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USING INTERNATIONAL LAW IN THE INTERPRETATION OF CONSTITUTIONAL PROVISIONS PROTECTING RIGHTS;

COMPARATIVE EXPERIENCES IN SRI LANKA AND SOUTH AFRICA

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CONTENTS

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Editor's Note ... ...

The Review contains in this Issue, two contributions that examine the relevance of standards of public international law on domestic legal systems, albeit from somewhat different perspectives.

Firstly, a finely crafted article by ***Winston P. Nagan*** and ***Craig Hammer*** written on special invitation to the Review, discusses a comparatively recent judgement of the South African Constitutional Court in *Mohamed v President of the Republic of South Africa* (2001 (3) SA 893, CCT).

This case concerns a decision delivered by South Africa's pre-eminent court in the best traditions of its notably rich jurisprudence advancing the protection of rights.

In this instance, the intervention of the Court was all the more remarkable given that it concerned an individual who was not a South African citizen but had been unlawfully using the country as a temporary safe haven at the time of his extradition to the United States on terrorism charges. Moreover, at the time that the Constitutional Court was moved in the matter, he had already been extradited to the US.

Regardless, the Court held that the South African executive was in violation of constitutional guarantees when it handed the deportee over to be extradited to the US without first obtaining an assurance that he would not be subjected to the death penalty.

Particularly significant in the opinion of the writers was the manner in which the Court used the declaratory remedy to give effect to its opinion instead of a judicial withdrawal on the basis that any intervention on its part would be futile given that the deportee was already in the US.

It is interesting that the Federal Court for the Southern District of New York before which Mohamed's case was being heard at that time, in turn, referred to the judgement of South Africa's Constitutional Court in its instructions to the jury. Reflecting on this example of judicial comity between nations in their contribution to the Review, Nagan and Hammer applaud what they term as the "extraterritorial reach" of the declaratory remedy and recommend its careful application in particular contexts that serve to enhance the rule of law.

Of specific interest to Sri Lanka is the requirement in the South African Constitution that calls upon courts to apply international law standards when interpreting provisions of the Constitution applicable to the protection of rights.

There is no doubt that Section 39(1) (b) of the South African Constitution, (which articulates this principle), together with Section 233 which requires a court when interpreting legislation to prefer that interpretation that is consistent with

international law over alternative interpretations, have been exceedingly useful to enlightened judges willing to expand the frontiers of South African law. The decisions of the Constitutional Court in the Mohamed Case as well as its seminal decision in *S v Makwanyane and Another* (1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC)) *interalia*, bear excellent witness to this commendation.

In the latter case, the Constitutional Court was called upon to consider whether the death penalty violated the right to life (expressed in unqualified terms in Section 9), the right to dignity (Section 10) as well as amounting to cruel, inhuman or degrading treatment within the meaning of Section 11(2) of the 1993 South Africa Constitution.

In writing a superbly reasoned judgement of the court, its President, Justice Chaskalson declared the relevant sub-sections of section 277(1) of the Criminal Procedure Act, (and all corresponding provisions of other legislation) sanctioning capital punishment to be inconsistent with the Constitution. The South African State was further forbidden to execute any person already sentenced to death under those provisions and ordered to substitute such sentences with lawful punishments.

In the second article in this Issue of the Review, ***Manjuka Fernandopulle*** makes a strong argument as to why the same interpretation provisions which the South African Constitution contains, should be incorporated in Sri Lanka's Constitution. While looking at certain domestic judicial decisions that have given effect to such a principle, he makes the point that explicit constitutional incorporation is necessary in view of conflicting judicial opinion in that regard.

His analysis is conducted within a general exploration of the non-compliance of Sri Lanka's obligations with Article 2 of the International Covenant on Civil and Political Rights (ICCPR). He suggests various measures by which such non-compliance can be dealt with and looks at, in addition, reform of the structure and functioning of the Human Rights Commission of Sri Lanka in order that ICCPR Article 2 obligations may be fully addressed.

Kishali Pinto-Jayawardena

Mohamed and Another v. President of Republic of South Africa and Others

Constitutional Restraints on the Executive Branch of the South African Government: The Rational Limits of Intergovernmental and Intragovernmental Cooperation in the Prosecution of Terrorists

Winston P. Nagan*
And
Craig Hammer*

What is evolving, hopefully, is a truly South African jurisprudence enriched by wisdom and experience from both home and abroad. There is a recognition that the practice of law is not static, it is subject to development and evolution.[1]

Honorable Pius Langa, President and Justice of the Constitutional Court of South Africa.

National courts as a general rule are not comfortable with international law. The two systems use similar language and concepts, but operate within different matrices. Yet there are times when the overlap between national and international law becomes unavoidable ... Judges in national courts are obliged to put aside their usual textbooks and cases, and open their eyes ...[2]

Honorable Albie Sachs, Justice of the Constitutional Court of South Africa.

I. INTRODUCTION

Mohamed and Another v. President of the Republic of South Africa,[3] was indeed a landmark case in which the Constitutional Court of South Africa set out an important opinion with significant international implications. In brief, Mohamed, a Tanzanian citizen residing in South Africa as an applicant for refugee status which he submitted by using a false passport, was wanted by American officials in connection with the bombing of American embassies in Tanzania and Kenya. Pending the outcome of his application, South Africa became his temporary safe haven. He was identified in

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[1] *See* Pius Langa, *The Role Of The Constitutional Court In The Enforcement And Protection Of Human Rights In South Africa*, 41 ST. LOUIS L.J. 1259, 1276-1277 (1997).

[2] *See* Albie Sachs, *Violence, Human Rights, And The Overlap Between National And International Law: Four Cases Before The South African Constitutional Court*, 28 FORDHAM INT'L L.J. 432, 432 (2005).

[3] *Mohamed v. President of the Republic of South Africa* (2001 (3) SA 893 CCT) (hereinafter *Mohamed*).

South Africa when he attempted to renew his temporary residence permit and was immediately arrested, detained, and interrogated by South African immigration officials. It became clear that he was, as he later admitted, unlawfully in South Africa. South African authorities moved speedily to turn him over to the United States authorities. He was transferred to American custody – specifically, the Federal Bureau of Investigation (FBI) – and flown to New York to be tried on murder charges, among other indictments, and to thus face the death penalty. At the time, legal officials stated that his deportation was predicated on his status at the time he was captured.

Mohamed's position vis-a-vis the South African immigration authorities was facially obvious. He used a false passport to gain entry and he was thus in the country unlawfully. Accordingly, he was subject to the jurisdiction of the Department of Home Affairs, particularly its immigration branch. The administrative power of the Department of Home Affairs is governed by the Aliens Control Act[4] and its administrative regulations.[5] It appeared to his lawyers to be a disguised form of extradition. The terms "transfer," "expulsion," "deportation," "removal" and "extradition" could in some measure be applied to the procedure used by the South African authorities to turn him over to American authorities. For convenience, we shall use the term "transfer" and assume it can derive meanings from the terms "expulsion," "deportation," or indeed "extradition." An appeal was hurriedly brought to South Africa's Constitutional Court on Mohamed's behalf, which challenged the validity of his deportation. Chief among Mohamed's arguments was the legal efficacy of his facing the death penalty in New York, which, he argued, contravened his rights under the South African Constitution.

Mohamed's presence in South Africa generated a broad interest in his status, because South Africa had experienced unsolved acts of terror which targeted civilians. The South African Directorate for Organized Crime (IDOC) and the National Intelligence Agency were also interested in an initial investigation of whether Mohamed might be connected to domestic terror attacks and thus constitute a national security problem for South Africa. The broader interest in Mohamed's status was also tied, at least implicitly, to the important foreign policy implications of the acts of terrorism for which he was ultimately convicted in the United States. The embassy bombings in which he was implicated collectively amounted to a specific foreign policy matter: three states with which South Africa maintained close cooperative ties – the United States, Tanzania, and Kenya – had been victimized by terrorism. The record seems to indicate that the South African authorities were satisfied that Mohamed was not linked to domestic terror. This paved the way for transfer procedures to be implemented against Mohamed.

Since the United States had been a primary target of Mohamed's terrorist acts, the United States had sent FBI agents to South Africa to facilitate Mohamed's transfer to New York to stand trial. The record seems to indicate that the government gave Mohamed a choice about the locus of his transfer – he could be transferred to Tanzania or to New York and he chose the latter. However, the Court and his lawyers did not view this choice to be a meaningful one. The procedural facts by which South African authorities handed Mohamed over to the FBI remain somewhat murky, and seem to represent an implicit assumption on the part of the government that since Mohamed was in South Africa unlawfully, the government had wide discretion in fashioning the terms and circumstances of his being handed over to another sovereign to account for his conduct. As the Constitutional Court notes, "it can nevertheless not be ascertained with any certainty when – and by whom – the decision was taken by the South African government to hand over [Mohamed] to the United States

[4] Act 96 of 1991.
[5] The Aliens Control Regulations published under Government Notice R999 (Government Gazette 17254) of 28 June 1996.

government."[6] However, the facts concerning Mohamed's removal from South Africa imply a very close level of collaboration between the different branches of the South African Executive (Immigration, Organized Crime and Intelligence). Perhaps this is not altogether surprising since the trend in both domestic and international criminal law is in the direction of cooperation within and across state lines. This is an indicator that both internal and external sovereignty are less reified and indeed seem to stress cooperation over unilateralism.[7] The level of cooperation in this case is evidenced by the fact that FBI agents were permitted to question Mohamed inside South Africa. The United States also supplied an airplane – in addition to more FBI agents, an American prosecutor, and a physician – to physically transport Mohamed from South Africa to New York. Shortly after arriving in New York, Mohamed was indicted.

In its landmark consideration of the case, the Constitutional Court of South Africa addressed the following four issues:

1. Whether the approach to Mohamed's deportation was valid under the Aliens Control Act and supplemental regulations;
2. Whether the transfer of Mohamed, be it described as deportation or a kind of functional extradition, was valid if he faced the death penalty;
3. Whether Mohamed's consent to being handed over to American authorities had any legal effect; and
4. Whether Mohamed sought relief, and if so, whether or not it was warranted, and if it was, how South Africa's Constitutional Court would grant it appropriately.

In this article, we discuss the first, second, and fourth issues.

II. TOWARD UNPACKING MOHAMED'S DEPORTATION

With regard to the first issue before the Court, the validity of Mohamed's deportation amounts to a relatively complex matter of interpreting the Aliens Control Act, other relevant regulations, and germane jurisprudential precedent. The issue is whether the government or the Presidency retains a broad prerogative to deport aliens outside of the statutory scheme mandated by Parliament. We would submit that this matter is not as clear-cut as the Constitutional Court seems to suggest. The control of an alien, unlawfully in the country, and the power to dispose of that alien, may indeed provide the Executive with a residual sovereign prerogative to deport an alien unlawfully in the country, not so much under the standard of the ostensible public good, but rather under the standard of a national security interest of the nation. That kind of interest may certainly be implicated more directly in the Executive's role and competence in the management of the nation's foreign relations.

In *President of the Republic of South Africa and Another v. Hugo*[8] the Court had held that Section 84(2) of the Interim Constitution did not explicitly provide for any power to deport an alien. It may be that the *Hugo* case could be fine-tuned when the ostensible deportation or transfer involves a matter deeply implicating diplomatic values, such as foreign relations matters normally committed to the Executive, and the possibility that those matters may implicate national security concerns as well. As the Court stated,

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[6] *See Mohamed* at para. 26.

[7] *See* Winston P. Nagan & Craig Hammer, *The Changing Character of Sovereignty in International Law and International Relations*, 43 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 141, 151 (2004).

[8] *See President of the Republic of South Africa and Another v. Hugo* (1997 (4)SA 1 (CC); 1997 (6)BCLR 708 (CC)).

The state has no remaining prerogative power to deport, for such power is not included in section 84(2) of the Constitution. Its power to deport and determine the destination of such deportation can only be found within the four corners of the Act and regulations. In terms of regulation 23 such power is limited ,regarding destination, to the places mentioned in paragraphs (a) and (b) thereof and determined in the manner therein prescribed. In any event, it is clear that regulation 23 comprehensively covers all possibilities; the person with a passport, the person who is a citizen or national of country and the stateless person. It covers the field of any common law power the state might have had.[9]

However, does it cover the constitutional competence of the Executive over diplomacy and national security interests? We respectfully submit that this is an important issue of principle that the Constitutional Court must address in future litigation.

An excellent, straightforward part of the Court's analysis is its construction of the limits of administrative action within the framework of the Aliens Control Act and related regulations. The Court was correct in construing the statutory language in its plain and ordinary sense, namely that the power to remove under the statutory and regulatory scheme is limited in terms of the destination of the removal. The regulations read as follows:

23. Any person to be removed from the Republic under the Act, shall –

1. If he or she is the holder of a passport issued by any other country or territory, be removed to that country or territory; or

2. If he or she is not the holder of a passport

    i. Be removed to the country or territory of which he or she is a citizen or national: or

    ii. And if he or she is stateless, be removed to the country or territory where he or she has a right of domicile.

Three limitations are stipulated: the country of the passport, the country of nationality and citizenship, and in the event of statelessness, the law of the domicile. While we agree with the Court's construction of Regulation 23, we would submit that the Executive's power over removal or other "transfer" might be constitutionally broader, as earlier suggested.

Another issue of importance to both comparative constitutional law and international law is the question of how we technically label the collaboration between the United States and South Africa throughout the process of transferring Mohamed to American authorities. This issue centers on whether the Constitution of South Africa forbids the handing over of a person to another state if there is reason to believe that that person will be subject to proceedings leading to the imposition of the death penalty. With regard to extradition, various courts in various states have declined to extradite persons in their custody and control to other states, unless there is a bilateral extradition agreement that the accused will not face the death penalty sanction.

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[9] *See Mohamed* at para. 36.

III. CUSTODY AND TRANSFER: REMARKS ON VALIDITY IN THE SOUTH AFRICAN CONTEXT AND GENERAL CONSIDERATIONS OF *MOHAMED*'S LOCAL-TO-GLOBAL IMPLICATIONS.

With regard to the second issue before the Court, the *Mohamed* case seems to clarify this issue more broadly by placing that limitation procedure on all transfers including deportation. But more importantly, it seems that regardless of the label we use – "transfer," "expulsion," "deportation," or "extradition," – the human rights dimension of the South African Constitution places a limitation on this form of international cooperation. Thus, the holding is that the South African Executive was in violation of the Constitution when it handed over Mohamed to the FBI, without first obtaining an assurance that he would not be subject to the Federal/US death penalty. In the Court's own words, the South African government under its Constitution would have been "under a duty to secure an undertaking from the US authorities that a sentence of death would not be imposed on him [Mohamed] before permitting his removal to that country."[10]

The South African Constitution specifically prescribes the right to human dignity, the right to life, and the right not to be subjected or punished in a cruel, inhuman, or degrading manner. In terms of Section 8(1), the Bill of Rights technically binds every part of the government, including the Executive.[11] Moreover, the South African Constitution requires the Court to apply public international law when that law is relevant to the interpretation and construction of the Constitution itself. For example, Section 39 of the South African Constitution of 1996 states,

(1) When interpreting the Bill of Rights, a court, tribunal or forum -

a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
b. must consider international law; and
c. may consider foreign law.

In *S v Makwanyane and Another*,[12] the South African Constitutional Court construed the rights to dignity and life and the freedom from unusual, degrading, or inhuman punishment, as a sufficient juridical basis for declaring the death penalty unconstitutional. While the Court relied on international law, particularly international human rights law, to support its construction of the South African Constitution, the question still arises as to the extra-territorial reach of the *Makwanyane* decision; how far and to what extent can it command deference in the domestic courts of other states?

The *Mohamed* case, of course, raises precisely this kind of question regarding the Mohamed's transfer from South Africa. In this context, South African authorities were ostensibly cooperating in a foreign legal proceeding in which the alien defendant might be subject to death penalty proceedings, which, in fact, was prohibited under South African Constitutional law. The case further highlights differing treatments of the death penalty. The United States federal government permits the death penalty for

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[10] *See Mohamed* at para. 22.
[11] *See* Constitution of the Republic of South Africa at Section 8(1).
[12] *S v Makwanyane and Another* (1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC)). The case was decided at a time when the 1996 Constitution was not in force. The court used Section 35(1) of the 1993 interim Constitution to support its use of international law standards to buttress its reasoning. Section 35(1) states that; *In interpreting the provisions of this Chapter, a court of law shall promote the values which underlie an open and democratic society based on freedom and equality, and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.".*

federal offenses, such as terrorism.[13] American prosecutors initiated proceedings against Mohamed and sought the death penalty. The Constitutional Court, however, had earlier determined in *S v Makwanyane and Another* that the death penalty was unconstitutional in South Africa.[14] South African law also relies on sources of public international law to support the unconstitutional status of the death penalty. The trend in international society from, at least, an official standpoint, is to gravitate away from the use of capital punishment, in the sense that international "soft law" anticipates the emergence of a "hard law" of universal prohibition. Since Mohamed was deported without any prior conditions regarding the kind of punishment he might receive if convicted, Mohamed's lawyers raised the question of whether Mohamed had been lawfully transferred to the United States.

A small number of states still hold vigorously that the death penalty is a domestic matter, an exercise of internal sovereignty. Indeed, they hold that there is no international hard law basis which requires them to honor the principle that capital punishment is incompatible with human dignity. The United States is one of a relative few industrialized democracies which rigorously insists that capital punishment is its own business. The ostensible clash, therefore, between the South African Constitutional Court's holding and United States practice, is in fact a classical international law problem of the conflicts of jurisdiction. Technically, the way in which states have resolved this problem in their dealings with the United States is to stipulate that they will not extradite potential defendants to the United States if they are to be subject to the death penalty phenomenon. The leading case cited by the Constitutional Court in this regard is the *Soering v. United Kingdom*.[15] In *Soering,* the European Court held that the Death Penalty phenomenon in the United States was effectually a violation of Article 3 of the European Convention on Human Rights.[16]

In other words, the death penalty amounts to prohibited torture or cruel, inhuman, and degrading punishment. This holding, as the Constitutional Court indicates, has been extended to non-death penalty cases as well.[17] As the Court correctly points out, "South Africa is under an explicit international obligation not to expel, return, or extradite, a person to another state where there are substantial grounds for believing that person will be subject to torture." Although the United States does not accept the position that its death row phenomenon falls within the definition of torture, it should be noted that the United States has ratified the Convention Against Torture.[18]

The Constitutional Court also expresses an important principle with respect to the protection of fundamental human rights of the deportable or extraditable alien. According to Court,

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[13] *See, e.g.,* Antiterrorism and Effective Death Penalty Act of 1996, Public Law 104-132; HR 3162, 1st Session, 107th Congress, 24 Oct. 2001).

[14] The *Makwanyane* opinion surveyed international treatment of capital punishment and concluded that it violates the Constitution of South Africa, which articulates unqualified protections of life and human dignity, and expressly prohibits cruel, inhuman, or degrading punishment. The Constitutional Court thus overlooked the absence of explicit Constitutional prohibitions of capital punishment and found that it was fundamentally incompatible with Constitutional protections. *See State v. Makwanyane*, Judgement No. CCT/3/94 (1995).

[15] *See Soering v. United Kingdom*, (1989) 11 EHRR 439

[16] Article 3 states in relevant part, "no one shall be subjected to torture or to inhuman or degrading treatment or punishment."

[17] *See Hillel v. United Kingdom*, Application # 4527-99, 9/6/2001; *see also, Chahal v. United Kingdom*, (1996) 23 EHRR 413.

[18] *See* Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85. *See also,* Winston P. Nagan, *The International Law of Torture: From Universal Proscription* to Effective Application and Enforcement, 14 HARV. J. HUM. RTS., 108, 108-112, 2001.

> *[The Constitution of South Africa] makes no distinction between expulsion, return, or extradition of a person to another state to face an unacceptable form of punishment. All are prohibited, and the right of a state to deport an illegal alien is subject to that prohibition. That is the standard that our Constitution demands from our government in circumstances such as those that existed in the present case.*[19]

We may summarize the Constitutional Court's holding up to this point as follows: deportation, expulsion, and/or extradition is limited in South Africa if the death penalty or torture may be used to punish the deportee.

IV. RELIEF IN *MOHAMED*: THRESHOLD CONSIDERATIONS

Moving on to the fourth issue before the Court, which explores what, if any, form of relief might be appropriate, it was at first a straightforward matter. The initial remedy sought by Mohamed's lawyer's was a prayer for mandatory relief. In its common law form, the writ of mandamus, as a specific form of relief, empowered the courts to require a governmental official to do what the law required them to do. The writ was therefore a special writ used in special circumstances and could be enforced by the contempt power of the court.[20] Mandamus is a "prerogative writ." Historically, there is a broad and narrow scope for the writ. The broad view is expressed by the Scottish law Lord, Mansfield, as follows:

> *"It was introduced... to prevent disorder from the failure of justice and defect of the police. Therefore, it ought to be used for all occasions where the law has established no specific remedy and where in justice and good governance there ought to be one."*[21]

The mandamus remedy has evolved more modestly in the common law.[22] Needless to say, when a writ is directed at the President officially requiring him to act, it qualifies as extraordinary. One might presume that such a writ is entirely appropriate as a form of relief when fundamental Constitutional rights must be protected or secured.

Since, in this case, we are dealing with basic constitutional rights as well as the allocation of basic constitutional competencies, the use of the writ must be considered as extraordinary. We would submit that a more careful juridical appraisal must be made between the respective spheres of judicial and Executive competence when the powers involved concern the role of the Executive in the conduct of foreign relations, diplomacy and possible international security interests. In effect, since Mohamed was already being tried in the United States, while the decision in the Constitutional Court was being adjudicated, a preliminary question would inevitably arise: namely, could the Constitutional Court require the Executive of South Africa to act pursuant to a writ of mandamus when it could no longer exercise jurisdiction over the person who was, in fact, now subject to the jurisdiction of the United States courts. In other words, can the Court require the Executive to act diplomatically (a power ostensibly within the Executive's own sphere of competence) if the Executive no longer has jurisdiction over the person whose rights, it is claimed, have been compromised? Technically, the Court could have fashioned a remedy in which it required the Executive branch of the South African

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[19] *See Mohamed* at para. 60.
[20] The leading common law study on the remedy of mandamus is Jaffee & Henderson, *Judicial Review and the Rule of law: Historical Origins*, 72 LAW Q. REV. 345 (1956) (hereinafter, *Judicial Review and the Rule of Law*) . *See also* Jaffe, *The Right to Judicial Review*, 71 HARV. L. R. 401 (1958).
[21] *See R v. Barker* 1772, cited in *Judicial Review and the Rule of Law* at 359-361.
[22] *See id.*

government to communicate with the President of the United States in order to request Presidential intervention in the Mohamed case, on grounds that the South African government had not only violated South African statutory and administrative law, but also the foundational principles on which the South African Constitution is based.

Such a remedy would clearly have embarrassed the Executive in the conduct of the nation's foreign relations. Since South African law affirms limitations on either extradition or deportation in capital punishment contexts, the South African government would then have been required to ask the Executive of the United States to specifically intervene in its prosecution of Mohamed to ensure that it would not seek the death penalty, and that if it had already sought the death penalty, it now would seek to reverse itself because of sensitive foreign policy considerations.

Problems would likely result from mandating such a procedure because this course of action places the Court in a position which ostensibly allows it to micromanage the foreign relations competence of South Africa. Since foreign relations touches on the sensitive issues of how each nation manages its relationships with a larger world community, and concerns in highly sensitive areas such as the international control of terrorism, national security interests may suggest that these basic interests may not be appropriate for judicial settlement. Here the Court might tread warily between its right and duty to uphold the law and at the same time not compromise the power of the government in its dealings with other states and sovereigns. It is noteworthy, that the Court showed prudence in not giving a judgment based on the relief required by the remedy of mandamus.

There are other factors, which might serve to limit the remedy of mandamus. For example, there are limitations on what the President of the United States can do. The US President is limited from excessively interfering with the professional independence of the prosecutorial branch of his Department of Justice. More pertinently, since the United States courts had been seized of the problem, could the President intervene effectively, in the face of the U.S. doctrine of separation of powers and independence of the judiciary? The President's own power would really only vest when the judiciary has exhausted its proceedings. In short, the President could not directly require the Prosecutor to ask or to refrain from asking for the death penalty once the case is jurisdictionally seized of by the Court. Furthermore, the President has no power to require the Courts to not prescribe the death penalty. After the judicial process is exhausted, the President would have the power to commute or pardon. It therefore seems that the writ of mandamus as a remedy in the foreign affairs context, is complex and problematic.

Of course, if Mohamed had not been so expeditiously transferred to the United States, then the Court could have issued a writ of mandamus requiring the Executive branch to refrain from deporting or extraditing or otherwise transferring the defendant unless an assurance was given by the United States Executive that he would not seek the death penalty. What the Court prescribed was, in effect, a declaratory judgment of the rights and responsibilities of the affected parties. One might infer from this that a principle of cooperative good faith between the different departments of government such that the Executive would then be given some reasonable discretion to determine what the best diplomatic approach might be in communicating to the United States, the scope of its legal concerns in relation to those of the United States.

The Constitutional Court has, in effect, prescribed a declaratory judgment. The precise language of the Court supports this: "It would not necessarily be futile for this Court to pronounce on the illegality of the governmental conduct in issue in this case."[23] The Court also recognized that the trial judge in

[23] *See Mohamed* at para. 71.

New York was fully aware of the concurrent proceedings before the South African courts. Moreover, that Court in New York seemed to be very interested in judicial cooperation between US and South African courts. As the Constitutional Court notes, "Indeed, Judge Sand specially authorized the expenditure of funds to enable Mohamed's court-appointed defense team to pursue his interests in the South African courts, urging that such proceedings be concluded with all due expedition."[24] Indeed, what seemed to be implicit in the actions of both the Constitutional Court and the Court in New York is that outside of the structure of Executive-to-Executive foreign relations communications, courts have found ways to collaborate with each other.

The long and historically venerable principle of judicial cooperation is the principle of comity.[25] It has been long recognized that comity is applied in the sound discretion of the court. However, the principle of comity has spawned a vast body of private and public law doctrines and institutions such as the recognition of foreign judgments which, in effect, apply principles of res judicata and sometimes principles of collateral estoppel aspects of res judicata, to name a few. But cooperation is not necessarily to be confined to traditional categories of well-established doctrine.

This is because the atomized version of sovereignty which permeated international law prior to WWII, and which produced a great deal of international anarchy has been superseded by an international constitution, the United Nations Charter. One of the foundational principles of the United Nations Charter is the principle of cooperation in good faith to achieve the legal and political objectives of the Charter itself. Many of these general principles are codified as well, in the authoritative gloss of the United Nations Charter, namely, the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.[26]

We should keep in mind that the abstractions such as state and sovereignty are not meant to obscure the reality that states themselves divide sovereignty in terms of coordinate branches which constitute their respective internal sovereign spheres. Thus, the courts of a state are vested with certain attributes of that state's sovereignty and those attributes include the obligation to cooperate in good faith. In this sense, the relationship between the Constitutional Court and the trial court in New York may be conceptualized as the courts of coordinate sovereigns cooperating and communicating to ensure that the rule of law foundations of both courts are respected under the international system. In short, the Constitutional Court could have been far more explicit in making clear that there are expectations of reciprocity and mutual respect between courts of states which fall under the United Nations Charter, as well as principles of communication and collaboration which are a major part of that system. It could have supported this by showing that the principles of comity well established in law have been strengthened by the obligation to cooperate. This is not the same as a mandate of Full Faith and Credit, but certainly suggests that states' courts carefully examine communications from other states when there is a concurrent or sequential interest in matters pending before the concerned jurisdictions. We might explore this principle further by noting exactly what, in effect, happened between the two courts.

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[24] *See Mohamed* at footnote 59.

[25] On the principle of comity, law distinguishes at least three versions: comitas gentuim (comity of nations); judicial comity, and comity of states. See Blacks Law Dictionary Revised 4th ed pg 334(1968). For an anthropomorphically based analysis covering principles of reciprocal tolerances in public and private international law *see* Winston P. Nagan, *Conflicts Theory in Conflict: A Systematic Appraisal of Traditional and Contemporary Theories*, 3 N.YL.S. J. OF INT'L. & COMP. L., 3 (1982).

[26] *See* G.A. Res 2625 (XXXV) 25 GAOR Supp. (No 28) 121 (1970).

The Court's order on this point was stated as follows, "The Director of the Court is authorized and directed to cause the full text of this judgment to be drawn to the attention of and to be delivered to the Director or equivalent administrative head of the Federal Court for the Southern District of New York as a matter of urgency."[27]

The Court's order was indeed communicated to Judge Sands in New York. The relevance of the order was vigorously disputed by the United States Department of Justice which took the position that it was no concern of the United States whether South African law was violated or not. The Defendant was within the jurisdiction of the federal authorities and subject to United States law, and that would be it. The memorandum from the United States Department of Justice shows a limited understanding of the concept of sovereignty under current international conditions and suggests insensitivity to the issue of communication and collaboration between courts in seeking to enhance rule of law cooperation.

Finally, the United State's prosecutors did not cite a single case in which the United States has irregularly obtained the custody of a defendant in which it had specifically sought to impose the death penalty. There were also no references to the *Soering* case or the line of cases which express concern that the United States take human rights and international law concerns into account. Judge Sand, in turn, ignored the protestations of the Department of Justice and included references to the South African Court's judgment as a mitigating factor in his instructions to the jury.[28] His instruction read as follows: "As a matter of South African law, Khalfan Mohamed should not have been released to American officials without assurances that he would not face the death penalty in the United States."[29]

V. CONCLUSION

The *Mohamed* case is extremely important for several reasons. First, it has established the important point that circumstances exist where South African courts will be concerned with the extraterritorial implications of the South African Constitution. These South African Courts – chief among them the Constitutional Court – will seek to protect those interests while working within the framework of cooperation, comity, reciprocity, as well as the principles of cooperation enshrined in the United Nations Charter and its authoritative gloss, the Declaration on Friendly Relations and Cooperation among States.

South African law also makes a crucial contribution to international jurisprudence, affirming that the death penalty is a violation of the human dignity, the right to life precept, as well as precepts that outlaw torture. The Constitutional Court has crafted a superior remedy which deserves significant continuing attention. Quite clearly, the use of mandamus is extraordinarily complicated and the writ, in any event, should be seen as extraordinary in constitutional litigation. On the other hand, the declaratory judgment remedy is more interesting and possibly more practical for giving efficacy to the Constitution in these circumstances.

Indeed, the deference which a declaratory judgment might command from coordinate branches of government as well as its extraterritorial reach merits careful development in the future if its promise

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[27] See Mohamed at para 5.

[28] In the traditional common law practice, the issue relating to the proof of foreign law was considered to be a matter of evidence, that is, a fact and, therefore it was a jury question. This has been changed in modern common law jurisdictions, including the federal courts of the United States. Those courts are permitted to take judicial notice of foreign law.

[29] *See* Ruhnke & Barret Memorandum, Letter from David Ruhnke to Jerome Ramages and Mohamed's Legal Representatives, July 10, 2001 (on file with authors).

in enhancing the rule of law is to be secured. The specific application of this remedy in the context of foreign affairs is going to require refined analysis because the judicial control over the Executive in international affairs requires giving the Executive a degree of discretion in making foreign policy judgments and flexibility about the character of diplomatic communications.

Importantly, the *Mohamed* decision demonstrates that the Constitutional Court is moving ever closer to delineating the circumstances under which the exercise of sovereignty among the internal branches of government reflects rule of law values, the commitment to fundamental human rights, but also a commitment to the fundamentals of good governance. This has critical world order implications. This means that the functions of the different branches of government need not necessarily be construed as being in conflict with each other in fact, the court must strive while respecting the primacy of law, to secure the principle of good faith cooperation between the branches of government and that frequently requires a careful assessment of the respective spheres of Constitutional competence between concerned branches of government. The principle of good governance implicit in the Constitution demands no less.

Finally, the Court has developed the notion of declaratory relief in an area which might be more carefully developed in terms of how courts may effectively cooperate with each other on technical matters involving the rule of law in ways that do not necessarily promote conflict between political branches of government in the foreign relations context.

For example, the rules of private international law find effective, neutral principles by which states can defer to each other's laws. The principles of conflicts of jurisdiction in public international law seek to secure principles which permit states to reasonably construe their law to have extraterritorial effect so long as it is reasonable under international law. The Constitutional Court has touched on these ideas and themes in a significant way and it appears to be seeking an opportunity to further explore them to provide practical guidance to lawyers who must grapple with problems of local-to-global-to-local reach.

THE POSITIVE DUTY TO ENSURE; FULFILLING SRI LANKA'S OBLIGATIONS UNDER ICCPR, ARTICLE 2

Manjuka Fernandopulle[*]

I. INTRODUCTION

The primary importance of the International Covenant on Civil and Political Rights (ICCPR) to the development of the international law on human rights arises from its catalytic role in metamorphosing the character of human rights in international law from being exhortative and recommendatory in nature, (lacking the imposition of any binding obligations as epitomized in the Universal Declaration of Human Rights (UDHR)), to one of binding obligations imposed by the way of an international treaty, commensurate with the international law principle of *pacta sunt servanda.*[1]

Article 2 of the ICCPR (hereafter Article 2) is the provision that is principally responsible for this metamorphosis. This provision constitutes the cornerstone for the delineation, of the nature of the obligations of state parties to the Covenant. It stipulates that state parties are obliged to, not only "respect" the rights enumerated in the provisions of the Covenant but also to "ensure" their protection in addition to prohibiting discrimination in the implementation of the Covenant by state parties in their respective domestic jurisdictions.

Moreover, it obligates state parties to provide an "effective" remedy to those persons whose rights are violated and requires the "enforcement" of such a remedy when granted. Thus, ICCPR Article 2 is central to demonstrating that the ICCPR goes beyond the mere obligation of "respect", imposed by a declaratory document such as the UDHR. The centrality of this provision to the implementation of the ICCPR is further underscored by the fact that the Human Rights Committee in its general comment[2] on reservations made upon accession or ratification to the Convenant expressly states that no reservation can be made in respect of obligations imposed by the way of Article 2 since it would defeat the object and purpose of the Covenant.

Consequently, analysis of a state party's fulfillment of its obligations under ICCPR Article 2 is crucial to the evaluation of the state party's compliance to its substantial obligations emanating from their agreement to be bound by the provisions of the ICCPR.

Indeed, it is for this reason that this essay examines Sri Lanka's fulfillment of obligations under Article 2 that arise by virtue of acceding[3] to the ICCPR.

In order to embark upon this enterprise, this essay firstly defines the substantive obligations imposed by this article as interpreted by the treaty monitoring committee of the ICCPR, the Human Rights Committee. It does so by examining the jurisprudence of this Committee in that regard.[4]

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[1] See article 26 of the Vienna Convention on the Law of Treaties and D.J Harris, *Cases and Materials on International Law* 5th edition (London, Sweet and Maxwell, 1998)

[2] General Comment No.24, para 14 (HRI/Gen/1/Rev.6 pp. 165)

[3] Sri Lanka acceded to the International Covenant on Civil and Political Rights (ICCPR) on 11 June 1980. For the purposes of this article, the ICCPR is also referred to, on occasion, generally as the Covenant.

[4] Jurisprudence of the Human Rights Committee consists of decisions under the first optional protocol, concluding remarks and general comments. For specific definition of the purpose of each these categories see Henry J. Steiner and Philip Alston, *International Human Rights in Context, Law, politics and morals, text and materials* Ch 9, 1st eds (Oxford, Clarendon Press, 1995)

Thereafter, using the Committee's jurisprudence, I will examine whether the measures taken by Sri Lanka as stated in its periodic reports are commensurate with its obligations imposed by ICCPR Article 2. In doing so, I will firstly examine whether such measures fulfills the obligations of non-discrimination contained within ICCPR Article 2(1) and enumerated by the Human Rights Committee in its general comments. Secondly, I will center my analysis around the constitutional provisions, which have been identified by the Human Rights Committee in its concluding remarks to be in breach of Sri Lanka's obligations under ICCPR Article 2.

Finally, I will examine the whether the functions and powers of the Human Rights Commission of Sri Lanka meets the standards of efficacy and adequacy as stipulated in the provisions of ICCPR Article 2 and defined by the Human Rights Committee through its jurisprudence.

II. STATE OBLIGATIONS DEFINED IN THE ICCPR IN RESPECT OF THE PARAMOUNT DUTY TO ENSURE NON DISCRIMINATION

ICCPR Article 2(1) mandates state parties, not only to respect but also to ensure that rights recognized are enjoyed by every individual within its territory and who are subject to its jurisdiction without any distinction of any kind.

The duty to "ensure," (which has the character of a positive duty imposed upon a state party), involves a duty to undertake specific measures that would guarantee that all individuals within its jurisdiction enjoy the rights enumerated in the Covenant. In contrast, the substantive provisions of the Covenant impose obligations that are general in nature. For example ICCPR Article 14 states that 'Everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law", without elaborating on the specific measures that required to be taken to achieve this end.

Nevertheless, the Human Rights Committee in its general comment[5] on ICCPR Article 14, defines the specific obligations by stating that;

> *State Parties should specify the relevant constitutional and legislative texts which provide for the establishment of the courts and ensure that they are independent, impartial and competent, in particular with regard to the manner in which judges are appointed, the qualifications for the appointment, and the duration of their terms of office; the conditions governing promotion, transfer and cessation of their functions and the actual independence of the judiciary from the executive branch and legislative branch.*

It is apparent that the legality of the obligations imposed on state parties to take specific measures to ensure an impartial and independent judicial process is derived not merely from substantive provisions of the particular article *per se* but also from the positive duty of "ensuring" which is encapsulated within the substantive content of ICCPR Article 2(1).

Thus, ICCPR Article 2(1) which requires state parties to prove that the commitment to protect and promote the right to equality before the law is not merely confined to declaratory statements and formal legal texts, which rhetorically subscribe to the norms associated with this right. Rather, the

[5] For the nature and purpose of the general comments see Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 40 (A/36/40) and also see CCPR/C/21/Rev.1

commitment needs to be embodied in the form of legislative and constitutional framework of the state party and manifested in the practical measures, which actually protects this right.

In fact, the Human Rights Committee has stated on two occasions, in its concluding remarks on Sri Lanka's periodic reports, that Article 107 of the Sri Lankan Constitution read together with the standing orders of the Sri Lankan Parliament[6] is incompatible with ICCPR Article 14 as it allows the legislature to exercise considerable disciplinary control over the judiciary.[7]

The second aspect of the obligations imposed on the state parties by ICCPR Article 2 is the prohibition on discrimination in affording protection to the rights guaranteed by the Covenant.

According to the Human Rights Committee[8] "any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms" would amount to discrimination.

As such, ICCPR Article 2(1), imposes a duty upon a state party to "respect and to ensure to all individuals within its territory and subject to its jurisdiction, the rights recognized in the present Convention without distinction of any kind". Thus, if a state party would exclude the protection of rights guaranteed by the Covenant on the basis of citizenship, sex, political opinion or any other such grounds, it would amount to a clear violation of ICCPR Article 2(1). This prohibition operates in a particular context where certain Covenant articles such as Article 25[9] and Article 13[10] are concerned.

However, the prohibition on discrimination should not be interpreted as preventing affirmative action[11] so long as it is based on reasonable and objective criteria. What is required by the ICCPR is not only the achievement of *dejure* equality but also of *defacto* equality.

Corollary to the obligation to "ensure" and the prohibition on discrimination contained in Article 2(1) of the ICCPR is the obligation imposed on state parties by Article 2(2) "to give effect" to the provisions of the Covenant through legislative and other measures in accordance with its constitutional process. Indeed, it is in order to comply with this article that state parties are required to take affirmative action[12] if necessary, to take immediate steps as opposed to progressive steps[13] to

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[6] the process of impeachment is explained in Sri Lanka's third and fourth periodic report published as CCPR/LKA/2002/4 at 70 and J.A.L Cooray, *Constitutional and Administrative Law of Sri Lanka*, 2nd edition, pp20 (Colombo, Sumathi,1995)

[7] CCPR/CO/79/LKA para 17

[8] General Comment 18 on Non-discrimination (HRI/GEN/1/Rev.6) pp146

[9] Article 25 of the ICCPR states "Every citizen shall have the right and opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions-

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
(b) To vote and be elected at genuine periodic elections which shall be by universal and equal sufferage and shall be held by secret ballot, guaranteeing, the free expression of the will of the electors;
(c) To have access, on general terms of equality, to public service in his country"

[10] Article 13 states "An alien lawfully in the territory of a State Party to the present Covenant may be expelled there from only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a persons especially designed by the competent authority

[11] see supra note 8

[12] General Comment No.4 (HRI/GEN/Rev.6 pp 126)

[13] Mc Goldrick, D. pp 273, *The Human Rights Committee.* Oxford: Clarendon Press; New York: Oxford University Press, 1991.

implement the Covenant and to ensure that there is no contradiction between the constitutional and legislative framework of a state party and the provisions of the ICCPR.[14]

The fourth aspect of the obligations imposed by ICCPR Article 2, which is further defined in Article 2(3) guarantees the right to an effective remedy against violations of the Covenant. Accordingly, state parties to the Covenant need to ensure that any person whose rights and freedoms recognized and protected by the provisions of the Covenant is provided with an effective remedy. Although preference is given to judicial remedies;[15] the remedial mechanisms could take the form of even administrative or legislative mechanisms provided they fulfill requirement of "efficacy" and are not merely confined to perfunctory redress.

Implicit in this discretion given to the state to determine the actual form and the manner of the remedy is the deference to the principles of territorial sovereignty and territorial jurisdiction, a feature that pervades the provisions of the ICCPR.[16] Indeed this principle is reiterated in Article 5(2)(b) of the Optional Protocol by the rule that requires the exhaustion of domestic remedies before a communication is submitted to the Human Rights Committee.[17] Thus the rule that a state should be given the first opportunity to redress by its own means and within the framework of its domestic system, the wrongs alleged to have been suffered by its citizen, is given primacy.

However, the Human Rights Committee has departed from this rule to the extent of intervening positively once it determines that remedies provided by the state parties have been proved to be ineffective.[18] Similarly, the Human Rights Committee has admitted communications relating to incidents that have taken place in the time period prior to accession to the first optional protocol by a state party by interpreting them to be ongoing violations, (even though there has been an express reservations made by the state party in this respect), on the basis that the remedies provided by the state parties have found to be wanting in efficacy.[19] The importance of providing an effective remedy to the implementation and fulfillment of state parties commitments under the ICCPR is thereby demonstrated.

Indeed, the Human Rights Committee has found domestic remedies to be ineffective on the basis they lacked transparency,[20] the actions of the state parties had undermined the credibility and the impartiality of the remedial mechanism,[21] where recourse to remedies remained only an theoretical possibility[22] and where the actions of the state party had made the invoking of the available domestic remedy both a *defacto* and *dejure* impossibility.[23]

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[14] *Ibid* pp 278

[15] Nowak, Manfred. pp 58, *Commentary on the U.N. Covenant on Civil and Political Rights*, Kehl am Rhein: N.P. Engel

[16] see the individual opinion by Mr. Bertil Wennergren in *Lubicon Lake Band vs Canada* (Communication No. 162/1984) and also *A &S vs Norway* para 4.2 (Communication No 224/1987) and T.K vs. France (Communication No. 220/1986)

[17] Article 5(2)(b) of the first optional protocol of the ICCPR states "The Committee shall not consider any communication from an individual unless it has ascertain: (b) The individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged"

[18] *T.K vs. France* (Communication No. 220/1986)

[19] *Quinteros v. Uruguay* (Communication No. 107/1981) and El Megreisi v. Libyan Arab Jamahiriya (Case No. 440/1990) and also see the recent HRC decision of *Victor Ivan v Sri Lanka* (CCPR/C/81/D/1033/2001)

[20] *Daniel Monguya v Zaire* (Communication no. 16/1977)

[21] *Monja Jaona v Madagsca* (Communication no. 132/1982)

[22] *Earl Pratt and Ivan Morgan v Jamaica* (Communications nos. 210/1986 and 225/1987)

[23] See supra note 21

Similarly, the Committee has concluded that there was no effective remedies to exhaust where the remedy was unreasonably prolonged[24] or the author of the communication had convincingly demonstrated that he or she does not have any prospect of obtaining any relief from the available domestic remedy,[25] where the state party had acted in total disregard to the decisions made by the remedial mechanism[26] and where the victims have not been adequately compensated for the violations.[27]

The Committee has also dispensed with the requirement of exhausting domestic remedies where the actions of the state party made recourse to available domestic remedy only an hypothetical possibility[28] or the actions of the state party had paralyzed the functioning of the available domestic remedial mechanism,[29] where the remedy had no deterrent effect against future violations,[30] where the remedy consisted of only an unrestricted discretion on the part of the political organ to grant amnesty[31] and where there is serious procedural flaws in the available domestic remedies.[32] However, the Human Rights Committee has held that actions to recover damages for negligent conduct and declaratory judgments or rulings, so long as it has binding effect on future conduct, would constitute effective remedies.[33]

I will now proceed to examine the basic incompatibility of Sri Lanka's Constitution with the positive duty placed on the Sri Lankan State by the ICCPR to ensure the non discriminatory nature of it constitutional remedies.

SHOULD ONE BE A 'CITIZEN TO CLAIM RIGHTS? – THE PROBLEMATIC LANGUAGE OF ARTICLES 12 (2) AND 14 (1) OF SRI LANKA'S CONSTITUTION

The Human Rights Committee in its general comment no 15 entitled "the position of aliens under the covenant"[34] defined the prohibition on discrimination embodied in ICCPR Article 2(1) to include discrimination based on national origin.

Interpreting the provisions of ICCPR Article 2(1), the Committee stated,[35] "the rights set forth in the covenant apply to everyone irrespective of reciprocity, and irrespective of his or her nationality or statelessness."

Further enumerating obligations prohibiting discrimination, the Committee stated thus;

> *The general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the*

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[24] Article 5(2)(b) of the first optional protocol of the ICCPR
[25] *Eric Hammel v Madagscar* (Communication no. 155/1983)
[26] *Baritusso v Urugay* (Communication no 25/1978)
[27] *Omar Berterretche Acosta v Urugauy* (Communication no 162/1983)
[28] *Hugo Gilmet Dermit v Urugay* (Communication no 84/1981)
[29] *Antonio Vioana v Urugay* (communication 100/1981)
[30] *William Edurado Delgado Paez v Columbia* (195/1985)
[31] *Luyeye Magana ex-Philbert v Zaire* (Communication no 90/1981)
[32] see supra note 21
[33] *C.F. et al vs. Canada* (Communication no 113/1981)
[34] HRI/Gen/Rev. 6 pp140
[35] *Ibid* para 1

Covenant, provided for in Article 2 thereof. This guarantee applies to aliens and citizens alike.[36]

Nevertheless, despite this express prohibition against discrimination on national origin, provisions of Sri Lanka's Constitution restrict the ambit of their protection only to citizens.[37] Article 12(2) of the Constitution provides substantially that "no citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any of such grounds" limiting the right thereby to citizens.

Importantly, the Human Rights Committee in its concluding observations upon examining Sri Lanka's Third and Fourth periodic report, stated as follows;

It is also concerned that contrary to the principles enshrined in the Covenant (e.g. the principle of non-discrimination), some Covenant rights are denied to non-citizens without any justification[38]

Article 14(1) (in all its manifold sub-sections) is another example of this contrariness. This article offers no protection to aliens in respect of their rights to freedom of speech and expression including publication, the freedom of peaceful assembly, the freedom of association, freedom to join and form trade unions and the freedom to engage in a lawful profession of one's choice. Similarly, only citizens are guaranteed the right to the freedom of movement and the right, in community with others of their group, to enjoy their own culture, to profess and practice their own religion.

In contrast, the Human Rights Committee in its General Comment on Aliens specifically declared that aliens have the right to hold opinions as well as to express them and that they are entitled to the right to peaceful assembly and of freedom of association.[39] In addition, the Committee expressly stated that aliens shall not be denied the right, in community with others of their group, to enjoy their own culture, to profess and practice their own religion and once having lawfully entered the territory the freedom of movement within the territory.[40]

Thus, by retaining this constitutional provision in its present form, it could convincingly be argued that Sri Lanka is in breach of its obligations under Article 2(1) of the ICCPR.

GIVING RETROSPECTIVE VALIDITY TO INCONSISTENT LEGISLATION

As noted previously, Article 2(2) of the ICCPR requires member states "to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the Convention".

This obligation was re-emphasized by the Human Rights Committee in its general comment no:3 in relation to "implementation at national level"[41], where the Committee stated that it "considers it necessary to draw to the attention of state parties to the fact that the obligation under the Covenant is not confined to the respect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction." Furthermore, this obligation is also borne out by ICCPR Article 2(3).

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[36] *Ibid* para 2
[37] Article 14 of the Sri Lankan constitution states "Every ***citizen*** is entitled to".....
[38] CCPR/CO/79/LKA para 7
[39] see supra note 36 para 7
[40] *Ibid* para7
[41] General comment no.3 (HRI/Gen/ 1 Rev.6)

Sri Lanka's position in this regard has been that provisions of the third chapter of the Constitution, fulfills its obligation of giving effect to the rights set out in the Covenant[42] as it contains provisions guaranteeing and protecting rights set out in the Covenant and also provides for a right to a remedy in instances of breach.[43]

As such, the State has claimed that no specific legislation is required to be adopted to fulfill its obligations under the Covenant.[44] Notwithstanding this assertion, the Human Rights Committee, in its concluding observation on Sri Lanka's third and fourth periodic reports observed that;

> *It remains concerned about the provisions of article 16, paragraph 1 of the Constitution, which permits existing laws to remain valid and operative notwithstanding their incompatibility with the Constitution's provisions relating to fundamental rights. There is no mechanism to challenge legislation incompatible with the provisions of the Covenant (arts. 2 and 26). The State party should ensure that its legislation gives full effect to the rights recognized in the Covenant and that domestic law is harmonized with the obligations undertaken under the Covenant.*[45]

The Human Rights Committee expressed concern in regard to Article 16(1) of the Sri Lankan Constitution in relation to its preclusion of judicial review of legislation on grounds of its inconsistency with the provisions of chapter three of the Sri Lankan Constitution.[46] Concerns were also expressed that Article 16(1) gave retrospective validity to legislation despite such legislation being manifestly inconsistent with the provisions of chapter three of the Sri Lankan constitution.

As a result, legislation such as the Public Security Ordinance, the Prevention of Terrorism Act,[47] the provisions of the Code of Criminal Procedure relating to the dispersion of an unlawful assembly giving immunity to police officers and armed forces personnel for exceeding their power in good faith,[48] and the Official Secrets Act[49] are invested or conferred with the cloak of constitutional validity.

Hence Article 16(1) has the effect of undermining the domestic implementation of Sri Lanka's duty of performance to enact laws and take measures to give effect to the provisions of the Covenant as envisaged by ICCPR Article 2(2) and to provide for an effective remedy pursuant to ICCPR Article 2(3).[50]

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[42] CCPR/C/LKA/2002/4

[43] Articles 10 to 17 of the Constitution

[44] CCPR/C/LKA/2002/4 and the Responses of the Government of Sri Lanka to the List of issues raised by the Human Rights Committee in relation to Sri Lanka's 4th and 5th periodic report reproduced in LST Review, 2003, Vol 13

[45] CCPR/CO/79/LKA para 7

[46] Article 16(1) of the Sri Lankan Constitution states "all existing written and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of this chapter."

[47] See the Committee's jurisprudence in Communication no 1033/2004 (CCPR/C/81/D/1033/2001) para 7.4

[48] Section 97(2)(a) of the Code of Criminal Procedure

[49] Act no 32 of 1955

[50] Indeed, provisions of Article 16(1) causes Sri Lanka to be in clear breach of its commitments under ICCPR Article 2 as its provisions give legitimacy to legislation that derogates or is inconsistent with constitutional provisions which according to Sri Lanka's own description, is meant to give effect its obligations under the Covenant.

Although not expressly adverted to by the Committee in its concluding remarks, the breach caused by the provisions of Article 16(1) is reinforced by Articles 168(1)[50] and 80(3)[51] of the Constitution, since they provide immunity to legislation from being challenged on the basis of their unconstitutionality and exclude post enactment judicial review of legislation.

Similarly, even the constitutional provisions, which permit pre-enactment constitutional review, given the short time period stipulated within such a challenge is permitted and the lack of public access to the order paper of the legislature, do not conform to the standard of efficacy as stipulated in article 2(3) of the ICCPR.[52]

III. REDRESSING SRI LANKA'S FAILURE TO CONFORM TO INTERNATIONAL OBLIGATIONS AND THE VARIOUS THEORIES THERETO

As noted above, the cumulative impact of Articles 16(1), 168(1) and 80(3) is that Sri Lanka continues to be in fundamental breach of its duties under the ICCPR. In these circumstances, the need arises to ensure that the provisions of the Sri Lankan Constitution fulfill Sri Lanka's obligations under ICCPR Article 2.

This challenge, which is essentially one of inter-penetration between the international and national systems, would require Sri Lanka to create a mechanism that would allows the validity of legislation to be challenged on the basis of incompatibility with the provisions of the Covenant.

Indeed, Sri Lanka has the choice of resolving this problem by adopting varying mechanisms and legal doctrines; it could do so by following the monist doctrine i.e by way of direct incorporation or automatic incorporation, or in the alternative, by following the method of legislative incorporation or the dualist method, which is also the method, presently adhered by Sri Lanka.

A third option would be to subscribe to the doctrine of judicial incorporation, a rule of construction which is an amalgam of the monist and dualist doctrines and which is, to a certain extent already in usage in the Sri Lankan courts. A brief discussion of the monist and dualist doctrines is now engaged in.

MONIST THEORIES

Monist theories have their genesis in natural law doctrines. They imagine a unitary world legal system in which national and international law have "comparable equivalent or identical subjects, sources and substantive contents."[53] The state law and international law is perceived as interrelated parts of the same legal structure. As monism perceives the science of law as a unified field of knowledge

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[50] Article 168(1) of the Sri Lankan Constitution states " Unless Parliament otherwise provides, all laws, written laws and unwritten laws, in force immediately, before the commencement of the Constitution, *shall mutatis mutandis* and except as otherwise expressly provided in the Constitution, continue in force

[51] Article 80(3) states, "Where a Bill becomes law upon the certificate of the president or the Speaker, as the case may be, being endorsed thereon, no court or tribunal shall inquire into, pronounce upon in any manner call in question, the validity of such act on any ground whatsoever."

[52] Article 121 stipulates that the bill can only be challenged within one week of the bill being placed on the order paper.

[53] Sir Robert Jennings QC and Sir Arthur Watts QC (eds), *Oppenheim's International Law*, 9th edition (Singapore, Pearson Education Ltd, 1992), pp 54

composed of binding rules, it accords international law the character of law. Accordingly, both states and individuals are equally bound by the rules of international law.

In its classical formulation, monists argue for the supremacy of international law in relation to national law. As such, it asserts that all aspects of a state's activities are regulated by superior international law. Indeed, given that advocates of monism construe international law as essentially part of the same legal order as municipal law, and superior to it, international law *ipso facto* stands incorporated into municipal law, thus giving rise to no difficulty in principle to its application within the internal legal order of a state.

Articles 93 and 94 of the Dutch Constitution embody the classical monist method of direct incorporation of international law into the domestic legal system of a country.[54]

Article 93 states that;

> *provisions of treaties and decisions of international organizations, the content of which may be binding on everyone, shall have this binding effect on everyone, and shall have this binding effect as from the time of the publication.*

Likewise, Article 94 provides that;

> *regulations which are in force in the Kingdom of the Netherlands shall not be applied if this application is not in conformity with provisions of treaties or decisions of international organizations which are binding upon everyone.*

The Dutch courts have therefore given precedence to self-executing treaty provisions over domestic law that is not in conformity with the relevant treaty provision, notwithstanding the fact that the legislation in question could either be an antecedent or posterior statutory or constitutional provision.[55]

Given that it allows for a cause of action be founded on the basis that a particular act of or statutory provision of the state party contravenes the provisions of the ICCPR, the Human Rights Committee has suggested monism as an answer to the challenge of fulfilling a state party's obligations under ICCPR Article 2(2).[56] However, although such an approach is alluring at first glance, it is my belief that the facetious character of the Committee's assertion stands exposed when confronted with both normative as well as empirical objections to the use of the monist doctrine

On a normative level, the objection is based on the space created by the executive to accrue to itself legislative powers which fall within the competency of the legislature. The conduct of foreign relations, which includes the power to negotiate and enter into treaties, is usually the exclusive prerogative of the executive. In this manner, the executive could subvert the legislature's powers by

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[54] Jorg Polakiewicz and Valerie Jacob-Foltzer, *The European Human Rights Convention in Domestic Law*, 12 Hum Rts. L. J. 65 and 125 (1991) at 65 in Henry J. Steiner and Philip Alston , *International Human Rights in Context, Law, politics and morals, text and materials*, 1st eds (Oxford, Clarendon Press, 1995), Ch 11, 551pp

[55] Sir Robert Jennings QC and Sir Arthur Watts QC (eds), Oppenheim's International Law, 9th edition (Singapore, Pearson Education Ltd, 1992), 69pp and also see Christopher Harland, *The Status of the International Covenant on Civil and Political Rights (ICCPR) in the Domestic Law of State parties: An initial Global Survey through UN Human Rights Committee Documents*, Human Rights Quarterly Review 22 (2000), 220

[56] CCPR/C/Sr. 942 (1989) and also see Nowak, Manfred. pp 54,para 50, *Commentary on the U.N. Covenant on Civil and Political Rights*, Kehl am Rhein: N.P. Engel

entering into treaties which have the effect of invalidating any legislation, (whether anterior or posterior), particularly in areas such as social policy, which have been hitherto exclusively within the legislature's realm of competence.

Conversely, a treaty could empower the executive to issue regulations that, according to the provisions of the treaty, have the effect of invalidating domestic legislation.[57] Moreover, as most treaty negotiations are conducted on the principle of *quid pro quo*, they are by their very nature incapable of being conducted in a transparent and open manner. This, in contrast to the exercise of legislative powers in a democratic system, leaves very little space for popular participation or public input. Thus it could be said that the monist doctrine has the effect of causing a democratic deficit.

Similarly, in federal countries, such as Australia, Canada, Malaysia and others, special concerns have been expressed that the ratification of international treaties could be used as a mean to undermine the constitutional distribution of powers.[58] Given that federalism has been mooted as a solution to Sri Lanka's ethnic problem, adoption of the monist doctrine would mean traversing upon a very sensitive issue.

The broad generality of the expressions used in international human rights instruments is the other normative basis for the critics to reject application of the Monist ideology. In order to achieve consensus, which reflects the common most denominator, the provisions of most conventions are couched in a language that lacks precision. They argue that this lack of precision would allow anyone to read into their broad language what they hope, expect or want to see.

Judges in countries inheriting the common law tradition such as Sri Lanka, have been bestowed with a creative judicial role, circumscribed as it is however by the warning that they should not legislate. In this context, it could be argued that subscribing to the monist way of incorporation opens the possibility that the process of democratic law making by the organs of government (which are directly or indirectly accountable to the people) may be undermined by the judiciary which lacks a democratic mandate.

Further in the Sri Lankan context, adopting the monist doctrine would entail empowering the judiciary with powers of post-enactment judicial review. However, an issue would then arise whether such a change is permissible within the present constitutional framework. The conventional view is that Article 16 read together with Article 76 of the Constitution, for all intents and purposes, precludes post enactment judicial review on the basis that a particular statutory provision contravenes the provisions contained in the third chapter of the Sri Lankan Constitution that gives institutionalized protection to fundamental rights.

It has been maintained therefore that if any amendment of these articles were to be made to permit post enactment judicial review, it would amount to an alienation of the legislative power of the parliament. Indeed as elaborated by the Supreme Court in *Re the Nineteenth Amendment to the*

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[57] Justice Kirby, *"Domestic Implementation of Human Rights Norms"*, 5 Aust. J. Hum. RTS. (1999), at 119 reproduced in *International Human Rights in Context, Law, politics and morals, text and materials*, 2nd eds (Oxford, Clarendon Press, 2001), Ch 11, 1016 and Virginia Leary, *International Labour Conventions and National Law*, 1982, at 1 in Henry J. Steiner and Philip Alston , *International Human Rights in Context, Law, politics and morals, text and materials*, 1st eds (Oxford, Clarendon Press, 1995), Ch 11, 726pp

[58] Henry J. Steiner and Philip Alston, *International Human Rights in Context, Law, politics and morals, text and materials, 2nd eds* (Oxford, Clarendon Press, 2001), 1016

Constitution[59], such a change might tantamount to an alienation of the inalienable sovereign power of the people as enumerated in Article 3 of the constitution.

As pronounced by the Chief Justice in that case;

> *Inalienability of sovereignty, in relation to each organ of government means that power vested by the constitution in one organ of government shall not be transferred to another organ of government, or relinquished or removed from that organ of government to which it is attributed by the Constitution. Therefore, shorn of all flourishes of Constitutional law and of political theory, on a plain interpretation of the relevant Articles of the Constitution, it could be stated that any power that is attributed by the Constitution to one organ of government cannot be transferred to another organ of government; and any such transfer relinquishment or removal would be an "alienation" of sovereignty which is inconsistent with Article 3 read together with Article 4 of the Constitution.*

Further, it was pointed out that;

> *the balance that has been struck between the three organs of government in relation to the power that is attributable to each such organ, has to be preserved if the Constitution itself is to be sustained.*

According to this view, adopting the monist doctrine would amount to amending Article 3 of the Constitution. This would, in terms of Article 83[60] of the Constitution, require not only to be passed by a two-thirds majority in parliament but would also need to be approved by the people at a referendum.

The contrary view professed is that post enactment judicial review is plausible within the present constitutional framework given that the definition of sovereign power as enumerated in Article 3 of the Sri Lankan Constitution is an inclusive definition rather than exclusive definition.

On an empirical level, objections to the application of the monist theory have been based on the fact that the acceptance of monist doctrine has not necessarily resulted in the enhanced protection of human rights. Critics point out to the example of Rwanda, where at the time of the genocide the ICCPR ranked above domestic laws. In contrast, the ICCPR does not claim a similar status in domestic Swedish law; a country widely acknowledged having a good track record in protecting and fostering Human Rights.[61]

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[59] (2002) 3 Sri L. R.85pp

[60] Article 83 states " Notwithstanding anything to the contrary in the provisions of Articles 82-

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

(b) a Bill for the amendment or for the repeal and replacement of or which is inconsistent with the provisions of paragragh (2) of Articles 30 or of paragragh (2) of Articles 30 or of paragragh (2) of Articles 62 which would extend the term of office of the President or the duration of Parliament, as the case may be, to voer six years

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

[61] Christopher Harland, *The Status of the International Covenant on Civil and Political Rights (ICCPR) in the Domestic Law of State parties: An initial Global Survey through UN Human Rights Committee Documents*, Human Rights Quarterly Review 22 (2000), 243 pp

Moreover, merely because the judiciary has the latitude to invalidate statues for the reasons of contravening the articles of the Covenant does not mean they would readily exercise this power. This is evident, for instance, in the judicial dispositions of Supreme Court judges of the Netherlands in relation to the provisions of the European Convention on Human Rights (ECHR). Despite its direct applicability of the ECHR, it has merely been accorded the status of a subsidiary source of law and when specific provisions of the convention are invoked before Dutch courts, it has been concluded that no violation had occurred.[62]

Further, when confronted with a conflict between a provision of the ECHR and Dutch statute, the Supreme Court of Netherlands has developed a propensity to circumvent it by giving to the latter an interpretation or scope different and wider from its original meaning on the basis of an anterior legal practice or by inserting a new principle into Dutch law derived from a treaty provision. Moreover, the percentage of the cases, in which the Supreme Court has found a violation, remains small- a mere 9%.[63]

Insofar as Sri Lanka is concerned, as repeatedly remarked upon by the Human Rights Committee in its consideration of Sri Lanka's periodic reports, what offends ICCPR, Article 2 is Article 16 of the Sri Lankan Constitution, which is a specific provision giving validity to existing legislation even though inconsistent with the Constitution. This needs to be distinguished from the more general provisions contained in Article 80(3) of the Constitution ousting the court's jurisdiction from inquiring into the constitutional validity of legislation. Accordingly there is no doubt that a specific constitutional amendment which brings Article 16 of the Sri Lankan Constitution in conformity with the provisions of the ICCPR is imperative.

DUALIST THEORIES

According to this theory, which has its origins in the positivist school of jurisprudence, national and international law represent entirely distinct legal systems. They are perceived as constituting two separate and structurally different systems; each logically complete and sovereign in its own domain. This view avoids any question of supremacy of one system over the other since they share no common field of application.

Its proponents accord international law an intrinsically different character from that of state law, given that the latter derives its legitimacy from commands issued by the sovereign authority. Thus, if states do not consent to be bound by international legal norms, it has no effect in their internal legal order. In fact, dualists define the biding nature of international law exclusively upon the agreement of states to be bound upon by it. As such, the subjects of international law are solely and exclusively states whilst individuals are the subjects of state law. Likewise, they also describe the source of state law as the will of the state itself in contrast to international law, which is derived from the common will of states.

As a result, international law cannot impinge upon state law unless the state explicitly allows its constitutional machinery to be utilized for this purpose. Indeed, if a treaty were to have any internal effect, it is required to undergo a transformation into a domestic statutory instrument by the way of legislative incorporation. Hence, when rules of international law apply within a state, they do so by virtue of their adoption by the internal law of the state and apply as internal law and not as international law.

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[62] See supra note 55 730 pp
[63] *Ibid* 732 p

Accordingly, in countries such as Sri Lanka that subscribe to the dualist school of thought, the primary responsibility of fulfilling obligations contained within Article 2(1) of the ICCPR; namely of "ensuring" the enjoyments of the rights and freedoms guaranteed by the Covenant would be incumbent upon the legislature. Usually, this would mean that the legislature undertakes a legislative audit whereby legislation is scrutinized for inconsistencies with the provisions of a treaty.

However, this process leaves opens the possibility for subjective interpretation of both the provisions of domestic statute and treaty provisions without the benefit of competing interpretations being placed before the institution or the individual undertaking this task. Moreover, since usually this is a one-off exercise, no space is provided for absorption of subsequent jurisprudential developments of a treaty monitoring committee in interpreting the provisions of a treaty. Indeed optional protocol decisions and concluding remarks of the Human Rights Committee on the inconsistencies contained within domestic legislation both in Sri Lanka[64] and Australia demonstrate the inherent deficiencies in this process.[65]

Australia and Sri Lanka, being dualist countries, the ratification of the ICCPR had no effect on the internal legal order until it is formally incorporated by statue into domestic law

Interestingly, at the time of ratifying the Covenant in 1980, the Australian government asserted that no new legislation were required since existing laws were in full conformity with the requirements of the convention.[66] However, the Human Rights Committee's decision in *Toonen v Australia*[67] exposed the fallacy of this statement.

In this case, the author of the communication alleged that his rights protected by ICCPR Article 17 i.e. the right to privacy or the freedom from arbitrary interference with one's private life and ICCPR Article 26 i.e. the right to the equal protection of the law, was violated by sections 122(a),(c) and 123 of the Tasmanian Criminal Code, which made homosexual behavior between consenting adults even in private a criminal offence.

The state countered this submission by stating that the particular provisions of the criminal code had become redundant by virtue of disuse since in the last seven years that there had not been any criminal prosecutions under these provisions and that in any event criminalization of private homosexual behavior did not transgress the provisions of the Covenant as it was justified on public and moral grounds on the basis they have the deterrent effect on the spread of HIV or AIDS.

In holding that the relevant statutory provision violated the author's rights protected by the Covenant, the Committee stated[68] as follows;

> *(it) considers that Sections 122(a), (c) and 123 of the Tasmanian Criminal Code "interfere" with the author's privacy, even if these provisions have not been enforced for a decade. In this context, it notes that the policy of the Department of Public Persecutions not to initiate criminal proceedings in respect of private homosexual conduct does not amount to a guarantee that no actions will be brought against*

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[64] CCPR/CO/79/LKA

[65] Henry J. Steiner and Philip Alston , *International Human Rights in Context, Law, politics and morals, text and materials*, 1st eds (Oxford, Clarendon Press, 1995), Ch 11, 732pp

[66] *Ibid*

[67] (communication no 486/1992) Int. Hum Rts. Reports 97(No3 1994)

[68] *Ibid* para 8.2

> *homosexuals in the future, particularly in light of the undisputed statements of the Director of Public Prosecutions of Tasmania in 1998 and those of members of the Tasmanian Parliament. The continued existence of the challenged provisions therefore continuously and directly "interferes" with the author's privacy.*

The Committee also went on to recommend that "an effective remedy would be the repeal of Sections 122(a), (c) and 123 of the Tasmanian Criminal Code."

Like Australia at the time of ratifying the ICCPR in 1981, Sri Lanka took up the position that all its laws are in conformity with provisions of the ICCPR. Here again, one needs only to peruse the concluding remarks of the Human Rights Committee on Sri Lanka's fulfillment of its treaty obligations on all occasions that it presented its periodic reports, to discover the heretical nature of this position.[69] The many suggestions that the Committee makes towards the necessity to amend constitutional/legislative provisions to ensure compatibility with the Covenant demonstrate that the Sri Lanka State has to accomplish much more to justify taking such a high moral ground.

An alternative method used by countries that subscribe to the dualist ideology is to incorporate the convention in its entirety by statute or provide for a constitutional provision in which treaties have the same rank as other legislation. However, utilizing the former method to fulfill treaty obligations has been objected upon on the basis that such an incorporation would result in the jettisoning of the jurisprudence built around existing legislative and constitutional provisions, which have been fulfilling the same function in the past.[70]

Indeed this objection is manifest in the statement of the delegation of the Republic of Ireland to the Human Rights Committee on the occasion it presented its periodic report. They stated that;

> *The remedy of substituting the provisions of the Convention for the existing constitutional provision would be undesirable because it would result in the jettisoning the jurisprudence built up around the existing provision*[71]

Similarly, another issue that might confront countries in following this method is if the domestic tribunal does not take the same views in interpreting the treaty provisions as the treaty monitoring body.[72]

In most instances, the later method of incorporation, (that of giving the Covenant, an equal status to other statues by way of a constitutional provision), would fulfill obligations of giving effect to the provisions of the ICCPR. This is because the courts could, by applying the principle *lex specialis derogate leges generales,* treat the convention as specific law, which would prevail in the case of conflict with a provision of a general statute.

This is evident, for example, in the German Federal Constitutional Court's jurisprudence in relation to the application of the provisions of the European Convention on Human Rights.[73] The court has

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[69] See CCPR/CO/79/LKA and CCPR/C/79/Add.56

[70] Cindy A. Cohn, *The Early Harvest: Legal Changes Related to the Human Rights Committee and the Covenant on Civil and Poltical Rights*, (1991) 13 Human Rights Quarterly, 295

[71] *Supra* note 66 pp 275

[72] See *Supra* note 60

[73] Rudolph Bernhardt, *The Convention and Domestic Law in Henry J. Steiner and Philip Alston , International Human Rights in Context, Law, politics and morals, text and materials*, 1st eds (Oxford, Clarendon Press, 1995), Ch 11, 729pp

expressly held that the priority must be given to the ECHR over statutes even laws enacted latterly, because it cannot be assumed that the legislature, without clearly stating so, wanted to deviate from Germany's obligations under Public International Law.

However, in the context of Sri Lanka's obligations under the ICCPR, such a provision would not be sufficient to fulfill state obligations as evident from the Human Committee's concluding remarks on Sri Lanka's periodic reports[74] according to which, the breaches of the treaty obligations emanate from constitutional provisions as opposed to mere statutory provisions. The Committee concluded upon considering Sri Lanka's fourth and fifth combined periodic reports[75], that Articles 16(1),[76] 13(6),[77] 15(7)[78] and 107[79] of the Sri Lankan Constitution to be in violation of Sri Lanka's obligations under the ICCPR.

THE DOCTRINE OF INCORPORATION

The doctrine of incorporation is essentially a rule of construction employed by the British courts to compel municipal laws to conform to the requirements of international law. This doctrine, which is an amalgam of the principles contained in the monist as well as dualist traditions, owes its origins to the decisions of British judges in the eighteenth century[80] in regard to laws relating to diplomatic immunity. The rules of the doctrine of incorporation have been enumerated distinctly in the context of customary internalization of customary international law and treaties.

In relation to reception of customary international law norms into domestic legal systems, this doctrine postulates that international customary law is inferred to be part of the common law of the land. Indeed Lord Alverstone in dicta in *West Rand Central Gold Mining Company vs R*[81] embodies this rule in its classical formulation. He stated that;

> *whatever has received the common consent of civilized nations must have received the assent of our country, and that to which we assented along with other nations in general may properly be called international law, and as such will be acknowledged and applied by our municipal tribunals to decide questions to which doctrines of international law may be relevant.*

Accordingly, accepting this rule would mean the application of international law as part of the law of the land. As such, (subject to the overriding effect of statute law), rights and duties flowing form customary international law will be recognized and given effect by courts without the need for any specific act adopting those rules into domestic law.

The cardinal principle of this doctrine in relating to internalization of treaties into the domestic legal system is based on a presumption that the legislature did not intend to commit a breach of international law. Premised upon this presumption, the doctrine enumerates a rule of statutory construction that gives the courts the latitude where there is any ambiguity in a statute and particularly

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[74] See *supra* note 74
[75] CCPR/C/Sr. 2164
[76] *Ibid* para 7
[77] *Ibid* para 10
[78] *Ibid* paras 8 and 9
[79] *Ibid* para 16
[80] See *Triquet v Bath* per Mansfeild Lj (1764 3 Bur 1478.Court of Kings Bench) and the Dicta of Talbot LJ in *Buvot v Barbuit* (1737) Cases t. Talb.281
[81] [1905] 2 K.B. 391

although not necessarily, where it is expressly enacted to give effect to a treaty, to interpret the statute in the light of and, if possible in such a way as to be consistent with a state's international treaty obligations.[82]

However, adherence to this rule would not anyway tantamount to a *carte blanche* for a cause of action to be predicted upon a norm of an international treaty law that hitherto not been incorporated into domestic law. Judicial recourse to such a norm or rule is permitted in only limited circumstances to assist in the interpretation by domestic courts of statute law or customary law.

Another canon of this doctrine has been developed by Australian courts to justify the reliance of international law norms in constructing domestic statutes, based on the administrative law principle of legitimate expectation.[83] It has done so on the premise that the ratification of treaty by a state is an express statement to the comity of nations and to its citizenry that its organs of government intend to be bound by the provisions of the particular treaty.

Consequently, a legitimate expectation is created on the part of its citizens and the world at large that a state would act in conformity with its treaty obligations. Thus, if a state has acted or intends to act in contrary manner, procedural propriety would dictate that the person affected by the impugned act should be permitted to rely on the provisions of the treaty to show the unreasonableness of the act. This rule was given judicial approval in the judgment of Mason CJ and Deane J in the Australian High Court case of *Minister for Immigration and Ethnic affairs v Ah Hin Teoh.*[84]

The issue that arose was whether obligations emanating from the provisions of the Convention on the Rights of the Child, (a treaty ratified by Australia but not expressly incorporated into domestic law), were factors that ought to be considered in the exercise of statutory discretion by the relevant authority. They stated that;

> *Ratification by Australia of an international convention.... is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the convention. The positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention and treat the best interests of the children as a primary consideration. But if a decision inconsistent with a legitimate expectation is given, procedural fairness requires that the persons affected should be given notice and an adequate opportunity of presenting a case against the taking of such a course.*

The United Kingdom and South Africa have gone a step further and expanded the scope of the doctrine of incorporation within their respective jurisdictions by giving statutory effect to it. While the United Kingdom has done so in the form of the Human Rights Act of 1998, South Africa did it in the form of a constitutional interpretation clause contained in article 39(1) of its 1996 Constitution.

Section three of the UK Human Rights Act of 1998 (hereafter the Human Rights Act) gives statutory effect to the doctrine of incorporation in respect of the provisions of the European Convention on

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[82] See per Lord Diplock in *Salomon v Commissioners of Custom and Excise* (1967) 2 Q.B. 116

[83] See for a good account of this doctrine, Peter Cane, *An Introduction to Administrative Law*, 3rd edition (Oxford, Claredon, 1996), 143 p

[84] 1995, 183 CLR 273

Human Rights by requiring courts to interpret primary and secondary legislation whenever enacted in a manner consistent with the obligations under the Convention. Commensurate with the canon of the doctrine of incorporation that precludes the use of internal law norms to invalidate or suspend statutes, the section expressly state that its provisions would not affect the continuing operation or enforcement of any incompatible of subordinate legislation or primary legislation. The House of Lords demonstrated the scope and the impact of this section in its majority judgment in the case of *R v A* (No 2).[85]

In this case, the defendant had been charged with rape and had been convicted by the trial judge rejecting his defence of consent. He had sought to establish his defence by cross-examining the complaint on a purported prior sexual relationship between her and the defendant during the three weeks before the act took place.

However, section 41 of the Youth Justice and Criminal Evidence Act of 1999, which was the statutory provision which the House of Lords was called upon to consider in appeal, prohibited the giving of evidence and cross-examination about any sexual behaviour of a complainant in a rape case, except with leave of the court, given only in a narrow range of circumstances. The trial court judge refused the defendants' application to cross examine or lead evidence of a prior sexual relationship between the complaint and the defendant on the basis of section 41 of the Youth Justice and Criminal Evidence Act of 1999.

A majority in the House of Lords, while conceding that section 41 interpreted in the ordinary way would wholly support the trial judge's decision, stated such an interpretation cannot any longer be sustained in light of requirements of section 3 of the Human Rights Act which mandates that the court takes into account UK's obligations under article 6 of the ECHR, which guarantee the right to a fair trial. It was possible, said Lord Steyn, giving the judgment, to read section 41 'as subject to the implied provision that evidence or questioning which is required to ensure a fair trial under Article 6 of the Convention should not be treated as inadmissible."

If this approach were adopted, he continued, "section 41 will have achieved a major part of its objective but its excessive reach will have been attenuated in accordance with the will of Parliament as reflected in section 3 of the 1998 Act." Thus, section 3 had the effect of permitting prior sexual conduct between complaint and the defendant to be admitted as evidence as of right.

Section 39(1)(b) of the South African Constitution enjoins courts to construe the provisions of the bill of rights of the South African Constitution in a manner commensurate with international human rights laws. It states, "when interpreting the bill of rights a court, tribunal or forum must consider international law."

Accordingly, it would appear that this section allows South African judges to draw on the entire field of international human rights including international custom as evidenced by general practice, the general principles of law recognized by civilized nations and international conventions which establish rules recognized by contesting states even where South African is not a party to a particular Covenant or Treaty.

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[85] [2002] 1 AC 45

Elaborating on the scope of this principle as set down in section 35(1) of the 1993 Interim Constitution which was reproduced in section 39 of the 1996 Constitution, the Constitutional Court stated in the case of *S v Makwanyane and Another*[86] that;

> *International agreements and customary international law accordingly provide a framework within which chapter 3 can be evaluated and understood and for that purpose decisions of tribunals dealing with comparable instruments may provide guidance as to the correct interpretation of particular provisions of chapter 3.*

The court further went on to state, in the case of *South African National Defence Union v Minister of Defence and another,*[87] relying on the provisions of section 39(1)(b);

> *that the law makers of the constitution should not lightly be presumed to authorize any law which might constitute a breach of the obligations of the state in terms of international law.*

The historical and philosophical foundations of the doctrine of incorporation on the reception of international law into the domestic legal system have found recognition in Sri Lanka to a certain degree in cases of *Ekanayake v AG*[88] and *Weeranwanse v AG.*[89]

In the case of *Ekanayake vs AG*[90] the appellant had been accused of seizing and taking control of a foreign aircraft, namely an Air italia Boeing 747, Flight No. Az 1790, in mid air unlawfully by force or threat and had thereby being charged for committing an offence under Sections 17(1)(a) read together with sections 19(1) and 19(3)(d) of the Offences against Aircraft Act no 24 of 1982. He was also accused of dishonestly and knowingly retaining stolen property and had been charged under Section 394 of the Penal Code.

Justice Senevirathne delivering the unanimous judgment of the Court, in finding against the appellant, referred to the articles of the Hague Convention on the Suppression of Unlawful Seizure of Aircraft (the Hague Convention). According to its preamble, the Offences Against Aircraft Act No 24 of 1982 sought to incorporate the Hague Convention into domestic law. As such, he explicitly adverted to the provisions of article 2 and specifically to article 4(2) of the Hague Convention to construe the phrase "in relation to foreign air craft" contained in section 9(3)(d) of the act, to include acts committed on board a foreign aircraft.

The use of the provisions of the convention to interpret the statutory provision was justified by using a canon of the doctrine of incorporation formulated in the Australian High Court case of *Burns Philip Co v Nelson and Robertson* and by Lord Diplock in *Solomon v Customs and Excise Commissioners.*[91] The judicial dicta of these cases as noted previously in this article provides the necessary latitude to the judiciary when faced with competing propositions, to resort to the provisions of a treaty to interpret a statute by imputing to the legislature a presumption of acting in accordance with

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[86] 1995 (6) BCLR 665 (cc)
[87] [1999] ICHRL 83 (26th May 1999)
[88] [1988]1 SLR 46
[89] [2000]1 SLR 387
[90] See supra note 89
[91] (1967) 2 Q.B. 116

international law in the context where the statue whether implicitly or expressly seeks to incorporate a treaty into domestic law.

Similarly in *Weerawansa V AG*, Justice Mark Fernando, held that the petitioner's fundamental rights protected by article 13(2) of the Sri Lankan Constitution had been violated by reason of non production before a judicial officer subsequent to deprivation of his liberty on the basis of an executive detention order issued by Minister of Defence in terms of section 9(1) of the Prevention of Terrorism Act of 1979.

One of the propositions propounded by him in arriving at this conclusion was that;

> *a State must .... respect international law and treaty obligations in its dealings with its own citizens, particularly when dealing with its own citizens, particularly when their liberty is involved. The State must afford to them the benefit of the safeguards which international law recognizes.*

He cited Article 27(15) of the Sri Lankan Constitution, which requires the State to "endeavor to foster respect for international law and treaty obligations in dealing among nations."

As such, Justice Fernando stated that the court must take into account Sri Lanka's treaty obligations under the ICCPR, which includes giving effect to rights guaranteed by Article 9 of the ICCPR, when interpreting the provisions of the constitution as well as statutes.

However, these pronouncements conflict with the position taken by the Supreme Court in its determination[92] in regard to the proposed nineteenth amendment to the Constitution. The Supreme Court specifically held in the latter case that, provisions of Article 27(15) would not be a bar to the legislature to enact legislation which is inconsistent with Sri Lanka's international obligations.

IV. SUBSTANTIVE FAILURES OF SRI LANKA'S CONSTITUTIONAL PROTECTION OF FUNDAMENTAL RIGHTS IN THE LIGHT OF ICCPR OBLIGATIONS AS IDENTIFIED BY THE HUMAN RIGHTS COMMITTEE

EXCLUSION OF PRIVATE ACTS FROM JUDICIAL REVIEW; FAILURE TO GIVE HORIZONTAL EFFECT TO CONVENTION RIGHTS

The duties of performance incumbent upon state parties under ICCPR Article 2 is not restricted to giving vertical effect to the provisions of the Covenant but also includes ensuring their horizontal effect.

In other words, ICCPR Article 2 stipulates that the protection afforded to rights guaranteed under the Covenant be not only extended to violations by states or state officials but also to acts which are purely private in character.[93]

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[92] S.C. Determination No.32/2004

[93] Nowak, Manfred. pp 37,para 20, *Commentary on the U.N. Covenant on Civil and Political Rights*, Kehl am Rhein: N.P. Engel

This requirement is highlighted in several provisions of the ICCPR, articles and the jurisprudence of the treaty monitoring body in form of general comments as well as decisions under the optional protocol.[94]

For example, the Human Rights Committee's general comment 16 elaborating on the obligations to protect the right to privacy states that;

> *The gathering and holding of personal and other devices, whether by public authorities or private individuals or bodies must be regulated by law. Every individual should be able to ascertain which public authorities or private individual or bodies control their files.*

Similarly in the case of *Herrea Rubio v Colombia,*[95] a case under the optional protocol, which involved the question whether, the Columbian government was responsible for the kidnapping and murder of the parents of a suspected guerrilla, the Human Rights Committee held the government responsible despite the fact that a judicial investigation had concluded that the military had not been involved in the murder. It did so on the basis that this investigation was not adequate in light of the duty to ensure rights pursuant to ICCPR, Article 2.

Despite clearly being obliged to give horizontal effect to the provisions of the Covenant, the issue is whether our current legal framework (purporting, as maintained by the State to fulfill Sri Lanka's obligations under the Covenant), provides an effective remedy for violation of rights protected by the Convention by acts, which are purely in private in character.

Article 126 of the Sri Lankan Constitution vests the Supreme Court with original jurisdiction in respect of fundamental rights.[96] However, it provides a remedy only in instances where there is an infringement or imminent infringement of fundamental rights as a consequence of administrative or executive act or acts. No specify remedy is available when violation is due to a purely private act.

Defining the ambit and the character of the jurisdiction vested in it by Article 126 of the Constitution and the right given by Article 17 of the Constitution to every individual to invoke this jurisdiction where there is an infringement or imminent infringement of fundamental rights, the Supreme Court has stated that it is an exclusively a public law remedy[97] and as such the relief granted by it is also is principally against the state.

Furthermore it has stated that relief is granted against state officials where there is either an express use of official authority or the action is a result of use of implied authority. The only exception to this rule recognized by the Supreme Court is where the infringement of Fundamental Rights arises as a consequence of state inaction

In *Mohamed Faiz v AG,*[98] Perera J held that responsibility for violation of fundamental rights would extend to a respondent who has no executive status but is proved to be guilty of impropriety,

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[94] Clapham, A., *Human Rights in the Private Sphere,* (Oxford, Clarendon press,1993), pp 107-112

[95] Communication no 161/1983

[96] Article 126 of the Sri Lankan Constitution states " The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to this infringement or imminent infringement by executive or administrative action of any fundamental right or language right declared and recognized by Chapter III or Chapter IV"

[97] Per Sharvananda J in *Mariadas Raj v A.G and another* FRD(1) 180, pp 228-229

[98] (1995) 1 SLR 372

connivance or any such conduct with the executive in wrongful acts violative of fundamental rights. Similarly, Fernando J stated in the same case that the act of a private individual would be amenable to judicial scrutiny if such act is done with the authority of the executive. Thereby, the Court transformed an otherwise purely private act into executive or administrative action.

Despite the ossified view that the protection for the rights guaranteed by Chapter III of the constitution is primarily against violation by the state or its officials acting in an official capacity i.e a remedy in public law, Fernando J in *Saman v Leeladasa*[99] sought to extend its scope to instances where the infringement is a result of an act which is purely private in character by articulating the view that the liability of the State is not one of primary liability but arises from liability as a master for an act done by a servant; in other words, based on the principles of vicarious liability.

The significance of this reasoning is that it allows for the creation of a constitutional delict, which has the effect of providing a remedy for infringement of human rights by non-state or private actors.[100] In fact, Fernando J stated that Article 126 of the Constitution only ousts the jurisdiction of all Courts and tribunals, other than the Supreme Court, to go into the question of infringement of fundamental rights by "executive or administrative action."[101] However, this view advanced by Fernando J was departed from by Amerasinghe J in the same case who preferred to treat fundamental rights as a *sui generis* remedy created by the Constitution and not through linkage to a delictual action.

The preceding analysis demonstrates the manner in which the constitutional protection afforded to fundamental rights fails to give horizontal effect to provisions of the Covenant. Hence, it is necessary to examine whether such horizontal effect is given effect to by the way of a parallel remedy in the common law based on principles in delict. In fact, the Human Rights Committee in *E.H.P v Canada,*[102] a decision under the optional protocol, held that a remedy in form of tortious damages would constitute an effective remedy to fulfill a state party's obligations under article 2(3) of the Convention.

The common law of Sri Lanka, which is the Roman Dutch law, recognizes two basic delictual actions in the form of the *Aquilian action* and *Actio Injuriarum.*[103] It is within the framework of the principles of these actions that horizontal effect can be given to the provisions of the convention through a parallel remedy. While in the case of a *Aquilian action,* it would require the proof of wrongful acts either in the form of omissions, negligence (cupla) or intentional wrongdoing (Dolus) and the resulting patrimonial loss, in the instance of an action based on *Actio Injuriarum*, the intentional infringement (animus injuriandi) of interests connected with person, dignity or reputation needs to be proved.[104]

If the existence of these elements can be shown, both the *Aqulian action* and *Actio Injuriarum* can take the form of a parallel remedy that protects the bodily security and the integrity of a person.[105] Thus, deliberate physical assault or torture, acts of sexual violence, interference with a person's liberty and the freedom of movement are actionable under both the *Aquilian action* as well as the

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[99] (1989) 1 SLR 1

[100] S.W.E Goonesekere, *Fundamental Rights and the Law of Delict* in A.R.B. Amerasinghe and S.S. Wijeratne ed, *"Human Rights, Human Values and the Rule of Law", Essays in Honour of Deshamanya H.L. de Silva, President's Counsel,* (Colombo, Legal Aid Foundation, 2003)

[101] See supra note 100

[102] Communication no 67/1980

[103] See supra note 101 pp 53

[104] J.C. Macintosh and C. Norman- Scoble, *Negligence in Delict,* 3rd ed. (Juta, Cape Town, 1947), pp 4

[105] See supra note 106

Actio Injuriarum.[106] Nevertheless, the challenge arises in giving horizontal effect to provisions of the ICCPR which prohibit discrimination, within the framework of core norms of delict.

Although, the right to be protected against discrimination is subsumed within the concept of every individual's inherent right to be treated with dignity or the right to be protected against the impairment of one's dignity, there is no authority to support the proposition that it would encompass obligations incumbent upon the a state party under the ICCPR to protect against discrimination.

The law as it presently stands in relation to the principles of *actio injuriarum* that protects a person against interference or violation against his or her interest in *dignitas,*[107] would only recognize a remedy against discrimination either if it is overt conduct which would amount to degrading or humiliating treatment or if it is an act or omission relating to the interference with the sanctity of marital relations, person's right to use and enjoy property including the right to use public property or violation of an individual's privacy or a person's statutory right or a right in contract.

However, the General Comment of the Human Rights Committee on non-discrimination states that;

> *the Committee believes that the term, discrimination, as used in the Convention should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.*[108]

Thus subtler forms of discrimination which amount to giving preference or a making distinction as opposed to outright exclusion or restriction could not be accommodated within the principles of *actio injuriarum* as it presently stands. A similar fate would befall in regard to conduct which only impair as opposed to nullify, the enjoyment of rights. Moreover, implicit in the fulfilling of a state party's obligations in affording protection against discrimination, is the according of recognition to the concept of reverse discrimination. Since such a concept is alien to the principles of *actio injuriarum*; it could not constitute an effective method of giving horizontal effect to the provisions of the Covenant.

EXCLUSION OF JUDICIAL ACTION FROM CONSTITUTIONAL REDRESS

Restricting remedies to only administrative or executive action has the result of depriving individuals of an effective remedy in regard to acts of judicial authorities that violate provisions of the ICCPR.

At present, judicial authorities could be held accountable for their acts which violate fundamental rights protected by the Constitution, only if those acts are found to be administrative in nature as opposed to being judicial, in that "if the person making the order was not fulfilling the functions and duties proper to an officer appointed to administer the law, viz, to form and pronounce an independent opinion on a matter placed before him, he cannot be said to be acting judicially"….. "

> …. *where a judge has abdicated his authority, for example by complying with or acceding to or acquiescing in proposals made by police officers and acting in concert*

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[106] *Ibid*
[107] C.F. Amerasinghe, *Defamation and other aspects of the Actio Iniuriaum in Roman Dutch Law*, (Lake House, Colombo, 1968), pp 226
[108] General Comment 18 para 1 (HRI/GEN/1/Rev.6) pp 146

with them, consenting rather than assenting, he would not, in my opinion, be acting judicially: it may be the act of an officer appointed to perform judicial duties and functions, but it would not be a 'judicial act.[109]

Thus, in *Joseph Perera vs AG,*[110] the Supreme Court held that the petitioner's fundamental rights protected by Article 13(2) of the Constitution was violated by a magisterial order issued under the emergency regulations detaining the petitioner, even though the police had not produced any material to justify such an action.

Similarly, the Supreme Court in *Weerawansa vs AG,*[111] held that the petitioner's fundamental rights guaranteed by Article 13(2) of the Constitution was violated as a result of the magistrate detaining the petitioner in a context where there was a patent want of jurisdiction.

Despite these judicial forays into some degree of liberalism in holding actions of magistrates accountable, the exclusion of judicial acts from the fundamental rights jurisdiction of the Supreme Court has had the cumulative effect of depriving individuals of an effective remedy where acts of judicial officers are concerned.

This is particularly evident in respect of acts of the Supreme Court where a person is punished for contempt of court. Unlike other courts, acts of the Supreme Court cannot be called into question either by way of appeal or by way of revision due to the fact of it being the final court of appeal. As such, any acts of the Supreme Court, which are in violation of basic guarantees of rights, cannot be remedied. Powers of revision that could be exercised by the Court have not been used substantively for this purpose.

Similarly, where a person is punished for contempt of court, no remedy is available even though the manner in which charges were framed and the trial conducted could have been in blatant violation of human rights norms protected by domestic constitutional standards as well as by the Covenant.[112]

The law relating to offence of contempt of court as it presently stands in Sri Lanka, does not provide a right of appeal as in the usual case of criminal convictions nor does it subscribe to the procedural norms that are obligated to be adhered to in any criminal trial by the Covenant.[113]

Moreover, the current law effectively subordinates the right to freedom of expression guarantee in Article 14(1) of Sri Lanka's Constitution to the untrammeled use of contempt laws by the courts. This is opposed to the converse position set out in the ICCPR which accords primacy to the substantive right of free speech and imposes restrictions only as exceptions to the same, calling upon all states meanwhile to ensure a similar treatment in their domestic laws.

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[109] per Amersinghe J in *Farook v Raymond* (1996) 1 SLR 217

[110] (1992) 1 SLR 1999

[111] see supra note 91

[112] Dr J de Almeida Guneratne & Kishali Pinto- Jayawardena, *Contempt of Court- The Need for Substantive Cum Procedural Definition and Condification of the Law in Sri Lanka*, a study done for the National Human Rights Commission of Sri Lanka, published also in Volume 14 LST Review, Issue 200, pp1

[113] *Ibid.* See also very particularly, the decision of the Human Rights Committee in *Tony Michael Fernando vs Sri Lanka* (Communication No 1189/2003 – Adoption of Views by the United Nations Human Rights Committee – 31, March, 2005) where it was decided that the committal of lay litigant Anthony Michael Fernando to a term of one year rigorous imprisonment for contempt of court by Sri Lanka's Supreme Court violated his right not to be arbitrarily deprived of his liberty in terms of ICCPOR, Article 9(1). The Committee directed Sri Lanka to make such legislative changes as are necessary to avoid similar violations in the future.

RESTRICTIVE TIME LIMITS FOR FILING FR PETITIONS

The Human Rights Committee in its concluding observations in regard to the fourth and fifth combined periodic reports of Sri Lanka, stated that;

> *It considers that a limitation of one month to any challenges to the validity or legality of any "administrative or executive action" jeopardizes the enforcement of human rights, even though the Supreme Court has found that the one-month rule does not apply if sufficiently compelling circumstances exist.*[114]

Article 126(3) of the Constitution stipulates that when an individual alleges that his or her fundamental right or language right has been infringed or is about to be infringed by the executive or administrative action, he or she must apply to the Supreme Court within one month upon the alleged infringement. The Supreme Court has given a relatively strict interpretation to this rule.[115]

The only exception to the adherence to the one-month rule is in a situation where the principles of *lex non cogit ad impossiblia* would apply.[116] That is where a person has been denied access to justice owing to no fault of his own. However, the Supreme Court has held that this principle is applicable only to cases where a would be petitioner has been held in detention in conditions in which he had not been "afforded that amount of facilities, time and freedom that is reasonably excepted by the law", so as to enable him to discuss his case and instruct counsel.[117]

The restrictive time limit imposed has the effect of breaching Sri Lanka's obligations under the Covenant by removing the element of "effectiveness" from the constitutional remedy. Given the high cost involved in litigation, if a person pursues an administrative remedy before invoking the fundamental rights jurisdiction of the Supreme Court but has been unable to come before the Supreme Court within the one month period due to the delay on the part of the administrative body in disposing of his appeal to them, the narrow interpretation given by the Supreme Court would have the effect of denying him justice.

Indeed as pointed out by one writer;

> *to require a poor peon in, say, the Assistant Government Agents office in the remote Panama Pattuwa or Mannar Islands, to seek his remedy in the Supreme Court when he can obtain redress by the simple exercise of addressing a letter to the Public Service Commission is, to put it mildly, unreasonable.*[118]

V. EXAMINING THE REDRESS PROVIDED BY THE HUMAN RIGHTS COMMISSION OF SRI LANKA IN THE CONTEXT OF THE ICCPR.

OVER EMPHASIS ON CONCILIATION AND MEDIATION TO PROVIDE REDRESS

The Human Rights Committee, in making its concluding observations in regard to the fourth and fifth combined periodic reports of Sri Lanka, stated that;

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[114] See CCPR/C/SR. 2156 para 7
[115] Jayampathy Wickramaratne, *Fundamental Rights in Sri Lanka*, (Colombo,Navarang. 1996), pp 459- 461
[116] per Ranasinghe J in *Edirisuriya v Navaratnam* (1985) 1 SLR 100
[117] *Navasivayam v Gunawardena* (1989) 1 SLR 293 and *Saman v Leeladasa* (1989) 1 SLR 1
[118] *Supra* note 120 pp 461

The capacity of the National Human Rights Commission to investigate and prosecute alleged human rights violations should be strengthened.[119]

The underlying rationale for this statement is found in the provisions of the Human Rights Commission Act, No 21 of 1996, (hereafter the Human Rights Commission Act) which places emphasis on mediation and conciliation in preference to prosecution to provide redress for violation of human rights.[120]

As shown previously, the Human Rights Committee has identified the existence of a deterrent effect[121] as an essential feature of any remedy which meets standards of efficacy required under article 2(3) of the Covenant.

However, the alternative report submitted to the Human Rights Committee by the Asian Legal Resource Center and the World Organisation Against Torture aptly demonstrates that the lack of a public prosecutor's department specially to deal with cases of human rights violations, has brought about a pervasive culture of impunity and a perception of inertia in making human rights violators accountable for their actions.[122]

Indeed, the non-availability of powers of prosecution to the Human Rights Commission, which is the principal governmental body charged with protecting and promoting human rights in the country not only reinforces the problem of impunity and inertia but also undermines the credibility of the Human Rights Commission as an effective remedy in the eyes of the public.

Hence, the credibility and efficacy of the Human Rights Commission would be enhanced if it is given powers to investigate and prosecution similar to that of the Commission to investigate Allegations of Bribery or Corruption.

Section 11 and 12(1) of the Commission to Investigate Allegations of Bribery or Corruption Act No 19 of 1994, gives the Director General of Bribery the powers to prosecute and indict individuals for transgressing the provisions of the Bribery Act.

Similar powers could be bestowed upon the Human Rights Commission, either on the substantive body itself or on a special executive officer created through a post of a Director General. The power of the Commission to conduct successful investigations needs to be strengthened by empowering the Chairman of the Commission to direct the Inspector General of Police to provide the required officers and facilitates to conduct its investigations and carry out other functions.

When doing so, the Human Rights Commission should be given the powers of selecting officers of its choice and also the power to direct the authorities to recruit individuals for the exclusive purpose of working for the Human Rights Commission. This would enable the Commission to train or recruit officers with specialized skills required for investigating human rights violation.

These officers should be responsible and answerable only to the Human Rights Commission. The Human Commission should be given the power to frame departmental orders concerning the functions and the manner of discharging the duties of these officers. Under the 17th Amendment, Articles 104C

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[119] See *Supra* note 115 para 10
[120] See sections 15(3) and 16
[121] See supra note 30
[122] 14 LST Review, ISSUE 192 & 193, pp 52

(1) and 104C (d) of the Constitution gives the (not yet constituted) Election Commission similar powers.[123]

PROVISIONS UNDERMINING THE INDEPENDENCE OF THE COMMISSION BY ALLOWING REGULATIONS TO BE DETERMINED BY MINISTERIAL FIAT

Sections 31 and 34 of the Human Rights Commission Act allow the Minister to make regulations in regard to the conduct of investigations by the Commission. Allowing a politician to make regulations would undermine the Commission's credibility particularly its ability to be perceived as impartial in the conduct of its investigations.

Indeed the prevalence of the perception of impartially in the execution of its functions is an essential factor for the Human Rights Commission to operate as an effective protector of human rights.[124] The provision should be repealed.

LIMITATIONS OF POWERS OF THE COMMISSION IN REGARD TO PROTECTION OF RIGHTS OF DETAINEES

Section 11(d) only allows the Commission to make recommendations on improving the conditions of detention of detainees.[125] This should be replaced with a provision allowing the Commission to make mandatory recommendations that attract penal sanction in the event of failure to implement.

OBLIGATION TO ESTABLISH SUB-COMMITTEES OF THE COMMISISON RESTRICTED TO PROVINCIAL LEVEL

Section 11(b) only obligates the Commission to have sub committees at provincial level.[126] However, reportedly, there is no Human Rights Commission office in the Sabaragamuwa Province. In a country with a population of 19 million, obligating the Commission to devolve its powers to sub committees at a provincial level and not even to a district level would indeed undermine its effectiveness. Hence the Commission should be obligated to operate sub-committee at least at a district level.

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[123] Whilst 104C(1) states "Upon the making of an order for the holding of an election or the making of a Referendum, as the case may be, the Commission shall notify the Inspector General of Police of the facilities and the number of police officers required by the Commission for the holding or conduct of such election or Referendum, as the case may be" section 104(d) states " It shall be lawful for the Commission upon the making of a Proclamation requiring the conduct of a Referendum, as the case may be, to make recommendations to the President regarding the deployment of the armed forces of the Republic for the prevention or control of any actions or incidents which may be prejudicial to the holding or conduct of a free and fair election or Referendum, as the case may be"

[124] see supra note 127

[125] Section 11 (d) states "For the purpose of discharging its functions the commission may exercise any or all of the following powers-

(d) Monitor the Welfare of persons detained either by judicial order or otherwise, by regular inspection of their places of detention, and to make such recommendations as may be necessary for improving their conditions of detention" also see sections 28(1),(2) and (3)

[126] Section 11 (b) states "For the purpose of discharging its functions the commission may exercise any or all of the following powers-

(b) appoint such number of subcommittees as provincial level, as it considers necessary to exercise such powers of the commission, as may be delegated to them, by the commission under this Act

POLICE OBLIGATION TO INFORM THE COMMISSION OF DETENTIONS RESTRICTED ONLY TO EMERGENCY LAWS

Section 28(1) of the Human Rights Commission Act only obligates the security service officers or the police to inform the Commission of the details of persons arrested under the Prevention of Terrorism Act or in terms of regulations made under the Public Security Ordinance.

Police officers are not obligated to inform the Commission of any arrest made generally by them. Indeed this has undermined the Commission's ability to proactively prevent and deter torture and illegal arrests. Hence, in order to enhance the efficacy of the Commission, the police must be obligated to inform the Commission of each and every arrest and detention. Moreover, the police should be obliged to have a hotline to the nearest Human Rights Commission office to enable the victim or a relative to inform the Commission of the arrest. The Commission officers should be allowed to be present at the time of interrogation to ensure that the arrested person is not tortured or subjected to degrading treatment.

INADEQUATE OVERSIGHT OF THE ACTIVITIES OF THE COMMISSION

Oversight of the Commission's work is supposed to be done by Parliament through scrutinizing the Commission's annual report.[127] However, no prominence is given to the publication of the report by the Commission, which is in any event always delayed. More importantly, examining and debating the contents of the Commission's report is not accorded high priority within the House itself. This has to be remedied.

VI. CONCLUSION

As shown previously, ICCPR, Article 2 imposes a duty upon state parties to ensure, an obligation to prohibit discrimination in the implementation of the Covenant and to provide for an effective remedy against violations of rights guaranteed by the Covenant.

However, as this paper clearly demonstrates, Sri Lanka is in default of these obligations for a myriad of reasons. Indeed, none of these reasons, (which are basically contraventions on the part of the internal laws), can be invoked as justification by a state party for the failure to perform a treaty obligation according to international law.[128]

Firstly, the State has failed to fulfill the obligation to prohibit discrimination in the implementation of the convention by virtue of the fact that Articles 12 and 14 of the Sri Lankan Constitution makes a distinction on the basis of citizenship in affording protection to rights enumerated by it. This is despite an express pronouncement by the Human Rights Committee in its general comments barring the making of such a distinction. Only an amendment to the respective articles of the Constitution affording protection to the rights enumerated in it, *sans* any distinction on citizenship, would have the effect of fulfilling Sri Lanka's obligations of prohibiting discrimination in the implementation of the Covenant.

Secondly, in addition to not complying with the requirement of prohibiting discrimination in the implementation of the Covenant, Sri Lanka has also failed in its obligations under Article 2 of the ICCPR to give effect to the provisions of the Covenant.

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[127] See section 30

[128] See article 27 of the Vienna Convention on the Law of the Treaties

This is due to the fact as shown previously, Article 16(1) of the Sri Lankan Constitution gives retrospective validity and immunity from judicial review to laws that are inconsistent with fundamental rights protected by the convention. In order to fulfill its obligation under the Covenant, Sri Lanka would have to amend its Constitution allowing the judiciary to invalidate statutory provisions, which are inconsistent with the provisions of Chapter Three of the Constitution.

However, as shown above, a constitutional amendment which is in keeping with the dualist doctrine, (the method of incorporation of international law into domestic law employed by Sri Lanka), would not be able to meet the requirements of Article 2 of the ICCPR as most often, it is a one off process of incorporation of international law that does not create the space to take into account the subsequent jurisprudential developments of the Committee.

The method of direct incorporation of international law into domestic law or monist doctrine has been prescribed as a solution to the challenge of ensuring that domestic statues conform to the requirements of the provisions of the ICCPR by its treaty monitoring body, the Human Rights Committee. However, as stated previously, not only does it fail to provide a remedy but it also has the potential of being the cause of further problems.

On a normative level, application of the monist doctrine is rejected for the reason that it could allow for the creation of a democratic deficit as it has the potential of allowing the executive to accrue to itself powers, which are beyond legislative scrutiny.

Moreover, in the context of Sri Lanka's obligations under Article 2 of the ICCPR, subscription to the monist doctrine would entail a constitutional amendment, which would have the effect of altering the balance of power of the three organs of the government as presently reflected in the Sri Lankan Constitution. According to the Supreme Court's determination in *Re the Nineteenth Amendment to the Constitution,*[129] such an amendment would need to be passed by two-thirds majority of the members of parliament in addition to being approved by the general public at a referendum in terms of article 83 of the Constitution.

Similarly on an empirical level as shown previously, from the Rwandan experience and the Dutch Supreme Court's reluctance to invalidate statutes on basis of being inconsistent with international law, mere adherence to the monist doctrine does not necessarily guarantee enhanced protection of human rights.

In contrast to the dualist and monist doctrines, the doctrine of incorporation seems to provide the paradigm for Sri Lanka to fulfill its obligations under article 2 of the ICCPR. Given that its application is primarily based upon on rules of statuary interpretation enjoining courts to interpret statutes in congruence with international law as opposed to invalidating a statute on the basis of its inconsistency with international law according to the requirements of the monist doctrine, a constitutional amendment giving effect to the canons of the doctrine of incorporation would not have the effect of altering the balance of power between the organs of government as it its reflected in the Sri Lankan Constitution.

Interpretation of a particular legislation to give effect to the intention of the legislature, which in the case of the application of the doctrine of incorporation would mean interpreting statutory provisions commensurate with international law, would be completely immanent to the power bestowed upon the judiciary by Article 3 read together with Article 4 of the Constitution. Indeed interpretation of statutory provisions lies exclusively within the province of judicial power.

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[129] *Supra*, note 60

Similarly, the central role assigned to the judiciary by the doctrine of incorporation in the application of international law into the domestic legal system means that the adjudicative body is possessed of competing interpretations when interpreting treaty provisions. It would also allow for the courts take cognizance of the subsequent jurisprudence of a treaty monitoring body. Thus, the doctrine of incorporation would be able to cure the maladies that plague the dualist doctrine in giving effect to the provisions of Article 2 of the ICCPR.

An interpretation clause akin to Section 3 of the Human Rights Act of the United Kingdom or Section 39 of the South African Constitution would be able to achieve this goal. Accordingly, as manifested by the English case of *R v A (No 2)* [130] as well as in the example of Section 39(1)(b) of the South African Constitution such an interpretation clause would compulsively enjoin the judiciary to offer interpretations of statutory provisions that are congruent with Sri Lanka's obligations under Article 2 of the ICCPR. The present formulation of Article 27 (15) though used by the courts in some instances for that purpose[131] may be strengthened in that context.

Given that such a constitutional interpretation clause would make it imperative upon courts to expand the frontiers of constitutional protection of human rights, it could provide the necessary interpretive tool and incentive to expand the law relating to *injuria* arising from the violation of *dignitas* to include the obligation to prohibit discrimination.

Furthermore, it could provide the judiciary with the support needed to engage in increased liberal interpretations of the constitutional provisions relating to the time limits for filing fundamental rights petitions under article 126 of the Constitution. A further constitutional amendment would be needed to fulfill the obligation to "ensure" in relation to judicial acts since judges should be specifically made accountable for actions, which violate rights as enumerated in the Covenant.

In the case of the Human Rights Commission of Sri Lanka as identified previously, it fails as a remedial mechanism to meet the standards efficacy stipulated in article 2(3) of the ICCPR in several respects. Various suggestions have been made in this paper as to the manner in which the lacunae in the enabling Act could be cured.

In sum, it is apparent that much greater commitment needs to be evidenced by the Sri Lankan State in demonstrating its adherence to ICCPR, Article 2. Periodic presentation of reports and cosmetic commitment to the repeated concluding observations of the Human Rights Committee as to the manner in which Sri Lanka should ensure compliance, clearly will not serve as good practice for the future.

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[130] *Supra*, note 86
[131] *Supra*, note 89

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