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DUE PROCESS AND THE RULE OF LAW

LAW & SOCIETY TRUST

CONTENTS

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Editor's Note ... ...

The Review publishes in this Issue, six papers that reflect on the theme, "**Due Process and the Rule of Law**" which were part of discussions at the 9th Consultation on Due Process Issues, conducted by the Asian Legal Resource Centre, Hong Kong recently.

The theme of the conference sessions was **"Judicial Protection of Human Rights"** with the special inclusion of judges from the Supreme People's Court of China and provincial courts in that country.

While the papers are, in the main, concerned with civil and political liberties, the inclusion of socio-economic rights in the debates reflected the overriding importance given to holistic discussion on the broad span of rights concerning the citizen.

From another perspective, the linkage between the domestic situation of rights prevalent in any country and international monitoring mechanisms was also discussed in detail. Sri Lanka, in this respect, offers, a good example of these linkages in the context of the duty to submit periodic reports to the UN Treaty bodies as a result of the ratification of such treaties, where the reporting process and the Concluding Observations issued by the various monitoring bodies has become more stringent over the years.

These linkages between the domestic and international sphere apply with even more substantive force where the International Covenant on Civil and Political Rights (ICCPR) is concerned, as a result of the State agreeing to become subject to the First Optional Protocol to the ICCPR which allows persons subject to the jurisdiction of the State to bring an individual communication before the United Nations Human Rights Committee (UNHRC) sitting in Geneva, alleging a violation of Covenant rights.

The discussions at the Consultation centered on several Communications of Views by the United Nations Human Rights Committee in response to a number of petitions brought before the UN-HRC by individuals alleging violations of their Covenant rights by the Sri Lankan State in recent times.

Kishali Pinto-Jayawardena

The Concept of Due Process and Inadequacies in the Sri Lankan Constitutional cum Legislative Regime

Jayantha de Almeida Gunaratne[♣]

Introduction - What is Due Process?

Historical Precursors – The Magna Carta (1215) and the US Constitution

As hard as one may search, one will not find a definition of 'due process' in any Constitution, whether written or unwritten, across the globe. The historical seeds of this definition could be found perhaps in the Magna Carta (1215) which covenanted that –

> *"we have also granted to all the free men of our kingdom, for us and our heirs forever, all the liberties, underwritten..."*
>
> *(1 lines 5-7)*

That, the said use of the terms "liberties" could well have been understood at the time to mean "personal (physical) liberty' is a fact that, perhaps could be taken notice of, for purposes of a historical survey on the topic under consideration, given the judicial initiatives taken first, to present an affront to the absolute authority of the King (Monarch), which led to the concept of the supremacy of Parliament (in effect, meaning, the supremacy of the elected representatives of the people, an apparent contradiction, no doubt, in the context of powers in a sovereign Monarch and a Parliamentary (representative) democracy which had emerged at the turn of the 17th century in England.)

However, the reference to the concept of 'liberties" carrying with it the potential to go beyond mere personal (physical) liberty exemplified by the writ of Habeas Corpus, became apparent by the 8th Century. While the said writ of Habeas Corpus had thus got entrenched in the global jurisprudence, it became incumbent on the USA, given the civil cum political factors which it was contending with, to extend it further when in its fifth amendment to its Constitution, the US declared that, the Federal Government is prevented from taking a person's life, liberty or property without due process which by the 14th Amendment imposed the same limitation on State governments.

Thus, appeared the phrase 'due process' in a written Constitution for the first time, but neither of these amendments define 'due process' and it became the task of the judiciary to interpret the same as meaning 'appropriate legal procedures' while however, the USA Constitution itself, specifies some of these procedures.

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The Indian Constitution

The Indian Constitution, in Article 20, provides protection in respect of conviction of offences incorporating within the said Article the values ingrained in the maxims *nullum crimen poena lege* and *nullum crimen sine lege* along with the maxims *autrofois acquit* and *autrefois convict.*

Article 21 decrees that,

> *"no person shall be deprived of his life, or personal liberty except according to procedure established by law"*

It will be noted that there is no reference to the phrase 'due process'

The Constitution of Sri Lanka

Article 13 while guaranteeing to a person freedom from arbitrary arrest, detention and punishment, states that these freedoms cannot be taken away except according to law or according to procedure established by law or in accordance with procedure established by law.

One again it will be noted that, there is no reference to the phrase "due process".

Preliminary Observations on These Constitutional Provisions

The US Constitution alone specifically refers to the phrase 'due process' in the context of a person's life, liberty or property. The Sri Lankan Constitution standing in contrast to both the US and the Indian Constitutions does not, in Article 13, make references to 'life, liberty or property' but instead provides for freedom of arbitrary arrest, detention and punishment except in accordance with procedure established by law. (and the cognate expressions referred to earlier.)

Consequently, if "due process" is to be regarded as "appropriate legal procedures", the Sri Lankan Constitution would be found to limit the said legal procedures only "to liberty" while the Indian Constitution goes further by extending it to life.

The constitutional right to property was first enshrined as a fundamental right in the Indian Constitution but was later replaced by Article 300A, (brought in as an Amendment in the year 1978) wherein it became a constitutional right. It decreed that "No person shall be deprived of his property save by authority of law" with no reference it might be noted, to the phrase "except according to procedure established by law" as contained in Article 21 of its Constitution.

The aforesaid preliminary analysis would thus lead one to draw the inference that, there is a qualitative difference between the expressly stated "due process clause" in the US Constitution and the "appropriate legal procedures" doctrine that has emerged in its wake; a valid constitutional equation for the US but which would not hold good in the context of the Constitution of Sri Lanka.

On the basis of the foregoing preliminary analysis, it is submitted that, *prima facie*, Sri Lanka's Constitution falls short of a "due process clause" in contrast with the (5th and 14th Amendments) of the

US Constitution in as much as the US Constitution encompasses within itself "appropriate legal procedures" (if an equation is, in fact, to be struck between "due process" and "appropriate legal procedures") in regard to not only "life and liberty" (attracting thereby the principles contained in the ICCPR) but also "property", (responding thereby to the ICESCR as well).

Judicial Recognition of the Right to Life as being Implied in the Constitution of Sri Lanka

Unlike in the US Constitution and the Indian Constitution which expressly recognise the right to life[1], the Constitution of Sri Lanka has no comparable provision. Yet, as recent as in the year 2003, the Supreme Court, in *Sriyani Silva v. OIC Paiyagala*[2] in a judgement delivered by his Lordship Justice M.D.H. Fernando,[3] declared in unequivocal terms that, the right to life is implied in the Constitution, bringing into play through the interaction of several provisions of the Constitution.[4]

Granted the fact that, both the US Constitution, which has stolen a constitutional march over most, if not all other democratic Constitutions followed by the Indian Constitution, in expressly recognising the "right to life" credit must surely be given to the Supreme Court of Sri Lanka in recognising such a right through a process of interpretation of the constitutional provisions, surely as being fundamental to all other rights, whether flowing from common law (or customary law), statutory law or in the sense of their being fundamental rights (enshrined in domestic constitutions or as responding to international norms as reflected in the ICCPR, ICESCR and other international standard setting conventions and protocols whether ratified or not).

Yet, His Lordship Justice M.D.H. Fernando, having made that constitutional advance, in at least recognising "a right of life" as being implied in the Constitution in the above stated *Sriyani Silva Case*, is seen to be reluctant to make an overreach beyond that, where his Lordship appears to have drawn a distinction between the right of life and the right to quality of life," though it may be said that the circumstances of the case in which Justice Fernando gave judgement may not have warranted such an overreach. In this regard, the Indian Supreme Court demonstrably as made clear positive strides in upholding the "quality of life" as well. For instance, access to roads has been held to be a concomitant of the right to life.[5]

The Right of an Accused to a speedy and expeditious trial as being subsumed in the concept of the Rights to a Fair Trial

The ICJ – Delhi Conference on the Rule of Law

The International Congress of Jurists, which was convened in Delhi in 1959, to consider the Rule of Law in a changing world, in the Third Report containing conclusions of the Convention which were reached in the consultative process, posed the initial question. Viz:

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[1] The 5th and 14th Amendments of the US Constitution and Article 21 of the Indian Constitution.
[2] SC/FR/417/2003.
[3] Most senior Judge of the Supreme Court of Sri Lanka as at 1999 who was bypassed in the appointment to the Office of Chief Justice and who retired prematurely in the year 2004, January.
[4] *Supra*, n. 2.
[5] *State of Himachal Pradesh and Others* v. *Umed Ram Sharma and Others*, AIR (1986) SC 847.

"If a citizen of a country which observes the rule of law is charged with a criminal offence, to what rights would he properly consider himself entitled ?"

In answering that question, among other minimum requirements, it set down that, where an accused stands trial, the trial should be fair and in public. However, though the members of the consultation had boasted that the purpose of it was to give material content to the rights of an accused as flowing from the Rule of Law, the necessity for "a speedy trial" appears to have escaped its attention.

The Lagos Conference of the ICJ held in 1961 as well as the Brazil Conference held in 1962, do not appear to have addressed the question.

Dennis Lloyd and the Rule of Law[6]

The Rule of Law is interpreted by Dennis Lloyd as one of the main values expressed in legal freedom. Establishing a link between the Rule of Law and the rights which ought to be accorded to an accused person, the writer formulated the proposition that, what the Rule of Law predicts, is the imposition of procedural guarantees which ensure Due Process of Law which in turn, *inter alia*, must provide for the speedy and fair trial of accused person.

The academic initiative taken by Lloyd could be said to have exposed a due process issue left unaddressed by the ICF Conference of the 1960s. The point sought to be raised at this juncture is that, the Criminal Procedure Act (of 1979) of Sri Lanka does not contain the mandating of a 'speedy trial." The Constitution itself, in Article 13(3) refers to "a fair trial" but does not make explicit that it should be speedy.

This continues to be a grave concern in the context of "due process" issues in Sri Lanka. The accused person held in remand with no indictments filed, sometimes for years and even where indictments have been filed but where the trials have not got underway have reached enormous numbers, the name of which is legion. In a reported case, the prisoner who has been charged with murder had pleaded to the lesser charge of culpable homicide not amounting to murder. The plea had been accepted on the basis of a "sudden fight." The prisoner had been 17 1/2 years of age at the time of the incident and the High Court[7] had sentenced him to a term of 15years rigorous imprisonment. He had been on remand prior to trial and conviction for a period of 2 years and 2 months.

The Court of Appeal, acting *ex mero motu*, presided over by His Lordship G.P.S. de Silva[8] after holding that, in the circumstances of the case, the sentence imposed by the High Court was too excessive made order that, taking into consideration the period already served by the accused in imprisonment, the accused be discharged from prison.[9]

It would not be an overstatement that, similar judicial initiatives taken in Sri Lanka are far and between. The accused in that case was fortunate in evoking the sympathy of His Lordship G.P.S. de Silva who had responded to a mere letter written by the accused to the Registrar of the Court of

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[6] Dennis Lloyd, The Idea of Law (Pelican), 1972.
[7] The Court having original criminal jurisdiction in regard to larger crimes.
[8] Later, the Chief Justice of Sri Lanka.
[9] CA/807/85, Appellate Law Recorder, pages 29-31.

Appeal. How many others in the position of the accused in that case must be languishing in prison with no trial commenced or no indictment filed, (bail being refused) awaiting a so-called fair trial?

Hence, in the context of "due process issues" it becomes imperative that, Article 13(3) of the Constitution be amended to read as –

> *"Any person charged with an offence shall be entitled to be heard, in person or by an Attorney-at-Law, at a fair (and speedy) trial by a competent Court."*[10]

If such an amendment is procured, it would thus become incumbent on a reviewing court on a person's conviction, as in the illustration provided above, and on the basis of analogical reasoning based on the rationale in that case, for an accused even to move that, he be granted back his freedom, if there is undue delay in putting him on trial for the offence he has been charged of, which would then amount to giving material content to the Rule of Law and the concept of 'Due Process' in relation to the rights of an accused.

"Due Process" in areas other than Criminal Cases

Administrative Law

The scope of the rule of law is not limited to cases of safeguarding accused persons in criminal cases but has a wide and important sphere of operation in regard to the exercise of State or governmental powers.

In consequence of the emergence of the Modern Welfare State, the States in response thereto have taken numerous legislative initiatives in creating statutory functionaries vested with power, the exercise of which could impact on the rights, interests and legitimate expectations of persons, given the fact that, power implies discretion and the exercise of discretion imposes in turn a duty to exercise that discretion in compliance with the doctrine of public trust and non-arbitrariness is now established firmly in the Sri Lankan jurisprudence.

Indeed, if one stops at the point in saying that, once power is granted, which in its wake implies discretion, then as it has been articulated, the Rule of Law would stand replaced by a Rule of Administrative (Governmental) discretion which would be like reducing Rock, (the Rule of Law), to sand, (Rule of Discretion).[11]

Hence, most (if not all) mature democratic states have developed rules and principles of administrative law which enable subordinate courts of law as well as statutory functionaries exercising power and /or discretion, to be made subject to judicial review of the superior Courts. These rules or principles are reflected in the long established doctrine of *ultra-vires*, both substantively and procedurally and the modern doctrine of illegality, irrationality, proportionality and procedural impropriety expounded in the English *GCHQ Case*.[12]

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[10] The emphasis reflects the suggested amendment.
[11] Wade & Forsythe, Administrative Law (8th Edition)
[12] (1985)1 AC 374 (HL)

While illegality, irrationality and proportionality might be thought as responding to the substantive context of an administrative decision affecting the rights of a party, it will be noted that, the principle of procedural impropriety strikes a direct responsive chord with the concept of "due process", meaning, if a decision is taken by a statutory authority affecting the rights of a person, it must be done in keeping with "appropriate legal procedure."

In Sri Lanka, it must be said that, there is no statute or code that specifies 'appropriate legal procedures" in the context of administrative decisions affecting the rights of a person. The initiatives taken by the Law Commission of Sri Lanka is suggesting the Government to enact a 'fair Administrative Procedure Act" have not been taken note of.[13]

The Establishment Code which lays down procedure in conducting disciplinary inquiries against public officers who are charged with employment offences, Disciplinary Codes of Procedure formulated by some Universities under the University Act of 1978 in the conduct of inquiries into alleged act of misconduct of University staff and students, however contain some elements of fair administrative procedure.

The inadequacy of these provisions has been exposed in two recent decisions of the Appellate Courts of Sri Lanka. In *Upasena* v. *Rajapakse and Sathyapala*[14] an employee of the Rubber Department had been charge sheeted on six counts. Upon the inquiry officer overruling an objection that the charge sheet was defective, in that, a preliminary investigation as completed by the Establishment Code had not been conducted, the aggrieved public officer made an application for a writ of certiorari to quash that ruling, but the Court of Appeal dismissed the application holding that, the charges did not require a preliminary investigation. It appeared that, there was a distinction between charges contemplated in the Code which had led the Court of Appeal to take the view it did.

However, the employee's appeal to the Supreme Court was allowed. Justice Mark Fernando striking a chord with the concept of "due process", held that, charges alleged based on disciplinary grounds (or misconduct) must not only contain a clear and simple statement of the acts of misconduct or lapse, but also the time frame within which the said acts are alleged to have occurred and the failure to do so (in the charge sheet) offended the principle of "fair inquiry."

Thus, an apparent lacunae in the Establishment Code was filled on the intervention of the Supreme Court.

In another case decided by the Court of Appeal where certain University students had been suspended and debarred from attending lectures for *inter alia*, alleged acts of intimidation against University Lecturers, Justice K. Sripavan allowed an application for certiorari quashing the suspension on the ground that, natural justice had not been complied with in that, a request made by the students to controvert the case put forward by the University through leading evidence and cross-examination at the inquiry had been denied to them. The concept of "fair opportunity" was the theme pursued by the Court. Counsel for the University had submitted that, the said request on the part of the students to lead the evidence of more than one hundred and ten witnesses was done in bad faith, to prolong the

[13] Law Commission of Sri Lanka (1996) – Report on "Code of Fair Administrative Procedure Act."
[14] 2003 (1) ALR 13.

proceedings and to circumvent the disciplinary action taken against them pending the inquiry into the allegation.

The said contention perhaps might have found favour with His Lordship if it had not been for the fact that, the particular University had not formulated any rules or a code of procedure to be followed in circumstances as which arose in the case, although the University Act expressly conferred power on the University to do so.

Consequently, as these illustrations show, the lack of a comprehensive fair Administrative Procedure Code remains an unaddressed "due process issue" in the context of the area of public administration in Sri Lanka.

Labour (Non-Governmental) Law

In labour disputes involving the private sector, jurisdiction is conferred on what are termed as Labour Tribunal to make "just and equitable orders" in instances where an employee's services are terminated.[15]

There is no Code of Procedure yet in the statute book of Sri Lanka as how Labour Tribunals should conduct their procedure in their attempts to resolve disputes between employers and employees. Since these tribunals do not qualify as "Court" within the definition of the same as contained in the Evidence Ordinance of Sri Lanka (which applies only to "Courts") and the Civil Procedure Code (again which basically applies only to District (Civil Courts), if one were to embark on an analysis of the procedure adopted by these tribunals, one is bound to discover that, there has not been consistency in the procedure followed, at times even impacting on legal doctrines such as the burden of proof.

Although the freedom thus resulting in the hands of Labour Tribunals has been commented upon by our Supreme Court as not being "a freedom enjoyed by an ass"[16] and accordingly, certain orders have been set aside as revealed from the Case Law of Sri Lanka, the judicial struggle accentuated in its wake still remains unaddressed by the legislature of the country. Even as recent as in the year 2002 the Supreme Court observed that,

> *"Although the Labour Tribunal is not bound by the Evidence Ordinance, the principle enshrined in Section 102 that, the person on whom the burden of proof lies would fail if no evidence at all were given on either side, is a commonsense principle, departure from which would not be justified if the circumstances do not warrant such a departure."*[17]

To date, the legislature has not thought it fit to lay a Fair Procedure Code in proceedings before Labour Tribunals which, it is submitted, is an imperative need for the reasons adduced above.

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[15] The Industrial Disputes Act of 1951 (as amended).
[16] per HNG Fernando, J. in a case decided in the 1960's.
[17] per Mark Fernando, J. in *David J. Anderson* v. *Adamad Husny*, 2001 (2) ALR 13.

Other Statutory Functionaries exercising powers affecting rights

The statute book is inundated with numerous statutory functionaries vested with power to take decisions or make orders affecting rights of parties. The Commissioner of National Housing under the Ceiling on Housing Property Law (as amended),[18] the Commissioner of Labour under the Factories Ordinance (as amended)[19] the Shop and Office Employees Act,[20] and the Workmen's Compensation Ordinance (as amended)[21] the Principal Collector of Customs under the Customs Ordinance[22], the Commissioner of Excise under the Excise Ordinance[23] may serve as examples.

It is true that, decisions of these statutory functionaries are reviewable under both, the substantive doctrine of ultra-vires as well as procedural ultra-vires. For example, the rationale applied to Labour Tribunal in the earlier quoted case of *Anderson* v. *Ahamed Husny*[24] was extended more recently in the Supreme Court decision of *Moosajees Ltd.* v. *Arthur and Others*[25] to the procedure that ought to be followed by the Commissioner of National Housing when hearing disputes between an owner and landlord and tenant who intends to purchase the house he is residing in.[26]

Thus, although through judicial initiatives, a due process system has emerged in the context of judicial review of administrative action, much litigation perhaps could be avoided if the principles enunciated in decided cases relating to fair procedure are collated and read into a Code for then, statutory cum administrative functionaries could avoid the pitfalls they might otherwise fall into.

Concept of Substantive Economic Due Process – further inadequacies of the Sri Lankan Constitution

As observed earlier Article 13 of the Sri Lankan Constitution is the only provision that comes even close to a due process clause in the American sense. Although the 'liberty' content in the 5th and 14th Amendments of the American Constitution arguably could be regarded as being reflected in Article 13 and the several provisions of the Code of Criminal Procedure Act of 1979, the omission of any reference "to life" also may be said to have been somewhat rectified through the intervention of the Supreme Court in Sriyani Silva's Case.[27]

What then is the 'property' related aspect of due process? What is the impact of "due process" on certain forms of social legislation? (and) what relevance does 'due process' have on the regulatory business environment.?

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[18] Legislative Enactments of Sri Lanka, (1980) Vol. 12, Chapter 339.
[19] Legislative Enactments of Sri Lanka (LEC), 1980, Vol. 7 Chapter 144.
[20] LEC, 1980 Vol. 7, Chapter 145.
[21] LEC, 1980 Vol. 7, Chapter 158.
[22] LEC, 1980 Vol. 13, Chapter 344.
[23] LEC, 1980 Vol. 3, Chapter 64.
[24] *Supra*, n. 14.
[25] SC/58/01, S.C. Minutes of 5/12/2002.
[26] per His Lordship T.B. Weerasuriya (with their Lordships' Justice Mark Fernando and Justice Wigneswaran agreeing)
[27] *Supra*, n. 2.

Needless to say, these are aspects which have hardly been addressed in Sri Lanka save for oblique judicial attempts that could perhaps be interpreted as foreshadowing an economic due process rationale." It is proposed to address these aspects in the ensuing paragraphs.

(A) "Property" related aspects of due process

It has come to be accepted that, a government's eminent domain power is its right to take or acquire private property for "a public purpose' on payment of just compensation. Thus, the requirement of any private property being required for a public purpose and the payment of just compensation" operate as conditions precedent to the actual "taking' of a private land by the government (or State).

The Land Acquisition Act of Sri Lanka confers power on the Minister to set in motion the exercise of acquiring private land for "a public purpose' by merely declaring that by gazette notification he is empowered to state that, a private land is required for a 'public purpose". The Act does not require the minister to state the public purpose for which such private land is required. In a series of decisions of the Appellate Courts of Sri Lanka, it had been consistently held that, that, the Minister is not obliged to state 'the public purpose.'

This judicial trend as impacting on a private land owner's rights has been further compounded by the Courts of Sri Lanka holding that, at the stage of the Minster so declaring that, a private land is required for a public purpose, the said declaration is not challengeable, apparently on the reasoning that, the affected land owner's interests are not affected at that stage, in as much as the land still remains privately owned land.

That judicial attitude completely fails to address the economic impact of such a ministerial declaration (that, the land is required for a public purpose) on the owner and the extent to which such a declaration interferes with investments on the security of his property based on his legitimate expectations regarding the future use of his property.

On a perusal and analysis of the case law in Sri Lanka, it would appear that, in fairness to our appellate courts, this aspect has not been put in issue for judicial consideration exemplified by the fact that, the Constitution of Sri Lanka does not guarantee the right to property in explicit terms through a provision to that effect.

Is there then 'due process" in the government seeking to acquire a privately owned land?

In that legislative background as judicially interpreted, complied with the constitutional yawn in not containing any provision relating to due process in the context of acquisition of privately owned property, even if a proposed acquisition is prompted by political cum personal motives, would stand removed from the realms of judicial review.[28]

In this regard, one Supreme Court decision in Sri Lanka sought to respond to due process where a private owner's land was sought to be acquired by the State, wherein it was held (per Justice Mark Fernando) that, where a Minister declares that, a land is required for a public purpose he must disclose

[28] *Mallika Ratwatte v. M/Lands* (76 NLR 128).

what that purpose is.[29] That decision posed certain vital questions; why should not someone whose land is sought to be taken be told the purpose for which it is being taken? If he is not told how would he be in a position to demonstrate that the purpose for which it is to be taken is not viable?

That decision has been sought to be distinguished by the Court of Appeal on the basis that even if the public purpose is not disclosed in the Minister's declaration, if circumstances showed that the aggrieved party in fact knew what that purpose was, he could not be said to have been prejudiced.[30]

The Court of Appeal respectfully, did not address its mind to the earlier judicial thinking that the public purpose can be changed at any time and that, that is the reason why the Minister's *ipse dixit* that, a land is required for a public purpose (without having to disclose the particular purpose) had been held to be conclusive.[31] The effect of the Court Appeal decision would thus be that, if a land owner is aware the purpose for which the land, (as revealed from correspondence and representations), is ostensibly intended to be taken, the Minister's mere declaration that the land is required for a public purpose, (without disclosing the purpose), would not matter although the public purpose which the land owner thought it was to be taken for could be changed by the Minister subsequently.

It is this kind of eventuality that was judicially circumvented in the Supreme Court decision in Manel Fernando's Case[32] which strikes a responsive chord with due process when a person's land rights are sought to be taken away.

There is another aspect that needs to be mentioned in the context of land acquisitions. That is, the law of Sri Lanka does not set a time frame within which compensation for expropriated land has to be paid to a land owner who has been deprived of his land. This is another matter that continues to be ignored by the legislature notwithstanding recommendations made by the Law Commission of Sri Lanka to address the issue. Sometimes land owners have had to wait several years without payment of compensation. In this regard mention may be made of the Malaysian Constitution which decrees that, compensation must be paid before a land which has been expropriated is utilised for the public purpose for which it was so expropriated. Such a provision would certainly accord with due process.

Before concluding this part of the paper, mention must be made of a Court of Appeal decision which invoked the principle of due process in the context of a occupier of land which had been acquired thirty years ago under the Land Acquisition Act. No steps had been taken under the Land Acquisition Act to take over possession of the portion of the said land of which the aggrieved party had continued to be in possession. After a lapse of thirty years the State sought to eject him by invoking the provisions of the State Lands (Recovery of Possession) Act of 1979 on the basis that he was in unauthorised possession of State land.

His Lordship Justice U. de Z. Gunawardena in *Edwin* v. *Tillekeratne*[33] after recalling those "historic words which the Courts adopted as a general rule of conduct, "That no man of what estate or

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[29] *Manel Fernando* v. *Jayaratne*, 2000(1) SLR 112(SC).
[30] *Seneviratne* v. *Urban Council, Kegalle* 2001(3) SLR 105 (CA)
[31] *Gamage* v. *Minister of Agriculture* (76 NLR 25), *Kingsley Fernando* v. *Dayaratne* (1991) 2 SLR 129.
[32] *Supra.*
[33] 2001(3) SLR 34

condition that he be, shall be put out of land or tenement ..... without being brought in answer by due process of law" held that, "to seek to eject the petitioner under State Lands (Recovery of Possession) Act, when in fact, he ought to be ejected, if at all, ... under the Land Acquisition Act" was violative of due process.

Due Process and Social Legislation

When one looks at the working of the American system, one sees how in the late 19th and early 20th Centuries, pro business Courts influenced by laissez-faire economic ideas, struck down various kinds of social legislation as being violative of due process. This was achieved by reading freedom of contract into the liberty concept protected by the 5th and 14th Amendments of the Constitution and interpreting "due process of law" as requiring that legislation denying freedom of contract must have some relation to the achievement of a valid governmental purpose.[34]

Apart from the inadequacies of the Constitution of Sri Lanka referred to earlier, in that, it does not guarantee the right to property, it also does not contain a provision similar to Article 1 Section 10 of the American Constitution which forbids the States from passing any law impairing the obligation of contract. The Constitution of Sri Lanka also does not provide for judicial review of enacted legislation.

In that background, while many forms of social legislation, (for example, those relating to fair wages, hours of work and grounds or dismissal of workman), though violative of freedom of contract by dictating terms to the employment relation, would be defensible on the argument that the test of reasonable relation to the achievement of a valid governmental purpose (namely, protection of relatively powerless workers), the question may be posed as to whether this economic version of substantive due process would be equally applicable to certain other forms of social legislation. Housing legislation of Sri Lanka may be taken as an illustration. The housing shortage in Sri Lanka has reached alarming proportions despite Article 27(c) of the Constitution of Sri Lanka having as one of its principles of state policy; *"the realisation by all citizens of ... ... adequate housing."*

To date there is no "housing policy" formulated in the country. Homeless persons, slum dwellers and those who are in occupation of unauthorised structures running the risk of being roofless at any given time, are numerous. Instead of addressing this issue systematically, successive governments since the 1940's have merely sought to afford protection to tenants who are already in occupation of houses through legislation[35] shifting the burden to landlords who sometimes own a single house, thus offending economic due process.

By two recent amendments, the current Rent Act has been amended[36] on the recommendations of the Law Commission in an attempt to strike a balance between landlords and tenants in pursuance of the

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[34] See: Business Law and the Regulatory Environment – Concept and Cases (Lusk Series) 1986, (6th Ed.), Chapter 42.

[35] The Rent Act of 1972 (and its legislative precursor the Rent Restriction Ordinance of 1948) and the Ceiling on Housing Property Law of 1973 (as amended)

[36] Act, No. 55 of 1980 and Act, No. 29 of 1999.

constitutional dictate that, the State shall pursue "the rapid development of the country by means of public and private economic activity."[37]

While it is true that, even economically developed countries such as the U.K. and The Republic of South Africa have legislation impacting on the landlord-tenant contractual relationship in the area of property, they are basically rent regulatory unlike the Rent Act (1972) of Sri Lanka which imposes statutorily stringent grounds upon which a landlord could hope to have his tenant ejected from a premises that has been let prior to 1st January, 1980.[38]

Besides carrying constitutional implications in terms of Article 12(1) of the Constitution and therefore rendering the same arbitrary, this resulting legislation regime arising in the context of the contractual relationship between landlord and tenant thus offends or runs counter to "due process" for the said legislative scenario while denying freedom of contract fails to have some relation to the achievement of a valid or rational governmental purpose in as much as it does not address the housing shortage rampant in the island but rather only encumbers the rights of house owners.

Thus, the reason why the Constitution omits reference to a contract clause as comparable with the USA Constitution or a property related due process provision becomes evident viz: in order to supply the omission flowing from governmental inaction in addressing the housing shortage through a dubious process of housing legislation.[40]

Conclusion

"Due process" as the phrase has now come to be established and understood, encompasses within its ambit not only "appropriate legal procedures" in criminal proceedings but also in respect of governmental action impacting on the Administrative Process in so far as property or other proprietary rights of persons are affected.

Although positive judicial initiatives have been taken in Sri Lanka to fill the lacunae left on account of the absence of a fair Administrative Procedure Code, such a Code is an imperative need in the context of Sri Lanka jurisprudence. Even in regard to criminal proceedings, constitutional or legislative indifference to such concepts as the right to life and the right of an accused to a speedy and expeditious trial as being subsumed in the broader concept of the right to a fair trial, have taken long years to be rectified by our supreme judiciary. More judicial advances are necessary, for example the need to recognise the concept of "quality of life" as reflected in the Indian judicial initiatives referred to in this paper and consequentially procedural safeguards.

In the specific context of property rights of an owner, the procedure reflected in the statute book of Sri Lanka, as judicially interpreted, represents the very anti-thesis of due process ideals when a private owner's property is sought to be acquired by the State. A singular decision of the Supreme Court[42] which sought to put that procedural defect to right has been sought to be distinguished.[43] The future

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[37] Article 27(C) of the Constitution of Sri Lanka.
[38] *Supra*, Act, No. 55 of 1980.
[40] *Supra*, n. 35.
[42] *Supra*, n. 5.
[43] *Supra*, n. 29.

trend that might take shape is therefore anybody's guess. Thus arises the need for appropriate legal procedure legislation in that context.

If the legislature thought it fit to enact a special procedure code in respect of property disputes between private parties that could lead to a breach of the peace[44] surely, would it not be in keeping with due process to initiate legislation in a context where a property owner's right (to a land) is sought to be expropriated by the State? The speedy payment of compensation for such expropriated lands is also not addressed in the existing legislation of Sri Lanka which stands in contrast by way of compensation to the Malaysian initiatives.[45]

In regard to the context of labour law (non-governmental) the point was made in this paper that, no procedure is laid down in the existing labour legislation of the country thus representing a failure to respond to due process. Although the supreme judiciary has come to the fore in filling that lacunae in certain specific contexts,[46] given the vagaries off judicial approaches, an imperative need once again arises for a legislatively initiated comprehensive procedure code in labour matters.

The same would apply to statutory functionaries exercising power affecting property (or proprietary) rights of persons, impliedly addressed by the supreme judiciary of Sri Lanka as recounted in this paper.[47]

In regard to University Discipline, though the University Act of 1978 confers power on the several Universities of the island to formulate their own codes, perhaps in response to the Lima Declaration decreeing as it does, the concept of University Autonomy, some Universities have been recalcitrant in this regard, which has paved the way for the Court of Appeal to uphold (in effect) the rights and grievances of a student (on fundamental values related to natural justice).[48] This is another aspect the legislature of the island must make a conscious effort to address upon in the interest of "Due Process" lest it could be relegated to another ignored concept in University Administration.

The concept of "economic due process" is no doubt an alien concept in Sri Lankan Jurisprudence. Neither the Constitution nor any judicial decision has acknowledged the said concept. As a result, legislation claiming to be social legislation goes unchecked and unchallenged for constitutional credence or validity. In this presentation one area has been specifically touched on viz: Housing Legislation, which exposes the said constitutional cum legislative compliance, which in the minimum, at least now, needs to be addressed.

In conclusion, it must be said that, unless "due process" is addressed in its entire gamut, not only, in relation to criminal proceedings but also in response to an aggrieved person where his or her contractual or property rights are affected, Sri Lanka (though boasting on paper her commitment as a country committed to uphold the sovereignty of the people from which all organs of government

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[44] Vide: Primary Courts (Procedure) Act No. 44 of 1979.
[45] See: the Malaysian Constitution.
[46] *Supra*, n. 17.
[47] *Supra*, n. 25.
[48] Representing a liberal judicial view in the classical sense as opposed to a judicial view perhaps consonant with a broad interpretation of University antonomy – Vide – CA/1316/2002 and CA/1317/2002 (two apparently conflicting decisions of the Court of Appeal).

derive their authority from[49]), would surely fall short of "due process" as that concept is understood in the developed global scenario.

If the gap has to be filled in consequence thereof and if the legislature and the current political culture is found to be non-responsible to the said social necessities, the time surely has come for organisations with no personal agendas but compelled by commitment to people's rights and antecedent procedures related thereto to agitate for reform.

Obviously there is no guarantee that, a mere demand on the government of the day by such organisations, as envisaged, would be responded to by "the government of the day". If such a negative eventuality is to follow, what options would be left in the hands of such organisations? If civil society organisations in Sri Lanka and the presumed responsible media of the country should fail in their quest for reform, the time would then come in the quest for good governance for initiatives to be taken by such organisations, by proxy, as coming forward to uphold the sovereignty, concept of the people[50] on, no doubt, an extended rationale based on the principle of locus standi. These are challenges thrown at organisations committed to good governance and the Rule of Law. After all, as long as there is life there is hope – *dum spiro spiro*.

[49] Article 3 of the Constitution of Sri Lanka.
[50] Article 3, *ibid.*

The Importance of Cesare Beccaria to Asia Today

Basil Fernando*

Introduction

Born in 1738, Becarria died in 1794. He wrote his best known book, *"On Crimes and Punishments"* when he was twenty six years old. This book is acknowledged to have created an enormous impact towards developing the principles relating to fair trial.

Amongst the basic ideas he pursued were the prohibition against torture to obtain confessions, secret accusations, the arbitrary discretionary powers of judges, the inconsistency and inequality of sentencing, the use of personal connections to get higher sentences and the use of capital punishment for serious and sometimes not so serious offenses. Much of the modern debate on these issues is the product of the discussions, which commenced during this time in Europe. Most of these principles had become an integral part of the legal systems in European countries already by the 19th century.

This short discussion paper is written with the objective of developing some of Becarria's ideas for debate in the modern context of criminal justice.

Becarria's Relevance to the Present

The Sum of Becarria's Ideas

The age of the time of Becarria can be characterised as the time of the modernisation in Europe. An aspect of this modernisation was the development of justice systems in keeping with human reason. This aspect of modernisation was connected to the overall aspects of the modernisation, which was the social reorganisation of society in rational terms, thus destroying irrational claims for power and superiority. The shaping of reasonable postulates to be the basis of the implementation of the notion of equality, was central to this exercise.

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Becarria attempted to formulate an abstract critique of adverse practices in regard to criminal investigations that were taking place in many countries during that period and argued that a more reasonable approach can be beneficial in developing norms of justice.

He based most of his ideas on the work of Montesquieu. Some of Becarria's ideas can be summed up thus.

By justice Becarria understood …nothing more, than that bond, which is necessary to keep the interest of individuals united; without which, men would return to their original state of barbarity. All punishments, which exceed the necessity of preserving this bond, are in their nature unjust;

Laws can only determine the punishment of crimes but the laws must conform to justice as explained in point 1, above;

If it can only be proved, that the severity of punishments, though not immediately contrary to the public good, or to the end for which they were intended, viz, to prevent crimes, be useless; then such severity would be contrary to those beneficial virtues, which are the consequence of enlightened reason, which instructs the sovereign to wish rather to govern men in a state of freedom and happiness, than of slavery. It would also be contrary to justice, and the social compact;

The laws must be clear and not obscure. It must be written in languages known to the people:

> *"Crimes will be less frequent, in proportion as the code of the laws is more universally read, and understood: for there is no doubt, but that the eloquence of the passions is greatly assisted by ignorance, and uncertainty of punishments."*

Swiftness of punishment is more important that the severity of punishment.

Becarria opposed capital punishment. This was one of the major critiques put forward by him in his classical book 'On Crimes and Punishment'. He argued that capital punishment is not necessary to deter while long term imprisonment is a more powerful deterrent since execution is transient. He describes the connection between social contract and the right to life. He argues that a steady example over a long period of time is more effective in creating mortal habits than the single shocking

example of an execution. He also argued that the death penalty in fact, has a bad effect on society by reducing their sensitivity to human suffering.

The basic argument of Becarria is based on the use of reason in the conduct of trials and the making of determinations of punishment. This argument has been taken forward in the modern day context in the Western countries to lead to the developing of the most sophisticated criminal investigation systems ever known to history. The development of DNA investigations and many other forms of technology which leave little room for a criminal to escape detection has become the basic deterrent of people committing crimes. When the public perception grows to the effect that avoidance of detection is more unlikely than not, this acts as deterrence for crimes.

The certainty of being detected of having committed a crime is greater deterrence than any severity of punishment, where the possibility of being detected for the commission of crime is less likely.

Conclusion

In almost all the countries of Asia, (except for a few places like perhaps Hong Kong and South Korea), the development of forensic facilities and the detective capabilities still remain at rather unsatisfactory levels. It is a good exercise to examine the nature of the crime detection capacity of a country when discussing criminal justice and particularly the punishment of crimes. If society tries to substitute severe punishments for its failure to develop effective detection capacity for crimes, then such a society does not do much good to itself by the adoption of such a policy.

The most evident aspect of a defective investigative capacity of a society is the extent to which torture is used as the method of the collection of information regarding crimes. In most Asian countries torture is still the most widely used instrument of crime detection. The law enforcement officers lack the possibility of the use of more reasonable methods. Naturally, it results in the same problems as Becarria describes in 1764 when he wrote his book "*On Crimes and Punishments*." Thus, the book is of great relevance to Asia today.

Ensuring Due Process in Sri Lanka in the Context of Life and Liberty Rights; Domestic and International Efforts

Kishali Pinto-Jayawardena[*]

Introduction

The rule of law implies necessarily the legitimacy of laws and accountability of the State, having as its core, the idea of justice as an underlying moral basis for all laws. Law must protect basic human rights and act as a constraining fetter on legislative, executive and judicial powers.

The Sri Lankan Constitution of 1978 guarantees, in Article 13(1) that no person shall be arrested except according to 'procedure established by law.' Any person arrested shall be informed of the reason for the arrest. Article 13(2) stipulates that every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to 'procedure established by law' and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with "procedure established by law."

In addition, Article 13(3) mandates that 'any person charged with an offence shall be entitled to be heard in person or by an attorney-at-law, at a fair trial by a competent court." Buttressing these rights in a fundamental manner, Article 11 states that 'No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

These constitutional articles are the modern core rights to due process in Sri Lanka in so far as the right to liberty is concerned, with all its concomitant aspects of the right to a fair and speedy trial. . These articles were preceded by similar legal guarantees contained in past Constitutions as well as in ordinary statute law. In drafting Sri Lanka's Independence Constitution (the Soulbury Constitution), Sir Ivor Jennings advised against the inclusion of a Bill of Rights in the Constitution, saying that –

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"In Britain, we have no Bill of Rights: we merely have liberty according to law, and we think – truly, I believe – that we do a job better than any country which has a Bill of Rights or a Declaration of the Rights of Man"[1]

At that time, sentiments as how due process, (in the context of life and liberty rights in particular), could be preserved, offers us some profoundly poignant pointers in regard to the actual observance of human rights *vis a vis* than their mere statement in black letter law. Thus, the Soulbury Commissioners put their trust in the good faith of the members of the majority community in the country, whom they believed, (touchingly albeit somewhat mistakenly), would adequately safeguard the minority community, provided that the clauses guaranteeing rights in relation to religion and equality and equal protection of the law (Sections 29 (1), (2), and (3) of the Soulbury Constitution were observed.

In retrospect, these were the truly gentler times, when a measure of sanity was expounded in the processes of legal and constitutional governance as compared to the degenerative realties that one faces today in Sri Lanka.

A Historical Glance at Early Due Process Issues

The Bracegirdle Case[2]

During the World War of 1939-1945, emergency requirements were provided for by a statutory Order in Council under the Emergency Powers (Defence) Act, 1939, which enabled the Governor to issue defence regulations.

Bracegirdle had been arrested ostensibly for trying to stir unrest among the plantation workers in the country. He was a strong critic of imperialism and his remarks about the living conditions of the estate workers outraged the elite planting community. The then Governor of Ceylon, Edward Stubbs issued a deportation order on Bracegirdle, purporting to act in terms of the provisions of clause 3 of Article III of the Order In Council of October 26, 1896 which was made applicable to Ceylon by the Proclamation of the Governor of 5th August 1914, as amended by a later Order In Council of 21st March 1916.

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[1] Jennings, Approach to Self Government (1958) at pg 20.
[2] In re Mark Antony Lyster Bracegirdle. 1937 (39 NLR 193).

Bracegirdle went into hiding, helped by the leftist parties, which openly protested against the order. Two days after a mass protest in his favour, Bracegirdle was arrested by the Inspector-General of Police on the order issued by the Governor authorising the IGP to arrest Bracegirdle and place him on board a ship bound for Australia. In this case, an application for a writ of habeas corpus was filed for the production of the body of Bracegirdle. The question was whether the Governor acting under Article III, 3 of the Order in Council, could have Bracegirdle arrested and removed from the colony.

The Crown contended that the Governor had been given very wide powers under Article III, clause 3, which gave him the full power authority to deport Bracegirdle. Whether an emergency has arisen or not is a matter that cannot be canvassed in a court of law. Those who are responsible for the national security must be the sole judge of what national security requires.

This argument proceeded on the basis that particular powers had been conferred upon the Governor in this regard and if the Governor exercises those powers within the 'four corners' of that power, the court cannot inquire into the reasons underlying that exercise. The only jurisdiction the court has is whether the order was validly made by the person to whom the power was granted, or in other words if it was *ultra vires*. The Governor was purporting to act in the public interest when issuing the relevant order.

On the other hand, Bracegirdle submitted that the Governor could exercise his powers under Article III, 3 only in times of emergency and the courts have the power to inquire whether such a situation of emergency had, in fact, arisen or not.

The judgement of the Court (by Chief Justice Abrahams) is a seminal judgement that magnificently illustrates judicial sensitivity at its best when confronted with the enactment of emergency laws infringing on the rights of a subject.

The Court refers to the fundamental principle of law enshrined in the Magna Carta that no person can be deprived of his liberty except by judicial process as well as to the predominance of the rule of law throughout the British empire. It goes on to hold that the whole of the enactment must be considered in the construction of any of its parts, meaning that the preamble of the amendment to the Order in Council referring to times of emergency was a necessary precondition before the Governor could exercise his power of deporting any person from the colony.

Accordingly, the Governor's power was not absolute. Such power may be exercised only under condition and even if the Governor had issued the order on the basis of a state of emergency, the court nevertheless had the power and the duty to inquire whether in fact, such a condition existed. The position of the Crown that the Governor's powers are absolute and unquestionable, was rejected. It was held that the Governor's order was without authority and that the arrest and detention of Bracegirdle was therefore illegal.

Commentators have lauded this judgement as having imposed a salutary restraint on the power of the State during emergency.[3]

While the purpose of this paper is not to discuss in detail, judicial responses in the decades in which emergency law replaced (effectively) the normal law of the land in Sri Lanka, it will look at one other example which is again remarkable for the strong pronouncements made by the Court in limiting the ambit of military law in favour of the fundamental rights to freedom from torture or cruel, inhuman and degrading treatment and the right to a fair trial.

Wijesuriya and Another, Appellants and the State, Respondent[4]

This case concerned the prosecution of two army soldiers for the attempted murder of a young woman (Premawathie Manamperi), a suspected insurgent held in custody after arrest by the police. She was killed in circumstances of great aggravation and brutality where she was forced to walk naked down the main street in Kataragama (her hometown) with her hands upraised, and was shot at by the first and second accused in torturous acts of deliberate and premeditated sadism. Discovered to be still alive when she was to be buried in a hastily dug pit, she was killed by another unidentified soldier. The incident had occurred when there was a lull in fighting during the quelling of the insurgency and there was no evidence to show that a state of actual war prevailed in the area at that time.

Counsel for the accused argued that the factual situation which existed at that time, justified the shooting of the woman as it occurred during combat where the first accused who engaged in the acts of degradation and first shot at her, was only carrying out the order of his superior officer to destroy ('bump off') the deceased.

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[3] S. Namasivayam, "The Legislatures of Ceylon 1928-1948" see also Constitutional and Administrative Law of Sri Lanka (Ceylon), J.A.L. Cooray, 1973, p 51.
[4] *Wijesuriya* vs. *the State*, 77 NLR, 25.

The case for the prosecution was far reaching at that time. It urged the court to hold that, whether there was a period of combat during the incident or a state of actual war, in either case, there was no justification for the shooting of a prisoner who was held in custody. In a situation such as that which existed on that date, a soldier subject to military law should remain the custodian of the civil law and has the responsibility of the discharge of police duties in which process, he is as much subject to the civil law as the ordinary policeman.

The Court of Criminal Appeal agreed with this submission. It pointed out, (unanimously), that no soldier should obey an order of his superior when such order is manifestly and obviously illegal and thereafter be permitted to plead mistake of fact in good faith, (a defence available under Section 69 of the Penal Code). Thus, a soldier may sometimes find himself in an embarrassing situation having to obey the orders of his superior officers but under military law, he is only required to obey such orders if they are lawful commands. In this regard, Section 100 of the Army Act states that every person subject to military law who disobeys any lawful command given by a superior officer, commits an offence. The term 'lawful' was emphasized by the Court to mean that a soldier cannot be penalised when he disobeys an order which is manifestly and obviously illegal such as shooting a helpless and unarmed person.

Provisions of international humanitarian law were referred to, in particular, the treatment of prisoners under the Geneva Conventions, which had been ratified and accepted by Sri Lanka at that time.

Additionally, it was reasoned that even though the armed forces called out under Part III of the PSO by the Prime Minister, have the same powers as the police to search and arrest persons, Section 20 of the Amendment Act No 8 of 1959 specifically stipulates that any person arrested by the armed forces shall without unnecessary delay, be delivered to the custody of a police officer to be dealt with according to law. The accused in this instance had not obeyed this directive.

Accordingly, the accused could not plead the provisions of the PSO which stipulates (through that very same amendment act) that no prosecution shall lie against any person for any act done in good faith in pursuance or supposed pursuance of any provision of the emergency regulations.

In a concurring opinion, Justice Thamotheram asserted that the PSO only gave the military powers to assist the civil authority to maintain public order, which meant that they are still subject to the ordinary law of the land. While the duties of the military could include the duty to kill, they should

then be covered by one of the general exceptions to the Penal Code like any other person as they do not have any more power than a police officer in the circumstances. •

His position is important for his explicit denunciation of terms such as "in combat", "in the field", "prisoners of war", and "military necessity" which were sought to be used by counsel appearing for the accused, to justify the brutal acts committed by them. The argument that when a state of emergency is called, the ordinary civil law of the land is *pro tanto* suspended, thus entitling the military to engage in whatever acts of brutality in pursuance or supposed pursuance under emergency powers conferred on them, was not accepted. The court unanimously affirmed the convictions of the accused and by a majority, affirmed their sentences of sixteen years rigorous imprisonment.

Some Cases That Attempt to Ensure Modern Due Process Rights in Sri Lanka

The 1st Republican Constitution of 1972 which succeeded the Independence Constitution, provided for a separate Bill of Rights but did not contain an express constitutional provision vesting jurisdiction in any particular court to adjudicate on complaints of infringement of fundamental rights. Among the rights thus entrenched was Article 18(c) stipulating that 'no person shall be deprived of life, liberty or security of person except in accordance with the law."

The fundamental rights entrenched in the 1972 Constitution were enforceable in the sense that a violation of such a right could be made the legal basis for seeking appropriate relief from the original or appellate courts, which in fact, was resorted to in one instance.

In a limited advance over these constitutional provisions, the 1978 Constitution entrenched fundamental rights (except the right to life) and vested exclusive jurisdiction in the Supreme Court to hear and determine complaints of infringements of those rights by executive or administrative action. Thus, judicial or legislative acts are not actionable.

When one considers the specific prohibition on practices of torture within the broad framework of the right to due process, Sri Lanka has also enacted domestic legislation to give effect to the UN Convention against Torture. Article 4 of the Convention provides that:

> *"(1) Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.*

(2) Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature."

Section 2 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Act No 22 of 1994 makes torture, or the attempt to commit, or the aiding and abetting in committing, or conspiring to commit torture, an offence. A person found guilty after trial by the High Court is punishable with imprisonment for a term not less than seven years and not exceeding ten years and a fine not less than Rs10,000 and not exceeding Rs 50,000.

In addition, there are the provisions of the Penal Code, under which persons may be punished for transgressions of physical security and personal liberty, for example, culpable homicide (Section 293), murder (Section 294), death by negligence (Section 298), attempt to murder (Section 300), attempt to commit culpable homicide (Section 301), hurt to extort confession (Section 322), wrongful restraint (Section 330), wrongful confinement (Sections 331, 334, 335), and criminal force and assault (Sections 340-9). Section 82 of the Police Ordinance makes it an offence for a police officer to knowingly and wilfully exceed his powers or to offer any unwarrantable personal violence to any person in custody.

This paper will discuss some modern judicial responses most relevant to basic liberty rights within a general due process framework and then examine specific domestic and international efforts in the context of prevention of torture practices.

A. Article 13(3) and the Right to a Fair Trial/The Right to Information

In one decision delivered in late 2000, the Supreme Court considered a case where a man named Wijepala was charged with the murder of one Srilal and tried before the Panadura High Court.[5]

The sole eye witness was the deceased's father, Senaratne who testified that he had been with his son on the night in question and that the latter had been stabbed by Wijepala after an acrimonious exchange of words. Wijepala was convicted of the lesser offence of culpable homicide not amounting to murder, (on Senaratne's version being believed by the trial judge), and sentenced to ten years rigorous imprisonment. This conviction and sentence was upheld by the Court of Appeal. When the

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[5] *Danwatte Liyanage Wijepala* v. *The Attorney General*, SC Appeal No; 104/99, SCM 12.12.2000, Judgement of; Ismail J and Fernando J (with Wadugodapitiya J. agreeing)

accused, Wijepala appealed there from to the Supreme Court in the normal course of criminal appeals, an interesting scenario unfolded, resulting in a bench comprising Justices Mark Fernando, S.W.B. Wadugodapitiya and Ameer Ismail setting aside the conviction and acquitting Wijepala.

Concurring judgements delivered by Justices Mark Fernando and Ameer Ismail incorporated judicial reasoning from complementary perspectives as to why the conviction had to be set aside. Evaluating distinct aspects of Senaratne's evidence, Justice Ameer Ismail disagreed with the thinking of the lower courts that his evidence was trustworthy enough to sustain a conviction. Instead, significant discrepancies had arisen in what Senaratne claimed to have seen and heard. The *cursus curiae* is that the evidence of a single witness, if cogent and impressive, can be acted upon by a Court but whenever there are circumstances of suspicion, then corroboration may be necessary. In this case Senaratne's evidence was not even barely supported by other evidence, direct or circumstantial.

Accordingly, the Court of Appeal had erred in declining to interfere with the finding of the trial judge on the basis that the appellate court is not entitled to engage in a re-appraisal and re-trial on questions of fact which come up before a judge in his capacity as "the trier of facts." While this approach may well be correct when an appellate court is considering a charge to a jury, it would be different where a trial before a judge sitting alone is concerned. Here, while the decision of the trial judge on questions of fact based on the demeanor and credibility of witnesses carry great weight, an appellate court must test the evidence in the case to a close scrutiny and if thereby a doubt is cast on the guilt of an accused, the benefit of that doubt should be given to him. This was so in the present case and Wijepala's conviction had therefore to be set aside.

Justice Mark Fernando adduces a distinct, (and persuasively appealing), reason as to why the conviction should not stand. His thinking evolves specific principles that have an immediate bearing on the right to a fair trial. Thus, the first information had been given by Senaratne in regard to the stabbing of his son, the contents of which were crucial as regards Senaratne's assertions that he saw the stabbing and could identify the assailant. Senaratne claimed that at 9.30 pm. he had made a statement to the police post at the hospital. However, it was his later statement to the Anguruwathota police that the prosecution had sought to put forward as his first information, which attempt had been however disallowed by the court. Whichever way it went however, problems arose regarding the believability of his evidence.

On the one hand, if only the later statement was the first information, then the Court of Appeal erred in concluding that Senaratne had made a statement at the earliest opportunity. This impacted once

again on the credibility of his evidence that he made an earlier statement at 9.30 pm. On the other hand, if he was truthful in claiming that he made a statement at 9.30 pm, the question arises as to where exactly that statement was.

Justice Fernando, was, in other words, perturbed about the fact that this 9.30 pm statement had not been annexed with the documents listed in the indictment nor included in the documents supplied to the defence in terms of the law. Evaluating the whole, he concluded that failure to supply this document resulted in the impairment of Wijepala's right to a fair trial, which is guaranteed to him under Article 13(3) of the Constitution.

It is in this novel manner that the concept of "equality of arms" in a criminal trial was brought in, under the protection of the Constitution. The judicial reasoning in this regard was deceptively simple. Article 13(3) of Sri Lanka's Constitution not only entitles an accused to a right to legal representation at a trial before a competent court. In addition, it entitles the accused to a fair trial and that would mean anything and everything necessary for a fair trial, including copies of statements made to the police by material witnesses.

South African law was used in this respect to buttress the importance of the right to information read with the right to a fair trial. As judicially opined, the fact that South Africa had an independent right to information does not make a difference as the right to a fair trial recognised by Article 13(3) of the Sri Lankan Constitution, which in fact, should include the ancillary right to all information necessary for a fair trial.

Again, Wijepala's judgement is important in terms of the professional duties that it lays on prosecuting counsel where a constitutional right to a fair trial is concerned. Quoting South African law, the Supreme Court emphasizes the principle that there is a general duty on the state to disclose to the defence all information which it intends to use and even which it does not intend to use but could assist the accused in his defence. This is however, subject to the limitation in regard to the exclusion of privileged information and where information is delayed due to the investigation not being complete. On an overall evaluation, the Court stated that the failure to disclose to Wijepala, the existence and contents of the first information in the present case, possibly casting serious doubts on the credibility of Senaratne's evidence, may well have caused a miscarriage of justice.

The Court thus expanded the conceptual span of Article 13(3) of Sri Lanka's Constitution, which article had, so far, been given somewhat stepmotherly treatment in the development of fundamental

rights jurisprudence. That it did so in the context of a normal criminal appeal instead of a fundamental rights application, was a welcome development.

B. Judicial Responses re General Right to Freedom from Torture

Supreme Court judgements against torture perpetrators have now become commonplace and the most brutal torture generally evokes no reaction other then cynicism, sometimes even among judges themselves.

The increasing prevalence of such cases can be traced to corruption/subversion of the policing system as well as the command structures of the police. Police lack training in proper criminal investigations and do not have forensic facilities with the end result that torture has come to be accepted as a legitimate and necessary means of investigation. Increase of crime and the corresponding increase of public pressure thereto, (where innocent individuals are framed in order to meet the public cry for justice) and effective disciplinary procedures within the police force to deal with errant police officers, are also important factors.

Some of the most recent cases in this regard evidence that, being subjected to practices of torture has been the common lot of individuals from vastly diverse backgrounds, including a cleaner, a labourer, a reserve police constable, a schoolteacher, an attorney-at-law, an alleged army deserter who was brutalised so much that he died in police custody and a thirteen year old boy.[6]

Torture is practiced in police stations with regard to persons suspected of petty theft or even arrested for mistaken identity.

For example, in a classically familiar case, in *Ajith Kumara Jayasinghe* vs. *Chief Inspector of Police, Kantalai and Others*[7], a twenty eight year old youth from Kantalai, alleged that his fundamental rights had been violated by 5 police officers of the Kantalai police station whose actions were motivated by political factors.

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[6] See respectively, *Konesalingam* vs. *Major Muthalif and Others*, S.C. (FR) No. 555/2001, S.C. Minutes of 10th February, 2003, *Shanmugarajah* vs. *Dilruk, S.I., Vavuniya*, S.C. (FR) No. 47/2002, S.C. Minutes of 10th February, 2003, *Adhikary and Adhikary* vs. *Amerasinghe and Others*, S.C. (FR) No. 251/2002, S.C. Minutes of 14th February, 2003, *Ekanayake* vs. *Weerawasam*, S.C. (FR) No. 34/2002, S.C. Minutes of 17th March, 2003, Sriyani Silva vs. O.I.C. Paiyagala S.C. (FR) No. 471/2000, S.C. Minutes of 8th August, 2003, *Harindra Shashika Kumara* vs. *D.I.G. De Fonseka and Others*, S.C. (FR) No. 462/2001, S.C. Minutes of 17th March, 2003.

[7] SC Application No: 15/59 (Spl.), SCM 28/08/1997. Bench comprised G.P.S. de Silva, C.J., Ramanathan, J. and Shirani A. Bandaranayake, J.

He had been arbitrarily arrested, brought to the police station, subjected to cruel, inhuman and degrading treatment and punishment, and kept in detention without being brought before a magistrate according to law. When he had been brought to the police station on 28/05/1995, he had been handcuffed and then brutally assaulted by police officers who kicked him on the back and asked him to crawl under a bench. Later, one police officer urinated all over his body. On 29/05/1995, he had been made to walk through the town to the magistrate's court in a deliberate attempt to humiliate him, when he could have been taken there in the police bus. The police denied these charges, saying that they had to use minimum force to bring in the Petitioner who had been named in a complaint against him, and that he had not assaulted the Petitioner as alleged.

Responding, the Supreme Court ruled that though the police averred that they had to use minimum force to bring Ajith Kumara under control, the contention that the injuries sustained were as a result of this use of minimum force cannot be accepted. The description given by the District Medical Officer in respect of the injuries that Ajith Kumara has sustained, provides strong corroboration of his version of the assault on him. He was subjected to degrading treatment, and infringement of his rights under Article 11 is established. The police officers were responsible for this violation of his fundamental rights, and in the circumstances, the responsible police officer was personally liable.

Gaps Between the Law and the Reality in this Regard

As the purpose of this paper is not limited to legal theory, it will attempt to examine some of the issues arising from clear gaps between due process and the right to freedom from torture as asserted in law and the practical realties.

Observations of the Supreme Court in this regard are also useful. In one particularly heinous case in 1995 where a fourteen year old girl had been tortured by police officers resulting in the impairment of the sight of one eye, the Supreme Court expressed its perturbation in the following manner;

> *"In many cases in the past, this Court has observed that there was a need for the Inspector General of Police to take action to prevent infringements of fundamental rights by police officers, and where such infringements nevertheless occur, this Court has sometimes directed that disciplinary proceedings be taken. The response has not inspired confidence in the efficacy of such observations and directions... ... ... "*

Thus indeed, the following recent judicial observation as well in the Gerald Perera case;

> *"The number of credible complaints of torture and cruel, inhuman and degrading treatment whilst in police custody shows no decline. The duty imposed by Article 4(d) [of the Constitution] to respect, secure and advance fundamental rights, including freedom from torture, extends to all organs of government, and the Head of the Police can claim no exemption. At least, he may make arrangements for surprise visits by specially appointed Police officers, and/or officers and representatives of the [National] Human Rights Commission, and/or local community leaders who would be authorized to interview and to report on the treatment and conditions of detention of persons in custody.*
>
> *A prolonged failure to give effective directions designed to prevent violations of Article 11, and to ensure the proper investigation of those which nevertheless take place followed by disciplinary or criminal proceedings, may well justify the inference of acquiescence and condemnation (if not also of approval and authorization)."*[8]

The Gerald Perera case concerned a completely innocent individual who was arrested on mistaken identity. Within few hours of arrest, he was assaulted to an extent that he suffered renal failure and had to be on a life support system for two weeks. His case is the typical example of what happens to an ordinary citizen lacking power and influence, inside a police station in Sri Lanka today.

The Chamila Bandara Case

The manner in which custodial officers practise torture is extremely well illustrated in the instance recounted hereafter. A minor, B. G. Chamila Bandara Jayaratne was tortured from 20th to 28th July 2003 at Ankumbura Police Station, ostensibly on grounds that he had committed some petty crimes. Denied of a good medical examination even after he had been remanded, it was only after being released on bail that he was admitted to the Peradeniya Hospital and given a proper medical examination, as a result of which, doctors declared the impairment of the use of his left arm.

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[8] Justice Mark Fernando, with Edussuriya, J. and Wigneswaran, J. agreeing, in Gerald Mervin Perera's Case, SCFR 328/2002, SCM 4/4/2003.

The second stage in this saga came when his case was reported to the district area co-ordinator of the National Human Rights Commission (NHRC) who, going by only the police version, concluded that there had been no mistreatment. Desperate, his family had appealed to local and international rights activists. Investigations were thereafter re-opened into Chamila Bandara's case by the NHRC and the matter was handed over to a one-man inquiry committee. Meanwhile, the members of his family were threatened by the police officers named as those responsible and Chamila himself had to go into hiding.

While this was ongoing, his case was taken before the United Nations Human Rights Committee (UNHRC) at its seventy ninth session when it considered Sri Lanka's combined fourth and fifth Periodic Reports under the International Covenant on Civil and Political Rights (ICCPR). Chamila himself gave testimony before the UNHRC members. At that point, it is notable that the representative of the State before the UNHRC specifically denied that torture had occurred when the case was brought to his attention by the UNHRC, more or less alleging that the allegations had been fabricated.

Chamila Bandara's plight was however vindicated by the report of the one man inquiry committee of the NHRC, released some time after, which concluded that the young boy had, in fact, been tortured, as a result of which, his rights under Article 11, Article 12(1) and Article 13(1) and (2) had been violated. The OIC of the Ankumbura police and other police officers serving under his command were found responsible. The final recommendation of the inquiry committee was that a copy of the inquiry report be sent to the IGP who should issue severe warning to the individual police officers concerned, that any further instances of abuse on their part would result in a termination of their services.

Whether this will constitute sufficient deterrence, is open to question. However, it is hoped that this case, at least, will serve as warning to otherwise well-intentioned officers and individuals in charge of monitoring human rights in this country, to be somewhat more cautious before defending that which is indefensible.

During the past years, Chamila Bandara's case is just one of the many documented cases of torture which show an increasingly traumatic pattern of police brutality with regard to the poor and the unfortunate as opposed to the 'terrorist' and the 'subversive.' Those who make complaints with regard to torture, face severe threats from the perpetrators, Despite adverse judgements by the Supreme Court against police officers, these officers, particularly officers in charge (OICs,) of police stations,

remain at their posts and continue to have enormous powers in the locality. For example, the officer in charge of the Wattala Police Station, found to have violated the rights of Gerald Perera, (in the case cited above), still remains the officer in charge of the same police station.

The primary problem remains the determining and issuing of effective sanctions against police officers or other state officers found responsible for torture. The lack of state will in this regard is apparent. For example, from the time that the Convention Against Torture (CAT) Act was enacted into law in 1994, no convictions for torture resulted under this Act up to 2004. This year, there were two convictions by the High Court manifesting an increased prosecutorial and judicial determination in this regard. And in this regard, in what manner has the utilisation of international monitoring mechanism helped? The following segment of this paper will discuss this question in detail.

Utilising of International Mechanisms In the Context of Life and Liberty Rights

As a country that has ratified the International Covenant on Civil and Political Rights (ICCPR), Sri Lanka is required to submit periodic reports to the United Nations Human Rights Committee (UN-HRC) under ICCPR Article 40, detailing the manner in which it adheres to obligations incurred under the ICCPR. Concluding Observations are thereafter issued by the UNHRC on the state of Sri Lanka's compliance.

In recent times, these Concluding Observations have been harsh in their assessment of what remains to be done by the Sri Lankan State. For example, on 6 November, 2003, in Concluding Observations adopted at the seventy ninth session of the UN-HRC, in response to Sri Lanka's combined fourth and fifth Periodic State Reports, the UN-HRC directed Sri Lanka (under Rule 70, paragraph 5 of the Committee's Rules of Procedure), to provide information, within one year, in regard to four issues, including importantly, persistent reports of torture and cruel, inhuman or degrading treatment or punishment of detainees by law enforcement officials and members of the armed forces.

Resort to Rule 70 procedure by the UN-HRC was a clear departure from the normal practice of state reports being submitted once in every four years. The stricter duty imposed on Sri Lanka could have been occasioned, in part, by the country's delay in submitting Periodic Reports, (the last had been submitted eight years back). However, there is no doubt that the severity and long standing nature of unresolved human rights questions in the 2002 State Periodic Report, was the primary reason why the UN-HRC thought fit to resort to this procedure.

The UN-HRC regretted that the majority of prosecutions initiated against police officers or members of the armed forces on charges of abduction and unlawful confinement, as well as on charges of torture, have been inconclusive due to lack of satisfactory evidence and unavailability of witnesses, despite a number of acknowledged instances of abduction and/or unlawful confinement and/or torture, and only very few police or army officers have been found guilty and punished.

It also noted with concern, reports that victims of human rights violations feel intimidated from bringing complaints or have been subjected to intimidation and/or threats, thereby discouraging them from pursuing appropriate avenues to obtain an effective remedy (Article 2 of the Covenant). It recommended that Sri Lanka adopt legislative and other measures to prevent such violations, in keeping with articles 2, 7 and 9 of the Covenant, and ensure effective enforcement of the legislation.

The members stated that the State should ensure in particular that allegations of crimes committed by state security forces, especially allegations of torture, abduction and illegal confinement, are investigated promptly and effectively with a view to prosecuting perpetrators. They also pointed out that the restrictive definition of torture in the 1994 Convention against Torture Act continues to raise problems in the light of article 7 of the Covenant.

The UN-HRC further recommended that the National Police Commission (NPC) complaints procedure be implemented as soon as possible. This related to duties imposed on the National Police Commission under Article 155G (2) of the Constitution, (by virtue of the 17th Amendment), to establish procedures to entertain and investigate public complaints or complaints of aggrieved persons against an individual police officer or the police service. The authorities were asked to diligently inquire into all cases of suspected intimidation of witnesses and establish a witness protection program in order to put an end to the climate of fear that plagues the investigation and prosecution of such cases. Strengthening of the capacity of the National Human Rights Commission to investigate and prosecute alleged human rights violations, was also called for.

As far as the Convention Against Torture is concerned, the CAT Committee in 1998, asked the government to ensure a review of the emergency regulations and prevention of terrorism laws following consideration of the first periodic report under the Convention. It recommended that the National Human Rights Commission be strengthened to ensure its impartiality and effectiveness and urged that the government allow individual communications on alleged torture to be submitted to CAT. Sri Lanka's second and third reports have now been submitted to the CAT Committee and will be considered next year.

Relief Through Individual Communications to the UN-HRC

On 3 January 1998, the Sri Lankan State agreed to become subject to the First Optional Protocol to the ICCPR which allows persons subject to the jurisdiction of the State to bring an individual communication before the UN-HRC, alleging a violation of Covenant rights.

In so doing, the State made a declaration that it;

> *"recognises the competence of the Human Rights Committee to receive and consider communications from individuals subject to the jurisdiction of the Democratic Socialist Republic of Sri Lanka, who claim to be victims of a violation of any of the rights set forth in the Covenant which results either from acts, omissions, developments or events occurring after the date on which the Protocol entered into force for the Democratic Socialist Republic of Sri Lanka, or from a decision relating to acts, omissions, developments or events after that date."*

The State proceeded on the understanding that the UN-HRC shall not consider any communication from individuals unless it has ascertained that the same matter is not being examined or has not been examined under another procedure of international investigation or settlement. The other condition was that exhaustion of domestic remedies must take place prior to an appeal going before the UN-HRC.

In a situation where much of the Covenant rights are not reflected in Sri Lanka's current constitutional document, such as the right to life for example, it was inevitable that an interesting scenario would emerge whereby the State would be called to account by the UN-HRC in respect of its Covenant obligations in specific cases. For a long number of years, the fact that Sri Lanka had submitted itself to the reach of the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), had been confined to paper.

Invocation of the individual communications remedy, involving a violation of Covenant rights and a corresponding inability of domestic laws and institutions to remedy those grievances, remained sluggish in the early years following 3 January 1998, which was the date on which the First Optional Protocol entered into force for Sri Lanka.

In recent years, this has changed. Spurred on by the increasingly dysfunctional nature of domestic institutions meant to protect the Rule of Law in the country, including the Supreme Court, (which is seen noticeably to be departing from earlier rights–friendly approaches despite few judicial exceptions in this regard), and the police, individual communications are increasingly being lodged with the UN-HRC in regard to protection of life and liberty rights as well as free speech. Increasingly also, we have seen the UN-HRC responding in a manner that holds out some hope for people traumatised as a result of a systemic collapse in a country that once posited itself as a beacon of development in South Asia.

But, what of the critics who maintain that all this is irrelevant in the context of Sri Lanka's national sovereignty, where the final authority remains with the domestic judicial tribunals? There are very simple but salient answers to this question. One great achievement of the modern age has been the evolving of international law norms that bind all countries, (excepting rogue administrations), to the obeying of basic human rights standards. It is no excuse to this rule of obedience to say that the domestic laws permit flouting of such standards. The horrendous example of the atrocities that the Nazi laws and courts - though perfectly legal in the sense of that word - permitted, is sufficient for acceptance of that fundamental truth. In the years since then, we have formulated an international legal regime that compels countries, notwithstanding national sovereignty, to abide by its norms.

This is how indeed, for example, the Supreme Court of a country, can be held accountable to another tribunal beyond its shores without explicit provision for such appeal in the domestic legal regime. There are good examples in this regard. Take Britain, for instance. Prior to 2000, British citizens could appeal to the Strasbourg based European Court, (and, at that time, the European Commission), on any allegation that their rights under the European Covenant on Human Rights, had been violated by an adverse finding by a British court even though no specific British law conferred such right of appeal. British judges were not bound by the Covenant, which, itself, was not directly enforceable in the British courts.

Nevertheless, the impact of the views of the European Court during this period was considerable, as evidenced in, for example, its virtual 'overruling' of the decision of the House of Lords in the Thalidomide case to stop the *Sunday Times* from publishing a newspaper article that discussed the responsibility of a drugs company for the deformities caused by the thalidomide drug. Subsequently, of course, we have the Human Rights Act, which came into force in October 2000 and made it unlawful for any public authority, including courts and persons, (exercising functions of a public nature), to act incompatibly with the Convention rights. However, the point of this argument is that,

even prior to this, decisions of the Strasbourg institutions were accorded general acceptance and indeed, overriding importance, in British law.

Sri Lanka is currently at a stage very similar to Britain in those early years. Like the United Kingdom, the Sri Lankan State has signed the International Covenant on Civil and Political Rights, thereby accepting the competence of its Geneva based Human Rights Committee to accept petitions from individuals alleging a violation of the Covenant rights, for which they have obtained no relief from Sri Lanka's Supreme Court.

In so far as implementation of the Views of the UN-HRC are concerned, it is relevant that Article 27(15) of the Directive Principles of State Policy in Sri Lanka's 2nd Republican Constitution of 1978 mandates the State to;

> *"...endeavor to foster respect for international law and treaty obligations in dealings among nations."*

The impact of this obligation on the Sri Lankan State, insofar as domestic adherence to the norms and standards imposed on the country by reasons of treaty ratifications that the State has engaged in, is severe. We cannot contend that the extent of these duties is confined to the international arena and have no application to the domestic legal context in the absence of specific legal provision in the national laws of the country. Rather, by ratification of the treaties, we have agreed to abide by those norms and standards including a specific duty to bring domestic laws in conformity with those standards.

This obligation is buttressed by judicial incorporation of international human rights standards in a growing body of jurisprudence in Sri Lanka since the late eighties as well as by the Directive Principles of State Policy, which though non- justiciable in Sri Lanka's constitutional context, has a direct impact on legal policy in the country.

Thus, we have Article 27(1), which states that;

> *"The Directive Principles of State Policy herein contained shall guide Parliament, the President and the Cabinet of Ministers in the enactment of laws and the governance of Sri Lanka for the establishment of a just and free society"*

The manner in which this country's Supreme Court has responded to the impact of the Directive Principles, (though perhaps not as boldly as India's Supreme Court), is illustrative of the duties imposed by this constitutional article.

While the object of this analysis is not to engage in a comprehensive examination of the judicial response to the Directive Principles, a few examples would suffice. For instance, when called upon to examine the constitutionality of the Provincial Councils Bill and the Thirteenth Amendment to the Constitution Bill[9] then Chief Justice Sharvananda pointed out as follows;

> *"True, the principles of State Policy are not enforceable in a court of law but that shortcoming does not detract from their value as projecting the aims and aspirations of a democratic government. The Directive Principles require to be implemented by legislation. In our view, the two Bills represent steps in the direction of implementing the programme envisaged by the Constitution makers to build a social and democratic society"*[10]

Again, in Seneviratne Vs U.G.C.[11] a judicial observation made this position even clearer;

> *"It is a settled principle of construction that when construing a legal document, the whole of the document must be considered. Accordingly, all relevant provisions of the Constitution must be given effect to when a Constitutional provision is under consideration and, when relevant, this must necessarily include the Directive Principles.....(and)....the Courts must take due recognition of these and make proper allowance for their operation and function"*
>
> *per Justice Wanasundera*

While the Directive Principles of State Policy have their own importance in the constitutional scheme of things, the obligations that Sri Lanka has incurred as a result of ratification of treaties and consequent submission to the international legal regime of human rights, has a separate – and profound – justification.

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[9] [1987] (2) Sri L.R. 312, at page 326

[10] See similar positions taken by the Supreme Court in *Maithripala Senanayake vs. Mahindasoma and Others* S.CC. Appeal No. 41/96 Minutes of 14.12.96 at pages 13-14 of the judgment (unreported) and in *Saliya Mathew vs. Podinilame and Others* S.C. Appeal No. 42/96, ibid.

[11] [1978-79-80] 1 Sri L.R. 182, at page 216

It is as a concession to the concept of national sovereignty (according to which a State binds itself to that degree acceptable to that State, excepting, of course, particular *jus cogens* principles of international human rights law that binds all nations irrespective of specific agreement) that the device of reservations to treaties have evolved. Thus, if a State, (for particular and deserved reasons), enters into reservations where particular treaty provisions are concerned, those reservations are respected as long as they do not detract from the substantive treaty obligation.

If reservations are not entered upon, then the effect of that treaty is given full force and it is not at all possible to plead non-enactment of domestic laws as an excuse for non-compliance with a treaty provision. What sanctity could be attached to the actions of a State party who maintains that adherence to obligations imposed by treaties to which that State party has voluntarily subjected itself in all its full force, is limited to mere rhetoric in international fora? Such an insistence would be tantamount to self-immolation in the community of nations, which any country – even the most powerful - can ill afford.

This rationale has now become extremely relevant for Sri Lanka in the context of the duty to submit periodic reports to the UN Treaty bodies as a result of the ratification of such treaties wherein the reporting process and the Concluding Observations issued by the various monitoring bodies have become more stringent over the years.

It applies with even more substantive force however where the International Covenant on Civil and Political Rights (ICCPR) is concerned, as a result of the State agreeing to become subject to the First Optional Protocol to the ICCPR which allows persons subject to the jurisdiction of the State to bring an individual communication before the United Nations Human Rights Committee (UNHRC) sitting in Geneva, alleging a violation of Covenant rights.

The objective of this segment of the paper is to discuss the context of the interventions being made by the UN-HRC in respect of individual communications and to look at the specific content of three cases in which it has seen fit to declare a violation of Covenant rights.

Views of the UN Human Rights Committee in Communication (Communication No 950/2000 (Sri Lanka, 31/07/2003) CCPR/C/78/D/950/2000 (Jurisprudence – The Jegetheeswaran Sarma Case

This decision in which the UN-HRC found against the Sri Lankan State in a complaint filed by a father from Trincomalee, whose son disappeared in army custody in 1990, affirms the doctrine of command responsibility in a manner that is of considerable value for domestic rights activism.

The members found a violation of the rights to liberty and security and freedom from torture in respect of the son who 'disappeared' in army custody. The State was directed to expedite current criminal proceedings against individuals implicated in the disappearance and to ensure the prompt trial of all persons responsible for the abduction. The State was also put under an obligation to provide the victims with an effective remedy including a thorough and effective investigation into his disappearance and fate, his immediate release if he is still alive, adequate information resulting from its investigation and adequate compensation for the violations suffered by him and his family.

Violation of the right to freedom from torture or cruel, inhuman and degrading treatment or punishment was also found in respect of his parents who, the UN-HRC opined, has suffered "anguish and stress" by his disappearance and by the continuing uncertainty concerning his fate and whereabouts. The Committee indicated its wish to receive from the Government, within three months, information about the measures taken to give effect to the Committee's views.

The facts of the case were in common with many cases of this nature during that traumatic period in Sri Lanka. The father, Jegatheeswaran Sarma, had gone to Geneva alleging that his son, Thevaraja Sarma had been arrested and detained in Trincomalee by members of the Army, including one corporal Sarath and others unidentified, in the course of a military search operation and that these acts resulted in the disappearance of his son.

In counter, the State argued that this disappearance was an isolated act initiated solely by a minor officer without the knowledge or complicity of other levels within the military chain of command. This was a position that was not accepted by the Committee in its deliberations.

The victim also argued that that the State party had failed to investigate effectively its responsibility and the individual responsibility of those suspected of the direct commission of the offences. It had given no explanation as to why an investigation was commenced some 10 years after the disappearance was first brought to the attention of the relevant authorities. Moreover, the

investigation did not provide information on orders that may have been given to the low ranking officers regarding their role in search operations, nor did it consider the chain of command.

It has not provided information about the systems in place within the military concerning orders, training, reporting procedures or other process to monitor the activity of soldiers which may support or undermine the claim that the superior officers did not order and were not aware of the activities of their subordinates.

It was also alleged that there were striking omissions in the evidence gathered by the State party. Thus, the records of the ongoing military operations in this area in 1990 had not been accessed or produced and no detention records or information relating to the cordon and search operation were adduced. Even though indictment was filed against corporal Sarath, key individuals were not included as witnesses for the prosecution, despite the fact that they had already provided statements to the authorities and could have provided testimony crucial to the case.

In delivering its views, the UN-HRC reasoned unequivocally that, for the purposes of establishing State responsibility, it is irrelevant that the officer to whom a particular disappearance of an individual is attributed, acted outside the law or that superior officers were unaware of his or her actions.

In this context, the definition of enforced disappearances contained in the Rome Stature of the International Criminal Court (Article 7) was also used to good measure. Here, "enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

The Committee concluded accordingly that where the violation of Covenant rights is carried out by a soldier or other official who uses his or her position of authority to execute a wrongful act, the violation is imputable to the State, even where the soldier or the other official is acting beyond his authority.

In doing so, it followed previous jurisprudence to this same effect by other regional tribunals, including the Inter-American Court of Human Rights in the *Velasquez Rodriguez* Case and decisions of the European Court of Human Rights.

Thus, even where an official is acting *ultra vires*, the State will find itself in a position of responsibility if it provided the means or facilities to accomplish the act. Even more boldly, it was affirmed by the Committee in this instance that even if, and this is not known in this case, the officials acted in direct contravention of the orders given to them, the State may still be responsible.

The views of the Committee, adopted its seventy-eighth session, constitutes a clarion call for those entrusted with the responsibility of prosecutions, in particular the officers of the Attorney General, to ensure that the State is not held liable on failure to hold accountable in law, those officers of the State identified to be responsible for grave human rights violations.

Views of the UN Human Rights Committee in Communication No. 909/2000: Sri Lanka 26/08/2004 (CCPR/C/81/D/909/2000 (Jurisprudence) – the Victor Ivan Case

Here, the UN-HRC found that the pending nature of three indictments for criminal defamation served on the editor of the 'Ravaya' in 1996 and 1997 for several years, (including up to the time of the final submissions made by the parties), was in violation of ICCPR, Article 14, paragraph 3 (c), (right to be tried without undue delay). Additionally, the delay left the author in a situation of uncertainty and intimidation, despite his efforts to have the cases terminated, and had a chilling effect, which violated ICCPR, Article 19 (right to freedom of expression), read together with ICCPR, Article 2(3) (right to effective remedy).

This violation of the right to speedy trial had not been specifically pleaded by the author whose case before the UN-HRC was originally based on a different argument; namely that the action of the Attorney General of Sri Lanka, in arbitrarily charging him with criminal defamation during the period 1993 to 1998, failed to properly exercise his discretion under statutory guidelines (which require a proper assessment of the facts as required in law for criminal defamation prosecution), and thereby violated his freedom of expression in terms of ICCPR, Article 19 as well as his right to equality and equal protection of the law in terms of ICCPR, Article 26.

The author also pleaded a violation of Article 2 (3) of the Covenant, based on the refusal of the Supreme Court to grant him leave to proceed with his fundamental rights application against the Attorney General, thereby depriving him of an effective remedy.[12]

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[12] *Victor Ivan* v. *Sarath N. Silva*, (1998, 1 SLR, 301)

The UN-HRC however declined to rule on both these grounds, instead restricting itself to a narrower finding of the right to be tried without undue delay. The complaint with regard to undue delay, in fact, arose during the long drawn out proceedings before the UN-HRC as this was not a factor that was in issue when the author first appealed to Sri Lanka's Supreme Court and was refused leave to proceed on a different basis altogether.

The willingness of the UN-HRC to rule on the right to speedy trial without insisting that the author first raise this issue specifically before the domestic courts and then come before the Committee, needs to be noted. The importance of this decision in the domestic context, is heightened by the fact that the right to speedy trial has not been substantively developed by the Sri Lankan Supreme Court as a core right of the constitutional rights to a fair trial.

Views of the UN Human Rights Committee in Communication No. 1033/2004: Sri Lanka 26/08/2004 (CCPR/C/81/D/1033/2001 (Jurisprudence) – the Singarasa Case

This case concerned the appeal of a detainee in the Boosa prison who had been convicted and sentenced to fifty years imprisonment, solely on the strength of a confession obtained in terms of the Prevention of Terrorism Act No 48 of 1979 (as amended), (PTA) for having conspired by unlawful means to overthrow the lawfully constituted Government of Sri Lanka, and for having attacked four army camps with a view to achieving the said objective.

Sinharasa had been detained on 16 July, 1993 pursuant to an order by the Minister of Defence under section 9(1) of the PTA which provides for detention without charge up to a period of eighteen months (renewable by order every three months), if the Minister of Defence "has reason to believe or suspect that any person is connected with or concerned in any unlawful activity." The detention order was not served on him and he was not informed of the reasons for his detention.

Thereafter, he was kept in detention up to August 1993, where he was first brought before a Magistrate, and then remanded back into police custody. No bail was given in terms of Section 15(2) of the PTA. Neither did the Magistrate review the detention order, in terms of Section 10, which states that a detention order under section 9 of the PTA is final and shall not be called in question before any court.

On 11 December 1993, he was produced before an ASP (who had previously interrogated him in the capacity of a police constable) and asked to sign a statement, which had been translated and typed in

Sinhalese by another police officer who also acted as an interpreter during this time. When Sinharasa had refused to sign as he could not understand it, he alleged that the ASP then forcibly put his thumbprint on the typed statement. He did not have legal representation.

The judicial medical report produced at his trial in the high court confirmed that he displayed scars on his back and a serious injury, in the form of a corneal scar on his left eye, which resulted in permanent impairment of vision. The report also stated that –

> *"injuries to the lower part of the left back of the chest and eye were caused by a blunt weapon while that to the mid back of the chest was probably due to application of sharp force."*

At a *voir dire* hearing in the High Court, the Court concluded that the confession was admissible, pursuant to section 16(1) of the PTA, which renders admissible any statement made before a police officer not below the rank of an ASP, provided that it is voluntary. The confession was admitted despite the Court noting that there were "injury scars presently visible on the [author's] body" and acknowledging that these were sequels of injuries "inflicted before or after this incident."

Further factors taken against him was that he had failed to complain to anyone at any time about the beatings, including the Magistrate. Sinharasa was convicted and sentenced to fifty years imprisonment in 1995 for under section 23(a) of the State of Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 1989 with the Public Security (Amendment) Act No. 28 of 1988, of having conspired by unlawful means to overthrow the lawfully constituted Government of Sri Lanka, and (read together with the provisions of the PTA) of having attacked four army camps with a view to achieving the said objective.

The conviction was based solely on the alleged confession. His appeal to the Court of Appeal was dismissed though his sentence was reduced. Thereafter, in January 2000, the Supreme Court also refused special leave to appeal. It was from this refusal that Sinharasa appealed to the UNHRC.

His position was that the burden imposed on him under Section 16(2) of the PTA to prove that the confession was extracted under duress and was not voluntary in terms of Section 16(2), was impossible of fulfillment as he had been compelled to sign the confession only in the presence of the police officers concerned by whom he had been tortured.

The primary question was as to whether his rights under Article 14, paragraph 3 (g) of the Covenant had been violated by his being forced to sign a confession and subsequently to prove its voluntary nature. The Committee answered this question in the positive. In so doing, it pointed out that its jurisprudence had laid down the principle that no one shall "be compelled to testify against himself or confess guilt" which must be understood in terms of the absence of any direct or indirect physical or psychological coercion from the investigating authorities on the accused with a view to obtaining a confession of guilt.

It was considered implicit in this principle that the prosecution prove that the confession was made without duress. Interestingly, it was pointed out that even if, as argued by the Sri Lankan State, the threshold of proof regarding the forced nature of a confession is "placed very low" and "a mere possibility of involuntariness" would suffice to sway the court in favour of the accused, it remains that the burden was on the author, this would not suffice. Its reasoning was unequivocal.

> *"The willingness of the courts at all stages to dismiss the complaints of torture and ill-treatment on the basis of the inconclusiveness of the medical certificate (especially one obtained over a year after the interrogation and ensuing confession) suggests that this threshold was not complied with. Further, insofar as the courts were prepared to infer that the author's allegations lacked credibility by virtue of his failing to complain of ill-treatment before its magistrate, the Committee finds that inference to be manifestly unsustainable in the light of his expected return to police detention."*

The UN-HRC found a violation of his right under ICCPR Article 14, paragraph 3 (g) (namely that no one shall "be compelled to testify against himself or confess guilt.", read together with ICCPR, Article 2, paragraph 3, and ICCPR Article 7. The State was directed to amend sections of the PTA that are incompatible with the guarantees of fair trial under the Covenant. In addition, the delay between conviction and the final dismissal of the author's appeal by the Supreme Court (29 September 1995 to 28 January 2000) in Case no. 6825/1994 was ruled to have resulted in a violation of the rights contained in ICCPR, Article 14, paragraphs 3(c), and 5, read together, which confers a right to review of a decision at trial without delay.

The State was put under an obligation to provide Sinharasa with an effective and appropriate remedy, including release or retrial and compensation. Importantly, Sri Lanka was also directed to avoid

similar violations in the future and to ensure that the impugned sections of the PTA are made compatible with the provisions of the Covenant.

Conclusion

Despite the fact that extraordinary emergency laws are no longer in force in Sri Lanka, what we have, in effect, is a situation where emergency law operates in the shadows in the continuation of the impunity afforded to law enforcement officers and custodial officers who engage in abuse of the powers of their office.

However, no government monitoring organisation or unit still appears to bestir itself, at least in the minimum, to engage their personnel in immediate visits to places from which complaints of torture are received and ascertain for themselves, the credibility of those complaints, (though individual efforts are made in some respects by some concerned officers in charge of these institutions).

Nor is there any direction given by any of these bodies regarding immediate remedial action, which would include medical treatment and production before court. Instead, the onus is on the victim himself or herself to engage in this process. Very often, this becomes next to impossible for either the victim or his or her loved ones driven from pillar to post in search of justice. This is what is basically wrong with the due process of law in Sri Lanka at present where the right to liberty is concerned.

In sum, the absence of effective sanctions against aberrant state officers who violate the basic norms of due process means that the delivering of fundamental rights judgements that are excellent in theory, has had little deterrent value in a system where police brutality has become a fact of normal life. Where the judiciary itself becomes unsympathetic to citizens who bring their appeals before the highest court, the situation becomes much worse. Much has changed now in Sri Lanka as a result of strong domestic and international lobbying using the modern human rights framework. We hope that more results will indeed, be evidenced in the future.

Judicial Protection of Human Rights in the Philippines

Judge Reynaldo A. Alhambra*

"Ultimately, man is the centerpiece of these instruments that affirm all human rights and which mandate all nations to respect, honor and observe these rights. But outside any international instrument, apart from any constitution and legislation, man already possesses these rights. It amazes that documents are still necessary to proclaim these inalienable rights. It puzzles that people need institutionalized assistance to ensure that their rights are dutifully protected and observed. It is perplexing that people still need to be enjoined so they can directly and actively participate in the economic, social and political activities of a nation to ensure a quality of life consistent with their aspirations."

Chief Justice Hilario G. Davide, Jr.[1]

Introduction

The historical and political experience of the Philippines - as a former colony of Spain for over three centuries; as a self-proclaimed free country under a revolutionary government in 1898; as a colony ceded to the United States by Spain after the Spanish-American War at the end of the 19th century; as a protectorate of the United States in the early part of the 20th century; as a self-governing nation under a Commonwealth before World War II; and, eventually as an independent republic after said war - developed in the Filipino People, love for freedom and democracy.

The fight by Filipinos for recognition and protection of human rights traces its roots to its unique history as a people, whose way of life was dictated by colonial masters up to the time they gained independence. These rights are enshrined in the Bill of Rights of the present Philippine Constitution which are derived mainly from the first ten Amendments to the U.S. Constitution. With some variations, these fundamental and protective guarantees of individual rights have been pronounced since the Malolos Constitution of 1898, the Organic Law of 1916, and the Independence Act of 1935.

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* Regional Trial Court of Manila, Branch 53. Paper delivered at the 9th Asian Consultation on Due Process hosted by the Asian Legal Resource Centre, Bangkok, Thailand, October, 2004

[1] Inspirational Message delivered at the Philippine Judiciary Workshop on Realizing Economic, Social and Cultural Rights, on September 14, 2001, at PHILJA, Tagaytay City, Philippines.

The fundamental rights and freedoms of individuals in these basic laws offered protection not just to Filipinos, but also to foreigners in the Philippines regardless of race, sex or creed.

It was about the time that the Universal Declaration of Human Rights was adopted, that the draft of the Civil Code of the Philippines was finished and eventually approved on June 18, 1949 as the Republic Act No. 386. Chapter 2 of the Civil Code is specifically devoted to Human Relations. The chapter includes Article 19 to Article 36. Article 32 of the Code is of special importance.

Analysis of Article 32

Any public officer or employee, or any private individual, who directly or indirectly obstructs, defeats, violates or in any manner impedes or impairs any of the following rights and liberties of another person shall be liable to the latter for damages:

These rights include the freedom of religion, freedom of speech, freedom to write for the press or to maintain a periodical publication, freedom from arbitrary or illegal detention, freedom of suffrage, the right against deprivation of property without due process of law, the right to a just compensation when private property is taken for public use, the right to the equal protection of the laws, the right to be secure in one's person, house, papers, and effects against unreasonable searches and seizures, the liberty of abode and of changing the same, privacy of communication and correspondence, the right to become a member of associations or societies for purposes not contrary to law, the right to take part in a peaceable assembly to petition the Government for redress of grievances, the right to be a free from involuntary servitude in any form, the right of the accused against excessive bail.

These rights also included the right of the accused to be heard by himself and counsel, to be informed of the nature and cause of the accusation against him, to have a speedy and public trial, to meet the witnesses face to face, and to have compulsory process to secure the attendance of witness in his behalf, freedom from being compelled to be a witness against one's self, or from being forced to confess guilt, or from being induced by a promise of immunity or reward to make such confession, except when the person confessing becomes a State witness, freedom from excessive fines, or cruel and unusual punishment, unless the same is imposed or inflicted in accordance with a statute which has not been judicially declared unconstitutional and freedom of access to the courts

Whether or not the defendant's act or omission constitutes a criminal offense, the aggrieved party has a right to commence an entirely separate and distinct civil action for damages, and for other relief.

Such civil action shall proceed independently of any criminal prosecution (if the latter be instituted), and may be proved by a preponderance of evidence. The indemnity shall include moral damages. Exemplary damages may also be adjudicated. The responsibility herein set forth may come into operation where the act or omission constitutes a violation of the Penal Code or other penal statute.

The Martial Law years under the regime of Ferdinand E. Marcos, saw the repression of freedoms and abuses by misguided military, police, and government officials. The revolution that gave birth to People Power and through which the Marcos Regime was toppled, became a learning process for the nationalist leaders who took over the government. A Constitutional Commission composed of selected persons known for their integrity and sense of nationalism was tasked with the crafting of a constitution designed to ensure that the dark incidents of disregard of human rights during the Martial Law years would not occur again.

True enough, the 1987 Philippine Constitution has a solemn commitment to human rights as it provides that, as a policy, the State values the dignity of every human person and guarantees full respect for human rights (Art. II, Sec. 11). In consonance with this commitment, Article XIII of the present Constitution, which consists of nineteen (19) sections, is exclusively devoted to Social Justice and Human Rights. The importance of protecting human rights is also emphasized by the creation of an independent office called the Commission on Human Rights (Art. XIII, Sec. 17) with broad powers and functions (Art. XIII, Sec. 18) enjoying the full support of Congress (Art. XIII, Sec. 19).

Since then, various laws have been enacted by Philippine Congress aimed at protecting and implementing human rights. Of course, much still needs to be done if full protection is to be achieved.

The Commitment of the Philippines in Enforcing Protection of Rights

The Philippines has been supportive of the Universal Declaration of Human Rights and has participated actively in implementing the two main covenants: the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on Economic, Social, and Cultural Rights (ICESCR). In fact, Art. II, Section 2 of the Philippine Constitution is explicit with regard to the effect of international human rights conventions:

Sec. 2. The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation and amity with all nations.

The Philippines has ratified or signed a number of major human rights treaties which are now being used as basis or framework for enacting laws that address specific concerns. Aside from the UN Charter, the UDHR, ICCPR, and ICESCR, the Philippines has committed to the following conventions and treaties: the Optional Protocol to the International Covenant on Civil and Political Rights; International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Rights of the Child, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; and others.

The Philippines recognizes and continues to take measures to abide with its obligations under these treaties and conventions. As an active participant, the Philippines is committed the following obligations: to ensure the equal right of men and women to the enjoyment of the right; to specifically prohibit, with criminal sanctions, violation of some rights, including the right to life, right not to be tortured or subjected to slavery or servitude as well as rights against gender-based violence; to bring about, in conformity with human rights treaties, legislation such as those relating to arrest, detention and trial, electoral laws and family law, which are relevant to the enjoyment of rights; to adopt other measures of a non-legislative kind necessary to make rights effective and to remove obstacles to their enjoyment, i.e. right to legal assistance, preferential treatment or other positive action to overcome discrimination or to bring a disadvantaged group into a position equal to that of the rest of the population.

These include also the obligation to ensure that any person whose rights or freedoms are violated shall have an effective and enforceable remedy even against persons acting in an official capacity; to ensure that any person claiming such remedy shall have his right thereto determined by competent, judicial, administrative or legislative authorities, or by any other competent authority, and to develop the possibilities of judicial remedy; to enforce through the competent authority (judicial, administrative or legislative, others) such remedies which must be effective, put an end to the violation, overcome or compensate for its effect and ensure against further violations.

From another perspective, protection of the Rights of Women and Children has found much headway in terms of statutory enactments as a consequence of the Philippines' ratification or accession to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the

Convention of the Rights of the Child (CRC). To comply with its commitments under the CEDAW, a number of laws have been passed.

The Republic Act No. 9208, the Anti-Trafficking In Persons Act of 2003, which had just recently taken effect in January of this year is a piece of legislation which addresses trafficking of persons as a violation of human rights. Women and children are usually the victims of trafficking. The abuse and exploitation of this most vulnerable sector of society has been attributed to a number of causes particularly poverty, lack of education and opportunities, dysfunctional family life, migration, political and economic regression, globalization and information technology and the increasing demand for sex-related services. While trafficking in its various forms has been tolerated in the past as a means to respond to family needs, there is a growing awareness of the impact of trafficking of women and children particularly in terms of the psycho-social effects on the victims themselves. Stiff penalties are prescribed by the law for offenders.

Judicial Protection of Human Rights

Protection of human rights was provided by Philippine courts prior to the country becoming a member of the United Nations. The domestic jurisprudence has been enriched by decisions relating to the protection of any individual's right to be treated and to live a life with human dignity – a concept which is universal, inalienable, inherent, and inviolable.

The pronouncements of Justice George Malcolm in *Villavicencio* vs. *Lukban*,[2], a case which was decided decades before the Universal Declaration of Human Rights, exemplified judicial protection of human rights. In this landmark case, the Philippine Supreme Court granted the privilege of the writ of habeas corpus to 170 women of ill repute (who were forcibly taken from their homes in Manila and involuntarily shipped to Davao City to prevent them from further engaging in their immoral trade) because such forcible taking of these women to have them deposited in a distant region deprived them of their freedom of locomotion.

In *Mejoff* vs. *Director of Prisons*,[3] Boris Mejoff, an alien of Russian descent was brought into the Philippines by the Japanese as a secret operative during the Japanese Occupation of the Philippines in the World War II, but was captured by elements of the US Counter Intelligence Corps and eventually turned over to the Philippine authorities for disposition under Philippine laws. The Deportation Board

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[2] 19 Phil. 778
[3] 90 Phil. 70 (1951)

ordered Mejoff deported to Russia, but no vessel would take him on board. Thus, he was detained in the National Penitentiary while awaiting arrangements for his departure. A petition for habeas corpus was filed by Mejoff. This was denied by the court. His second petition for habeas corpus, which was filed after two years of detention, was however granted by the Supreme Court. Justice Tuason held as follows:

> *"The protection against deprivation of liberty without due process of law and except for crimes committed against the laws of the land is not limited to Philippine citizens but extends to all residents, except enemy aliens, regardless of nationality. Whether an alien who entered the country in violation of its immigration laws may be detained for as long as the Government is unable to deport him, is a point we need not decide. The petitioner's entry into the Philippines was not unlawful; he was brought by the armed and belligerent forces of a de facto government whose decrees were law during the occupation."*

Moreover, by its Constitution (Art. II, Sec. 3), the Philippines 'adopts the generally accepted principles of international law as part of the law of the nation." Cases touching on human rights protection have since then enriched Philippine Jurisprudence. A look at current decisions of the Supreme Court disclose that judicial protection has been extended upon the invocation of human rights, laws, treaties or international conventions touching on varying fields of legal concern.[4]

The decisions rendered in these cases have a strong impact on the enforcement of human rights because they form part of the law of the land. The decision in Genosa for example, has led the Supreme Court into considering the battered woman syndrome (BWS) as a complete justifying circumstance of self-defense and not just mitigating.

In furtherance of providing judicial protection, the Supreme Court has time and again used its rule-making power on cases involving human rights. In the exercise of this power, the Supreme Court has adopted new rules or amendments to the Rules of Court. On December 15, 2000, the Rule on Examination of a Child Witness took effect. The Rule on Juveniles in Conflict with the Law and the Rule on Commitment of Children took effect on April 15, 2002. On May 1, 2003, the Rule on Guardianship of Minors took effect. And, on March 15, 2003, the Rule on Legal Separation and the Rule on Declaration of Absolute Nullity of Void Marriages and Annulment of Voidable Marriages

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[4] to name a few leading cases, *Llorente* vs. *Sandiganbayan*, G.R. No. 122166, March 11, 1998, -right against unjust discrimination; *Oposa* vs. *Factoran*, 224 SCRA 792, *Momongon* vs. *Omipon*, 242 SCRA 332, *Tano et al*, s. *Socrates, et al*., 278 SCRA 154 – right to a healthful environment; *People* vs. *Genosa*, G.R. 122191, October 8, 1998– domestic violence.

took effect. These new rules are responses to the need for providing further protection to human rights.

Conclusion

The Philippine Judiciary has remained vigilant in order that fundamental freedoms and human rights are protected and promoted. There is no gainsaying that despite the global acceptance of the principles embodied in the Universal Declaration of Human Rights, rampant violations continue to take place in many parts of the world. The task of securing a future where there is absolute and irrevocable peace and security among nations continues to be hampered by ongoing conflicts among peoples and nations in the world today. Nonetheless, we continue to cling to the hope that ultimately the whole world and all people will recognize our common humanity. Awareness and consciousness of human rights that we share with others can be the only means to achieve peace and security.

Protection against prolonged and arbitrary and the role of the judiciary in Korea

Yong-Whan Cho[♣]

Introduction

It is the established rule of international human rights law that –

> *"arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose."*[1]

In its resolution of 1991/42, 5 March 1991, the UN Commission on Human Rights defined "arbitrary detention" as "detention imposed arbitrarily or otherwise inconsistently with the relevant international standards set forth in the Universal Declaration of Human Rights or in the relevant international legal instruments accepted by the States concerned."

In this paper, the term "prolonged detention" is defined as "detention imposed exceeding limits of maximum period set forth in the relevant laws of Korea" and the term "arbitrary detention" is defined as "detention imposed inconsistently with the standards set forth in the relevant laws of Korea." The purpose of this paper is to introduce our experiences in Korea in protecting persons against prolonged and arbitrary detention,

Before the 'democratic breakthrough' in June 1987, the criminal procedure of Korea was notorious for rampant abuse of human rights; illegal arrest, detention *incommunicado*, prolonged detention, and various forms of ill-treatment and torture were frequently a part of such procedures. The fact that torture was institutionalized as an integral part of the military government's security policy[2] meant that arbitrary detention was the rule rather than the exception during such time.

♣ Attorney-at-law, Korean Bar; Managing Partner, Horizon Law Group. Paper delivered at the 9th Asian Consultation on Due Process hosted by the Asian Legal Resource Centre, Bangkok, Thailand, October, 2004.

[1] Principle 2, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by General Assembly resolution 43/173 of 9 December 1988.

[2] Amnesty International, TORTURE IN THE EIGHTIES (1984), pp. 4-6.

Now, while Korea is still coping with many tasks that must be solved in its journey to a 'rights-protective regime'[3], the 'atmosphere of terror' that once characterized the criminal process has disappeared. It may be said that the practices of the law enforcement authorities have undergone dramatic and substantial reform through a gradual process of change. The role of the judiciary appears to have been one of the main engines of such reform and change.

Overview of the Criminal Justice System of Korea

The judiciary of Korea is composed of the ordinary court and the Constitutional Court. With the exception of the power to adjudicate the constitutionality of laws that is vested with the Constitutional Court,[4] the ordinary court system that is composed of the Supreme Court, High Court and the District Court exercises judicial power.[5]

The Chief Justice of the Supreme Court who is appointed by the President with the consent of the National Assembly (Legislature), has the power to nominate thirteen other justices and to appoint lower court judges.[6] In case of the Constitutional Court, the President, the National Assembly and the Chief Justice has the power to nominate three judges each who are then appointed by the President. The President of the Constitutional Court is designated by the President from among nine judges of the Court.

The independence of the judiciary is one of the most dramatic aspects of democratization in South Korea. Under the dictatorship, the judiciary was nothing but a cosmetic creation, the independence of which was only nominally guaranteed in the text of the Constitution.[7] Now, the independence of the judiciary as an institution as well as of individual judges are strictly guaranteed both under law and in practice to a degree not less than that of the Basic Principles on the Independence of the Judiciary.[8]

The prosecution is a part of the Administration[9] and has no power to intervene in the exercise of the judicial power by the courts.

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[3] Jack Donnelly, INTERNATIONAL HUMAN RIGHTS, Westview press (1993), p. 146.
[4] Constitution Art. 111.
[5] Constitution Art. 101.
[6] Constitution Art. 104; Court Organization Act Art. 4.
[7] Court Organization Act and the Constitutional Court Act.
[8] Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.
[9] Government Organization Act Art. 31 and Prosecutors' Office Act.

As the basic structure of the criminal procedure consists of adversarial system with partial modification by inquisitorial aspects, the prosecutor is regarded as the adversary who has equal status with the suspect and/or the defendant. The right to legal counsel is recognized by the Constitution as an indispensable guarantee of the equal status of the suspect/ defendant with the prosecutor.

Guarantees of Fundamental Rights and Freedoms in Criminal Procedure

(A) Provisions of the Constitution

Article 12 of the Constitution sets force basic principles of the criminal justice system by recognizing fundamental rights and freedoms of a person.

Paragraph 1 declares that personal liberty can be restricted only by law and through due process of law.

Paragraph 2 prohibits torture and protects people from self-incrimination.

Paragraph 3 stipulates that arrest, detention, seizure or search is allowed only in case a warrant issued by a judge is presented.[10]

The right to a legal counsel of one's choice is guaranteed by Paragraph 4.

The procedural guarantees are provided by Paragraph 5: while the suspect has the right to be informed of the reason of arrest or detention and the right to a counsel, the reason for and the time and place of the arrest or detention should be notified to his or her family, etc.

Paragraph 6 provides for the *ex post facto* review of the legality of the arrest or detention by the court.

Paragraph 7 declares the exclusionary rule of involuntary confession by stipulating that –

> *"in a case where a confession is deemed to have been made against a defendant's will due to torture, violence, intimidation, unduly prolonged detention, deceit or etc., or in a case where a confession is the only evidence against a defendant in a trial, such a confession shall not be admitted as evidence of guilt, nor shall a defendant be punished by reason of such a confession."*

(B) Guarantees against Prolonged and Arbitrary Detention under the Code of Criminal Procedure (CCP).

Based on Article 12 of the Constitution, the CCP provides detailed provisions aiming at the protection of a person against prolonged and arbitrary detention.

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[10] Exceptions to this rule are (1) apprehension of a person *flagrante delicto* and (2) apprehension of a person suspected of committing a crime punishable by imprisonment of three years or more and of escape or destroying evidence,

First of all, the CCP strictly restricts the maximum period of detention for each stage of the criminal procedure. In case any of these periods expires without proper measure of transferring a detained person to the next stage, the detained person must be automatically released.

Secondly, as detention of a person is regarded as an exceptional measure, the CCP stipulates various requirements for arrest and detention. Detention of a person in violations of these procedural requirements may be regarded as unlawful or arbitrary and may lead to release the detainee.

Thirdly, procedures or measures for the purpose of preventing prolonged and arbitrary detention are institutionalized as follows; communication of a detained person with the outside world as well as access to the detained person by family members, etc. is guaranteed, in principle; a legal counsel is entitled to have access to the detained client; the prosecutor has the power to inspect the place of detention facilities for the purpose of preventing unlawful detention;[11] and a certain category of unlawfully obtained evidence is excluded from evidence against the defendant, which is one of the most important and the best preventive measures against arbitrary detention and violation of human rights by the investigative authorities.

In addition to the involuntary confession that is excluded from evidence against the defendant under Art. 12 of the Constitution, the judiciary has gradually expanded the scope of this exclusionary rule to a case of serious violation of the defendant's rights.

Fourthly, various procedures are provided for the purpose of controlling unlawful exercise of power by the investigative authorities by the court. The court is entitled to intervene in any stages of detention with the petition by the defendant, his or her counsel, etc. or *ex officio* and to order the release of the detained person when deemed appropriate. In addition to it, detention of a person in violation of any of the procedural guarantees constitutes a crime of illegal detention under Article 124 of the Criminal Code and a tort under the Civil Code simultaneously. This means that a law enforcement official who is responsible for arbitrary detention of a person may risk criminal punishment and/or monetary compensation.

[11] CCP Art. 198-2.

(C) Procedural Requirements of Arrest and Detention

The basic principle that regulates criminal procedure is that detention[12] of a suspect and/or a defendant should be an exceptional measure. Based on this principle, various restrictions are imposed on the procedure of detention. With some exceptions, warrants issued by a judge is required for all forms of compulsory measures.

When deemed necessary for investigation, a public prosecutor or a judicial police officer may request appearance of a suspect and interrogate him or her with prior notification of his or her right to keep silence.[13]

The investigative authorities may arrest a suspect principally with the "warrant of arrest " issued by a judge or exceptionally by way of the "emergency arrest" without warrant. The warrant of arrest may be issued when there is a reasonable ground to suspect that the person has committed a crime and when the person has refused to appear before the investigative authorities or there is reasonable ground to suspect that the person would refuse to appear before such authorities. The person who has been arrested with the warrant of arrest should be release unless the prosecutor requests a warrant of detention to a judge within 48 hours from the time of arrest.[14]

The "emergency arrest " made without an arrest warrant is allowed in the following cases;

Where there is reasonable ground to suspect that a person has committed a crime punishable with death penalty, life imprisonment or imprisonment for three years or more;
Where there is reasonable ground to suspect that the person may destroy evidence, or when the person escapes or there is reasonable ground to suspect that (s)he would flee, and
Where it is not possible to obtain a warrant of arrest from a judge due to urgency.[15] The person under the "emergency arrest" should also be released unless the prosecutor requests a warrant of detention to a judge within 48 hours from the time of emergency arrest.

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[12] Under CCP, the "detention (□□)" is differentiated from the "arrest (□□)". "Detention" includes both the "compulsory appearance (□□)" of a defendant to a relevant court and the "confinement (□□)" of a suspect or a defendant during specified period (CCP Art. 69). However, in this paper, the term "detention" primarily means the "confinement" unless otherwise explained. Meanwhile, "arrest" means a compulsory measure to force a suspect to appear before the investigative authorities (CCP Art. 200-2). Both "compulsory appearance" and "arrest" may lead to "confinement." In this context, the notion of "detention" in the Korean CCP seems more similar to that of "arrest" in the criminal procedure of China.
[13] CCP Art. 200.
[14] CCP Art. 200-2.
[15] CCP Art. 200-3.

As an exceptional measure, at least in theory, the investigative authorities may investigate a crime by detaining a person with the "warrant of detention" issued by a judge. The issuance of warrant of detention by a court is possible only in the following cases;

Where there is reasonable ground to suspect that the person has committed a crime, and

Where the person falls under any of the following; when the person has no fixed dwelling; when there is reasonable ground to suspect that the person may destroy evidence; or

When he escapes or there is reasonable ground to suspect that (s)he may flee.[16]

When a person has been detained by the judicial police with the warrant of arrest, (s)he should be transferred to a prosecutor within ten days of detention period permitted to a judicial police officer or be released. When (s)he has been transferred to a prosecutor after ten days of detention by a judicial police officer or has been detained by a prosecutor with the warrant of arrest, (s)he should be indicted within 20 days of pre-trial detention period permitted to a prosecutor or should be released.[17]

The CCP stipulates the form and the contents of a warrant of detention, which should be presented to a suspect or a defendant.[18] A warrant of detention should contain the name and address of the suspect or the defendant, title of the crime, summary of the facts of crime, the place of detention, the date of issuance, the effective period of the warrant, and the signature and the seal of the judge.[19] As soon as a suspect or a defendant is detained, his or her counsel or family, etc. should be notified, without delay and in writing, of the title of the crime, time and place of detention, and the summary of the charges.[20]

Another important procedural guarantee against arbitrary detention is the judicial review process prior to the issuance of a warrant. When a request for a warrant of detention is filed with the court by a prosecutor, the judge may summon and question the suspect upon request by the suspect, his or her counsel, family members or employer, etc. In order to guarantee this right to be examined by a judge, the CCP provides that the public prosecutor or the judicial police officer is obliged to inform the

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[16] CCP Art. 70.
[17] CCP Art. 201 through 205. The 48 hours permitted to investigative authorities after arrest or emergency arrest is included in the calculation of the 10 days or 20 days of detention period permitted to a judicial police officer or a prosecutor, respectively.
[18] CCP Art. 85.
[19] CCP Art. 75.
[20] CCP Art. 87.

suspect of this right and to record the suspect's response on whether to request the examination by a judge in the protocol of examination of the suspect.[21]

This judicial review process cannot be said to be a comprehensive procedure that is designed to protect everyone from arbitrary detention in that it only applies to the cases where the suspect actively requests such review and where the examination is deemed necessary by the judge.

For this reason it has been subject to harsh criticism that it is not compatible with article 9 of the International Covenant on Civil and Political Rights[22] to which Korea has been a party since 1990.[23] Keeping such limitations of the procedure in mind, it still plays an important role in restricting investigative authorities from human rights abuses in the beginning stage of an investigation, because such abuses may easily be exposed to the judge and others through this procedure.

(D) Rights of a Detained Person and Exclusionary Rule

The rights of a detained person to communicate with his or her family members, etc. and to a legal counsel are also important instruments in preventing human rights violations through monitoring of the investigation. In particular, the role of the legal counsel is critical because the legal counsel is entitled to almost unlimited access to the detained person, while communication of a detain person with others is subject to restriction by the prosecutor or by the judge. This issue has undergone the most striking development in the criminal procedure processes since the beginning of the 1990s.

In the past, the right to a legal counsel had been severely infringed by the investigative authorities. While refusal to allow interview or imposing arbitrarily short time limit was not uncommon, the presence of the investigative official in the place of interview was customary. Since 1990s, this notorious tradition has been changed with the active intervention by the judiciary, particularly, the

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[21] CCP Art. 201-2.

[22] Adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of 16 December 1966 and entered into force on 23 March 1976.

[23] Art. 9 (3) of the ICCPR stipulates that "anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power . . . " In this context, the UN Human Rights Committee found that it is incompatible with Art. 9 of the ICCPR in that "detention of a suspect is subject to judicial review only if the detainee lodges an appeal." Concluding Observations of the Human Rights Committee: the Republic of Korea. 01/11/99, CCPR/C/79/Add.114, I November 1999, para. 13.

Constitutional Court in a series of leading cases where the judiciary expanded the scope of the right to legal counsel.

The first monumental decision came from a judge of a Seoul District Court. In a case where the National Security Planning Agency had refused to allow the lawyer's interview with a detained suspect, the court ordered the Agency to allow the interview using its power to order cancellation or alteration of a disposition made by the investigative authorities,[24] which power had long been regarded as being buried under dead letters. This courageous judgement was followed by a decision of the Constitutional Court, which denied the confession extracted without allowing interview with a lawyer as evidence against the defendant.

The decision of the Constitutional Court that declared the presence of the investigative officials in the place of lawyer's interview with a detained person was in violation of the Constitution resulted in the revision of the relevant provision of the Penal Administration Act which had been interpreted by the authorities as justifying such custom. Now, it is established that interviews between a detained person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official.[25]

Another intensely debated issue was whether a detained person has the right to receive assistance of his counsel during the interrogation by the investigative authorities. After a long period of debate, both the Supreme Court and the Constitutional Court have delivered decisions declaring that the presence of a legal counsel should be allowed in the place of interrogation.

Exclusion of illegally obtained evidence is one of the most effective judicial strategies to prevent various human rights violations. In many cases, a main reason for subjecting a person to arbitrary arrest and detention and other forms of mistreatments including torture, is to extract confession or obtain evidence of a suspected crime. Therefore, exclusion of the illegally obtained evidence as evidence against the defendant is the best means to frustrate such intention of the law enforcement officials.

Since the 1990s, the court has changed its traditionally reluctant attitude in applying the exclusionary rule provided by the Constitution. After affirming the rule as stipulated by the Constitution, it has

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[24] CCP Art. 417. "A person who objects to a disposition concerning confinement, seizure or restoration of seized articles by a public prosecutor or a judicial police officer, may request cancellation or alteration to the court . . ." This procedure is called as a *Quasi-Appeal*(□□□)

[25] Body of principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 18 (4); Penal Administration Act Art. 66(1).

gradually expanded the scope of its review in criminal procedures to determine whether other rights have been violated, as in the case where the access of a lawyer to a detained person or even the presence of a lawyer in the place of interrogation was denied.

(E) Control by the Court

(1) Under the Korean law, the power to detain a person as a part of the judicial power is vested in the court. Therefore, the court may be called to intervene in every stage of the criminal procedure.

First of all, the court may order to cancel or alter the disposition made by a prosecutor or a judicial police officer concerning detention, etc. Using this power, the court has guaranteed the lawyers' access to detained persons and thereby contributed to the prevention of arbitrary detention and other human rights violations.

Secondly, in addition to the judicial review prior to the issuance of a warrant, *ex post facto* review, which is called the "review of the legality of detention", is also instituted. In this procedure, the court, upon request by a suspect, his counsel, etc., may question the suspect and order his release when there is no valid ground for detention.[26] As not only the detained person, but also his legal counsel may present opinion and submit, if any, evidence for the suspect's interest in the hearing, arbitrary detention or other violation of human rights may provide a good ground for the court to order the release of the suspect under this procedure.

Thirdly, in the trial stage after indictment, a detained defendant may be released on bail.[27] According to the CCP, the court is obliged to allow bail unless the defendant falls under specified exceptions; (1) when the defendant has committed a crime punishable with death penalty, imprisonment for life or imprisonment for more than ten years; (2) when the defendant has committed a cumulative offence or habitual crimes; (3) when there is sufficient ground to suspect that the defendant has destroyed or may destroy evidence; (4) when there is sufficient ground to suspect that the defendant flees or is likely to flee; (5) when the dwelling of the defendant is unknown; or (6) when there is sufficient ground to doubt that the defendant does or may do harm to the victim or a person who is deemed to know the

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[26] CCP Art. 214-2.

[27] In the case of bail, the defendant released by the court order of release may be detained again with the court order to cancel the bail when the defendant does not obey any of the conditions specified by the court or when any of the exceptional grounds enumerated by Art. 95 of the CCP apply to the defendant.

facts necessary for the trial.[28] Certainly, the scope of these exceptions is too vague and vulnerable to arbitrary interpretation by a judge. However, the number of the orders issued to allow release on bail by the court has increased.

Fourthly, upon request or *ex officio* ruling, the court may rescind the detention when the grounds for detention are deemed not to have existed or to have been disappeared.[29] On the other hand, the court is also empowered to suspend the execution of detention when there is reasonable ground to do so.[30] Contrary to the rescission of detention, the detained person is released during the period with conditions specified by the court.

(F) Criminal and Civil Responsibility for Human Rights Violations

Under the Criminal Code, unlawful arrest and arbitrary detention by law enforcement officials are defined as crimes.[31] With regard to certain crimes[32] by law enforcement officials, a very important exceptional procedure to indict those who have committed such crimes is provided under the Criminal Code.

It is the principle that the power to indict a suspect of crime is monopolized by a prosecutor and the prosecutor is given discretion not to indict the suspect even when his guilt has been proven.[33] As an exception to this rule, in case a prosecutor has decided not to indict a public official who has committed any of the specified crimes including arbitrary detention, the victim of the crime, etc. may file a request with the relevant High Court to "order the indictment" of the perpetrator. When the High Court deems it reasonable, it decides to have the trial on the case by a District Court. Upon this decision, it is deemed that a public indictment has been initiated against the official and a lawyer appointed by the High Court discharges the role of the prosecutor on this case.[34]

In the past, the prosecutor's discretion not to indict had been severely abused and encouraged law enforcement officials' violations of human rights including arbitrary detention and torture. There was a widely spread belief that their crimes would be overlooked and pardoned both by the prosecutor and

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[28] CCP. Art. 95. In addition to it, Art. 96 empowers the court to order the release of the detained defendant on bail even when deemed necessary in spite of the existence of any exceptional ground enumerated by Art. 95.
[29] CCP Art. 93.
[30] CCP Art. 101.
[31] Criminal Code Art. 124. In addition, violence or other cruel treatment is also stipulated as a crime by Art. 125.
[32] Crime of unlawful arrest, detention (Art. 124), crime of violence or cruel treatment (Art. 125) and crime of abuse of public authority under Art. 123 of the Criminal Code.
[33] CCP Art. 246, 247.
[34] CCP. Art. 260 through 265.

Judicial Response to Socio, Economic and Cultural Rights: An Indian Perspective

Bijo Francis

Introduction

The Constitution of every nation embodies its philosophy. Ideally, this philosophy should be the quintessence of the aspirations of the people. The organs of the state should reflect the same in their functioning. The Constitution of a nation is viewed as a political manifesto, power map, supreme law, mirrors of change, charter of rights and liberties, an autobiography of the power relationship, in a broader sense as the whole system of Government, and a framework within which the functionaries of the state work for the common good of the people's will.

The philosophy of the Indian Constitution[1] should be understood in the socio-political and cultural milieu of its formation and the life of this living organism through the parliament and judiciary. It can be very well said that the Constitution of India embodies within itself –

i) the objectives of national unity and integrity,
ii) a spirit of democracy and
iii) fosters a social revolution for its people.[2]

All these strands should harmoniously work, augmenting each other and should be interdependent, as observed by Granville Austin.

This paper will discuss the third feature of the Indian Constitution. The social revolutionary goals of the Constitution of India can be viewed in the Directive Principles of State Policy[3] (hereinafter DPSP). A correct perspective of these directives could be better understood when reading the said directives against the pluralist society of the nation. The Constitution of India, at its inception, had identified certain rights as fundamental,[4] and justiciable in nature and certain others as non-justiciable.[5] These latter rights were identified as the guiding principles in the formulation of policy

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[1] The Preamble of the Constitution of India, which reads thus; "We, the people of India, having solemnly resolved to constitute India into a sovereign, socialist, secular, democratic republic and to secure to all its citizens: JUSTICE, social, economic and political; LIBERTY of thought, expression, belief, faith and worship; EQUALITY of status and of opportunity; and to promote among them all FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation…" incarnate the philosophy of the Constitution.

[2] G. Austin, Working of Democratic Constitution, The Indian Experience, Oxford University Press, New Delhi, 1999, pp 4-10

[3] Part IV, The Constitution of India

[4] Part III, The Constitution of India

[5] *Supra*, note 5

of governance.[6] The content of Part IV of the Constitution of India can be largely said as a facsimile of these rights.

This paper tries to map the socio-economic and cultural rights embodied in the Constitution of India and gives focal attention to analysing the role of judiciary in transcending these rights from the statute law to reality. We still pose the question as to how far judicial pronouncements actually percolate into the life of the ordinary person. I am leaving this 'little person' here to deliberate on an academic premise for the moment and shall get back later to this little person in the street who is very close to every disquiet mind.

Figuring out the Constitutional Rights

A bare reading of the document, the Constitution, brings forth our attention to a myriad of rights which are reflected in a number of international human rights instruments such as the Universal Declaration of Human Rights (UDHR), The International Covenant on Civil and Political Rights (ICCPR) and the International Convention on Economic, Social and Cultural Rights (ICSECR).

These rights include the right to life,[7] equality,[8] fundamental freedoms guaranteed to a citizen[9], cultural and educational rights of the minorities[10] and the right to seek judicial redress on the violation of these rights before the Supreme Court of India.[11] The right to property was a fundamental right but was taken away by way of a constitutional amendment[12] and now is read in Article 21 as a Constitutional Right.[13] These extended rights are posited differently from the elevated Fundamental Rights.[14]

Article 37 of the Constitution declares that the Part IV provisions (DPSP) as non-justiciable and states that they

> *"shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws."*

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[6] Later in the life of the Constitution, one can observe that these rights have acquired the status of fundamental rights in practice, though technically they remain in part IV, as non-justiciable.
[7] Article 21, See, generally Articles 20 and 22
[8] Article 14, constructive equality is dealt with in Articles 15 and 16
[9] Article 19: freedom of speech and expression, freedom to assemble peaceably and without arms, freedom of association, freedom of movement, freedom to settle and reside in any part of the nation and freedom to practice any profession, or to carry on any occupation, trade or business. These freedoms are to be read within the reasonable restrictions provided in the same Article as proviso 2 to 5
[10] Articles 25, 26 and 30
[11] Article 32
[12] The right to property was omitted by Constitution 44th Amendment Act, 1978.
[13] The Constitution of India, Part XII, Chapter IV, Right to property, Article 300A. No person shall be deprived of his property save by authority of law.
[14] The framers considered the nascent democracy and the limited resources and felt that these rights are safer in a separate part but this part was designed to be the beacon of all policy formulations and is to be achieved in the long run.

The rights so placed are minimum living wages,[15] free and compulsory education for all children up to age of fourteen[16] minimum standards of living, nutrition and public health,[17] protection and improvement of environment, forests and wild life[18] and the right to free legal aid.[19] Though democracy is a non-derogable right[20] of the citizen, curiously, the right to vote is not expressly stated in the Constitution and has, rather been defined as a statutory right.[21]

Life of the Law

The Constitution of a nation is treated as a document *sui generis* in character. It is a document prepared by the people at a particular point of time but for timeless operation. But, the life of the law, (and of the Constitution), is not just logic; it is not to be 'cribbed and cabined' within the statute books; it travels beyond court rooms and touches the everyday lives of the individual creating rights, duties and liabilities. Every little man in the community should have a say in the formulation, application and administration of the law. In a democracy, the people's will is said to be represented in the *sanctum sanctorum* of legislative houses.[22]

This is, of course, the ideal. However, people need a structure that will attempt to bridge the gap between the ideal and the real. The best mechanism to accomplish this task is a sensitive judiciary. The realist school of jurisprudence has rightly put forth its theory that the life of law is in courtrooms and the role of a judge is pivotal in the real life of the people.[23] The orthodox view of the role of the judge, which prevents him from pronouncing a new law, is treated as a child's fiction that does not hold good any more. Lord Denning in his much-acclaimed work 'From Precedent to Precedent' gives a pointer towards the dynamic role of a judge as the factor of change.[24]

Techniques of Judicial Interpretation

India's constitutional structures encompass the principle of separation of power. The role of the judge is generally viewed as that of the administrator of justice. Nevertheless, the judges need to interpret law to administer justice and the judges are enjoined to provide justice beyond statutes as well.[25]

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[15] Article 43
[16] Article 45
[17] Article 47
[18] Article 48 - A
[19] Article 39 - A
[20] Considered as the basic structure of the Constitution
[21] Thampanoor Ravi *v.* Charupara Ravi (1999) 8 SCC 74 and see generally *Union of India v. Association for Democratic Rights* (2002) 5 SCC 294
[22] According to Noam Chomsky, there is no real democracy even in USA, the self ordained saviour of democracy. To him, interest groups wield power in the guise of democracy.
[23] See generally, O.W. Holmes, the Path of the law, (1897) 10 Harv. L Rev, 457-478 and K. Also, see Llewellyn, Some Realism About Realism, (1931) 44 Harv. L.Rev. 1222.
[24] He argues in his work, that the task of a judge in common law is to act as an instrument of evolution in accordance with the changing needs of the society and the demands of the justice.
[25] Constitution of India, Article 142

As any other legal systems, the judiciary of this nation is also bound by the rules of interpretation. However, the interpretation of the Constitution is accomplished on a different premise, as the character of the document to be interpreted is considered to be *sui generis*.

The passage of time saw the emergence of constitutionalism and the role of the judges as a creative element in the constitutional tapestry. The Constitution was treated not as a mere statute but as a mechanism under which laws are made which need to be interpreted in a creative manner as opposed to the narrow pedantic approach. It was well realised by judges that situations have arisen in the country, which the framers never could contemplate at that time. Such situations call for a generic or flexible construction of constitutional provisions, that are required in order that the Constitution may become a living organism to meet the needs of the changing society.

Courts, especially the Apex Court started liberally interpreting the Constitution[26] and assumed the role of the protector and guardian of the Constitution, more specifically of the Fundamental Rights. It can be safely concluded that the judiciary in India employs the technique of generic or flexible interpretation to deliver justice and establish the link between law and life.

Judiciary in the fabric of the Constitution: A search within the document

India is governed by the Constitution and the judiciary has been endowed with powers and duties as borne out from the Constitution itself. The scheme of appointment and conditions of service of the judges are envisaged within the Constitution[27] and purport to protect the independence of judiciary which is a fundamental postulate of all democratic polities.

The law declared by the Supreme Court of India is binding upon all the subordinate courts and in turn, can be seen as the law of the land itself.[28] The decrees or directives of the court could be in the nature that is '*necessary for doing complete justice in any cause or matter pending before it*' and the same shall be enforceable.[29] The Supreme Court can warrant the help of all authorities for its assistance as provided in the following words '*all authorities civil and judicial, shall act in aid of the Supreme Court.*'[30]

Being a Court of record, it has power to punish for Contempt of Court.[31] It has original jurisdiction in a miscellany of matters including inter-governmental disputes[32] and enormous appellate jurisdiction in civil and criminal litigation.[33] By special leave[34] granted by it, any decision made by any tribunal

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[26] The Supreme Court says that the judicial approach to Constitution should be dynamic rather than static, pragmatic and not pedantic, elastic rather than rigid. Pathumma v. State of Kerala AIR 1978 SC 771. This approach is steadily followed by the judiciary as could be observed in In Re Special Reference 1 of 2002 and later as well.
[27] Constitution of India, Part V, Chapter IV, Art: 124 - 130
[28] Article 141
[29] Article 142
[30] Article 144
[31] Article 129
[32] Article 131
[33] Article 132 - 134
[34] Article 136

could be judicially reviewed. Cases from other High Courts under certain conditions may be transferred or withdrawn to it.[35] Fundamental Rights, which are the human essence of social, economic, political and cultural justice, are directly enforceable by the Supreme Court.[36]

In sum, such constitutional conferral of macro-jurisdiction means that justice is delivered in a manner liberated from colonial 'jural cocoons' but rather determined by socio-legal values and mandates implicit in or articulated by the Constitution as a reflection of the values of the people of India.

Pivotal Role of the Indian Judiciary in the Protection of Rights

The wide range of powers discussed earlier makes the position of the judiciary pivotal and the relevance of a judiciary that speaks the language of social justice is momentous in a developing country like India. Within the counter claims of judicial activism and judicial self-restraint, it can be said that the Indian judiciary has found a safe balance, albeit some aberrations in this regard.[37]

History testifies that, building this concept of the judiciary as the citadel of rights has not been easy. The interest of the individual and the larger claim of the society collided many times and the courts had to strike an equilibrium between the components of the Constitution itself. Though the individual fundamental rights were read contrary to the interests within DPSP at one time, the court used the technique of harmonious construction and held that both are not antagonistic but complementary in character.[38]

The efforts of the judiciary to read in unspecified rights in specified rights[39] spearheaded a new era of activism which had a definite purpose in the 'reading in of rights'[40] that gave socio-economic and cultural rights a new meaning and enforceability.

Judicial response to socio economic and cultural rights

Article 21 of the Constitution which enjoins the state not take away the life and personal liberty of the person,[41] proved to be fertile soil when this expansion of rights occurred. Public Interest Litigation

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[35] Article 139-A
[36] *Supra* note 14
[37] The attitude of judiciary recently to penalize the petitioner in Public Interest Litigation and judgment in the Narmada Andolan issue is widely criticized.
[38] Three approaches can be deduced from a search of judgments. The earlier view held by the Supreme Court in issues of tussle between the fundamental rights and DPSP, court adopted an approach that 'the directive principles have to conform to and run subsidiary to the chapter on fundamental rights as held in *State of Madras v. Champakam Dorairajan*, (1951) SCR 525. A different approach could be viewed in Mathew, J's judgment in *Keshavanda Bharati v. State of Kerala* (1973) 4 SCC 225, wherein it was stated that 'in building up a just social order, it is sometimes imperative that the fundamental rights should be subordinated to directive principles." Krishna Aiyer, J in *State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310 gave a balanced approach on the basis that fundamental rights and DPSP are complementary 'neither part being superior to other.'
[39] Maneka Gandhi *v.* Union of India, (1978) 1 SCC 248
[40] For example, in *Francis Coralie Mullin v. Administrator, Union Territory of Delhi* (1981) 1 SCC 608, it was held that right to life includes *inter alia* the right to socialize.
[41] The Article reads, "No person shall be deprived of his life and personal liberty except according to procedure established by law"

and a combination of vigilant NGOs and public-spirited individuals accelerated the race of this *pro bono publico* march. A mapping of the rights read in Article 21, which gave an extended meaning to that Article, can be said to be limitless.[42] This paper will examine judicial responses to certain selected rights as a sample study.

Life with dignity

The interpretation of the term 'life' in Article 21 is seminal in nature. An approach that was commenced by Justice Field, in *Munn* v. *Illinois*[43] had its reactions in India as well. Thus, life is qualified as "life with dignity" with this simple expansion encompassing within it, a vast domain. Life in the Constitution is in no way limited to animal existence but connotes a life with human dignity.

To quote the judiciary:

> *"But the question which arises is whether the Right to Life is limited only to protection of limb or faculty or does it go further and embrace something more. We think that that the Right to Life includes the right to live with human dignity and all that goes along with it, viz; the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in divorce forms, freely moving about and mixing and mingling with fellow human beings... [I]n any view of the matter, include the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self."*[44]

It is witnessed in the following observation of the court:

> *"The Right to Life with human dignity encompasses within its fold, sum of the finer facets of human civilization which makes life worth living. The expanded connotation of life would mean the tradition and cultural heritage of the persons concerned."*[45]

Courts in India have created an archetype that encompasses within life all that goes along with life. The resonance of that reasoning can be seen in a series of judgments. The major extension of the right to life occurred in the area of criminal justice[46] and the court is today using compensatory jurisprudence[47] to mete out justice. The judicial trend in this line is consistent as evidenced by the approaches of the Courts.

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[42] For example; rights of arrested person, fair trial, speedy trial, legal aid, prisoner's rights, quality of life, right to livelihood, right tom shelter, right to health, right to education, economic rights, right to privacy, right to clean environment etc.
[43](1876) 94 U.S 113
[44] *Francis Coralie Mullin* v. *Administrator, Union Territory of Delhi*, (1981) 1 SCC 608
[45] *CERC* v. *Union of India*, AIR 1995 SC 922
[46] Fair trial, speedy trial, legal aid, rights of the arrested persons, directions on hand cuffing etc.
[47] *Rudul Shah* v. *State of Bihar*, AIR 1983 SC 1086

Right to Work

Life essentially depends upon livelihood and therefore the right to work needs to be a part of the realm of rights. The Constitution of India mentions the right of work in express terms in Article 41[48] and the mandates in Articles 38[49] and 43[50] needs specific mention at this point. The positioning of these rights in DPSP had raised issues with relation to the enforceability and the same was answered by the Supreme Court in the following words:

> *[B]ut they do indicate the socialist goal. The degree of achievement in this direction depends upon the economic resources, willingness of the people to produce and more than all the existence of industrial peace throughout the country. Of those rights the question of the security of work is of utmost importance*[51]

Moreover, the rights of laborers and the concept of right to livelihood was read as a part of Article 21 itself. This changes the nature of the right. Here, a subtle difference needs to be made between the right to work and the right to livelihood. Court tends to read the right to livelihood as a part of right to life while the right to work as such, is yet to get judicial recognition. Yet it should be borne in mind that the right to livelihood, though read in Article 21, does not in no way undermine the content and meaning of what is stated in DPSP.

The Supreme Court in *Bandhua Mukti Morcha* v. *Union of India*[52] gave directions to state Government to take actions for the redress of the plight of interstate migrant labourers who were forced to work below minimum wages. To quote the court:

> *The right to live with human dignity enshrined in Article 21 derives its life breath from DPSP and particularly clauses (e) and (f) of Article 39 and Articles 41 and 42 and at the least, therefore, it must include protection of the health and strength of workers... against abuse... Since the Directive Principles of the State Policy contained in clause (e) and (f) of Article 39, Articles 41 and 42 are not enforceable in a court of law, it may not be possible to compel the State through the judicial process to make provision by statutory enactment or executive fiat for ensuring these basic essentials which go to make up a life of human dignity, but where legislation is already enacted by the State providing these basic requirements to workmen and thus investing their right to live with basic human*

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[48] See Article 41 "[T]he state shall within its economic capacity and development, make effective provision for securing the right to work, …"
[49] See article 38, 'state shall strive to promote the welfare of the people'.
[50] See article 43, 'state shall endeavor to secure a living wage and decent standard of life to all workers.
[51] This observation was in Daily Rated Casual Labour employed under *P&T Department* v. *Union of India*, (1988) SCC 122. The same attitude is carried in Dharwwad P.W.D. *Employees Association* v. *State of Karnataka*, (1990) 2 SCC 396, *Jacob M. Puthuparambil* v. *Kerala Water Authority* (1991) 1 SCC 28, *Air India Statutory Corporation* v. *Union of India*, (1997) 9 SCC 425.
[52] (1984) 3 SCC 161

dignity ... the state can certainly be obligated to observance of such legislation, for inaction on the part of the state in securing implementation of such legislation would amount to denial of right to live with human dignity enshrined in Article 21...[53]

By this effort, the court converted this non- justiciable issue to a justiciable matter by invoking Article 21. The same reasoning was used by the court in an issue relating to sexual harassment at work place.[54]

The first step towards reading in the right to livelihood as implied in right to life was done by judiciary in 1983.[55] The same was reiterated in Olga Tellis where the court observed that '...that which alone makes it possible to live, live aside what life makes livable, must be deemed to be an integral component of the right to life'. This makes the judicial technique of reading in the right to livelihood as part to life. However it should be noted here, that the right to work has not yet been recognized as a fundamental right.

Right to Shelter

This right is read as a part of right to life in Article 21 of the Constitution by judicial interpretation. The classic case of the slum and pavement dwellers of the Bombay Municipal Corporation,[56] is basic to any discussion with regard to right to shelter and livelihood.[57] To the Court, the right to live takes in the right to food as well as reasonable accommodation to live in. The judgment read contextually, does not cast a positive duty on the State to provide dwelling but tends to regard housing for poor as a right to be recognized, though not absolute. Later in a similar context, the Court observed as follows:

Due to want of facilities and opportunities, the right to residence and settlements is an illusion for the rural and urban poor. Articles 38, 39 and 46 mandates the State, as its economic policy to provide socio- economic justice to minimize inequalities in income and in opportunities and status. It positively charges the State to distribute its largesse to the weaker sections of the society envisaged in Article 46 to make socio economic right a reality, meaningful and fruitful so as to make life worth living with dignity of a person and equality of status and to constantly improve excellence. Though no person has a right to encroach and erect structures or otherwise on foot-paths, pavements or public streets or any other space reserved or earmarked for a public purpose, the state has a constitutional duty to provide adequate facilities and opportunities by distributing

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[53] Emphasis added
[54] *Vishaka* v. *State of Rajastan* (1997) 6 SCC 241
[55] *Board of Trusties of the Port of Bombay* v. *D.R. Nankarni*, (1983) 1 SCC 124
[56] As it was then known. The name of the city has changed into Mumbai and it is currently known as Mumbai.
[57] *Olga Tellis* v. *Bombay Municipal Corporation* (1985) 3 SCC 545

its wealth and resources for settlement of life and erection of shelter over their heads to make the right to life meaningful.[58]

A quote from another judgment of the Supreme Court of India is relevant in this regard;

Shelter for a human being, therefore, is not a mere protection of his life and limb. It is home where he has opportunities to grow physically, mentally, intellectually and spiritually... The right to shelter, therefore, does not mean a mere right to a roof over one's head but right to all the infrastructure necessary to enable them to live and develop as a human being.[59]

Right to education

Education is the most fundamental of all rights. It facilitates individual as well as community development that endorses the sheer sustainability of society. Every farsighted government will make comprehensive plans for education of its people. The Indian judiciary has identified the potential of this right and has given judgments that are positive in this regard.

The current judicial tend in this field, which could be viewed from the T.M.A Pai judgements,[60] which is an aftermath of the Government's policy of allowing self-financing colleges to take part in the education scenario is termed as retroactive, though.

The constitutional frame work of this right rests in Article 45 which states that the State shall endeavor to provide, within a period of ten years from the commencement of the Constitution, for free and compulsory education for all the children until they complete the age of fourteen years. The same right could be without challenge, read into Article 21 as well.

The judiciary took an active stand in the recognition of this right, which could be said to have ultimately resulted in a Constitutional Amendment[61] which recognizes the right to primary education as part of fundamental rights. The judicial response to this right can be traced to what is commonly known as "the capitation fee case"[62] in which the court said that there is a fundamental right to education.

The right was declared without any limitations. The same judgment was referred to later in Unnikrishnan's Case[63] which modified the judicial thinking in Mohini Jain to limit the fundamental right to education, to primary education. To quote the judges:

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[58] *Ahmedabad Municipala Corporation* v. *Nawab Khan Gulab Khan* (1997) 11 SCC 123
[59] *Chameli Singh* v. *State of Uttar Pradesh* AIR 1996 SC 1051
[60] AIR 1996 SC 2652, AIR 1994 SC 13
[61] Article 21A is included in part iii of the Constitution of India
[62] *Mohini Jain* v. *State of Karnataka*, (1992) 3 SCC 666
[63] *Unnikrishnan* v. *State of Andhra Pradesh*, (1993) 1 SCC 645

The right to education further means that a citizen has a right to call upon the State to provide educational facilities to him within the limits of its economic capacity and development. By saying so, we are not transferring Article 41 from part IV to Part III - we are merely relying upon Article 41 to illustrate the content of the right to education flowing from Article 21. We cannot believe that any State would say that it need not provide education to its people even within the limits of economic capacity and development.

Right to Health

The health of the citizens is undoubtedly the best investment that a nation can make. Traditionally healthcare is treated as a government domain in every welfare state. In the current era of globlisation, (as a part of the shrinking of the state from the public sphere), healthcare is also invaded by private participation. The judiciary of India, by its very many judgments, has reiterated the right to healthcare as a part of Article 21. The Apex Court in *Paramanand Katara* v. *Union of India*,[64] unequivocally stated that preservation of life is of paramount importance, as once lost, a *status quo ante* is impossible. To quote:

Article 21 of the Constitution casts an obligation on the state to preserve life... Every doctor at a government hospital or otherwise has the professional obligation to extend services with due expertise for protecting life.

The court has even penalized the dereliction of duty by government hospitals in providing treatment to an accident victim in the form of compensation in a writ petition.[65] The court in this case has ruled that the primary duty of the government in a welfare state is to provide adequate medical facilities for the people.[66] The failure by a government hospital to provide proper health service has been treated as a violation of his right to life. The Court has observed that the state cannot plead lack of financial resources to provide adequate medical services to the people.[67] A slightly differing view with regard to financial constraints was accepted in a later case of 1998.[68]

In the area of healthcare, the approach of the Indian judiciary tends to pin primary responsibility on the government. In a developing country like India, where masses stay below the line of poverty, the role of the state as provider of healthcare can never be minimized. The state has been directed not only to provide healthcare facilities but also to ensure that such facilities are accessible and easily approachable.

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[64] (1989) 4 SCC 248
[65] *Paschim Banga Khet Mazdoor Samity* v. *State of West Bengal*, AIR 1996 SC 2426
[66] *Ibid* at p 2429
[67] See also *Khatri* v. *State of Bihar*, (II) AIR 1981 SC 928
[68] State of *Punjab* v. *R.L. Bagga*, AIR 1998 SC 1703

Right to a Healthy Environment

Two decades back, we thought that nature was imperishable and inexhaustible. The policy of the governments even incorporated the doctrine of 'exploitation of natural resources'. However, these attitudes have changed from exploitation to conservation in the wake of the increasing scarcity of natural resources.

The Constitution of India has embodied in its fundamental duties, a citizen's duty to preserve environment[69] whereas the right to a healthy environment is a part of DPSP.[70] Apart from this, the judicial invocation of the right to healthy environment has resulted in an environmental jurisprudence which includes the reading into the ambit of Article 21, the right to healthy and pollution free environment.[71]

Judges have taken a view that environmental elements such as air, water, soil and forest are necessary for life and has developed doctrines such as the principles of strict and absolute liabilities, precautionary principle, polluter pays principle, doctrine of sustainable development and the public trust doctrine in this respect. These principles are used to impose penal and remedial measures in the event of violation of the right. The right to a healthy environment has been asserted as an integral part of the right to life.[72]

Right to Privacy

The Constitution of India does not specifically mention the right to privacy though it has been brought in by judicial pronouncements. The Court first had occasion to deal with this issue as early as 1963.[73] The case, which is better known for its minority view, held that there is a right to privacy, though not absolute. Later in *Govind* v. *State of Madhya Pradesh*[74] it was held:

> *The right to privacy in any event will necessarily have to go through a process of case-by-case development ... and we do not think that the right is absolute.*

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[69] Part IV, Article 51A (g)

[70] Article 48A, reads, The State shall endeavor to protect and improve the environment and to safeguard the forests and wild life of the country. Inserted by the 42nd Amendment, 1976. Article 47 too can be used as it speaks about the duty of the state to improve public health.

[71] Commendation should be given to Mr. M.C Mehta, the stalwart of environment protection through legal front whose name has been read synonymous to environment protection along with other individuals and organization who have used the judiciary to establish the right.

[72] See generally, *Subhas Kumar* v. *Bihar*, AIR 1991 SC 420, *A.P Pollution Control Board* v. *M.V Nayudu*, AIR 1999 SC 812, *M.C Mehta* v. *Union of India* AIR 1988 SC 1037, See also AIR 1997 SC 734, *The Vellore Citizens Welfare Forum* v. *Union of India*, AIR 1996 SC 2721. These are an assortment of judgments in this field and the list is not comprehensive.

[73] *Kharak Singh* v. *State of Uttar Pradesh* AIR 1963 SC 1295

[74] AIR 1975 SC 1378

More recently, the Apex Court, in R. Rajagopal v. State of Tamil Nadu,[75] asserted that the right to privacy has acquired a constitutional status and stated that it is implicit in the right to life and liberty guaranteed to the citizens. In another instance, the judges held that:

> *We have therefore no hesitation in holding that the right to privacy is a part of the right to life and personal liberty enshrined under Article 21 of the Constitution. Once the facts in a given case constitute a right to privacy, Article 21 is attracted. The said right cannot be curtailed 'except according to procedure established by law.'*[76]

Modus of Implementation of Judicial Decisions

The Court employs various devices through which it could implement its decree and also monitor its implementation. There are also instances where the Court gathers adequate information before coming into a conclusion and finally decreeing the case. These would include the employing of the following mechanims.

Very often the Court appoints a senior counsel as *amicus curie*, to assist the Court in the proceedings; The Court may appoint commissioners, who may be technical experts or lawyers to report to the Court regarding factual aspects or reports regarding implementation of its orders;

The Court usually builds into its directions a forewarning of the consequences of disobedience or non-implementation. Contempt of court is one such action;

While passing orders, the Court has been careful to explain the legal basis for its intervention. Thus the right to health, right to education, right to free and fare environment have been described and interpreted as a fair and reasonable extension of the right to life;

Judicial interventions have been limited to cases where the Court has found that the appropriate bodies which were liable to execute and discharge their constitutional functions, have failed to discharge their duties.

Conclusion

The forgoing discussion in reference to the role of Indian judiciary in invoking socio-economic and cultural rights, reflects the aspirations of generations. The judiciary has developed a pro- people jurisprudence. The path that the judges took, was of course, through the Constitution wherein they developed modes of judicial interpretation for their purpose.

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[75] AIR 1995 264
[76] Peoples Union for Civil Liberties v. Union of India AIR 1991 SC 207

The judiciary is just one limb of the state, vested with the duty of realizing the constitutional philosophy of the nation. Those rights, which were not *stricto sensu* enforceable rights at the time of the framing of the Constitution, are now recognized as rights enforceable through a due process of law. In the process, the country even witnessed constitutional amendments that were brought about as a direct result of the dictates of the court.

However, the percolation of this ever-widening concepts of rights requires equal participation by the other limbs of the state, which includes the legislature and the executive. Most importantly, it is imperative that a rights/duty conscious polity, carry the basic norms underlying the 'entitlement jurisprudence' of the Indian courts, into the arena of the ordinary person on the streets. This remains an urgent task for the future.

Citations:

AIR: All India Reporter
SC: Supreme Court / Apex Court
SCC: Supreme Court Cases
SCR: Supreme Court Reporter

Mode of citation:

(a) 1998 AIR 1 SC 598: Year 1998, All India Reporter, Part 1, Supreme Court, Page 598
(b) (1992) 3 SCC 666: Year 1992, Part 3, Supreme Court Cases, Page 666

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