introducing the liberalised phase of capitalism.

- The majorities that the governments achieved also allowed the ruling regime to treat the opposition parties undemocratically. The sheer numbers in parliament could be used for narrow partisan political purposes. This led to antagonism between the two major parties to the extent that after every election each

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[3] There were other devices in the institutional design of this period to ensure minority rights. A special clause in the constitution and a senate where minority representatives could be appointed are such examples. However this note is only concerned with the electoral system design.

party used the power it enjoyed to victimise the supporters of the other. This has spread right down to the village level making electoral politics violent.

- Each of these electoral victories inaugurated significant changes in the directions of the economic policies. 1956 electoral victories began the period of the growth of the state sector in the economy. The state began to intervene much more significantly on welfare issues. The 1970 elections brought in a coalition government with the participation of left parties which expanded to state capitalist policies to many areas of social and economic life. Finally, the victory of UNP in 1977 with a huge majority in the parliament signified the beginning of the phase of liberal capitalism which still continues.

- At the level of the electorates, the first past the post period laid the foundations for patronage politics which has now become institutionalised. Rather than being just a lawmaker, the major pre-occupation of the elected MPs was to channel state resources to the electorate in the name of development. Obtaining state resources for various infrastructure projects was the most popular item of MPs. This created a visible impact in the electorate and it also involves channelling contracts to the loyal supporters of MPs and the usual ceremonies to open them. Later on, with the intervention of the state into all spheres of life, MPs' authorisation became important for people to obtain benefits from the state. This is the beginning of the patronage system and patronage politics which is a key feature of electoral politics at present. This is the real nature of the 'close relationship between the elected MPs and the electorate' considered as a positive aspect by those who advocate the first past the post system.

Contrary to the belief, especially in the Anglo-Saxon world, that the first past the post system creates stable governments and political stability, the Sri Lankan experience shows that this is not the case. The electoral system contributed to the deterioration of ethnic relations. It created an antagonistic relationship between the two major parties which influenced the political culture as a whole. There was also instability in development policies. Each government made use of the power they had to make changes which did not help the economy. Patronage politics that characterised the relationship between the MPs and the electorate also contributed to antagonisms within the political culture.

There were also features which did not allow governments to complete their term in office. A number of governments were brought down before the term was over either because of the parting of ways with coalition partners or crossing over of MPs from the government side to the opposition. Of course if we consider the violence and instability associated both with the alienation of minorities and violent electoral conflicts between the two major parties, the first past the post system has contributed much more to instability than to stability.

The major achievement of Sri Lankan politics during this period was the widening of the social base of the ruling political class. The bulk of the political class which constituted the first parliament in 1947 came from the colonial elite that accumulated wealth during the colonial period. It was only the representatives of the working class parties that diverged from this trend. The post-independent electoral politics has certainly widened this base. The turning point of this process was the 1956 election.

The electoral politics paved the way for an intermediate layer coming from semi-urban and rural areas to enter into the political class. The entry of this new class into electoral politics had a significant impact especially among the Sinhalese. This class championed two issues that began to dominate politics of Sri Lanka. These were policies that supported Sinhala nationalism and policies that called for the expansion of the role of the state both in the economy and society. The latter set of policies also had support from other classes such as the working class and peasantry. But the elevation of intermediate classes to share power with the traditional elite was significant in implementing these policies.

However this widening of the political base of ruling regimes did not manage to incorporate two new types of political forces that emerged on the scene during the seventies. One of them was from the Sinhalese and the other from Sri Lankan Tamils. The first was the Janatha Vimukthi Peramuna (JVP) and the second Tamil militant groups. The insurgency of 1971, led by the JVP, demonstrated that there was a social base among the Sinhalese that was not incorporated into mainstream electoral politics. Secondly, the growing militancy of the Tamil youth in the mid seventies showed the alienation of Tamils due to the political outcomes of the first past the post period. In this case too, electoral politics of this period was unable to give an answer to their political grievances.

PR and political outcomes

The PR system of Sri Lanka was established through the 1978 constitution. Contrary to the opinion sometimes heard, when it was established, it had very little to do with resolving the issue of ethnic relations. The1978 constitution expected that instruments such as a special provision for the Tamil language and decentralisation would be able to meet the needs of the Tamil minority, although the major political party of Sri Lankan Tamils fought 1977 elections on a separatist platform.

The primary motivation in designing a new electoral system was the need to create political institutions that were conducive to promoting the liberalised phase of capitalism which was inaugurated in 1977. Politically what were needed for this purpose were new institutions that could manage the social forces represented in the legislature. As we mentioned before, by this time due to the operation of adult franchise from 1931, the social composition of the legislature had changed to include a broader range of social classes. The key addition to this broadening was the entry of intermediate classes. Many of the demands of this class were not conducive to new economic policies. Therefore, social pressures emanating from the legislature had to be managed in order to go ahead with economic reforms.

Secondly, the instability created by allowing MPs to cross over from the government to the opposition, which was the usual mechanism of bringing governments down before their period was over, had also to be dealt with. Thirdly, huge majorities that the system allowed were a threat to the continuation of the policies in future. One answer to these political needs of the liberalised phase of capitalism was the PR system. President J. R. Jayawardena, the architect this new system voiced these opinions way back in 1966. The second institution enacted was the presidency that was elected independently. This has a

considerable degree of power to override the legislature. Therefore, the same political purpose of reducing the power of the legislature was achieved.

These political intentions of the UNP leadership were clear from the details of the electoral system that was first proposed by the parliamentary select committee which was established to enact the 1978 constitution. Briefly these details are as follows;

- The country is divided into 22 electoral districts. The boundaries of these districts coincided with administrative boundaries as far as possible. Once these boundaries were established, no more delimitation is possible without a constitutional amendment. This should stabilise the electoral district and do away with instability created by regular delimitation.

- No of seats are allocated to each electoral district depending on the voter strength. This has to be adjusted before every election. This did away with the power that the sparsely populated rural areas had in the parliament. Electoral power moved to more urbanised densely populated areas.

- Parties or independent groups that are contesting elections put forward a list of candidates for the electoral districts that they want to contest in. The hierarchy in the list is determined by the party leadership.

- A party has to get more than 12 ½ % of the valid vote to be eligible for seats.

- The party that gets the largest number of votes gets a bonus seat.

- Remaining seats are allocated to the parties in proportion to the vote that they get.

- Once a member is elected there is no crossing over or changing parties.

- No by-elections. If something happens to a sitting member the party appoints the next member in the hierarchy in the list submitted to the election.

The political outcome of this system would have been a parliament where the bigger parties would have controlled power. Smaller parties would have had very little chance of getting elected. Members would have been tightly controlled by the party machinery and stability of government would have been ensured. This formula would have taken cared of most of the factors that created instability under the first past the post system. Precisely what was need for the liberalised phase of capitalism.

The politics that followed these proposals brought in pressures from two quarters. First, from the minority representatives who were concerned about the high cut off point, and secondly, from the members of the parliament who were worried about the excessive controls that the party was going to have over them. Minority interests had to be taken into account primarily because of the deteriorating situation in the

North/East and the political influence of the lone member of the Caylon Workers Congress, Mr. Thondaman, representing the plantation vote. As a result, the cut off point was reduced to 5%.

Second, a system of preference votes was introduced in order to decide who could fill those positions allocated to each party according to the proportion of votes that they received. It did away with the power that party machinery wielded under the new proposals. Provisions that prevented crossing over from one side to another were also relaxed. Finally, a new innovation of 29 national list members was introduced. Their names had to be presented to the electorate at the time of the election. According to the national proportion of votes obtained each party is entitled to a certain number of national list members.

Hence the design of the architects of the PR system which was motivated by the demands of the liberalised phase of capitalism was opposed both by class forces and ethnic forces. The resistance of the MPs to party control meant that MPs representing the interests and ideology of the intermediate classes could not be managed through party control as originally envisaged. This resistance introduced the preference vote. The demands of the minority MPs reduced the cut off point paving the way for the entry of smaller parties to the parliament. The result is the current system which has created its own problems for the original agenda of promoting liberal capitalism.

What are the major political outcomes of the system?

PR has done away with the huge majorities that the governing parties used to enjoy. Hence it's not easy for ruling parties to change policies or amend the political structures in the manner they did in the past. Under PR, there is a check on the power of the major parties. Perhaps this is most important political outcome of the system.

The reduced cut off point has allowed smaller parties to come into the parliament. There are two types of smaller parties that espouse completely different ideologies that have managed to gain entry into the parliament. First, the parties representing ethnic minorities. These are parties representing Sri Lankan Tamils, Muslims and Hill country Tamils. Second, political parties representing Sinhala extremist views have also strengthened their position. Janatha Vimukthi Peramuna (JVP) and Jathika Hela Urumaya (JHU) are the examples. From these two JVP is also a strong supporter of the pre '77 state centric capitalism reflecting the interests of the intermediate classes.

These developments have had an influence on both ethnic politics and class politics. The key to this influence is the fact that the major parties, devoid of the huge majorities that first past the post provided, now have to depend on these smaller parties to form and sustain a government. Hence coalition politics has become the norm.

Coalition politics with the parties representing minorities has forced the major parties to take into account questions relating to ethnic relations. The most important issue has been the resolution of the civil war through political negotiations. However at the beginning, the PR system actually led to the breaking of

the monopoly that the TULF had under the first past the post system[4] and to the establishment of a number of parties representing the Sri Lankan Tamil community. This actually led to a weakening of their political bargaining position. During the last two elections, they have been brought together in this parliament as the Tamil National Alliance under the pressure of LTTE. This has improved their bargaining position. In addition to the parties representing the Sri Lankan Tamil minority, SLMC representing the Muslims and CWC representing the Hill country Tamils have entered into coalition politics with the major parties in order to promote their interests.

The ability of the JVP to secure a considerable number of seats in the parliament is the other major political outcome of the PR system. For the politics of the Sinhalese, it is a very significant development. With the entry of the JVP into the parliament, the most important anti-systemic force that emerged among the Sinhalese in 1971 has been given space within electoral politics. It is a reflection of the ability of the system to give space to a social force that emerged into southern politics more than thirty years ago, but was repeatedly suppressed by the establishment. Within a very short period of time, helped by the PR system, JVP has not only secured a significant number of seats in the parliament but has become a coalition partner of a ruling regime.

The entry of the JVP into the parliament has had an impact both on the class issue and the ethnic issue, which are the two most important political issues that liberal capitalism has to resolve. On the class question, the JVP has brought the interests of the intermediate classes that support state centric capitalism right into the policy debates on economic reform. The ruling classes cannot ignore it any more. Perhaps one of the trickiest political questions in the immediate future will be how the elites, who want to take the reform process of liberal capitalism forward, deal with this new political force. The entry of the JVP has also a direct bearing on negotiations to resolve the civil war. Its uncompromising view on state reforms to meet Tamils demands has made it difficult for the major parties to take this agenda forward.

The political outcomes of the PR system have also contributed to the further entrenchment of patronage politics, the beginning of which we have seen under the first past the post system. In the period of liberal capitalism that began in 1977, the institutionalisation of a system of patronage politics, that keeps the elected members happy, has almost become another mechanism through which elected members are politically managed. The hallmark of this patronage politics of the political class is the use of state resources and state patronage for personal accumulation as well as distributing patronage to party members, family members, the caste network, etc, etc. As a result, electoral politics is dominated by a simple straightforward desire to grab power so that there can be access to resources and influence that state power provides. In such a context, devoid of any ideological loyalties, it is also easy for MPs to cross over from one party to another. Money and access to patronage are major determinants in finalising these horse deals which determine the loyalty of MPs.

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[4] Under the first past the post system TULF like the two major parties enjoyed more seats than its electoral base warranted. This was removed by PR. Of course there were other factors like the establishment of armed struggle in the North/East that led to the deterioration of the influence of TULF. However when some of the former militant groups entered electoral politics after the Indo-Lanka Accord PR helped them to secure seats in the parliament.

Since PR has made coalition regimes the norm, patronage has become an important mechanism in ensuring the stability of regimes. Providing opportunities to exercise this patronage has become a principal mechanism for satisfying various fractions of the ruling regimes and members of coalition partners. Hence, patronage is necessary both for satisfying one's own MPs as well as keeping coalition partners happy. PR has contributed to strengthening of this system.

Finally, in an account of the political outcome of the PR period, it is difficult to ignore electoral violence. Electoral violence in the period of liberal capitalism began with the desire of the regime which introduced these policies to remain in power beyond the time that they were entitled to. The turning point was the 1982 referendum which not only allowed the UNP to remain in power for another seven years but also allowed them to enjoy the majority in the parliament which they obtained in 1977. The referendum itself was characterised by widespread electoral fraud, intimidation and attacks on opposition political parties and groups. This event undermined the election machinery. Elections which followed this were characterised by violence. Counting the number of election-related deaths, intimidation and impact of fraud on election results has become as important as counting the number of votes and seats that parties have gained.

There is no doubt that the primary reason for this referendum was the desire on the part of the UNP to continue the economic policies that they began in 1977. They were extremely concerned with what would happen to the power that they wielded in the parliament which they obtained through the first past the post system, if they went for an election under PR. In their calculation, this would have undermined their ability to continue with these policies. The answer was the postponement of elections through a fraudulent referendum and undermining of the entire electoral process.

At the level of the electorate, there is a strong link between electoral violence and patronage politics. Quite a bit of violence during election times, especially in rural areas, can be attributed to the desire to control patronage networks on the part of those who want to get elected. All possible means are used to win elections and get access to these goodies. What is characteristic of the PR period is how this conflict engulfs a large section of the electorate as well. As we have mentioned before, in the period of state centric capitalism people depended to a great extent on the MPs for their various needs. Unfortunately the period of liberal capitalism has not altered this situation much. On the other hand due to the unravelling of rural livelihoods due to the harsh impact of market forces, the dependence of the rural population on political patrons seems to be greater. Hence, a significant proportion of the electorate is drawn into this conflict over control of patronage networks either directly or indirectly.

Concluding Remarks

This brief survey of the history of the political outcomes of the two electoral systems in Sri Lanka shows that some of the assumptions often made in exercises of electoral system design have to be questioned. Some of the more important conclusions that can be extracted from this discussion are,

- It is important to unravel the nature of the dominant political forces and their interests in order to understand why particular electoral systems emerge at a particular time. Knowledge of these political forces is necessary for electoral system design. In order to promote electoral designs that will have positive outcomes it is necessary to engage with these forces. Therefore rather than some a historical discussion about electoral systems engagement with political forces existing at a particular historical juncture is necessary.

- In the case of Sri Lanka, in unravelling these forces, issues of class as well as ethnicity are important. It is necessary to include both aspects in order to get the comprehensive picture.

- Persistence and continuity of identity politics is based on a complex set of issues. Electoral systems might be a peripheral factor in this process. Creation of 'territorial' electorates did not lead to any transformation of identity based politics.

- Election of members of a particular identity group does not mean that they will invariably act only in the interests of that group. There are many other factors, such as class that can have an influence. Therefore representation *per se* might not be the answer.

- Once an electoral system is set up, it can be unravelled due to the impact of many factors. Hence establishing electoral systems and consolidating them involves a whole host of other strategies than just concentrating on the specifics of the system. This demands a much more comprehensive engagement with society.

- The first past the post system does not necessarily lead to stability. Once again in determining the political outcomes of the first past the post system there are many other variables which are very specific to these societies.

- The PR system, while reducing the power of the larger parties, has expanded representation of many other political interests. Some of them have been representing minority interests. But PR has also given space for Sinhala extremist political interests. Hence, the larger parties have to get support from very different types of political forces leading to a very complicated situation both on the economic front and negotiations to end the civil war.

- Establishment of a patronage system whereby elected MPs use their influence and state resources to dole out patronage has become a distinguishing feature of electoral politics. This patronage politics makes a mockery of all assumptions behind electoral system design to promote a liberal order. Electoral designers need to take this into account and identify issues that need to be tackled.

- These issues demand a closer look at how these systems operate in the context of liberal capitalism and globalisation. Market forces and their social impact can undermine the legitimacy of liberal institutions to such an extent that all these design efforts have very little meaning.

- Electoral violence needs a much more comprehensive approach than intervening only at the time of elections. There is a need to identify the principal motivations and key political forces whose interests are served by violence. At the level of the electorate there is a strong link between patronage politics and violence. Hence we need to identify factors that promote patronage politics to tackle electoral violence.

These conclusions point to a totally different kind of approach in electoral system design. As in many other reforms, it needs to be very well grounded on the specificities and the concrete characteristics of the society that we are dealing with.

ANALYSIS OF THE PREVENTION OF DOMESTIC VIOLENCE BILL

Ambika Satkunthanathan*

'In the case of intimate violence, male supremacy, ideology and conditions confer upon men the sense of entitlement, if not duty, to chastise their wives. Wife beating is therefore not an individual, isolated or aberrant act, but a social license, a duty or sign of masculinity, deeply ingrained in culture, widely practiced, denied completely or largely immune from legal sanction'.[1]

Introduction

Today, international human rights law recognises gender inequality as a problem that needs to be tackled at both the national and international levels. In Sri Lanka, although the rights of women have been recognised to some extent, most women still experience discrimination and violence and occupy a disadvantaged position in society.

Sri Lanka, as signatory to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is held to account under international human rights law in respect of actions that violate provisions of CEDAW. This Convention, which has been described as an international bill of rights for women, is a detailed and comprehensive document which recognises that "a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women".

Article 2 of CEDAW requires States to "pursue by all means and without delay a policy of eliminating discrimination against women", which includes the duty to "refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation". Further, CEDAW obligates states to "take all appropriate measures including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women." Hence, Sri Lanka as signatory to the CEDAW is obliged to ensure that the rights of women are protected and promoted.

International Human Rights Standards and the Concept of Due Diligence

In 1992, the Committee on the Elimination of Discrimination Against Women adopted General Recommendation 19, in which it confirmed that violence against women constitutes a violation of human rights. It emphasises that "States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or investigate and punish acts of violence."[2] The

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[1] Rhonda Copelan, 'Intimate Terror: Understanding Domestic Violence As Torture', in Rebecca Cook (ed.) *Human Rights of Women: National and International Perspectives,* University of Pennsylvania Press, Philadelphia, 1994, p.116.

[2] General Recommendation 19 (9), 11th session, 1992, accessed at http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19

Committee made recommendations on measures States should take to provide effective protection of women against gender-based violence, including:

- Effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including *inter alia*, violence and abuse in the family, sexual assault and sexual harassment in the workplace;

- Preventive measures, including public information and education programmes to change attitudes concerning the role and status of men and women;

- Protective measures, including refuges, counselling, rehabilitation action and support services for women who are the victims of violence or those who are at risk with violence.

The concept of due diligence has been advanced by the judgment of the Inter-American Court of Human Rights in the case of *Velasquez Rodriquez*[3]. This judgment, which represents an authoritative interpretation of an international standard on State duty, is one of the most significant assertions of State responsibility for acts by private actors. The due diligence requirement encompasses the obligation to both provide and enforce sufficient remedies to survivors of private violence. Thus, the existence of a legal system criminalizing and providing sanctions for acts of violence against women would not in itself be sufficient; the government would have to perform its functions to "effectively ensure" that such incidents are investigated and punished. Indicators for measuring due diligence would be the existence of government programmes to protect victims of violence, the type of investigative and other actions taken by police, State officials etc.

CEDAW Committee's Concluding Observations on Sri Lanka's 3rd and 4th Periodic Reports[4]

In its Concluding Observations on Sri Lanka's third and fourth periodic reports, the CEDAW Committee recognised violence against women, as a serious problem facing Sri Lankan women. While urging the enactment of special legislation, the Committee points out issues which deserve special attention, such as the need to criminalise marital rape and the failure of the police to respond 'effectively and sensitively" to complaints of domestic violence. Violence perpetrated against women in the former conflict zones is highlighted with calls for State action including making victims aware of their rights and increasing accessibility to means of redress.

Violence Against Women

Violence is a reality that many Sri Lankan women face daily. Statistics for the year 2003 state that in total there were 2155 incidents of minor crimes against women. The category of minor crimes

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[3] Inter-American Court of Human Rights, 1988, Ser.C No.4, 9 Human Rights Law Journal. 212 (1988) in Steiner & Alston, *International Human Rights in Context: Law, Politics, Morals,* Oxford University Press, 2000, pp 881-887.

[4] Accessed at http://www1.umn.edu/humanrts/cedaw/srilanka2002.html

includes sexual harassment, assault and infliction of bodily harm amongst others[5]. In the case of "serious crimes", i.e. rape, murder, attempted murder, severe bodily harm, severe sexual abuse, incest etc, the offences for the year 2003 total 1506[6]. It should be noted that these statistics do not have a category titled "domestic violence".

Draft Prevention of Domestic Violence Bill - Objectives, Definitions and Language

After continued lobbying by women's groups in Sri Lanka the government introduced the "Prevention of Domestic Violence" Bill. Although this is a welcome move by the government, the Bill is inadequate, as it does not take a holistic approach toward the issue of domestic violence but instead concentrates only on the issuance of protection orders. The Long Title of the Bill states it is "an Act to provide for the issuing of protection orders, to prevent any act of domestic violence…" It has to be kept in mind that protection orders are often issued to prevent acts of domestic violence only after the first or first few acts of domestic violence have taken place. Hence, this Bill instead of criminalizing the act of domestic violence, appears to protect the victim only after an act of domestic violence has taken place. Hence, the Bill does not contain the message that domestic violence is a serious crime.

In addition, the language of the Bill is very legal and not accessible to non-lawyers. As, in the case of any Prevention of Domestic Violence legislation, dissemination and public education is imperative to the effectiveness of the legislation, the language used in the legislation should be devoid of legal jargon and accessible to all.

The UN Special Rapporteur on Violence Against Women has recommended the use of "the broadest possible definition of acts of domestic violence".[7] The definition of domestic violence in the Bill fails this test, as domestic violence is defined as an "act which constitutes an offence in Schedule I" and "any emotional abuse".[8] Schedule I contains "all offences contained in Chapter XVI of the Penal Code" which are the offences of "grievous hurt", "causing miscarriage" etc, Section 327-"extortion" and "criminal intimidation". The resort to a number of existing Penal Code offences without formulating a broad definition illustrates the reluctance to recognise domestic violence as a criminal offence.

Other measures required to prevent domestic violence

The Bill which concentrates only on protection orders, ignores other issues related to domestic violence that contribute to preventing domestic violence and protecting victims of domestic violence. For example, the Bill does not make it compulsory for medical service providers to complain of incidents of domestic violence to the police; it does not provide guidelines to police officers on how they should respond to complaints of domestic violence etc. In this regard, the United Nations Declaration on the Elimination of Violence Against Women, which calls upon States to take the

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[5] Police Department Statistics for 2003.

[6] Ibid.

[7] Report of the UN Special Rapporteur on Violence Against Women, Radhika Coomaraswamy, E/CN.4/1997/47, 12 February 1997, p.18.

[8] Section 22, Prevention of Domestic Violence Act.

following action in addition to enacting appropriate laws and procedures to provide redress to victims of violence, should be followed. The Declaration calls upon States to:

- develop national plans to eradicate violence against women;
- train judges, lawyers and the police; and
- set-up support services (shelters, legal and psychological counselling) for victims of violence.[9]

The Bill states it does not deprive the aggrieved person of the right to institute a separate civil action or criminal proceedings[10]. However, the fact that the legislation only deals with one aspect of domestic violence, i.e. the issuing of protection orders, instead of being comprehensive and providing both civil and criminal remedies is cause for concern. Ideally, the legislation should focus on, amongst other issues, the provision of:

- enhanced penalties for repeat offences aggravated assault and use of weapons;
- clear sentencing guidelines;
- emergency services such as crisis-intervention centres and immediate medical care; and
- treatment for victims and offenders

Standing

The bill only allows the affected person, i.e. the person who has been subjected to domestic violence to make an application for a protection order[11] and does not provide for any other person to do so on the victim's behalf. In the case of women who due to fear of violence may not be able to petition the court, provision should be made to allow others to do so on behalf of the victim.

Penalties & Prohibitions

The penalties in the enforcement provision of the Bill are weak and unlikely to deter the commission of acts of violence. For example, the Bill does not provide for a warrant of arrest upon issuing of a protection order, i.e. whenever a court issues a protection order or an interim protection order, the Court must make an order authorising the issue of a warrant for the arrest of the respondent and suspend the execution of such warrant subject to compliance with any prohibition, condition, obligation or order imposed. The warrant will remain in force unless the protection order is set aside, or is cancelled after execution. A suspended warrant therefore saves the aggrieved person from initiating action once more in the Magistrate's Court to enforce the order in case a Protection Order or Interim Order is violated. If a suspended warrant of arrest is issued, the Police can immediately arrest the respondent when an Interim Protection Order or a Protection Order is violated. The aggrieved person will therefore have immediate relief. Although this might seem draconian in nature, in Sri

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[9] Article 4, Declaration on the Elimination of Violence Against Women, accessed at http://www.un.org/documents/ga/res/48/a48r104.htm.

[10] Section 20, Prevention of Domestic Violence Act.

[11] Section 2, Prevention of Domestic Violence Bill

Lanka where domestic violence is still thought to be a private act outside the purview of the law and where the victim has few legal remedies and has to deal with an insensitive and chauvinistic legal system, such a measure is the only means through which protection for the victim can be assured.

Other Measures

Since police officers are not trained to handle cases of domestic violence, the legislation should provide guidelines for the police in acting in matters of domestic violence. Further, provision should be made to raise awareness and initiate public education programmes on domestic violence.

Response of Parliamentarians

When the Bill was presented in Parliament, the response of members was not positive or supportive but exhibited lack of awareness about the issue of domestic violence. Some concerns raised during the debates relate to the possible break up of the family as the result of baseless complaints lodged by a spouse who might apply for a protection order for personal gain. This is highly unlikely considering the inaccessibility of the legal system, the cost of legal action, and societal norms, which prevent people, especially women, from resolving private matters in the public sphere. Hence, the reality is that women will be reluctant to apply for a protection order and would do so only when the violence is severe.

The difference between Sri Lanka and 'Western' societies was repeatedly pointed out and cited by many members to illustrate the unsuitability of such a 'western' creation, i.e. the Bill, for Sri Lanka. Upon analysis, it is evident many MPs believe it is legitimate for husbands to 'chastise' or 'punish' their wives- hence, their fear that families would break up when the woman seeks relief from the violence she is subjected to. This further reveals the tendency to 'infantilise' women whereby they are viewed not as individuals capable of making decisions about their lives but as persons who need to be controlled and guided throughout their lives. The view that the family is a private haven and hence should be safe from scrutiny is also prevalent amongst parliamentarians.

At this juncture, it is important to point out that for many women the family, rather than being a site of security and peace, is actually the site of violence and fear. It is a fact that many acts committed against women, in the home, such as physical assault etc, are illegal and would result in action being taken against the perpetrator if committed against a stranger. It is therefore important for the law to treat all persons equally and extend the same protection to women. Hence, it is important to take domestic violence seriously and view it as a violation of human rights.

The Way Forward

The Sri Lankan government should therefore focus on substantive equality rather than formal equality and take measures to effectively deal with violence against women in a manner which is not only concerned with the equal treatment of the law but also with the actual effect of the law. Its approach should take into account historic, socio-economic and cultural realities and seek to eliminate systemic and institutional inequality.

While we call for legal reform to address the discrimination faced by women we should also keep in mind that women from besieged communities who might have been subjected to extensive state controls due to their race, ethnicity, class or a similar factor may take refuge in the private sphere of their ethnic/racial/class communities. Their reluctance to support legal reform that impacts on their particular communities highlights the conflict between individual rights and the rights of the community. While supporting diversity and right of communities to protect their culture, we should ensure that the rights of women are respected and they have the right to make decisions that affect their lives and families.

Questions and Answers Re
THE PREVENTION OF DOMESTIC VIOLENCE BILL [*]

- **What relief can be obtained under the Act?**

A person who is aggrieved by an act of *domestic violence* can apply to a Magistrate's Court to obtain an Order directing the person whose conduct has caused the grievance, to refrain from doing certain things or requiring him to do certain things so as to ensure the safety of the aggrieved person. The Order is aimed at protecting the aggrieved person from harm within the home environment. Such an Order is called a Protection Order.

What is envisaged is that, where a person needs protection from imminent harm, an *Interim Protection Order* (IPO) be issued immediately upon an application being made. A *Protection Order* (PO) will be issued as a second step after inquiry into the application.

- **What is an 'act of domestic violence'?**

An act of domestic violence is an act which results in either *physical abuse* or *emotional abuse* occurring between persons who are related. The degrees of relationship are specified in the Bill.

Physical abuse amounts to an act of domestic violence if caused by an act which is an offence under *Chapter XVI of the Penal Code* (which contains all the offences affecting the human body) ; *criminal intimidation* (section 483 of the Penal Code) and *extortion* (section 372 of the Penal Code) or an attempt to commit such an act.

Emotional abuse is defined in the Bill as a "*pattern of cruel, inhuman, degrading or humiliating conduct of a serious nature directed towards an aggrieved person.*" Emotional abuse is not known to the criminal law.

To fall within the scope of the proposed DV Act, the offensive conduct complained of should be that which arises out of the <u>*personal relationship*</u> between the parties. This could be conduct occurring within the home environment or even outside it. Offensive conduct which arises out of a purely business relationship even if it is between related persons, will not fall within the scope and ambit of the Bill.

- **Who can make an application ?**

Any person against whom an act of domestic violence has been committed or is likely to be committed may make an application. Such a person is referred to in the Bill as an *aggrieved person.*

A Police Officer can also make an application on behalf of such a person. On behalf of a child, a parent or guardian, or a person with whom a child resides, or a person authorized by the National Child Protection Authority can make an application.

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[*] Briefing paper prepared by the Ministry of Justice and Judicial Reforms

- **Who are the persons against whose conduct relief can be sought ?**

A spouse, ex-spouse or co-habiting partner of the person aggrieved, as well as other persons in close relationship to these persons including ascendants, descendants and collaterals. The Bill refers to such a person as a "*relevant person.*" The Bill includes a comprehensive definition of that term.

- **At what point of time can an application be made to court?**

An application can be made when a person fears that a domestic violence offence is likely to be committed or even after such an act has been committed to prevent further commissions.

- **Does the Act seek to create new offences?**

No. However, the failure to comply with a PO issued by court, is a punishable offence.

- **To which court should an application be made?**

To the Magistrate's Court within whose jurisdiction the aggrieved person resides (even temporary residence), or the relevant person resides or the act of domestic violence took place.

- **In what form should the application be?**

Substantially in the Form which will be set out in the proposed Act. The application should be made in duplicate. Affidavits from persons who have knowledge of the acts complained of may also be attached to support the application. This, however, is not mandatory.

- **Upon receiving an application what procedure will the court follow?**

The court is required to do the following –

- to *consider* the application *forthwith* and determine whether an Interim Protection Order (IPO) is *urgently* needed to be issued to prevent the commission of an act of domestic violence and ensure the safety of the aggrieved person. This is required to be done pending inquiry ;
- *where an IPO is considered necessary,* to forthwith issue an IPO and fix a date for the inquiry ;
    - alternatively, *where an IPO is* ***not*** *considered necessary*, to fix a date for the inquiry ;
    - the date for the inquiry should be within 14 days of receipt of the application ;
- to notice the respondent to show cause (at the inquiry) why a Protection Order (PO) should not be issued ;
- to hold an inquiry into the application thereafter (commencing on the date fixed) to determine whether a PO should be issued ;
- if the respondent *does not appear in court for the inquiry on the date fixed*, and the court is satisfied that the notice has been served on him, to consider the application even in the absence of the respondent and determine whether a PO should be issued ;

- if the respondent *appears in court on the date noticed,* to proceed to inquire into the matters set out in the application ;
- after inquiry, if the court is satisfied that a PO is necessary to prevent the commission of an act of domestic violence and the need to ensure the safety of the aggrieved person, or where the respondent does not object to the issue of a PO, to issue a PO ;
- Upon issuing a PO, the court is required to have copies of the Order served on the respondent, the aggrieved person/applicant, the OIC of the Police Station within which the respondent resides and within which the aggrieved person resides.

- **What are the main features of an IPO?**

- An IPO essentially prohibits the respondent from committing an act of domestic violence. It may also impose other conditions. Please see below for these other conditions that may be imposed.
- An IPO is the *immediate* relief obtained upon the making of an application where the court sees the urgency for protecting the aggrieved person from an act of violence at the hands of the respondent even before hearing him.
- An IPO can be issued without hearing the respondent. An IPO may even be issued without hearing the applicant because, at this stage, it is not always necessary for the aggrieved person to give evidence in court. Court will call the applicant and any other material witness, only if it is considered necessary.
- An IPO remains in force until a PO is issued or it is vacated after the hearing and determination of the application.
- An IPO necessarily restrains the respondent from committing or causing the commission of an act of domestic violence. An IPO can restrain the respondent in any other way only if the court is of the view (after hearing evidence of witnesses) that it is necessary to do so to ensure the safety of the aggrieved person.
- An IPO is required to be served on the respondent. However, where the respondent evades receiving the Order, it can be posted in a conspicuous place at his normal place of residence.

- **What are the main features of a PO?**

- A PO essentially prohibits the respondent from committing an act of domestic violence. It may also impose other conditions. Please see below for these other conditions that may be imposed.
- A PO is issued after inquiring into the application at which inquiry the respondent will be given an opportunity of showing cause why a PO should not be issued.
- A PO can be issued even if the respondent does not appear to show cause, if the court is satisfied that notice has been served on him and that a PO is necessary to prevent the commission of an act of domestic violence and to ensure the safety of the aggrieved person.
- A PO remains in force for the duration specified in the Order which cannot initially be for more than 12 months. It can be extended, amended, varied, modified or revoked on application made by either party and after hearing both parties.

- **What degree of proof must be established to obtain an IPO or a PO?**

The court needs only to be satisfied that it is necessary to issue an Order for the purpose of preventing the commission of an act of domestic violence and for ensuring the safety of the aggrieved person.

Unlike in a criminal charge, guilt need not be proved *beyond reasonable doubt*.
It is possible for the court to issue a PO without proof or admission of guilt.

- **What Orders can the court make in an IPO or a PO?**

The court has very wide powers to restrain the respondent. In addition to essentially prohibiting the respondent from committing or causing the commission of a domestic violence offence, the court may prohibit the respondent from entering the aggrieved persons residence, place of employment, school or from following the aggrieved person around so as to cause a nuisance, or from entering a shelter in which the aggrieved person may be, from occupying or entering a residence previously shared with the aggrieved person, from having contact with any child, from having access to shared resources, from encumbering the matrimonial home by sale or transfer so as to place the aggrieved person in a destitute position.

The Bill sets out details of the courts powers. In making these orders, the court is required to take into consideration the accommodation needs of the aggrieved person and the children as well as any hardship that may be caused to the respondent as a result of the order.

Further, where a PO is made, the court can, if it is satisfied that it is reasonably necessary to do so, make additional orders called **supplementary orders,** to protect and provide for the immediate safety, health and welfare of the aggrieved person. Thus the court may order the Police to seize any weapons that are in the possession of the Respondent or to accompany the aggrieved person to assist with the collection of personal property; may order that the aggrieved person be placed in a shelter for temporary accommodation; or order a social worker or similar officer to monitor the observance of the PO between the aggrieved person and the respondent ; order the respondent to provide *emergency monetary assistance* to any person who the respondent has a duty to support, having regard to the financial needs and resources of both the aggrieved person and the respondent.

- **When a PO is issued does it mean that the respondent is guilty of any offence ?**

No. An IPO or a PO is a **civil remedy**. To find a person guilty of an offence, he must be charged in a criminal court.

- **How can a person who commits a domestic violence act, be made criminally liable for that offence?**

Where an offence under Chapter 16 of the Penal Code or the offence of criminal intimidation or extortion is committed, a complaint is required to be made to the Police and action will be taken to proceed against the offender in terms of the criminal law and procedure.

However, emotional abuse is not a criminal offence and there is no process to secure punishment for such abuse. Persons can be protected from emotional abuse by obtaining a PO from court for its prevention, but it is not an act which attracts penal sanctions.

- **Where an act of domestic violence has been committed, can both processes be followed?**

Yes. A complaint can be made to the Police if an act of domestic violence has been committed. As explained earlier, the Police will pursue action to investigate and prefer charges if there is adequate evidence to establish that the offence was committed.

At the same time, an application for a PO can be made to restrain the respondent from continuing violent acts. Even before an act has actually been committed, an application can be made for a PO if an act is imminent and is expected. However, no *criminal process* can be initiated before an act has actually been committed.

A criminal charge and an application for a PO are two parallel processes seeking two different remedies.

A criminal charge is preferred by the State, whereas an application for a PO is made by the individual who is aggrieved or by the Police on his/her behalf or by an authorized person on behalf of a child.

- **What happens when a person violates a PO?**

In the event of a failure to comply with an Order, the respondent can be charged before a Magistrate's Court for the violation and upon conviction, can be punished with fine up to Rs. 10,000 or to imprisonment (simple or rigorous) up to one year or both fine and imprisonment.

In the event of a failure to comply with an Order to provide the aggrieved person with emergency monetary assistance, the court may direct the employer of the respondent to directly pay to the aggrieved person a part or the whole of the financial relief ordered by court.

- **What happens where an act which is a criminal offence has already been committed before a PO is made?**

Action can be taken under existing law to investigate and prosecute any offender in respect of the criminal offence. A person cannot be punished under the DV Act for the commission of a criminal offence.

The allegation that he committed an offence will be investigated as in any other criminal offence and if there is adequate evidence, the offender will be charged in a court of law. The entire process is a criminal law process. The proposed Domestic Violence Bill does not contain any provision which affects the present provisions under the criminal law and procedure.

- **What is the link between a PO under the Act and the criminal offence that may have been committed?**

These are two different issues. The PO is a civil remedy. The offence is a criminal offence and will be dealt with in terms of the criminal law and procedure.

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