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THE 17TH AMENDMENT TO THE CONSTITUTION

NOISE POLLUTION IN SRI LANKA

BANGLADESH'S RIGHT TO INFORMATION DRAFT LAW

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Editor's Note ... ...

In continuation of the Review's focus on due implementation of the 17th Amendment to the Constitution, this Issue publishes a thoughtfully researched paper on Sri Lanka's Constitutional Council, written by *Elaine Chan* for the *Sri Lanka Democracy Forum*. Earlier publications on various aspects of the 17th Amendment have included 'The Interim Report of the Parliamentary Select Committee on the 17th Amendment' which was published in Volume 18 Issue 238 August 2007.

In this instant critique, the author observes that "The gradual and eventual breakdown of the 17th Amendment – the non-appointment of members to the Constitutional Council, as well as the compromising of the independence of key commissions and important public offices – is largely the casualty of a lack of political will from all quarters of the political spectrum. "

This is an assertion in regard to which there is rare public consensus in Sri Lanka. Indeed, the fate that has befallen the 17th Amendment has become one of the country's most significant constitutional tragedies in current times. The concern evidenced and efforts taken by professional organisations and members of the public to restore this constitutional amendment to its full functioning have not resulted in any change of heart by the political executive. Such clear violation of constitutional imperatives brings with it immediate negative consequences.

As the author notes;

> "Undeniably, the Government faces a very difficult situation with the prolonged armed insurgency carried out by the LTTE. Yet, it has a higher responsibility to ensure that there is no abuse of its own power. Moreover, it is in the Government's interest to safeguard and promote the human rights of its citizens for it can only serve to increase its credibility and support against the LTTE. The 17th Amendment, and the Constitutional Council that comes out of it, is a valuable means by which a measure of accountability can be demanded from State actors, and has the potential to bring about State reform, to promote the rule of law and to nurture democratic processes."

The second discussion paper that the Review publishes in this regard is by ***Basil Fernando***, who examines the fallacy of similarities being drawn between Sri Lanka's 1978 Constitution and France's Gaullist Constitution in the general context of the

authoritarian spirit that pervades Sri Lanka's constitutional structure. His conclusion that the Executive President must be held responsible for the current impasse regarding the Constitutional Council is unequivocal.

The Review also publishes a recent judgment of the Supreme Court on noise pollution as well as Bangladesh's draft Right to Information Ordinance. It is of note that Bangladeshi activists made a large contribution to the compilation of this draft which was in the making since 2005.

In this regard, it is extremely unfortunate that the draft Right to Information law in Sri Lanka, worked upon in 2003 by a committee consisting the then Attorney General, the then Secretary to the Ministry of Justice, the then Legal Draftsman, representatives of the media and academia has been relegated to the ranks of obscurity.

As in the case of the 17th Amendment, here too, lack of political will has resulted in the non adoption of a measure that would have contributed to the strengthening of public accountability and responsible governance. This, it seems, is a persistent feature of public administration today.

Kishali Pinto-Jayawardena

SRI LANKA'S CONSTITUTIONAL COUNCIL

Elaine Chan[*]

1. BACKGROUND TO THE 17TH AMENDMENT

A. The 1978 Constitution

The legacy of the Executive Presidency bequeathed by the late J. R. Jayewardene is entrenched in and evident from Chapter VII of the Constitution of the Democratic Socialist Republic of Sri Lanka. The President is "the Head of State, the Head of the Executive and of the Government, and the Commander-in-Chief of the Armed Forces"[1]. He or she is elected directly by the people and holds office for a maximum of two six-year terms.[2] The President is consequently a fixed executive and is not removable from office except for the reasons stipulated in Article 38(2) of the Constitution, and is empowered to appoint his or her own Cabinet of Ministers as well as determine its numbers.[3]

The end-product of the 1978 constitutional revision was the institutionalisation of a powerful executive that is not responsible to the legislature during the period of time the former is in office. Such concentration of power has unsurprisingly led to the abuse of power, and contributed to the atrophy of the rule of law and the erosion of democracy.

In the context of communal violence and a civil war that has engulfed the country, particularly during the period between the late 1980s and early 1990s[4], increased powers given to the police and the security forces during states of emergency have encouraged the use of torture by law enforcement officials, and led to increased incidences of abductions, enforced disappearances and extra-judicial executions. As State-linked violence became more prevalent in the face of rising LTTE militancy, other State institutions that are meant to be protecting the rights of victims – the Attorney General's Department and the judiciary – were systematically weakened. State actors tasked with enforcing the law carried out human rights abuses with impunity.

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[*] Elaine Chan is a researcher and wrote this paper at the invitation of the Sri Lanka Democracy Forum

[1] Constitution of the Democratic Socialist Republic of Sri Lanka, Article 30(1).

[2] Constitution of the Democratic Socialist Republic of Sri Lanka, Articles 30(1) and 32(1).

[3] Constitution of the Democratic Socialist Republic of Sri Lanka, Article 44.

[4] The signing of the Indo-Lanka Accord in 1987 provided the Sinhala nationalist Janatha Vimukthi Peramuna ('JVP') party with an excuse to instigate an armed insurrection against the Government for capitulating to an Indian presence in the North and the East. Its tactics aimed at undermining State authority and instilling fear among the general populace included killing politicians, political activists from main stream political parties, individual members of the police and armed forces, as well as those labelled as 'traitors' or 'enemies'. At the same time, the Liberation Tigers of Tamil Eelam ('LTTE') launched a military campaign against the Indian Peacekeeping Force ('IPKF') in the North East for what they considered to be a betrayal, and to seize control of territory in the area. During this period, thousands were extra-judicially executed and disappeared.
See: Elizabeth Nissan, *Historical context*, August 1998, "Demanding sacrifice: War and negotiation in Sri Lanka" (Jeremy Armon and Liz Philipson, eds) Accord and Conciliation Resources, available at <http://www.c-r.org/our-work/accord/sri-lanka/historical-context.php>.

B. Passing of the 17th Amendment

Amidst the mire of domestic political instability and widespread perception of poor governance in a turbulent year,[5] President Chandrika Kumaratunga's People's Alliance signed a Memorandum of Understanding with the JVP on 5 September 2001, which stipulated, among other things, the tabling of a constitutional amendment in Parliament that would lead to the establishment of a Constitutional Council and a number of independent Commissions. After much negotiation between the political parties, the 17th Amendment to the Constitution was passed by Parliament on 24 September 2001 and was certified on 3 October 2001. Despite the parties' differing reasons for supporting the bill – the JVP had made good governance demands of the SLFP in a bid to secure a measure of political respectability given its previous bloody insurrection campaigns; the SLFP agreed to those demands primarily to buy time to continue staying in power; and the opposition parties recognised that the setting up of any 'independent' Commission and the appointment of its members could not be left to the Executive President – the 17th Amendment was a creditable attempt at depoliticising public sector appointments, as well as establishing transparency and accountability in public life.

2. STRUCTURE OF THE CONSTITUTIONAL COUNCIL

The 17th Amendment envisages a ten-member Constitutional Council that is apolitical, independent, and which exercises supervision over the appointment of nominees to public offices and independent commissions.

The Constitutional Council consists of three *ex-officio* members who are the Prime Minister, the Leader of the Opposition and the Speaker of Parliament (who is also the Chairperson of the Council).[6]

The other seven members of the Council are "persons of eminence and integrity who have distinguished themselves in public life and who are not members of any political party"[7]. They all hold office for a period of three years from the date of appointment,[8] and any person appointed to fill any vacancy holds office for only the unexpired portion of the term.[9] Five of these seven are joint-

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[5] In April 2001, anti-Muslim riots in Mawanella were suspected to be instigated by local politicians from the President's party, the Sri Lanka Freedom Party ('SLFP'). The Sri Lanka Muslim Congress ('SLMC'), which was part of the People's Alliance, initiated a no-confidence motion against SLFP minister, Mr Maheepala Herath, when it appeared that the party was reluctant to take any action. The President subsequently dismissed from cabinet Mr Rauf Hakeem, who was the SLMC leader and who took this party out of the People's Alliance coalition, which reduced the People's Alliance to a minority in Parliament. Given Sri Lanka's political structure, this would mean the resignation of the Prime Minister and the Cabinet. When the opposition United National Party ('UNP') took the opportunity to table a no-confidence motion against the Government, President Kumaratunga responded by proroguing Parliament and announced that a referendum on the feasibility of a new Constitution would be held. Such an act, whilst constitutionally permissible, was widely denounced as undemocratic. In the context of such political instability, the LTTE launched a deadly attack on Bandaranaike International Airport on 24 July 2001.
See: Jayadeva Uyangoda, *Sri Lanka: Dimensions of a crisis*, 1 October 2001, The Hindu, available at <http://www.hindu.com/2001/10/01/stories/05012524.htm>.

[6] Constitution of the Democratic Socialist Republic of Sri Lanka, Articles 41A(1)(a)-(c) and 41A(2).

[7] Constitution of the Democratic Socialist Republic of Sri Lanka, Article 41A(4).

[8] Constitution of the Democratic Socialist Republic of Sri Lanka, Articles 41A(7) and 41A(9).

[9] Constitution of the Democratic Socialist Republic of Sri Lanka, Article 41A(8). Strictly, the 17th Amendment does not specify that the replacement of a Presidential appointee shall hold office for only the unexpired portion of the former member's term. This is not a deliberate omission, but a mistake due to the haste in which the 17th Amendment was drafted and passed.

nominees of both the Prime Minister and the Leader of the Opposition;[10] the sixth member is nominated upon agreement by a majority of the minority parties in Parliament;[11] and the final member is a Presidential appointee[12]. Three out of the five members selected by the Prime Minister and the Leader of the Opposition are chosen following consultations with party leaders and independent groups in Parliament to ensure representation of minority interests.[13] The President makes the respective appointments upon receipt of a written communication of the nominations.[14]

The powers of the Constitutional Council are twofold. Firstly, it is authorised to recommend appointments to key commissions, which include the Election Commission, the Public Service Commission, the National Police Commission, the National Human Rights Commission and the Commission to Investigate Allegations of Bribery or Corruption.[15] Secondly, it is empowered to approve appointments to a number of important public offices, which include justices of the Supreme Court and the Court of Appeal, members of the Judicial Service Commission, the Attorney General and the Inspector-General of Police.[16] The 17th Amendment emphasises the independent and impartial role of the Council by stipulating that the Executive President cannot make any appointment to any Commission or public office listed in the 17th Amendment without obtaining prior recommendation or approval from the Constitutional Council.[17]

A. Accountability of the Constitutional Council & the Independence of Institutions

It is evident from the composition of the Council that it is not politically accountable and that it intends to represent the interests of all sections of Sri Lankan society. It attempts to draw the composition of vital commissions and public offices away from the politics of government, and is also a significant attempt at deliberately disallowing the President from exercising arbitrary power in making appointments to those positions.

The importance of the independence of such national institutions as the Public Service Commission, the National Human Rights Commission and the National Police Commission as a check on executive power and on political turpitude in a democracy cannot be sufficiently emphasised. This has particular bearing on the context of Sri Lanka given that there is such a concentration of power in the Executive Presidency, and that the conflict situation has resulted in the declaration of a protracted state of emergency with the suspension of certain constitutional safeguards. The danger of the abuse of power and the risk of poor governance are very real,[18] both of which point towards the pertinence of the 17th

[10] Constitution of the Democratic Socialist Republic of Sri Lanka, Article 41A(1)(e).
[11] Constitution of the Democratic Socialist Republic of Sri Lanka, Article 41A(1)(f).
[12] Constitution of the Democratic Socialist Republic of Sri Lanka, Article 41A(1)(d).
[13] Constitution of the Democratic Socialist Republic of Sri Lanka, Article 41A(3).
[14] Constitution of the Democratic Socialist Republic of Sri Lanka, Article 41A(5).
[15] Constitution of the Democratic Socialist Republic of Sri Lanka, Article 41B.
[16] Constitution of the Democratic Socialist Republic of Sri Lanka, Article 41C.
[17] Constitution of the Democratic Socialist Republic of Sri Lanka, Articles 41B(1) and 41C(1).
[18] It is noted that the President himself holds the most strategic Ministries of Finance, Defence and Nation-Building. One of the President's brothers, who is Secretary of Defence, is one of the chief architects of the Government's military strategy to the present conflict, and was responsible for the Government's military operation against the LTTE in the East. Another brother is a senior Presidential Advisor who has recently been sworn in as a Member of Parliament; whilst a third sibling holds the portfolios of Minister of Irrigation and Water Management and Minister of Ports and Aviation.

Amendment and the Constitutional Council in imposing and demanding a measure of accountability from State actors.

3. BREAKDOWN OF THE 17TH AMENDMENT

The gradual and eventual breakdown of the 17th Amendment – the non-appointment of members to the Constitutional Council, as well as the compromising of the independence of key commissions and important public offices – is largely the casualty of a lack of political will from all quarters of the political spectrum.

The first Constitutional Council was appointed on 22 March 2002 and its term expired on 21 March 2005. The second Constitutional Council is yet to come into being, stemming from what the Government asserts to be the failure of the minor political parties to nominate the tenth member under Article 41A(1)(f). The JVP claimed that it, being the largest minority party, had the right to nominate Prof. Upali Jayasekara. The Tamil National Alliance ('TNA'), however, rejected the JVP's nominee and insisted that because the JVP contested in the 2004 parliamentary elections under the banner of the ruling People's Alliance, it could not be considered a separate minority party.[19] At this time, the joint nominees of the Prime Minister and the Leader of the Opposition, despite some delay, had already been submitted to the President but no appointments were made.

Two related issues were debated in connection with this impasse. The first was whether the JVP qualified as a minority party in Parliament; and the second was whether all ten members had to be nominated before appointments could be made by the President.

Significantly, with respect to the first issue, the Attorney General submitted the opinion that the People's Alliance (including its alliance parties) and the UNP were major parties, and that the JVP could not join with parties not affiliated with the Prime Minister or the Leader of the Opposition.[20] The Attorney General's views are quite reasonably based on political parties' nomination papers in the preceding elections that make up the constitution of the current Parliament.

When the Speaker of Parliament failed in his capacity as Chairperson to persuade the disputing parties to submit a final nomination for the reconstitution of the Constitutional Council after being asked to do so by the President, the latter exercised his executive powers and directly appointed members to the Public Service Commission and the National Police Commission, allegedly following advice from the Supreme Court.[21] A few weeks later, the President made further appointments to vacancies in the National Human Rights Commission, the Court of Appeal and the Supreme Court in the absence of a functioning Council.

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[19] In June 2005, the JVP left the ruling coalition in protest at government plans for a tsunami aid deal with the LTTE. The opposition UNP subsequently agreed to share control of the Committee on Public Enterprises and the Public Accounts Committee with the JVP.

[20] Kishali Pinto-Jayawardena, *Opting for Political Arrogance and the Defeat of the 17th Amendment*, 28 May 2006, The Sunday Times, available at <http://sundaytimes.lk/060528/columns/focus.html>.

[21] Poorna Rodrigo, *President sidesteps CC, appoints Commissions*, 11 April 2006, Daily Mirror, available at <http://www.dailymirror.lk/2006/04/11/front/3.asp>. It is believed that the advice of the Supreme Court relied on by the President was an earlier opinion about the residual power of the President to make appointments, and was not specifically given in relation to this context.

Many have argued that regardless of the status of the JVP, the President could have resolved the deadlock through more constitutional means by appointing the joint nominees of the Prime Minister and the Leader of the Opposition, to the Council.[22] Indeed, there is no constitutional requirement that all non-*ex-officio* members of the Constitutional Council must be nominated before appointments can be made. Article 41A(5)[23] reads:

> "The President shall upon receipt of a written communication of the nominations under sub-paragraph (e) *or* sub-paragraph (f) of paragraph (1) of this Article, *forthwith*, make the respective appointments." (emphasis added)

If this had been the chosen course of action, there would have been nine members on the Constitutional Council, thus meeting the constitutional requirement for a quorum of six[24] and would have allowed the Council to carry out its mandate. Undoubtedly, this alternative is more in keeping with the spirit of the 17th Amendment that appointments to key Commissions and public offices be kept independent and apolitical.

Having put in place a constitutional process of nominating and appointing members to the Constitutional Council, the Executive President is duty bound to carry out his or her mandate and cannot hold the process up indefinitely. In parallel with appointing the existing nominees, the President should then consult with the Supreme Court as he is empowered to do, pursuant to Article 129(1)[25] of the Constitution, as to which minority party should be entitled to make the final nomination.[26]

The lack of political will of the Government to resuscitate the 17th Amendment is also highlighted by the non-release of the final report of the Select Committee of the Parliament to look into the Operation of the 17th Amendment to the Constitution, despite the submission of its interim report to Parliament on 9 August 2007. The interim report on the whole contains a number of practical recommendations that, if implemented, would resolve some of the procedural issues with the Constitutional Council and

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[22] For example: Civil Rights Movement, *The Constitutional Council must function – a meaningful interpretation needed*, 23 April 2006, available at <http://www.ahrchk.net/statements/mainfile.php/2006statements/495/>.

[23] The Attorney General had advised that all candidates nominated under sub-paragraphs (e) and (f) have to be appointed together because the Sinhala version of Article 41A(5) uses the word "and", rather than "or". It is arguable, however, that one should adopt a purposive reading of the Constitution that is in keeping with the ends and objects of the 17th Amendment, i.e. an interpretation that facilitates the functioning of the Constitutional Council; rather than one that frustrates it.
See: Civil Rights Movement, note 22 above.

[24] Constitution of the Democratic Socialist Republic of Sri Lanka, Article 41E(3).

[25] "If at any time it appears to the President of the Republic that a question of law or fact has arisen or is likely to arise which is of such nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court on it, he may refer that question to that Court for consideration and the Court may, after such hearing as it thinks fit, within the period specified in such reference or within such time as may be extended by the President, report to the President its opinion thereon."

[26] It is noted that the JVP has very recently agreed to a consensus nominee with the other minority political parties to the Constitutional Council after the Organisation of Professional Associations initiated discussions between the parties in Parliament. Whilst this is a much welcomed development in easing the deadlock; the advisory opinion of the Supreme Court should still be sought to clarify the constitutional process to address any future issues.
See: Kelum Bandara, *CC deadlock broken at last – JVP decides on former Audit Chief as its nominee*, 10 January 2008, Daily Mirror, available at
<http://www.dailymirror.lk/DM_BLOG/Sections/frmNewsDetailView.aspx?ARTID=3486>.

would provide a real chance for it to work as intended (see below). The Government has repeatedly stated that it is in the final stages of completing the report even though there does not appear to be good reason for the delay.

Even at its earliest days, a lack of political will in ensuring the effective functioning of the 17th Amendment institutions was evident. President Kumaratunga refused to appoint the Constitutional Council's recommendation for Chairman of the Election Commission on the grounds that the nominee had links to the UNP. Despite the Council's finding of the Presidential objection to be lacking in merit and the nominee being resubmitted to President Kumaratunga for appointment, the President chose not to proceed with the appointment and the Election Commission has never been constituted.

To a certain degree, what appears to be of equal concern is the role the Courts have played in the dismantling of the 17th Amendment; and is symptomatic of the state of the rule of law, which is an essential component of good governance and democracy. In a challenge to the Court of Appeal by the Public Interest Law Foundation regarding the inaction of President Kumaratunga in appointing the Chairman of the Election Commission,[27] the Court held that the President's refusal to appoint the Constitutional Council's nominee fell under the "blanket immunity" conferred by Article 35 of the Constitution.[28] Such a precedent prevents future challenges to direct Presidential appointments to Commissions under the 17th Amendment.[29]

A. National Police Commission

Given the country's history of civil conflict and communal violence, the establishment of the National Police Commission ('NPC') under the 17th Amendment to the Constitution was particularly anticipated. The NPC is composed of seven members[30], and is responsible for the "appointment, promotion, transfer, disciplinary control and dismissal of police officers other than the Inspector-General of Police ('IGP')"[31]. Equally important, it is also mandated to "establish procedures to entertain and investigate public complaints and complaints of any aggrieved person made against a police officer or the police service, and provide redress in accordance with the provisions of any law."[32]

Initially, the NPC delegated the disciplinary control of police officers to the IGP on the basis that it was necessary for the latter to administer his own department. The latter in turn referred the cases either to his subordinates or to a special investigation unit. Given the institutionalised problems within

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[27] *Public Interest Law Foundation v The Attorney General and Others*, CA Application No. 1396/2003, CA Minutes of 17 December 2003.

[28] For a more detailed discussion of the Presidential immunity as interpreted by the Courts, see: Kishali Pinto-Jayawardena, *Offering Constitutional Solutions for the Conflict Amidst Constitutional Anarchy*, 2 July 2006, The Sunday Times.

[29] E.g. The Court of Appeal refused interim relief in two petitions initiated by Avadhi Lanka and CIMOGG Organisations against direct appointments by the President to the National Police Commission and the Public Service Commission.

[30] Constitution of the Democratic Socialist Republic of Sri Lanka, Article 155A(1).

[31] Constitution of the Democratic Socialist Republic of Sri Lanka, Article 155G(1)(a).

[32] Constitution of the Democratic Socialist Republic of Sri Lanka, Article 155G(2).

the police force[33], dealing with disciplinary matters within the policing system itself was at best ineffective. Besides taking on a 'passing the bucket' role, the Commission did not establish any public complaints procedure as required by the 17th Amendment and concerned itself mostly with the filling of vacancies and controversial promotions of officers[34]. Putting in place a public complaints mechanism is especially important because elements within the police force are known to commit human rights abuses against the very people they are tasked to protect.

Despite its disappointing start, the NPC recalled its delegated powers and assumed substantive disciplinary control of subordinate police officers. Notably, it prevented politically motivated transfers of officers in the lead up to elections and interdicted those found guilty of torture under the *Anti-Torture Act* of 1994. Such an assertion of independence on the part of the NPC was, however, met with much political displeasure.

At the end of 2005, the NPC's term of office ended and in the absence of the Constitutional Council, the Cabinet's solution to the issue was to delegate the powers of the Commission to the IGP. Following the impasse regarding the composition of the Constitutional Council, the President made direct appointments to the Commission. The second NPC has since (in 2006) gazetted a Public Complaints Procedure and established a Public Complaints and Investigations Division, although it needs to be much more effective and transparent with the complaints it receives and the investigations it carries out, as well as adopt more stringent disciplinary sanctions towards erring police officers[35].

The integrity and credibility of the NPC are clearly at stake on account of its functioning unconstitutionally. At all times, and even more so at a time of heightened military conflict, the Commission must be politically independent, particularly to hold rogue elements within the police force to account, but more generally to preserve the rule of law and prevent the policing system from succumbing to political pressures.

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[33] The reports of the Soertzs Commission (1946), the Basnayaka Commission (1970), the Jayalath Committee (1995) and the Commissions of Inquiry into the Involuntary Removal and Disappearance of (Certain) Persons collectively trace the deterioration of the Sri Lankan policing system. Briefly, the militarisation of the police force beginning from the 1970s (in response to rising militant Tamil separatism) meant that it was transformed from a criminal investigatory and law enforcement agency to one of riot control and insurgency suppression, which gave rise to opportunities for rampant corruption and abuse of power.
For more detailed discussions on Sri Lanka's police force, see: Kishali Pinto-Jayawardena, *A Stringent Critique of the National Police Commission of Sri Lanka*, paper delivered at sessions on "Police Accountability in Asia" hosted by the Commonwealth Human Rights Initiative, New Delhi, 23-24 March 2007; and Basil Fernando, *Sri Lanka: Police Reform Initiatives within a Dysfunctional System*, in Jasmine Joseph (ed), Sri Lanka's Dysfunctional Criminal Justice System (Asian Human Rights Commission, Hong Kong; 2007), available at <http://www.ahrchk.net/pub/pdf/Dysfunctional_AHRC.pdf>.

[34] E.g. an Assistant Superintendent of Police who vacated this post four years ago was promoted to be Superintendent of Police; another senior officer who had migrated abroad also received promotion. See: Senaka De Silva, *Senior officers to sue Commission*, 5 July 2004, Daily Mirror, available at <http://www.dailymirror.lk/2004/07/05/front/7.asp>.

[35] According to the Public Complaints Procedures, disciplinary action against errant officers will be in accordance with applicable departmental procedures, rather than in accordance with the law.
See: Kishali Pinto-Jayawardena, *An objective look at the NPC's public complaints procedure*, 18 February 2007, The Sunday Times, available at <http://lakdiva.org/suntimes/070218/Columns/focus.html>.

B. National Human Rights Commission

The National Human Rights Commission ('NHRC') was set up prior to the 17th Amendment, but was subsequently brought under it in what can only be interpreted as an attempt to strengthen the institution's independence.

It has quite an extensive list of powers vested under it, the most important of which include the power to investigate any infringement or imminent infringement of fundamental rights[36]; to intervene in[37] and initiate[38] litigation; and to monitor the welfare of detained persons[39]. In addition, it also has very general authority to "do all such other things as are necessary or conducive to the discharge of its functions"[40]. The Commission consists of five members[41], and is authorised to delegate its power to sub-committees[42].

Like the NPC, the work of the NHRC left much to be desired in the first year of it operating as a 17th Amendment institution primarily because of its failure to develop an effective complaint and investigation procedure.[43] Subsequently, however, it began taking a more serious stance on the prevention of torture and began conducting inquiries and making recommendations for prosecution under the *Anti-Torture Act* of 1994 to the Attorney General. The work that the Commission began in this respect was abandoned for a few months after the terms of the Commissioners expired on 3 April 2006, until the President made direct appointments[44] to the NHRC on 18 May 2006.

Such an arbitrary exercise of power by the Executive clearly violates the Paris Principles[45], which require that a national human rights institution be independent from the Government in the way it is created, the way its members are appointed, and in the operation of the Commission. The erosion of the NHRC's independence is manifested in two of the Commission's acts: firstly, it made the decision to halt investigations into more than 2,000 cases of enforced disappearances "unless special directions are received from the Government"[46]; secondly and more recently, it imposed a three month time limit

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[36] *Human Rights Commission of Sri Lanka Act*, sections 11(a) and 14.
[37] *Human Rights Commission of Sri Lanka Act*, section 11(c).
[38] *Human Rights Commission of Sri Lanka Act*, section 15(3)(b).
[39] *Human Rights Commission of Sri Lanka Act*, section 11(d).
[40] *Human Rights Commission of Sri Lanka Act*, section 11(h).
[41] *Human Rights Commission of Sri Lanka Act*, section 3(1).
[42] *Human Rights Commission of Sri Lanka Act*, section 24.
[43] See: Asian Legal Resource Centre, *National Human Rights Commission of Sri Lanka in serious need of reform*, 15 April 2004, UN Doc E/CN.4/2004/NGO/24, written statement at the 60th Session of the United Nations Commission on Human Rights in Geneva, available at <http://www.alrc.net/pr/mainfile.php/2004pr/63/>.
[44] Two former members of the NHRC declined reappointment to the Commission on the basis that to accept would be to conform to an unconstitutional process.
[45] The Principles Relating to the Status and Functions of National Institutions for the Promotion and Protection of Human Rights set out the minimum standards required by national human rights institutions (NHRIs) to effectively fulfil their role. The Paris Principles, which have been endorsed by the United Nations Commission on Human Rights and the United Nations General Assembly, generally require NHRIs to: (i) have a clearly defined and broad-based mandate based on universal human rights standards; (ii) have their independence guaranteed by legislation or the constitution; (iii) be autonomous from government; (iv) be pluralistic in character, and include membership that reflect society; (v) have adequate powers of investigation; and (vi) be sufficiently resourced.
[46] Namini Wijedasa, *No investigations 'without special directions from govt' – Human Rights Commissions dumps 2,000 uninquired complaints*, 16 July 2006, Sunday Island.

on the filing of complaints, with complaints made beyond the time limit subject to the NHRC's discretion before investigations are carried out.[47] Refusal to carry out mandated responsibilities and the setting of a time limit to entertain complaints of fundamental rights violations - when victims of violence are not only unprotected for coming forward to volunteer information, but live in fear of retribution for seeking justice - are not measures that independent human rights commissions would resort to even if under-resourced. After her visit to Sri Lanka, the United Nations High Commissioner for Human Rights expressed her concern and noted that the unconstitutional appointment of the NHRC meant that a credible voice on human rights violations was lacking.[48] Most recently, in its latest review of the NHRC, the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights downgraded the Commission from Grade A to Grade B.[49]

Given that the *Human Rights Commission of Sri Lanka Act* put in place a legal framework for an "imaginative and dynamic commission"[50], the present state in which the NHRC finds itself is regrettable, especially because its effective functioning as an institution for the protection of the rights of the Sri Lankan people is desperately needed at a time of escalating violence.

C. Judicial Service Commission

As in the case of the NHRC, the Judicial Service Commission ('JSC') was in existence before the 17th Amendment to the Constitution. It comprises the Chief Justice and two other judges of the Supreme Court[51], and is authorised to "appoint, promote, transfer, exercise disciplinary control and dismiss judicial officers and scheduled public officers"[52]. Clearly, entrusting these powers to the JSC is critical to maintaining the independence of the judiciary and distancing the latter from the influence of government politics.

In early February 2006, however, two senior Supreme Court judges – Justices S. Bandaranayake and T.B. Weerasuriya – resigned from the Commission on grounds of conscience,[53] resulting in a potentially serious vacuum in the administration of justice. The President made acting appointments to the JSC on the advice of the Chief Justice and in the absence of a functioning Constitutional Council. Due to the non-constitution of the second Council during that period, it can only be presumed that the appointments were renewed fortnightly.[54] Thereafter, substantive appointments were made to vacancies in the appellate courts by the President.

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[47] Association of Family Members of the Disappeared (AFMD), Colombo, et. al., *Review of Human Rights Commission of Sri Lanka*, 24 October 2007, open letter to the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights.
[48] BBC Sinhala, *Sri Lanka protests UN statement*, 30 November 2007, available at <http://www.bbc.co.uk/sinhala/news/story/2007/11/071130_mahinda_arbour.shtml>.
[49] BBC Sinhala, *'Safeguard' humanitarian workers*, 19 December 2007, available at <http://www.bbc.co.uk/sinhala/news/story/2007/12/071219_eu_redcross.shtml>.
[50] Mario Gomez, *Sri Lanka's New Human Rights Commission*, 1998 Vol. 20 Human Rights Quarterly, pp 281-302.
[51] Constitution of the Socialist Democratic Republic of Sri Lanka, Article 111D(1).
[52] Constitution of the Socialist Democratic Republic of Sri Lanka, Article 111H(1)(b).
[53] Over differences with the Chief Justice in regard to the manner in which disciplinary power was wielded in respect of minor judges.
[54] Constitution of the Socialist Democratic Republic of Sri Lanka, Article 41C(2).

The effect of this is that, more than rendering the provisions of the 17th Amendment redundant, it demonstrates a disregard for constitutional processes and the spirit of the 17th Amendment. Practically, it also raises the question of whether the decisions by judges appointed in this manner possess constitutional legitimacy should they be challenged at any point in the future.[55] There can be no doubt that such an action has eroded the public's confidence in the judiciary and the administration of justice.

Executive interference in the judiciary through control of the Commission to prevent effective investigation of human rights abuses has been documented in at least two cases.[56] In the case concerning the disappearance of Fr. Jim Brown, the Magistrate (Mrs. Nandasekaran) who had commenced investigations was abruptly ordered by the Chief Justice to transfer her responsibilities to another Magistrate. In the case on the killing of the 17 *Action Contre La Faim* aid workers in Mutur, the Magistrate (Mr. Manickavasagar Ganesharajah) who was about to deliver an inquest verdict received instructions to transmit the case to a different Magistrate. In both these instances, the efforts of judicial officers at investigating and punishing serious crimes possibly carried out by State actors were thwarted by the executive, which highlights the need for the JSC to be independent and free from political influences such that it functions as an effective check on the excesses of the executive.

4. THE WAY FORWARD

A. Urgency of the Constitutional Council being Reconstituted

Admittedly, the initial operation of the 17th Amendment was plagued with problems and it did not live up to its full potential.[57] That does not, however, equate to it being a complete failure, nor does it necessarily mean that it should continue to be disregarded particularly while the current Constitution remains the law in Sri Lanka. To the contrary, the marked deterioration in the conflict over the last couple of years, as well as what appears to be the Government's pursuit of a military strategy aimed at defeating the LTTE at all cost - including grave human rights violations and the abuse of power,[58] highlight the urgent need for the Constitutional Council to be reconstituted. In a situation where the highest levels of government are actively mobilising for a "war on terror", there must be accountability by State actors, particularly when they may be responsible for abuses against the civilian population.

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[55] Pinto-Jayawardena, note 20 above.

[56] See: University Teachers for Human Rights (Jaffna), *From Welikade to Mutur and Pottuvil: A Generation of Moral Denudation and the Rise of Heroes with Feet of Clay*, Special Report No. 25, 31 May 2007, available at <http://www.uthr.org/SpecialReports/spreport25.htm>.

[57] Some procedural issues that were brought to light during 2003 and 2004 include the non-provision for the resignation of the Presidential appointee and the ambiguity between the recommendatory authority of the Constitutional Council and the appointing authority of the President. As indicated above, the Election Commission was never constituted due to the President's refusal to appoint its Chairman; and both the NPC and NHRC were criticised over their failure to develop a public complaints procedure and an effective complaint and investigation procedure, respectively, during the period when their commissioners were nominated by the Constitutional Council.

[58] For an account of the conflict and its human rights impact, see: International Crisis Group, *Sri Lanka's Human Rights Crisis*, Asia Report N°135, 14 June 2007, available at <http://www.crisisgroup.org/home/index.cfm?id=4459&l=1>.

The President should make the appointments nominated by the Prime Minister and the Leader of the Opposition immediately, and at the same time seek the opinion of the Supreme Court as to the identification of minority political parties for the purposes of giving effect to the 17th Amendment.[59]

B. The Parliamentary Select Committee

The Select Committee of the Parliament to look into the Operation of the 17th Amendment to the Constitution's (the 'Parliamentary Select Committee') interim report on the 17th Amendment contains a number of recommendations that are positive and which address the issues that beset the first Constitutional Council.

With regards to the issue of whether the nominees under sub-paragraphs (e) and (f) of Article 41A(1) have to be appointed together, the Committee proposed that it was not necessary for all six candidates to be nominated before they are appointed by the President, and that the Sinhala version of Article 41A(5) be amended to read "... nominations under sub-paragraph (e) *or* sub-paragraph (f) ...". Furthermore, the Parliamentary Select Committee recommended that it be stipulated that the President appoint the nominees to the Constitutional Council within 14 days of receiving the written nominations, and that the 17th Amendment be amended to expressly provide that the Council be permitted to function with six or more members. The Committee was also of the view that members of the Council be ineligible for reappointment on the basis that reappointment may compromise their independence.

In relation to appointments to Commissions, the Parliamentary Select Committee recommended that the Constitutional Council make three nominations for the filling of any vacancy for the post of Chairman, out of which the President "may" make one appointment; whereas the President "shall" make appointments within 14 days of receipt of nominations for the filling of any general vacancy in the Commissions. The Committee also suggested that provision be made to enable members of Commissions to continue in office after the expiry of their terms until new members are appointed.

The Committee does not definitively clarify the ambiguity between the Constitutional Council's recommendatory authority and the President's appointing authority. Although the setting of a time frame - by which appointments to non-Chairman positions of the various Commissions must be made by the President - does strongly suggest that the executive cannot disregard the nominations of the Council, the same cannot be said for appointments to the posts of Chairman. Given that the President has a choice out of three options as to the Chairman of any 17th Amendment Commission, the Committee should also have proposed that the President make any such appointment within 14 days. Having subjected the Executive President to a constitutional process in respect of the appointment of members of independent Commissions, the President should not be allowed to frustrate the process by being able to delay the appointing of the Chairman of the Commissions.

With respect to acting appointments under Article 41C(2) and existing Commissions, the Parliamentary Select Committee was of the opinion that the approval of the Constitutional Council be sought for successive acting appointments, and that current Commissions be dissolved and reconstituted with legitimate appointments pursuant to the 17th Amendment, respectively.

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[59] See footnote 26 above.

On the whole, the recommendations by the Parliamentary Select Committee have tended to focus on the procedural issues afflicting the working of the 17th Amendment. To its credit, the Committee attempted to resolve all the issues that contributed to, and arose as a consequence of, the deadlock, and the Government should make public and official the final report of the Select Committee without any further delay.

5. THE BROADER POLITICS

All too frequently, the standard response of the Sri Lankan State has been to set up ad hoc Commissions of Inquiry, Parliamentary Select Committees and various other forms of investigatory mechanisms that are largely knee-jerk responses to crises that erupt over a longer political timeframe. Recent history has shown the effectiveness of such bodies to be questionable because they are typically under-resourced, and there is a lack of political will in ensuring that such ad hoc mechanisms are sufficiently empowered to carry out their mandates.

The 17th Amendment should not be added to this list of casualties consigned to the ash heap of history, particularly as its passage through Parliament represented a rare moment in Sri Lankan history when there was unanimous consensus across the political divide for depoliticising public life. Rather, the Government must invest in a constitutional process such as the 17th Amendment that would promote transparency, accountability and good governance of the State in the longer run, and stem the proliferation of toothless ad hoc Commissions that can only fuel disenchantment and pessimism among the general populace.

The effectiveness of such a constitutional process takes on a larger significance in the context of a conflict situation in which both State and society have been increasingly militarised. Whilst one acknowledges State efforts at countering acts of terror carried out by the LTTE, the imposition of a protracted state of emergency, the restriction of constitutional safeguards, the extensive use of the *Prevention of Terrorism Act*, and the increased powers accorded to the police and security forces, all have the cumulative effect of encouraging poor governance and the abuse of power at the expense of distorting rule-of-law systems and democratic institutions and practices. Undeniably, the Government faces a very difficult situation with the prolonged armed insurgency carried out by the LTTE. Yet, it has a higher responsibility to ensure that there is no abuse of its own power. Moreover, it is in the Government's interest to safeguard and promote the human rights of its citizens for it can only serve to increase its credibility and support against the LTTE. The 17th Amendment, and the Constitutional Council that comes out of it, is a valuable means by which a measure of accountability can be demanded from State actors, and has the potential to bring about State reform, to promote the rule of law and to nurture democratic processes.

A. State Reform

Any step towards strengthening the operation of the 17th Amendment has broader positive implications for much needed State reform in Sri Lanka. Subjecting the Executive President, in the exercise of his or her power conferred by the 1978 Constitution, "to a constitutional process where appointments, transfers, promotions and the disciplinary control of officers to key public institutions

[are] placed under the authority of independent bodies"[60] is a crucial step in diluting the concentration of power in one single person.

The propensity for the abuse of power is greatly increased in the context of drawn out civil strife, for not only does the State lose its ability to maintain law and order, but ends up becoming a source of decay and oppression of its people. The abuse takes place in various forms – abductions[61], enforced disappearances[62], extra-judicial executions[63], torture[64], impunity[65], mass displacement – and, more often than not, it is unknown who the perpetrators of such violence are. The question on the merits of the Government's military strategy against the LTTE aside, the Government must not overstep the fine line between waging a war and sponsoring force and violence against the civilian population. It is bound by internationally recognised laws of war and has an obligation to observe and respect customary international humanitarian law.

In the face of such deterioration of the State, the role that civil society plays as both a conscience and a check on Government in non-conflict situations becomes much more difficult as voices advocating change are curtailed through a culture of fear and intimidation. In such a situation where there is pressing need for good governance, the Constitutional Council and the 17th Amendment institutions play an extremely critical role in holding the State to account.

A broader question to be contemplated when considering the issue of State reform in Sri Lanka is whether the Executive Presidency, which is a source of authoritarianism and autocracy, should be abolished to make way for the restoration of a Westminster parliamentary system of government.[66] This deserves serious thought and debate as empowering the elected representatives in Parliament is a vital step towards enhancing accountability of Government. Abolishing the Executive Presidency, decentralising the authority once held by a powerful individual, and establishing effective checks and balances on the various branches of Government are crucial for promoting any credible and substantive reform of the State.

B. Democracy in Sri Lanka

In thinking about State reform and a political solution, one has also to bear in mind that the purpose of devolution of power and power sharing at centre has to be to promote democracy[67] so that people are genuinely able to participate in governance and are empowered to challenge the State for redress in instances of abuse.

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[60] Asian Human Rights Commission, *Sri Lanka: Bypassing the 17th Amendment is a move towards the return to absolute power*, 14 February 2006, available at <http://www.ahrchk.net/statements/mainfile.php/2006statements/432/>.

[61] Philip Alston, *Civil and Political Rights, Including the Question of Disappearances and Summary Executions: Extrajudicial, summary or arbitrary executions – Report of the Special Rapporteur, Addendum Mission to Sri Lanka (28 November to 6 December 2005)*, 27 March 2006, UN Doc E/CN.4/2006/53/Add.5, available at <http://www.extrajudicialexecutions.org/reports/E_CN_4_2006_53_Add_5.pdf>.

[62] Alston, note 61 above.

[63] Alston, note 61 above.

[64] See: United Nations News Service, *UN human rights expert reports allegations of torture in Sri Lanka*, 29 October 2007, available at <http://www.un.org/apps/news/story.asp?NewsID=24457&Cr=sri&Cr1=lanka>.

[65] Alston, note 61 above.

[66] The notion is by no means novel, and has been part of election campaign manifestos since 1994.

[67] Rohini Hensman, *Democracy as the Solution to Sri Lanka's Ethnic Crisis*

Another way of thinking about democratic processes relates to the need for independent institutions that are responsible for ensuring that authorised officials and bodies act within constitutional boundaries and in accordance with the law. The public offices and commissions under the 17th Amendment are such institutions, and not only must their independence be preserved, but they must also function in accordance with established international norms and standards.[68]

The effective functioning of the 17th Amendment also has an important bearing on the conflict in the North and East, where nothing short of a democratic, political and constitutional solution will suffice. The Government has to prove that it is committed to the political process, and calling for peace and democracy in the abstract will not evince sufficient political will. The 17th Amendment to the Constitution is a test case for future constitutional reform: the question as to whether the political parties have the requisite commitment to resolve the national question through a constitutional process.

C. The Rule of Law in Sri Lanka

In order to create and sustain peace and democracy, society must be based on the rule of law with effective and efficient rule of law institutions.[69] From the foregoing, one is able to discern two criteria by which to assess the rule of law in Sri Lanka.

The first relates to rule-of-law institutions such as the police, the Attorney General's Department and the judiciary, which are tasked with maintaining law and order, bringing perpetrators of crimes to justice, ensuring due process and dispensing the law. The second notion of the rule of law relates closely to the first, but focuses on people's sense of security and expectation of the State to provide and guarantee justice and fairness.

The role of the Constitutional Council is central to both concepts. In relation to rule of law institutions, the Council must be able function effectively in order to ensure that the police act within the confines of their roles of law enforcement; that the Attorney General is effective in bringing about prosecutions and in protecting the rights of victims; and that the judiciary is independent and free from political pressures when meting out justice. The deterioration of rule-of-law and related institutions, as a result of the abuse of legal and constitutional safeguards such as the Constitutional Council, has also led to the proliferation of extra-judicial forces such as State-linked death squads operating in parallel with State mechanisms. Reversing the decline of constitutional and legal bodies will be an important first step towards reining in the abuses by extra-judicial forces. It is only when rule-of-law institutions are functioning effectively that people are able to enjoy basic security of person and to expect protection from the State.

Unfortunately, people's normal understanding of what is right and wrong in non-conflict situations becomes perverted in conflict situations where there is abuse of power by the State, and law enforcement and security agencies tasked with upholding the law and protecting civilians end up abusing human rights with impunity. As people's sense of right and wrong, justice and injustice,

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[68] To which Sri Lanka is party, and to which it owes obligations, particularly in relation to the international treaties that it is party to.

[69] Sanjeewa Liyanage, *Sri Lanka: Peace and Democracy without the Rule of Law?*, available at <http://material.ahrchk.net/ruleoflawcharter/updates/rolc-u-4.htm>.

become blurred, it becomes imperative that a constitutional process such as the 17th Amendment is put in place to ensure the effective functioning of rule of law institutions to prevent further weakening of the rule of law – loss of security of person, institutionalisation of State-linked violence, the reign of extra-judicial death squads and internal disorder of society at large. A war can never be justification for the killings and torture of civilians and grave human rights abuses more generally, and those responsible for such atrocities must be brought to account by the State.

Some Thoughts on Sri Lanka's 1978 Constitution and the Constitutional Council

Basil Fernando[♦]

Sri Lanka's Flawed and False Constitution of 1978

For more than 27 years, since the promulgation of the 1978 Constitution of Sri Lanka, it has repeatedly been said that this Constitution has been modeled on the French Constitution of 1958 - known also as the Constitution originated by Charles de Gaulle. Constitutional pundits and politicians alike have harped on a 'de Gaullian Constitution' for so long that this misnomer has now become almost an article of faith. The reference is mostly to the institution of the Executive Presidency created by the 1978 Constitution, which is compared to the position of the French President under the 1958 Constitution. However this comparison is a fallacy as will be explained below.

The French Constitution

The opening two lines in the French Constitution regarding the President of the Republic are as follows (A.5): 'The President of the Republic shall see that the Constitution is observed. He shall ensure, by his arbitration, the proper functioning of the public authorities and the continuity of the State.

It is thus amply clear that the primary function of the Presidency in the French Republic is to see that the Constitution is observed. It is also his or her primary duty to ensure the proper functioning of the public authorities and the continuity of the state. The French Constitution of 1958 is thus credited by observers with ushering in an era of stability. There is no doubt that France has one of the richest constitutional histories in the world. Along with the United States, it was one of the first countries to put into practice the modern idea of a Constitution. But the 1787 American Constitution is still in effect today, while the French Constitution of 1791 did not last even a year. A good dozen regimes followed on the heels of one another thereafter until the idea of the Republic triumphed and finally, in 1958, the Fifth Republic brought a stable regime to France. (http://www/france.diplomatie.fr/label)

Sri Lanka's 1978 Constitution

How is it that the 1978 Constitution did not bring about some form of stability to Sri Lanka? In fact, it maybe said that the most chaotic period in Sri Lankan history was during the operation of the 1978 Constitution with horrendous human rights abuses being committed in the South, North and East. Also, it is without a doubt that national institutions were at their weakest during this era. So, in what manner has the French constitutional model affected Sri Lanka? Is the comparison simply a bogus claim? And is it that, on some superficial aspects, the two Constitutions are similar but on a more substantial and fundamental level, they are inherently different?

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The answer perhaps lies in a further question as to whether the Sri Lankan President has the duty to see that the Constitution is observed. The basic duty of the French President, as mentioned in that Constitution, is to see that the Constitution is observed. If this duty is applied to the tremendously problematic dilemma that has now arisen, in the context of the non-functioning Constitutional Council and the bypassing of the 17th Amendment to the Constitution, one may well ask who has the responsibility to resolve this dilemma? If it is the duty of the President to ensure the Constitution is observed, then the responsibility would be on the President to ensure that such a deadlock does not arise and, if it does, to resolve it immediately. To fail this sacred duty is to fail in the most primary function of the President - that is, if the Constitution itself is based on the French model. However, to maintain (as some have done consistently) that there is no such obligation on the President under the Sri Lankan Constitution to ensure the observance of constitutional provisions is tantamount to saying that the 1978 Constitution is substantially and fundamentally different to the French model.

Who is the guarantor of the Constitution?

If the President of Sri Lanka was to say that there was no responsibility on the part of the President to ensure the proper functioning of the Constitution, then the question remains: who is the guarantor of the observance of the Constitution? It cannot be the Parliament, which itself can be dissolved at the whim of the President. In any event, no action of the Parliament can be executed by itself. Executive power rests entirely with the President. Now, in this respect too, some writers seem to labour under the misconception that the relationship between Parliament and the Executive President is similar in France and in Sri Lanka. However, this too is far from reality.

The Constitutional Council

The third important difference between the two Constitutions is regarding the Constitutional Council itself. The French *Conseil Constitutionnel* is a powerful judicial body. Independent from both the executive and legislative branches, it had gradually carved out a role of a constitutional court. And among the world's greatest judicial authorities on Constitutions are the Constitutional Court of Germany and the French *Conseil Constitutionnel.*

Sri Lanka's Constitutional Council is at best an administrative body, dealing basically with appointments to important posts. It is not a judicial body at all. Furthermore, its functioning can be disrupted by the President or due to other contingencies as we are now seeing. Currently this Council is experiencing such a fundamental disruption. Sri Lanka does not have a judicial body similar to the *Conseil Constitutionnel* and this lacuna is one of the fundamental differences between the Sri Lankan Constitution and its French counterpart.

Public authorities

The French President is also duty bound to ensure the proper functioning of public authorities (A.5). In comparison, it may be asked as to who is to ensure the proper function of public authorities in Sri Lanka? Today almost the entirety of the public administration is in a state of collapse. Public administration relating to policing, elections, public health and education, as in many other areas of life, is in a state of anarchy. Almost everyone including members of the ruling parties and Opposition agree on that point, so does public opinion and the media. The average citizen's daily complaint is the

fact that public authorities function to his detriment and not for his benefit. And within the Constitution, there is no one to ensure the proper function of these public authorities.

If the Sri Lankan Constitution differs from the French model in all these fundamental aspects, then the question is who created this big fallacy; namely that the Sri Lankan model is similar to the French model? Why does this fallacy continue to be perpetuated? Have not whole generations of lawyers and law students been ill educated regarding the paramount law of their country? Will educational institutes carry on their education based on this false notion and propagate the same to yet more generations of students? And is not the entire civic education in the country based on serious misinformation about one of the most vital areas of the nation, which is its Constitution? If there is an attempt to answer these questions, the people may begin to see the whole constitutional debate in the country in a different light.

Other Constitutional Disparities

According to article 12 of the Gaullist Constitution:

> *"The President of the Republic may, after consulting the Prime Minister and the Presidents of the assemblies, declare the National Assembly dissolved."*

Thus the French President does not have the power to dissolve parliament without consulting the Prime Minister and the Presidents of the assemblies. However, under the Sri Lankan Constitution, the President can dissolve Parliament without consulting the Prime Minister or the Speaker of the National State Assembly. As it was demonstrated in one instance in recent years, the Sri Lankan President dissolved Parliament when the opposition party (UNP) was in power not only without consulting the Prime Minister or the Speaker but in fact, having given assurance to the elected representatives and the people that Parliament would not be dissolved.

Indeed, the Sri Lankan President can take everyone by surprise by dissolving Parliament as and when he or she wishes. Such power places the government and the National State Assembly completely at the mercy of the President. There is no way to have any checks and balances or controls over the President's power to dissolve Parliament. The purpose of such dissolution could simply be to disrupt a government or to obtain some advantage for the President and the political party to which he or she belongs, at a given time. Thus, purely for personal reasons, a government can be dissolved by the wish of a single individual who does not have to convince even the prime minister or the leader of the National State Assembly (the Speaker) as to the necessity or justifiability of such action. Such power in the hands of the President is one of the major causes of political instability for any government in power in Sri Lanka.

Emergency powers

The French Constitution states:

> *"Where the institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfillment of its international commitments are under serious and immediate threat, and where the proper functioning of the*

constitutional public authorities is interrupted, the President of the Republic shall take the measures required by these circumstances, after formally consulting the Prime Minister, the Presidents of the assemblies and the Constitutional Council."

Thus, the declaration of emergency requires not only certain pre-conditions to be satisfied but also requires that this can be done only after formerly consulting the Prime Minister, Presidents of the Assemblies and the Constitutional Council. Perhaps the most important aspect of this matter is that the President should formerly consult the Constitutional Council. The Constitutional Council is the highest judicial body on constitutional matters in France. Thus, declarations of emergency and the contents of such declarations come directly under the scrutiny of a judicial body. Further, such emergency measures should be for the shortest time possible and "the Constitutional Council shall be consulted with regard to such measures."

Thus, in these matters the President is under the strict control of an independent judicial body which wields the highest authority on constitutional matters in France. However, as far as Sri Lanka is concerned there is no such control. It is no surprise that over 30,000 people "disappeared" in the South alone when the emergency was in operation in the eighties and early nineties. Much larger numbers of civilians were killed in the North and East. The wide powers given under the emergency regulations were the cause of such gross abuses. In France, such actions would have been considered by the Constitutional Council which would have controlled the powers of the president.

The Judiciary

The Gaullist Constitution enhanced judicial power in two ways. The first was through the creation of the Constitutional Council and the second was through the functioning of the judicial authority. The Constitutional Council consists of nine members having power over several vital areas: it has to ensure the proper conduct of the election of the President and shall examine complaints and declare the results of the vote; it shall also rule on the conduct of the elections of deputy and senators in disputed cases; it has to ensure proper conduct of referendum proceedings and declare the result of such; institutional acts and rules of procedures of parliamentary assemblies must be referred to it and it shall rule on their conformity with the Constitution. Acts of Parliament should also be referred to it before promulgation. The determinations of the Constitutional Council are binding on all public authorities and on all administrative authorities and on all courts. Other than the Constitutional Council, there is the judicial authority. The President is the guarantor of the judicial authority and is assisted by the high council of the judiciary. The high council of the judiciary consists of two sections: one for the jurisdiction of judges and the second for public prosecutors. Thus, the creation of the post of the President under the Gaullist Constitution did not limit the power of judicial bodies but in fact enhanced it enormously.

On the other hand, Sri Lanka's 1978 Constitution resulted in judicial power being extremely diminished. Judicial review was confined to the Supreme Court and no authority similar to the Constitutional Council was created. Review of Acts of Parliament is referred before promulgation to the Supreme Court for the limited purpose of looking into the constitutionality of the provision. This form of review is very much more limited than the power of the Constitutional Council. There is no authority similar to the Constitutional Council to check the interference of the Executive President over the judiciary. While the Gaullist Constitution ensured that the Constitutional Council would act

in balancing the powers of the Parliament and the President, the Sri Lankan Constitution primarily treated the independence of the judiciary as a threat to the Executive President. Thus, the Constitution gave complete immunity to the President. The type of presidency that was created under the 1978 Constitution did not tolerate a strong capacity in the courts to play a role in ensuring proper checks and balances. Instead, it limited the powers of courts to political and administrative matters and made them as weak as possible.

Thus, while the Constitutional Council in France fashioned itself as a major challenge to the arbitrary use of power either by the President or the Parliament or other public and administrative bodies, the role to be played by the courts on such matters in Sri Lanka was curtailed significantly by the 1978 Constitution.

Constitutional logic, constitutional pretext and constitutional fancy

Constitutional logic is based upon sound principles that determine the relationships between different parts of a Constitution. These principles are then rationally applied case by case. For instance, there may be demands for a referendum to be held on a specific issue. These demands should be met with reference to general principles under the Constitution regarding referendums, as well as contemporary concerns. A proposal for a referendum seeking people to forgo their right to elect a government by allowing earlier elected representatives to continue for another term, must be looked at with the constitutional logic of the Gaullist Constitution of 1958, on which the Sri Lanka Constitution claims to be based. Such logic would regard the proposal as absurd, as it contradicts all constitutional principles of democracy. The constitutional logic of the American Constitution would say the same.

A constitutional pretext gives a semblance of logic to a proposition that falls outside the structure of the Constitution. This can be done by simply referring to any constitutional process, such as procuring the necessary majority in parliament. For instance, a pretext could be established that any proposal accepted by way of a referendum is valid if passed with an absolute majority. That the proposal contradicts the basic tenets of the Constitution can hence be completely disregarded. In terms of constitutional pretexts then, even the most absurd proposals may acquire legality. This is how presidents are able to acquire the powers of a dictator under a Constitution that declares the nation to be a democracy.

A democratic Constitution, as mentioned above, should contain principles that determine the relationships between the people and the state. In the Gaullist Constitution, these principles are stated under the following headings:

PREAMBLE; TITLE I - On sovereignty (art. 2 to 4);
TITLE II - The President of the Republic (art. 5 to 19);
TITLE III - The Government (art. 20 to 23);
TITLE IV - Parliament (art. 24 to 33);
TITLE V - On relations between Parliament and the Government (art. 34 to 51);
TITLE VI - On treaties and international agreements (art. 52 to 55);
TITLE VII - The Constitutional Council (art. 56 to 63);
TITLE VIII - On judicial authority (art. 64 to 66);
TITLE IX - The High Court of Justice (art. 67 and 68);
TITLE X - On the criminal liability of members of the government (art. 68-1 to 68-3);

TITLE XI - The Economic and Social Council (art. 69 to 71);
TITLE XII - On territorial units (art. 72 to 75);
TITLE XIII - Transitional provisions relating to New Caledonia (art.76 to 77);
TITLE XIV - On association agreements (art. 88);
TITLE XV - On the European Communities and the European Union (art. 88-1 to 88-4);
TITLE XVI - On the amendment of the Constitution (art. 89).

The principles stated in each section are linked to those in other sections. The position of the President in the Gaullist Constitution is thus clearly defined and is linked to principles in other sections of the Constitution. The position of the President of France is different to that of the Sri Lankan President under the 1978 Constitution of Sri Lanka. In terms of Gaullist constitutional logic, the concept of the Executive President in the Sri Lankan Constitution could be described as a constitutional monstrosity.

A constitutional fancy is an idea of power and relationships based not on constitutional logic, but on imagination. The type of power attributed to the Sri Lankan President under the 1978 Constitution can only be fanciful; in reality such a presidency is a constitutional absurdity. The Sri Lankan President has almost absolute power, which is the very thing a democratic Constitution is designed to prevent. In practical terms, this presidency can destroy every other constitutional body it relates to, such as the Parliament, the government, and the judiciary. In fact, it does not even have a body to oversee the interpretation of the Constitution, like the French Constitutional Council, which is a powerful body that ultimately determines all constitutional matters. The internally absurdities contained in the Sri Lankan Constitution make it impossible for the State to function.

Can there be constitutionalism when the Constitution itself is fundamentally flawed?

There cannot be constitutionalism when a Constitution itself is fundamentally flawed. The Sri Lankan Constitution is one that is fundamentally flawed despite the pretensions that it is based on the Gaullist Constitution. The Sri Lankan Constitution helped the Executive President to escape form all constitutional controls and become a creature capable of using power arbitrarily. Thus, the purpose of this Constitution was not to create a constitutional government but to liberate the President from a constitutional form of government.

In such circumstances, the references to the Constitution in courts of law can only be on minor matters. Even forms of references to courts can often be a pretext rather than have substantive value. There have been many glaring examples of this since 1978. Perhaps most demonstrative of those was the 1982 referendum to allow the existing parliament to have another term without an election. Such absurdity is possible only because constitutionalism has hardly any meaning in the Sri Lankan context, since the promulgation of the 1978 Constitution. Looking back on the experience resulting from the implementation of the 1978 Constitution one may question the validity of the following assertion made by Dr. M.J.A. Cooray in a book published in 1982 entitled *The Judicial Role under the Constitutions of Ceylon/Sri Lanka:*

> *It is a truism that the modern administrative and judicial system of Sri Lanka has its origins in the institutions introduced by the British in Ceylon at the time it was ruled by them.*

At the time this comment was made, this Constitution had only been in existence for 6 years and there was a prevalent assumption that despite some changes such as the Executive Presidency, introduced by this Constitution, there was a continuity of tradition starting from the British times. However, now after almost 27 years of the practice of this Constitution, it is clear that to claim any continuity with the British practice is farcical. Perhaps around 1982, much of the constitutional analysis consisted of purely looking into the text and comparing it with the text of the earlier two constitutions and the practices under those constitutions. However, in examining political interpretations given to the 1978 Constitution, it becomes evident that what was envisaged was an authoritarian form of government in which the President had unfettered powers without any of the checks and balances developed within the British constitutional system. Thus, what emerged as a result of the 1978 Constitution was the loss of the continuity of the laws and practices of constitutionalism. If these departures from the administrative and judicial system of Sri Lanka were justified under the pretext of adopting a French model of a constitution, we have earlier shown that this claim is untenable.

Responsibility regarding the non-functioning of the Constitutional Council

There is no doubt that the Executive Presidency must be held responsible for the current impasse regarding the Constitutional Council. The country's institutions cannot function until this responsibility is addressed. Currently this is the most important constitutional question to be resolved if there is to be any constitutional form of government in the country.

THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

S.C. Application No. 38/2005 (FR)

1. Alhaj M.T.M. Ashik
2. Alhaj M.F.M. Naufer
3. Alhaj A.R.M. Muzanna
4. Alhaj A.R.M. Rismy
5. M. Mohamed Nakib

All Trustees, Kapuwatta Mohideen Jumma Mosque, Denipitiya, Weligama

Petitioners

Vs.

1. R.P.S. Bandula, O.I.C., Weligama
2. A.H.M. Nazeem, A.S.P. Weligama
3. Inspector General of Police
4. Deputy Inspector General of Police (Southern), Galle
5. Hon. Attorney General

Respondents

6. Environmental Foundation Ltd., Colombo 5

Intervenient Respondent

7. Senaka Kumar Weeraratne, Colombo 5

Party Seeking Intervention

8. P.C. Ranawaka,
   Ministry of Environmental &
   Natural Resources
   Colombo

8th Respondent

9. Secretary
   Ministry of Environmental &
   Natural Resources
   Colombo

BEFORE : Sarath N. Silva — Chief Justice
Shiranee Tilakawardena — Judge of the Supreme Court
A.M. Somawansa — Judge of the Supreme Court

COUNSEL : Ikram Mohamed, P.C., for the Petitioners
Ms. Indika Demuni de Silva for 2nd, 3rd and 4th Respondents
Ms. B.J. Tilakaratne, Deputy Solicitor General for Central Environmental Authority
Uditha Egalahewa for the 7th Respondent

DECIDED ON : 09th November 2007

Sarath N. Silva, C.J.,

The proceedings in this case commenced with an application by the Trustees of the Kapuwatte Mohideen Jumma Mosque of Weligama impleading the action of the 2nd Respondent, (A.S.P) in not issuing a loudspeaker permit under Section 81 of the Police Ordinance to the extent permitted in previous years and in imposing restrictions on such use, as in being in breach of their fundamental rights.

When the matter was supported on 25.2.2007 for leave to proceed, the Court noted that the application raises fundamental issues with regard to sound pollution and the standards that should be enforced by the Central Environmental Authority, and the guarantee of the equal protection of the law (Article 12(1)) in this regard.

Accordingly notice was issued on the Central Environmental Authority which was later added as the 6th Respondent.

The Environmental Foundation Limited being a non-governmental organization that has consistently engaged in public interest litigation to preserve and protect the environment, was permitted to intervene in the case in view of the general concern that emerges in this case requiring adequate legal safeguards to protect the People from exposure to harmful effects of sound pollution.

Mr. Senaka Weeraratne, Attorney at Law, sought to intervene representing the interests of persons affected by noise pollution. He was added as the 8th Respondent.

In his affidavit dated 29.6.2007, he contradicted the claim of the Petitioners for unrestricted use of loudspeakers in the call to prayer from the Mosque. He also contended *inter alia* that such unrestricted use makes:-

> *"Captive listeners of people of other religious faiths and violates the fundamental rights of the general public, such as the right to silence and the right to quiet enjoyment of property."*

As a matter of personal experience, he contended in paragraph 4 of is affidavit that he is an aggrieved party as a result of similar conduct of a place of worship situated on the Marine Drive between Jaya Road and Nimal Road in a residential area in Colombo where

> *"the high pitched sound of a call to prayer is amplified* five *times a day beginning in the early hours of the morning, that is at 5.00 a.m and ending at 8.15 p.m and repeated daily and which conduct is causing unnecessary hardship and much disturbance, to residents in the neighbourhood, the majority of whom belong to other religious faiths and which locality comprise in addition to residential dwellings, schools e g Holy Family Convent, private Accountancy Studies Institutions, Buddhist temples, Kovils, Churches..."*

With the inclusion of the aforesaid parties, and considering the material presented and the submissions that were made the Court proceeded with the matter as being of public interest, to make a determination as to the effective guarantee of the fundamental right enshrined in Article 12(1) of the Constitution for the equal protection of the law in safeguarding the People from harmful effects of noise pollution. The impact of pollution is pervasive and its effect cannot be identified with the right of any particular person. The matter has to be viewed as being of general and public concern affecting the community as a whole.

The second Respondent whose action has been impleaded in this case filed an affidavit supported with several other affidavits and documents. It appears that the particular dispute with regard to the action of the 2nd Respondent, the A.S.P., being himself a Muslim, arose as a result of loudspeaker permits granted to three mosques situated in close proximity in the village of Kapuwatte in Weligama.

The dispute is between the Kapuwatte Mohideen Jumma Mosque and Jiffery Thakkiya Mosque on the one hand and the Jamiul Rabman Jumma Mosque on the other.

In paragraph 5 of the affidavit the 2nd Respondent has stated that to the best of his knowledge from about April 2004 residents in the area where the three Mosques are located have complained of noise pollution due to the excessive use of the loudspeakers by the three Mosques and that, subsequently a dispute had arisen between the persons associated with the Mohideen Jumma Mosque and Jamiul Rahman Mosque with regard to the use of loudspeakers which resulted in the parties lodging complaints against each other at the Weligama Police Station. The Police conducted investigations into the incidents and being apprehensive of an imminent breach of peace filed a "B" Report bearing No. 2154/04 in the Magistrate Court of Matara citing persons associated with the said Mosques as parties. It appears that the proceedings are continuing. The allegation now appears to be that the 2nd Respondent has given more favourable treatment to the Jamiul Rahman Mosque.

The 2nd Respondent has produced marked "2R4A" to "2R4G" photocopies of some of the complaints and affidavits of persons, all of whom are Muslims that specifically state that noise pollution resulting from excessive noise emitted from loudspeakers of the Mosque, has caused severe health problems. Two of the deponents have coronary ailments and have produced medical evidence in support. The ASP has stated that it was in these circumstances that he reduced the use of loud speakers in the call for prayer to 3 minutes since in his view as a Muslim that period is adequate. The Petitioners have not sought to contradict the material adduced by the 2nd Respondent.

It is seen that complaint emerge from Muslims themselves as to the harmful effects of excessive emission of noise from loudspeakers in Mosques. Thus Mr. Weeraratne does not stand alone as a victim of such excessive noise.

Although there is no contest in the case as to the harmful effects of noise pollution the case has gone on for more than 2 years to enable suitable regulations to be made to be implemented by the Central Environmental Authority effectively.

Section 23P to Section 23R of the National Environmental Act No. 47 of 1980 as amended provides for restrictions on noise pollution. The scheme of Section 23P and 23R is that it would be an offence to emit noise in excess of the volume intensity and quality of the standards or limitations that are

prescribed which thus becomes a prerequisite for the effectiveness of these provisions. Deputy Solicitor General submitted that the standards and limitations that have now been prescribed in relation to industrial noise cannot be used in respect of community noise (Vide. proceedings 28.3.05).

In the circumstances the parties agreed for adjournments to facilitate the formulation of Regulations.

Draft regulations have been tendered from time to time to Court.

The Environmental Foundation limited made a comprehensive written submission that the initial draft regulations would be unworkable and ineffective and that in contrast the existing legal regime as contained in; Section 80 of the Police Ordinance regarding the grant of permits for the use of loudspeakers, amplifiers and the like; Section 261 of the Penal Code with regard to the offence of public nuisance; the provisions of the Code of Criminal Procedure with regard to the abatement of any nuisance and the National Environmental (Noise Control) Regulations No. 1 of 1996; are adequate and that suitable directions could be issued by this Court in terms of Article 126(4) of the Constitution to assure the people equal protection of the applicable legal regime.

The Court noted that it is desirable to grant further time to formulate suitable Regulations and the added parties were permitted to make representations to the relevant authority to improve the draft. Several postponements have been granted but there appears to be indecision, disputes, vacillation and on the whole a lack of collective will to take positive action. Deputy Solicitor General now submits that she has received instructions to move to add the Ministry of Religious Affairs as a party. This, in our view, puts the matter back to square one. It has to be firmly borne in mind that Sri Lanka is a secular State. In terms of Article 3 of the Constitution, Sovereignty is in the People at common devoid of any divisions based on perceptions of race religion language and the like. Especially in the area of preserving the environment and the protection of public health, being of immediate concern in this case, there could be no exceptions to accommodate perceived religious propensities of one group or another. No religion advocates a practice that would cause harm to another or worse still as would cause pollution of the environment, a health hazard or a public nuisance being an annoyance to the public.

We have had in this country probably the oldest jurisprudential tradition of a secular approach in dealing with matters that constitute a public nuisance. I would refer to the Judgment of this Court handed down in the year 1895 in the case reported in Marshall vs Gunaratne Unnanse - (1 NLR page 179). In that case the principal trustee of a Buddhist vihare in Colombo was charged for creating noise in the night and disturbing the inhabitants of the neighbourhood. The report to Court was under the then applicable Section 90 of the Police Ordinance. Considering the particular circumstances of the case Bonser C.J., upholding the conviction stated as follows (at page 180):

> *"... the idea must not be entertained that a noise, which is an annoyance to the neighbourhood, is protected if it is made in the course of a religious ceremony.*
>
> *No religious body, whether Buddhist, or Protestant, or Catholic, is entitled to commit a public nuisance, and no license under Section 90 of The Police Ordinance, 1865 will be a protection against proceedings under the Penal Code, though it may protect them from proceedings under the Police Ordinance."*

It is to be noted that in terms of Section 261 of the Penal Code a person is guilty of public nuisance who does any act or is guilty of an illegal omission, which causes *inter alia* any annoyance to the public or to the people in general who dwell or occupy any property in the vicinity. Section further states as follows:

> *"A public nuisance is not excused on the ground that it causes some convenience or advantage."*

The proposition of Bonser C.J., which could be cited as a classic statement of a secular approach in dealing with a public nuisance is referable to the final sentence of Section 261 cited by me above. A perceived convenience or advantage to some based on a religious practice cannot be the excuse for a "public nuisance which causes annoyance to the public or to the people in general who dwell or occupy property in the vicinity".

Subsequent jurisprudential developments in other countries follow a similar trend of reasoning.

In the case of Church of God (full gospel) in India vs K.K.R.M.C Welfare Association - AIR 2000 SC page 2773 the Supreme Court of India posed the selfsame question as follows:

> *"Whether a particular community or sect of that community can claim rights to add to noise pollution on the ground of religion?"*

Shah J.., in his Judgment at page 2774 stated as follows in answer to that question

> *"Undisputedly no religion prescribes that prayers should be performed by disturbing the peace of others nor does it preach that they should be through voice-amplifiers or beating of drums. In our view, in a civilized society in the name of religion, activities which disturb old or infirm persons, students, or children having their sleep in the early hours or during day-time or other persons carrying on other activities cannot be permitted It should not be forgotten that young babies in the neighbourhood are also entitled to enjoy their natural right of sleeping in a peaceful atmosphere. A student preparing for his examination is entitled to concentrate on his studies without there being any unnecessary disturbance by the neighbours. Similarly, old and infirm are entitled to enjoy reasonable quietness during their leisure hours without there being any nuisance of noise pollution. Aged, sick people afflicted with psychic disturbance as well as children upto 6 years of age are considered to be very sensitive to noise. Their rights are also required to be honoured."*

It transpired in the course of the submissions that at times there is rivalry between respective religious groups. In this case the rivalry appears to be between different places of worship of one religious group. It is commonly known that when there is call to prayer in the early hours of the morning at about 5.00 a.m, on the other hand amplifiers and loudspeakers blare forth recorded chantings of "pirith". The proceedings in this case evoked much response of persons who are buffeted by the countervailing forces of such amplified noise.

It may be appropriate here to state albeit briefly some matters with regard to the chanting of "pirith" which dates back to the time of the Buddha. The chanting of "pirith" takes place only upon an invitation addressed three times to the Maha Sangha. Chanting follows with compassion to the devotees who address the three-fold invitation.

Much respected Piyadassi Thero in his work titled "The Buddhas Ancient Path" has stated as follows (at page 17). That benefit could be derived only, *"by listening intelligently and confidently to paritta sayings because of the power of concentration that comes into being through attending whole-heartedly to the truth of the sayings."*

Thus there must necessarily be a close proximity between the person chanting and the person who is listening. Blaring forth the sacred suttas and disturbing the stillness of the enviromnent, forcing it on ears of persons who do not invite such chant is the antithesis of the Buddha's teaching.

I would finally refer to the important case in India *In Re. Noise Pollution* AIR 2005 SC page 3136, especially because in that case the Supreme Court of India issued several directions in order to safeguard the people from the harmful effects of noise pollution. The motion of the intervenient 6th Respondent is that similar directions be issued pertinent to our legal context in terms of Article 126(4) of the Constitution.

The Chief Justice of India commences his judgment delving into the etymology of the term "Noise' itself and has noted that it is derived from the Latin 'Nausea" defined as unwanted sound. He has cited a leading authority which describes unwanted sound as "a potential hazard to, health and communication dumped into the environment without regard to the adverse effect it may have on unwilling ears and has continued to state that -

> *"noise is more than just a nuisance. It constitutes a real and present danger to people's health. Day and night, at home, at work, and at play, noise can produce serious physical and psychological stress. No one is immune to this stress. Though we seem to adjust to noise by ignoring it, the ear, in fact, never closes and the body still responds - sometimes with extreme tension, as to a strange sound in the night."*

Further, "that noise is a type of atmospheric pollution. It is a shadowy public enemy whose growing menace has increased in the modem age of industrialisation and technological advancement." (pages 3141 and 3142).

The Supreme Court of India has firmly rejected the contention that there is a fundamental right to make noise associated with the freedom of speech and expression. The Chief Justice observed –

> *"Nobody can claim the fundamental right to create noise by amplifying sound of his speech with the help of loudspeakers. While one has a right to speech and others have a right to listen or decline to listen, nobody can be compelled to listen and nobody can claim that he has a right to make his voice trespass into the ears or mind of others. Nobody can indulge in aural aggression." (page 3141)*

In an exhaustive survey, the Supreme Court of India has dealt with the developments in many other jurisdictions where comprehensive provisions have been made to safeguard people from the harmful effect of the public nuisance of noise pollution and finally the Court issued several directions (pages 3164 - 3165) including a direction that "no one shall beat a drum or tom tom or blow trumpet or beat or sound any instrument or use any sound amplifier at night (between 10.00 and 6 a.m) except in public emergencies".

There is no dispute in this case that People have been denied the equal protection of the law by the failure of the executive to establish by way of regulations an effective legal regime as mandated by Section 23P of the National Environmental Act No. 47 of 1980, as amended by Act No. 56 of 1988 to safeguard the public from the harmful effects of noise pollution. The facts also reveal that there are no guidelines for the effective implementation of the applicable provisions of law so as to provide to the people equal protection of the law guaranteed by Article 12(1) of the Constitution.

Accordingly, we consider it to be just and equitable in the circumstances of the case to make the following directions in terms of Article 126(4) of the Constitution:

i. That the emission of noise by the use of amplifiers, loudspeakers or other equipment or appliances which causes annoyance to the public or to the people in general who dwell or occupy property in the vicinity be considered a public nuisance in terms of Section 261 of the Penal Code and that the Police should entertain complaints and take appropriate action for the abatement of such public nuisance;

ii. That all permits issued by the Police under Section 80(1) of the Police Ordinance shall cease to be effective forthwith;

iii. That no permits shall be issued in terms of Section 80(1) of the Police Ordinance for the use of loudspeakers and other instruments for the amplification of noise as specified in that section covering the period 10 p.m (night) to 6 a.m (morning). Such permits may be issued for special religious functions and other special events only after ascertaining the views of persons who occupy land premises in the vicinity, a record of such matters to be maintained and the grant of any such permit shall be forthwith reported to the nearest Magistrates Court;

iv. That in respect of the hours from 6.00 a.m to 10.00 pm permits may be issued for limited periods of time for specific purpose subject to the strict condition that the noise emitted from such amplifier or loudspeaker or equipment does not extend beyond the precincts of the particular premises.

v. Where a permit is issued in terms of Section 80(1) as provided in direction (iii) and (iv) sufficient number of Police Officers should be designated and posted to the particular place of use to ensure that the conditions imposed are strictly complied with;

vi. That the Police will make special arrangements to entertain any complaint of a member of the public against any person guilty of an offence of public nuisance as provided in Section 261 of the Penal Code or of using any loudspeaker, amplifier or other instrument as provided in Section 80 of the Police Ordinance contrary to any of these directions and take immediate

steps to investigate the matter and warn such person against a continuance of such conduct. If the conduct is continued after that warning to seize and detain the equipment as provided in Section 80(4) of the Police Ordinance and to report the matter to the Registrar of this Court.

Copies of this Judgment to be sent to the Secretary, Ministry of Defence and the Inspector General of Police for immediate action to be taken in regard to Directions stated above.

The Inspector General of Police to submit a report to Court as to the action taken on the judgment.

Mention case on (10.12.2007).

Chief Justice

Tilakawardena J.,
I agree

Judge of the Supreme Court

Somawansa J.,
I agree

Judge of the Supreme Court

Bangladesh's (Draft) Right to Information Ordinance 2008[♦]

Preamble:

The desire to know is people's natural drive. The eagerness to know information has gradually developed into the right to information.

Whereas the right to know is recognised in the constitution and the empowerment of the citizens of a democratic country is necessary to exercise right to information;

And whereas transparency and accountability of all public and private institutions will be ensured if right to information is established;

And whereas some special types of information should be preserved under the control of the government;

And whereas it is necessary to enact this ordinance for ensuring people's right to know by harmonising on the one hand security and secrecy of the state and public interest, and on the other hand the right to information of the public;

Therefore, the President, under the power provided by Article 93(1) of the Constitution, enact and publish the following Ordinance:

(1) (a) Short title: This Ordinance will be called the Right to Information Ordinance, 2008.

(b) Scope and effectiveness: It extends to the whole of Bangladesh; and it shall come into force within 120 days of notification in the gazette

(2) In this Ordinance, unless contrary to the subject or context—

(a) "information" means any material existing in any form, including advice, circulars, orders, contracts, statistics, e-mail, logbooks, materials, model, memos, opinion, papers, press releases, records, reports, samples, material held in any electronic form , correspondences, memorandums, books, plans, maps, drawings, diagrams, photographs, films, microfilms, sound recordings, video tapes, records readable in machines, any certified material irrespective of its condition and nature, and its reproduction, and any information obtained under any law for the time being in force about any authority.

(b) "Information Officer" means any Officer designated under this ordinance or any officer or employee of public authority empowered to perform the functions and carry out the responsibilities described in this Ordinance, and in the absence of any designated offices or

[♦] As released on March 4 2008 by the Government of Bangladesh for public commentary and translated from Bangla by Asif Nazrul with Paul La Porte

employee, the head of concerned public authority, any branch, directorate, wing, department, or its administrative unit shall be regarded as information officer.

(c) "Authority" means

(i) any ministry or public or semi-public office, department, directorate, institution or local or other statutory bodies or offices, or bodies constituted under public or private ownership or bodies administered with public finance which are established under any law, Ordinance or Notification.

(ii) Any company, corporation, trust, firm, society, co-operative society, private body, association, organisation registered under any existent law of Bangladesh;

(iii)which conducts public work on behalf of the government or under contract with any body of the government;

(iv)other authorities designated , from time to time, by gazette notification of the government;

(d) "right to information" means the right to obtain information from any public authority and it includes taking notes and obtaining photocopies or certified copy of any document or record, taking certified sample of any materials, obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device;

(e) "Third party" means any person who is not a citizen or any institution including any public authority who is interested to obtain information

(3) Primacy of Ordinance: After entry into force, the provisions of this Ordinance shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923, and any other law for the time being in force

(4) Right to Information:

(a) Every citizen shall have the right to information and every citizen, through application or request, shall know any decision, written proceedings of or any work performed or proposed to be performed by any authority

(b) Every public authority shall have the responsibility to maintain all its records duly catalogued and indexed in an appropriate manner so as to facilitate the right to information from any authority under this ordinance or any other law for the time being in force; this right shall not delimit denial to furnish information or the availability of information [sic].

(c) The Information Commission shall prepare a guideline to be followed by all authorities in maintaining and managing information held by them.

(5) Publication by authority:

Every public authority must publish at least once in every two years a report containing the following information-

(a) the particulars of its organisation, activities, duties of its officers and employees and the process of decision making

(b) the categories of record held by the authority including list of laws, rules, regulations, instructions, manuals used by its employees

(c) the description of conditions under which any citizen can obtain any licence, permit, grant, allocation, approval, or any other facilities, and the conditions which are required for any transaction or execution of any contract.

(d) the particulars of facilities available for ensuring peoples' right to information

(e) the names, designations and other particulars of the Information Officers to whom the application for information should be made.

(6) The procedure of requesting and receiving information

(a) A person, who desires to obtain any information under this Ordinance, shall make an application to the designated officer or to the Head of the Office describing the nature of the information sought and the procedure of obtaining information meaning inspection, copy or taking note etc.

(b) The application shall be made in the application form printed by the authority and with prescribed fee.

(c) The authority on receipt of an application under sub section (a) shall furnish the information applied for within 20 days of receipt of the application.

Provided that the concerned authority shall fix additional fee depending on the actual cost of providing information.

(d) if the concerned officer or the head of the office does not agree to provide the information, he shall inform the applicant the reasons thereof within 20 days of receiving the application.

(7) The procedure of providing information:

(a) Subject to the conditions set forth in section (8), the Information Officer, on receipt of an application under section 6(a) shall, as expeditiously as possible, and in any case within twenty days of the receipt of the application, either provide the information on payment of prescribed fee or reject the request for any of the reasons specified in sections 8.

Provided that where the information sought for concerns the life death or liberty of a person from jail, the information shall be provided on considering the importance of the information, within forty-eight hours of the receipt of the application.

(b) If the Information Officer fails to provide information within the stipulated period mentioned in clause (a), he shall be deemed to have refused the request.

(c) Where access to the record or a part thereof is required to be provided under this Ordinance to a person who is sensorily disabled, the Information Officer shall provide assistance to enable access to the information, including providing such assistance as may be appropriate for the inspection.

(d) if the information is provided in print or in any electronic format, the applicant shall, without prejudice to subsection (?), pay the fixed fee.

Provided the fees determined under section 6(a) and 7(a) and (e) shall be reasonable and it shall not exceed the actual cost of the photocopies and the highest amount of fees shall be determined according to rules.

(e) the information shall be generally provided in the format it is requested.

(8) Exemptions from publication of information

Application for access to information under this law may be rejected
if :-

(a) there is apprehension that disclosure of information would prejudicially affect the sovereignty, honour, foreign policy, defence or relation with foreign State or organisations, or

(b) information connected with commercial, trade or strategic scientific interests of the authority and disclosue of which would harm such interests, or

(c) the disclosure of Information is likely to disturb the economic management of the government or likely to benefit or harm any particular person or organisation financially, or

(d) the information relates to the income tax of any person or authority, custom tax and tariff or exchange rate of currencies, and interest rate or the monitoring and administration of economic organisations, or

(e) information, the disclosure of which would impede the legal process or encourage crime, or would endanger the safety of any person or public at large, impede proper adjudication of any case under trial, the process of investigation or arrest of the accused, violate the secrecy of an information or influence or impede the decision making process or

(f) the disclosure of the information would cause an unjustified breach of privacy of any person, or

(g) information the disclosure of which shall be a violation of orders given by any appropriate court or special proceedings of the parliament, or

(h) information which is already available for sale after its publication, or

(i) information, disclosure of which is against public interests

(9) Publication of partial information: partial information may be furnished to the applicant subject to the exceptions set forth in section 8

(10) Disclosure in public interests: Notwithstanding anything contrary in any other law or in any of the provisions in this Ordinance, the government/authority may disclose information in public interest.

(11) Impunity: No suit, prosecution, punitive measure or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done under this Act or any rule made thereunder.

Information Commission

(12) (a) The Government shall, through Gazette Notifications, establish a body known as information commission to exercise the authority and perform the functions described in the Ordinance.

b) The Commission shall be established comprising

i. a Chief Information Commissioner and
ii. maximum two other Information Commissioners

c) The Chief Information Commissioner and Information Commissioners shall be appointed by the President on recommendation of the following committee. But at least one of the commissioners shall be a female.

d) The members of the committee are as follows

i. A judge of Appellate Division nominated by the Chief Justice - Chairperson
ii. Chairman, Public Service Commission- Member
iii. Cabinet Secretary- Government of Bangladesh - Member
iv. Chairman, University Grant Commission

e) The Chief Information Commissioner, with cooperation from other information commissioner, shall perform the responsibilities of general supervision, management and administration of the Commission as an autonomous body.

f) The Chief Information Commissioner and other commissioners shall not be member of national parliament or political party or they shall not hold office of profit.

g) The Conditions of appointment of the Chief Information Commissioner and information commissioners

(1) The term of office of the Chief Information Commissioner and information commissioner shall be for 4 years or up to 65 years whichever is earlier, and they cannot be re-appointed in the respective position.

Provided that every Information Commissioner shall, on vacancy of the office of Chief Information Commissioner shall be eligible for appointment as the Chief Information Commissioner.

Provided further where the Information Commissioner is appointed as the Chief Information Commissioner, his term of office shall not be more than four years in aggregate as the Information Commissioner and the Chief Information Commissioner.

(2) They shall have vast experience and expertise in the field of law, science, technology, information, social work, management or public administration.

(13) Resignation of Commissioners:

The Chief Commissioner and Commissioners can resign from their respective positions by tendering resignation letter to the President. They may also be removed under the procedure described in section 16.

(14) Remuneration and allowances

a) Remuneration and allowances for Chief Information Commissioner shall be equivalent to those of a judge of the Appelllate Division of the Supreme Court

b) Remuneration and allowances of the Information Commissioners shall be equivalent to those of a judge of the High Court Division.

(15) Staffs of the Commission:

In order to carry out the functions of this commission effectively, the government shall arrange those numbers of officers and employees as are necessary. The conditions of their service shall be determined by the government.

(16) Removal from Office:

a) Subject to the provisions of sub-section (3?), the Chief Information Commissioner or any Information Commissioner shall be removed from his office by the President through the same procedure under Article 96 of the Constitution which the President may apply for removing any judge of the Supreme Court

b) The President may suspend any commissioner from office in respect of whom a reference has been made to the Supreme Court under sub-section (a) until the President has passed orders on receipt of the report of the Supreme Court on such reference.

c) Notwithstanding anything contained in sub-section (1), the President may by order remove from office the Chief Information Commissioner or any Information Commissioner if the Chief Information Commissioner or a Information Commissioner, as the case may be,—

d)

(1) is adjudged an insolvent; or has been convicted of an offence which, in the opinion of the President, involves moral turpitude; or

(2) is unfit to continue in office by reason of infirmity of mind or body; or

(3) has been guilty of gross misconduct

(17) Powers and functions of the Information Commissions, appeal and penalties:

(a) Power and functions of the Information commission:
Subject to the provisions of this Ordinance, it shall be the duty of the Information Commission to receive, inquire and dispose of a complaint if it is made by any person on the following grounds,—

(1) he has been unable to submit a request to an application by reason that no designated officer has been appointed under this ordinance or Act, or he has failed to submit the application as the authority has refused to accept his or her application for information.

(2) he has been refused access to any information requested under this Ordinance;

(3) he has not been given a response to a request for information or access to information within the time limit specified under this Ordinance;

(4) he has been required to pay an amount of fee which he considers unreasonable;

(5) who believes that he has been given incomplete, misleading or false information under this Ordinance; or

(6) in respect of any other matter relating to requesting or obtaining access to records under this Ordinance.

(b) Where the Information Commission is satisfied that there are reasonable grounds to inquire into the subject matter of the complaint, it may initiate an inquiry in respect thereof.

(c) If any complaint is lodged against any information officer or the authority, the Commission shall, in appropriate cases, enquire into the matter and it may also, if necessary, can initiate an enquiry *suo moto*.

(d)The Information Commission shall, while inquiring, have the powers as are vested in the Code of Civil Procedure, 1908, in respect of the following matters, namely:—

(1) summoning and enforcing the attendance of persons and compelling them to give oral or written evidence on oath and to produce the documents or things;

(2) requiring the discovery and inspection of documents;

(3) receiving evidence on affidavit;

(4) requisitioning any public record or copies thereof from any court or office;

(5) issuing summons for examination of witnesses or documents; and

(6) any other matter which may be prescribed by the Government.

(e) The Information Commission may, by official notification, make any necessary regulations for implementing the provisions of this Ordinance without affecting the generality of the above mentioned powers.

(18) Examination of records:

Notwithstanding anything inconsistent contained in any other law, the Information Commission may, during the inquiry of any complaint under this Act, examine any record held by any authority to which this Ordinance applies.

(19) Appeal:

(a) Any person who, does not receive a decision within the time specified in sub-section (a) of section 7, or is aggrieved by a decision of the Information Officer may within thirty days from the expiry of such period or from the receipt of such a decision prefer an appeal to such senior officer who is acting as Head of the administrative unit in the authority:

Provided that such superior authority may admit the appeal after the expiry of the period of thirty days if he is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

Provided that an appeal may be preferred directly to the information commission by a person aggrieved by the decision of an information officer who himself is the head of administrative unit.

As the appellate authority, the Head of the administrative unit shall, within 15 days of receiving the appeal, instruct the information officer to provide the requested information or reject the appeal.

(b) A second appeal against the decision under sub-section (a) shall lie within sixty days from the date on which the decision should have been made or was actually received, with the Information Commission.

Provided that the Information Commission may admit the appeal after the expiry of the period of sixty days if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

(c) Where an appeal is preferred against an order made by a Information Officer which relates to a third party, the commission shall give an opportunity of being heard to that third party.

(d) In any appeal proceedings, the onus to prove that a denial of a request was justified shall be on the Information Officer who denied the request.

(e) An appeal under sub-section (a) or sub-section (c) shall be disposed of within thirty days of the receipt of the appeal or within such extended period not exceeding a total of forty-five days from the date of filing thereof, as the case may be, for reasons to be recorded in writing.

(f) The decision of the Information Commission shall be binding.

(g) In its decision, the Information Commission has the power to—

(1) require the authority to take any such steps as may be necessary to secure compliance with the provisions of this Ordinance, including—

(i) by providing access to information, if so requested, in a particular form;
(ii) appointing a Information Officer
(iii) publishing certain information or categories of information;
(iv) making necessary changes to its practices in relation to the maintenance, management and destruction of records;
(v) enhancing the provision of training on the right to information for its officials;
(vi) providing it with an annual report in compliance with clause (b) of section 26;
(vii) require the public authority to compensate the complainant for any loss or other detriment suffered;

(2) impose any fine provided under this Ordinance;

(3) reject the application.

(h) The Information Commission shall give notice of its decision, (mentioning any right of appeal, if there is any) both to the complainant and the public authority.

(i) The Information Commission shall decide the appeal in accordance with such procedure as may be prescribed.

(20) Representation during Appeal:

In order to present their statements, the parties to the appeal shall appear in person or nominate lawyer or officer in their behalf. The commission shall, as far as possible, work like an enquiry committee in which in stead of unpleasant argument, preference shall be placed on revealing the truth.

(21) Offences and penalty:

(a) Where the Information Commission, at the time of deciding any complaint or appeal is of the opinion that the Information Officer has, without any reasonable cause, refused to receive an application for information or has not furnished information within the time specified, or malafidely denied the request for information or knowingly given incorrect, incomplete or misleading information or obstructed in any manner in furnishing the information, it shall impose a specified penalty for each day till application is received, so however, the total amount of such penalty shall not exceed twenty-five thousand takas.

Provided that the designated information Officer shall be given a reasonable opportunity of being heard before any penalty is imposed on him:

Provided further that the burden of proving that he acted reasonably and diligently shall be on the Information Officer.

(b) Where the Information Commission, at the time of deciding any complaint or appeal is of the opinion that the Information Officer has, without any reasonable cause and persistently, failed to receive an application for information or has not furnished information within the time specified or malafidely denied the request for information or knowingly given incorrect, incomplete or misleading information or destroyed information which was the subject of the request or obstructed in any manner in furnishing the information, it shall recommend for disciplinary action against the Information Officer under the service rules applicable to him.

(22) The applications of the Limitation Act of 1908: subject to the provisions of this Ordinance, the provisions of the Limitation Act of 1908 shall be applied, as far as possible, to an appeal preferred under this Ordinance.

(23) Realisation of Fines:

Any fine of compensation to be imposed under this ordinance shall be realised from the salary of the concerned officer or through the procedure through which outstanding land tax and revenue is collected under the Public demand recovery act of 1913.

(24) No court shall entertain any suit, application or other proceeding in respect of any order made under this Ordinance and no such order shall be called in question otherwise than by way of an appeal under this Ordinance.

(25) Annual Budget:

The information Commission shall prepare its own budget and shall submit it to the government for its presentation before the Parliament. The Parliament shall allocate necessary budget to the information commission.

(26) Annual Report:

a) The Information Commission shall, as soon as practicable after the end of each year, prepare a report within February on the implementation of the provisions of this Act during that year and forward a copy thereof to the Government and publish another copy for people's access in various medium including in its website (if such website exits).

b) Each Ministry or Department shall, in relation to the authorities within their jurisdiction, collect and provide such information to the Information Commission as is required to prepare the report under this section and comply with the requirements concerning the furnishing of that information and keeping of records for the purposes of this section.

c) Each report shall state in respect of the year to which the report relates,—

(1) the number of requests made to each public authority;

(2) the number of decisions where applicants were not entitled to access to the documents pursuant to the requests, the provisions of this Act under which these decisions were made and the number of times such provisions were invoked;

(3) the number of appeals referred to the Information Commission for review, the nature of the appeals and the outcome of the appeals;

(4) particulars of any disciplinary action taken against any officer in respect of the administration of this Act;

(5) the amount of charges collected by each public authority under this Act;

(6) any facts which indicate an effort by the public authorities to administer and implement the spirit and intention of this Act;

(7) recommendations for reform, including recommendations in respect of the particular authorities, for the development, improvement, modernisation, reform or amendment to this Act or other legislation or common law or any other matter relevant for operationalising the right to access information. The Government may, as soon as practicable after the end of each year, instruct the Information Commission to submit

its report mentioned in clause (1) on 1 march for causing it to be laid before the Parliament,

(8) If it appears to the Information Commission that the practice of a public authority in relation to the exercise of its functions under this Act does not conform with the provisions or spirit of this Act, it may give to the authority a recommendation specifying the steps which ought in its opinion to be taken for promoting such conformity.

(27) The Government may, by notification in the Official Gazette, make rules to carry out the provisions of this Act.

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