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EVALUATING THE JUDICIAL ROLE IN DECISION MAKING

THE CONTINUING STRUGGLE TOWARDS FREEDOM OF INFORMATION

LAW & SOCIETY TRUST

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Editor's Note ... ...

It is no small irony that, despite decades of highly developed jurisprudential thought, debate and discussion in Sri Lanka, we have now returned to serious reflections on the judicial role in decision making as well as the proper nature of judicial interventions into the administrative and governance process.

This regression has undoubtedly come about as a result of the turbulence that our legal system has been subjected to during recent years. In this regard, however much we may coyly desist from discussing the extent of political infiltration into the country's judicial institutions, this question remains at the core of the problem. In theory, we may agree, as with jurists such as Upendra Baxi who have long argued the same, that law and jurisprudence should move away from 'bottomline' questions as to whether courts are political institutions or not, whether courts make law or not and address more fundamental issues; how can the judiciary maximise its role in the constitutional hierarchy and which functions does it reform best? (see, U. Baxi, *The Indian Supreme Court and Politics*, 1980).

This is, of course, not a novel argument. George H. Gadbois, Jr., in an analysis of the Supreme Court of India as a Political Institution (*Selection, Background, Characteristics and Voting Behaviour of Indian Supreme Court Judges*, 1950-1959, in Glendon Schubert and David J. Danielski (eds.)), has remarked that it is too late in the day to cling to the old Blackstonian view of the judge as a value-free technician or legal wizard whose only task is to find the law and declare it. Specifically, 'judicial behaviour' research in countries such as India and the United States indicates the extent to which decisions of judges reveal in their decision making, their behaviour and political, social or economic philosophies. Such research reflects the manner in which judges, even if reluctantly, assume the role of political actors in their decisions, although it may amount to judicial heresy to actually admit the fact.

However, as much as we may agree with the theoretical underpinnings of these persuasive arguments and even allowing for that natural degree of 'political behaviour' in judicial decision making, the current debates in Sri Lanka regarding the judicial role are characterised by an essential loss of innocence in pursuing the ideal of an 'independent judiciary.' The complex interplay between the political structures and the judicial structures that is so crucial for the good administration of a country and which is determined primarily by scrupulously observed conventions rather than by rigid constitutional or statutory prohibitions, has changed for the worse. In this

context, it is unfortunate that we have been compelled to return to such ancient questions as those concerning judicial 'activism.'

Certain hard truths are however easily identifiable. Judges themselves are not elected and are not answerable to the people. This, in turn, has two specific consequences. First, if a judge uses such power to advance his or her own political or personal agendas, then this amounts to a type of oppression that can even surpass political oppression. This is why judges themselves have, through the ages, scrupulously avoided not only actual political bias but also the very appearance or the possibility of bias. These are principles on which the entire edifice of the institution of the judiciary is built. Any departure from such hallowed ground clearly suffices to discredit the entire institution and not one or two judges alone.

Secondly, even if political bias is not manifested, judges are human beings and thus subject to sudden arbitrariness or contrariness resulting in injustice to individuals. Consequently, in developed jurisdictions, judges have engaged in the formulation of exhaustive codes of conduct and rules relating to contempt of court to guard against such arbitrary conduct from which there would otherwise be no redress since the Court itself is the weapon causing the injustice. Courts in these jurisdictions are characterized by commendable judicial restraint towards litigant and lawyer alike. Departure from these rules of restraint has resulted in swift action against the errant judges, including at times, the chief justice of that particular country. In many systems, the remedy of impeachment by Parliament (as is currently the practice in Sri Lanka) has been adjudged to be too political; instead, alternative systems of disciplinary control have been put into place from which no judge is exempt.

These observations are directly relevant to the central theme of this Issue of the *LST Review*. First, we publish the Oration delivered by *Deshamanya Dr. R.K.W. Goonesekere* at the 60th Anniversary of the Faculty of Law, University of Colombo titled appropriately enough, *'Arm of the Law'*, where Dr. Goonesekere traces the history of judicial decision making in the realm of public law in Sri Lanka, from the seminal *Bracegirdle Case* to modern decisions. His exploration of the different areas in which judges have gradually been given authority to decide questions unequivocally belonging in the sphere of 'policy' is an important part of the analysis. The resultant impact, as he points out, has shifted the focus away from, for example, Parliament (which ought to be a forum where debates intrinsic to parliamentary democracy should take place) to the Court and the decisions of judges.

The 'political question' doctrine is also discussed in a context where, *interalia,* the question is asked as to whether Courts are empowered to decide on matters such as the entering into of treaties which categorically belongs to the political domain? His caution in respect of judicial arbitrariness emerges clearly from the discussion. Thus, the following observation:

> *"All declarations, orders and directions made by the Court are not reviewable by any authority and some, if not all, are backed by Court's contempt powers which are also not subject to review...."*

Meanwhile, his parting caution that judges should also not be above the law, brings us to the observation made earlier in this Editor's Note in regard to the need to fashion appropriate disciplinary procedures for appellate court judges as differentiated from the mechanism of impeachment in Parliament.

Secondly, we publish a paper on the impact that recent decisions of the Court has had on the protection of social and economic rights in Sri Lanka, by ***Dinesha Samararatne.*** This paper looks at the constitutional background in this respect including the Directive Principles of State Policy in acknowledgement of the fact that such rights are not justiciable. It examines in detail, several recent judgments of the Court and poses the query as to whether the cases have largely enforced traditional guarantees of civil and political rights rather than articulated the protection of social and economic rights that are not explicitly secured in the constitutional framework.

The writer also questions lacunae evident in legal reasoning thereto and warns against relying on the decisions to support the argument that the decisions indicate unequivocal victories in the advancement of the judicial protection of social and economic rights. Her underlying theme is that the recent decisions, irrespective of criticisms that may be made regarding their contents or context, reflect the commonly accepted and essential indivisibility of civil, political, social and economic rights.

The third paper by ***Madhushika Jayachandra*** looks at a comparatively different question of the Right to Information (RTI). Framing the conceptual nature of this right, she looks at its various components as well as its recognition at the international and regional level. While some jurisprudential advances in this respect are recognised, Sri Lanka's failure to enact a RTI law (despite spirited efforts by various groups and individuals) is bemoaned.

Lastly, we publish a Preview of the book, *Recovering the authority of public institutions – A resource book on law and human rights in Sri Lanka'*, by the ***Asian Human Rights Commission.*** This publication examines the manner in which the Sri Lankan systems of governance gradually changed from being a rule-of-law system to a non-rule-of-law system. It looks at the loss of supremacy of the law, where a paradigm shift has taken place from a system recognising the separation of powers to one based on the absolute power of the executive president. The analysis is marked for its theoretical critiques buttressed by extensive documentation of more than 200 cases of grave violations of human rights across the country.

Kishali Pinto-Jayawardena

ARM OF THE LAW*

Dr. R.K.W. Goonesekere[*]

I

When I was a first year law student at the University of Ceylon, constitutional law was a subject in our course. The class was taken by Sir Ivor Jennings, the renowned constitutional law expert who was then Vice Chancellor. Sir Ivor was also advisor to the Government of D.S. Senanayake in drafting the Independence Constitution for Ceylon, a task that required much skill. The Soulbury Commission had come and gone leaving a Constitution less than what a country—fired by the success of nationalism in India—wanted. There were great discussions in all parts of the country and we, young students, had great expectations from the course.

My remembrance of that year, however, was of learning the fundamentals of the British Constitution, sovereignty of Parliament, doctrine of separation of powers, independence of the judiciary, Dominion Status, the Statute of Westminster, and rudiments of administrative law. Of the constitutional history of Ceylon there was hardly anything except for an analysis of the Soulbury Constitution, especially the protection of minority interests.

Writing today, what strikes me most was the small part given in the course to the substance of judicial control of administrative acts. The importance of the *writ of habeas corpus* in guaranteeing the cherished concept of freedom for British People received its due share with English law examples. But there was no reference to our leading case of Mark Bracegirdle (39 NLR 153) and the curbing of executive power by a colonial judiciary not bent on cringing before a powerful executive authority. In this case, the Governor was acting under the power vested in him by Order in Council, 1896, to order a person to quit the Colony. The question was whether this was an absolute power given to the Governor not conditioned by time, occasion or circumstance, in which case the deportation order was valid. The Supreme Court interpreted the Order in Council as giving a power to deport only when the national security was in danger as by war or extreme civil disorder. Such was the case in W.A. de Silva (18 NLR 277) when the writ of *habeas corpus* to secure the release of a person detained under martial law failed.

Bracegirdle's case was different because deportation was sought simply because he was a labour agitator and an irritant to British planters and the order was held to be invalid. This landmark decision owed much to the brilliance of Ceylonese lawyers who were listened to attentively by the Bench, a feature of the times. The case is recommended to all law students

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* The *60th Anniversary Oration* of the Faculty of Law, University of Colombo delivered on 24th October 2008.

* Deshamanya Dr. R.K.W. Goonesekere is former Chancellor, University of Peradeniya, and former Principal, Sri Lanka Law College. (Ed. Note: Dr. Goonesekere, as Senior Counsel, was in the forefront of the development of fundamental rights jurisprudence in Sri Lanka, particularly in the nineteen eighties and nineteen nineties.)

to show that advocates and their juniors studied hard to assist the Bench and were given ample time to develop their arguments. Nothing is more pleasing to an advocate than that he is given a patient hearing. Bracegirdle is an example of good law reporting and the fair and meticulous writing of judgments.

Our law reports show that *habeas corpus* was regularly used in hope of freeing persons in detention camps under the Immigration and Emigration Act. They did not succeed and the judgment in *Sudali Andy Asary v. Vanden Driesen* (54 NLR 66) shows more than due deference being shown by the Supreme Court to Ministerial acts. Lord Atkin's famous dissent in *Liversidge v. Anderson* (1948) (1 AER 373) was however noted.

The other prerogative *writs*, which also gave powers to the judiciary, were not frequently used except to settle disputed local government elections. From the beginning great caution was expressed by Judges in invalidating official acts. In W.A. de Silva (*supra*) the Court emphasized that their duty was to inquire into questions of fact but not to the exercise of military law powers.

But changes were taking place in England after World War II and they did not go unnoticed in our Law Library. The *writs*, especially *Certiorari* and *Mandamus* were given a new vitality by English Judges. Executive decisions came increasingly under judicial scrutiny, and executive authorities were on the defensive. Here the process was made easier by local administrators taking over governance and local Judges replacing English Judges. When I came to practice, the Anisminic case and Wednesbury rules were being talked about in Hulftsdorp and civil and criminal law rules were already dwarfed by public law. But judges were cautious of their new power which if not used with restraint could lead to a "New Despotism" as feared by W.A. Robson. They were at pains to say that their duty was to see if there had been a competent exercise of a lawful authority and no more. As stated by the Supreme Court in 1956:

> *There is no authority in law for the substitution of the decision or discretion of the Court in place of the decision or discretion of the Minister.*
> *- John Nadar v. Vanden Drieesen* (58 NLR 85).

There was also insistence on strict satisfaction of the accepted conditions to the exercise of their jurisdiction. These are to be found in any book on Administrative Law and there has been no disagreement between judges and lawyers.

Further developments in Administrative Law with the recognition of grounds beyond illegality and abuse of discretion gave greater opportunities for Judges to come into conflict with the government. It is in this connection that the judicial role came correctly to be seen as upholding the Rule of Law. When all this was happening there was no recognition by Judges that they now had an unrestricted power. H.W.R. Wade said in 1982,

...the Court will treat an administrative act or order as invalid only if the right remedy is sought by the right person in the right proceedings.
- Administrative Law, 5th ed. (repeated in later editions)

The vigor shown by judges in the review of administrative acts many years later led a frustrated government to amend the Interpretation Ordinance in order to place limits on the exercise of judicial power. This failed due to the remarkable judgment of a bench of nine judges with eight judges writing separate judgments in *Sirisena v. Kobbekaduwa* (80 NLR 1) and led to a second amendment but the limitations failed to survive the 1978 Constitution.

II

As judges got accustomed to controlling the acts of executive officers, another task was given to them. The Independence Constitution created a Parliament of elected and nominated members with power to pass laws. But as Jennings, who may be regarded as one of the architects of the Constitution said, *"The Legislative power of Parliament is not that of a sovereign legislature..."*. It became the unexpected duty of judges to uphold the Constitution if a law was found to contain provisions inconsistent with the Constitution by declaring such provisions invalid. We saw the exercise of the power by a Bench of three judges in *Queen v. Liyanage* (64 NLR 313). But the Supreme Court was uneasy when called upon to rule on politically sensitive laws. In *Mudanayake v. Sivagnanasunderam* (53 NLR 25) collateral attack by *writ of Certiorari* on the Citizenship Acts which had the effect of disenfranchising persons who previously had voting rights did not succeed. The more controversial Official Languages Act was challenged in the District Court as *ultra vires* Section 29(2) of the Constitution, and the District Judge held it was. In the Supreme Court Judges showed obvious reluctance to holding a law as discriminatory of minorities and decided the case on another ground.

After a strong socialist government took office with a mixture of Marxist leaders it was decided to replace the Westminster given Constitution by Order Council with an autochthonous Republican Constitution. The Republican Constitution of Sri Lanka, 1972, retained features of the Independence Constitution with significant differences, one of which was to take away the power of Courts to pronounce on the legality of any law passed by the new legislature, which was declared in the Constitution to be *"the supreme authority of the state power."* Instead to satisfy public opinion, a Constitutional Court was created and given the task of examining proposed laws before they passed through Parliament in order to see that they did not contain provisions inconsistent with the Constitution. The Court's powers were limited and did not extend to preventing the National State Assembly (NSA) from enacting a law even inconsistent with the Constitution because the NSA retained the power to pass the Bill into law by a special majority. Otherwise, the Court's opinion was binding on all institutions administering justice and could not be in any manner called into question.

If the shortness of time given to the Court to express its opinion and the handpicking of members of the Court was in the expectation that there would be a rubber stamping of Bills submitted to the Court, this did not happen. When the six volumes of the *Decisions of the*

Constitutional Court are looked at, they will show that the Court consisting of Judges and former Judges took this new function seriously and acted with commendable independence and integrity. There was no question too that lawyers appeared before the Court in the same spirit and gave the Court all assistance.

Perhaps judges and lawyers enjoyed the role of being adjuncts to law-making. The denial of the right to challenge a law at a later and more appropriate stage before a judicial forum had its critics. Strangely however, the fact that persons trained only in law and whose only experience was Court work may now be going into questions of policy, an area traditionally left to lawmakers, did not appear to be a matter of concern.

It may be for these reasons that the Second Republican Constitution adopted the same policy of not allowing duly passed laws being struck down by Courts. Again we find provision for pre-enactment scrutiny now given to the Supreme Court but with more safeguards for the supremacy of Parliament in making laws. There have been a larger number of petitions of challenge to the Supreme Court in the last 30 years, showing that the opportunity to take part in law making was seized by ordinary people more particularly by organisations and unions.

Looking at the Decisions of the Constitutional Court (CC) and the Determinations of the Supreme Court it cannot be taken for granted that this novel procedure has had a satisfactory effect. For the NSA there may have been good reasons at the time for enacting a law with provisions inconsistent with the Constitution, which could be explained in Parliament and passed, whatever the CC may have had to say in its Decision. But under the present Constitution the entrenching of several Articles and decisions of the early Supreme Court that Article 4 attracted Article 3 had the unexpected result of many Bills having to be ruled as not only having to be passed by a two-thirds majority but also submitted to a Referendum or drastically amended. In a Parliament elected under the proportional representation (PR) system even a simple majority is often unattainable, as we have seen, much less a two-thirds majority. This places the fate of a proposed law in the hands of three Judges. What has happened is that serious debates that should take place in Parliament by people's representatives and are intrinsic to Parliamentary democracy, are stalled. The focus now becomes proceedings in Court. The 13th Amendment to the Constitution was hotly 'debated' in the Supreme Court, but not sufficiently, for lack of time. Subsequent speeches in Parliament, so necessary for a Bill of this nature, were missing. The incorporation of associations by Private Members' Bills, for which a special procedure is laid down in Standing Orders of Parliament for hearing of public opinion, was routinely used to incorporate religious associations. Supreme Court Determinations, when three religious bodies sought incorporation, prevented this on grounds which it is difficult to imagine would have been urged in Parliament. Submissions made for and against the Anti-Conversion Bill in the Supreme Court show how easy it is for policy and Constitutional provisions to get blurred.

In my view the advantage of prior judicial scrutiny over the slight risk of later invalidation of a law by judges has not been demonstrated. There is subordination of law making to another branch of government that is not accountable to the people.

III

Representative government has always meant having clean elections to choose representatives. Rules are laid down in the governing election laws for ensuring free and fair elections and serious consequences ensue for non-observance by political parties and candidates. The election petition for unseating a candidate declared elected had the most salutary effect. The threat of losing one's seat for corrupt practice during the election was sufficient to deter candidates and their supporters from resorting to thuggery etc., and the function of deciding on the petition was assigned to an election Judge. There was little difficulty in presenting evidence when the electorates were small and the duty of the Judge was to apply the law. There was no need for local or international observers.

All this changed when, under the proportional representation system, the electorate became the District with a large number of candidates from many parties contesting. Election laws and election offences remained to ensure clean elections and election petitions could still be filed but the procedure for prosecuting the petition was now difficult. Election petitions virtually disappeared with unfortunate consequences for the country.

If the important role assigned to Judges was seldom exercised, a new role was given to them by a Constitution fashioned for election of political parties and less of candidates who had the confidence of voters. Party constitutions and party discipline mattered more to elected candidates than satisfying the wishes of the electorate. The threat of elections petitions and a by-election was now replaced by threat of expulsion by the party which also meant loss of the parliamentary seat. This was to prevent changing sides after election, a freedom enjoyed by members of parliament (MP) earlier. The only way for the expelled member to retain his seat was to petition the Supreme Court that the expulsion did not follow the party's constitution. Now the Supreme Court was requested to go into the party constitution and the petitioner's acts and explanation and in effect decide on the MP's fate. If the expulsion is upheld, another member is sent by the party without a by-election. If the Court decides in favour of the petitioner, he will remain a MP and officially a party member. In a coalition government, because one party does not have an absolute majority, the crossing over of members from other parties to the government in large numbers will give a much needed majority to the government. In this situation, the decisions of the Supreme Court to uphold the expulsion as valid could lead to the downfall of the government. Thus, the fate of a government could lie in the hands of the Judges.

There is a theory that when a Constitution clearly commits an issue to a coordinate political department such as the executive or the legislature, any challenge to the decision of that body is a 'political question' and non-justiciable by the Courts. The doctrine of separation of powers requires that there be no lack of respect to a coordinate branch of government and that no embarrassment is caused by different pronouncements by various departments on a particular issue. The smooth working of government requires this. The doctrine of 'political question' is clearly intended as a limitation of judicial power. The law involved in *Queen v. Liyanage* referred to earlier, can also be explained as the legislature showing lack of respect for the judicial branch. On the other hand the suitability of members of the legislature is not

in our law committed to the legislature but to the judiciary. But what of appointments within the legislature?.

The question has not arisen in Parliament with regard to the appointment of Prime Minister or other Ministers. Not so in the case of Provincial Councils. After Provincial Council elections, the appointment of two Chief Ministers of two Provincial Councils by the respective Governors was challenged by *writs of Certiorari* and *Mandamus* applying the test of Wednesbury unreasonableness. It was countered by the argument that the power given to the Governor was a matter for his subjective assessment and not subject to review by the Court. In the Supreme Court, Counsel submitted that it was a 'political question' and relied on the reasons propounded in the American case of *Baker v. Carr* (1962) (369 US 186). The Court rejected this submission holding that a Provincial Governor cannot be regarded as a branch of government coordinate to either of the Superior Courts and that no judicial deference or self-restraint is owed to subordinate executive or legislative bodies such as the Governor of the Provincial Council. It is interesting, however, that the judgment said that the Court's position would be different in the case of the President and Parliament. It cannot therefore be said that the 'political question' doctrine was dismissed from our law (see, *Premachandra v. Jayawickrema* (1994) (2 SLR 90)).

Entering into treaties when assigned solely to the executive branch, as in our Constitution, is generally non-justiciable because it is outside the area of judicial competence. The recent judgment of the Supreme Court in the Singarasa case is contrary to the argument that there is such a thing as a 'political question' or non-justiciability of an issue or the ordinary respect due by Courts for the political domain.

IV

In the last section I will say something of the new role given to Judges by the 1978 Constitution. Having enumerated fundamental rights and made them enforceable, the Constitution also gave the Supreme Court jurisdiction for the protection of fundamental rights (Article 118) and by Article 126 which recognized the Supreme Court as having sole and exclusive jurisdiction to hear and determine any petition relating to the infringement of any fundamental right by State action. The Constitution required the petition to be presented within one month of the infringement, a condition insisted upon by the Court unless the petitioner is able to show good reasons why it should be relaxed. The Rules of the Supreme Court required that the petition should set out the facts and circumstances relating to the right, by whom and how it was infringed and the relief prayed for. In short, the petitioner should know all or most of the facts relating to the infringement of his fundamental rights before coming to Court.

When the petitioner succeeds in his or her application, the Court has the power *"to grant such relief or make such directions as it may deem just and equitable in the circumstances"* (Article 126(4) of the Constitution). Judges have not considered this power as giving them an absolute or unfettered discretion.

Usually it is an order for costs and compensation to the petitioner by the State and/or the respondents, and such other orders as are necessary to give relief or redress to the petitioner. The basis for the sum of money awarded as compensation is not given in the judgments.

It is abundantly clear from Articles 17 and 126 that it is the person who is entitled to the fundamental right who can be the petitioner by himself or by an attorney-at-law on his behalf and no one else. The question whether a third party can bring the action was considered by a Bench of five Judges in *Somawathie v. Weerasinghe* (1990) (2 SLR 121). The majority decision was that not even the wife of the torture victim had any standing under Article 126. Putting the Article under close scrutiny Justice Amersinghe held that the words to be clear and unambiguous. He added,

> *...separation of powers requires me as a Judge not to presume, that I know how best to complete the legislative scheme. In such a situation any attempts on my part to fill the supposed gaps would lead me to cross the boundary between construction or interpretation and alteration of the legislation.*

In taking this view he took into consideration that otherwise even a concerned citizen could claim standing. In *Faiz v. AG* (1995) (1 SLR 372), agreeing with Justice Amerasinghe, Justice Mark Fernando said:

> *Article 126 does not enable the Court to reach all those responsible, at least by means of just and equitable orders and directions. Thus jurisdiction cannot be expanded by twisting, stretching or perverting the Court through a populist process of activist usurpation of the legislative function thus creating a judicial despotism under which the Courts assume sovereignty over the Constitution... for the Rule of Law binds the Judiciary as well as other organs of government.*

Again the same Judge in *Sriyani Silva v. Iddamalgoda* (2003) (1 SLR 14) drew attention to the fact that Article 126(2) gives only the person who alleges that a fundamental right "relating to **such** person" (emphasis in judgment) has been infringed to apply to Court. It is a very limited exception that has been recognised as to who can bring a fundamental rights case justified by the special facts of each case. It was applied also in *Rani Fernando v. Seeduwa Police* (2005) (1 SLR 40). Article 126 is a Constitutional provision and an interpretation must be appropriate to the words.

There is a consistent line of decisions as to who is entitled to be the petitioner in an application under Article 126 and good reasons have been given. It is nonsense to say they represent a conservative view relying on Indian cases which have developed a broad approach to standing in public law and accepted public interest litigation. In the Constitution of India the Supreme Court is given a concurrent right with the High Court for the enforcement of fundamental rights and the power to issue directions or orders or writs. There is a fusion of the writ and fundamental rights jurisdiction. India does not have a provision corresponding to Article 126 which calls for its own interpretation and application. Our writ law is unwritten

and can and has been developed in a liberal manner. The "new doctrine" of the scope of fundamental rights litigation has not seen the distinction.

Let us see where the 'new doctrine' has led us from some decided cases. In the Post-Tsunami Operational Management Structure (P-TOMS) Case (*Weerawansa v. AG*) thirty MPs of one political party who clearly did not satisfy the test in Article 126 succeeded by an application under Article 126 in overturning a political decision of the government. Their contention that they were acting in the public interest was accepted by the Supreme Court. In *Omalpe Sobitha Thero v. Commissioner of Elections* (known as Date of Presidential Election Case) there was no finding by the Court that the Commissioner had infringed the right of the petitioners and no order was made against him. The Courts however said that the petition had been filed in the public interest and claiming to act under Article 125 directed the Commissioner to fix the date of election according to the findings in the judgment. According to Presidential Election law it was the Commissioner who had the right to decide the date. In the NE De-merger Case (*Wijesekera v. AG*) the petitioners had standing and their delay in coming to Court within one month was excused. Three Executive Presidents had postponed the taking of the poll in the Eastern Province for 17 years and this would have been due to their political perception of the situation in the country but it did not prevent the Court from declaring the postponement invalid.

In the President's Entitlements after Retiring Case (*Senarath v. Chandrika Kumaratunga)* two petitioners who filed a petition for infringement of their fundamental rights under Article 12(1) made no attempt to show how their rights were infringed. But they claimed they were representing the rights of the people of the country. When objections were taken to their right to come to Court under Article 126, the Court concluded that ordinarily a fundamental rights petition is filed when the wrongful executive act affects a person. But the Court proceeded to say that it does not prevent any person in the public interest from seeking a declaration from the Court, for infringement of their fundamental right to equality before the law by a decision of the President and the Cabinet. The Court held their rights had been infringed and besides making other orders awarded Rs.100,000 as costs to each petitioner to be made by the respondent.

An ordinary school admissions case (*Haputhantrige v. Sujatha Vidyalaya, Matara)* was settled to the satisfaction of all parties. Ordinarily this would have been the end of the case. But it did not stop there because the Court decided to look at the Rules of the Ministry of Education as set out in the Circular to see if they satisfied the equal protection laws of the Constitution. The Circular had been affirmed by the Cabinet as being the national policy for admissions. The examination by the Court led to Court faulting some of the criteria on the ground that proper guidelines for formulating a policy had not been followed, and that the school had deviated from the Circular issued by the Ministry of Education. The judgment went on to order a new policy to be formulated which would not be in breach of the right to equality before the law and equal protection of the law. This was done by a draft Circular submitted by the Ministry to Court after judgment. On yet a later date associations of past pupils made representations as to proper guidelines in a draft prepared by them. Finally, the

Supreme Court approved the amended draft submitted by the Presidential Secretariat and later ordered admissions for the next year to be completed by 29 February.

In *Nanayakkara v. Choksy et al* (SLMSL Case) the Petitioner as a former politician and social worker said that he filed the application in the national and public interest to enforce the fundamental right to equality before the law which had been denied by unjust, wrongful, unlawful, unreasonable, arbitrary, capricious and *mala fide* actions. Respondents objected that the petitioner was out of time and that he had no right to represent the citizens of the country. These were overruled by the Supreme Court. The first because the petitioner had to obtain material documents from sources not accessible to him. The second, because the executive as guardians of the State resources in the people's interest gave him a 'positive component' in the right to equality. The Court declared all agreements which formed the basis of the transfers of State land invalid and directed the Secretary to the Treasury to pay Rs.500,000 to the State, and two public companies and two officers holding managerial positions to pay Rs.250,000 costs to petitioner as just and equitable relief. After judgment was delivered the Secretary to the Treasury was summoned to appear before Court and asked to resign from all public offices held by him. This was not a relief asked for by the petitioner in his petition on which leave to proceed was granted. Nor was it an order made in the judgment except that the judgment ended by saying that, *"All parties to the proceedings will take necessary action on the basis of the findings stated above."*

In the Water's Edge Case (*Mendis v. Chandrika Kumaratunga*) the petitioners alleged that they brought the action because the national interest and national economy and rights of citizens of the country had suffered by abuse of the executive power vested in the President. Objections were taken that they had no standing and were out of time. The first was rejected on the ground that petitioners in public interest litigation have a Constitutional right given by Articles 17 and 126 to forward their claim. The second was also rejected because no date had been indicated as to when the one month period should be reckoned. The judgment itself gives the date of acquisition as 1984 and other material dates as 1998 and 2003. The judgment allowing the petitioner's application declared their rights under Article 12(1) to have been infringed. The Court further held that, several transactions which had Cabinet approval, had no force or avail in law because they were ratifications of actions in violation of the Public Trust doctrine. The former President as Head of Cabinet was ordered to pay Rs. 3 million to the State. A respondent who had no executive status but had profited from the transaction was found 'guilty' of impropriety or connivance with the executive in the wrongful acts and as a 'punishment' was ordered to pay Rs. 2 million to the State, raising the question whether the original fundamental rights jurisdiction given, the Supreme Court has acquired a criminal jurisdiction. Costs in Rs.500,000 were ordered to be paid to each petitioner by eight respondents in equal proportion.

As reported in the newspapers at present, there are other fundamental rights cases which are leading the Supreme Court to making orders. Some of these are:

1. For removal of permanent checkpoints, and illegal 'no parking' signs that lead to prohibition of parking in certain roads; for minimizing inconvenience caused to the public due to stoppage of traffic to permit VIP movement;

2. For Secretary to Treasury to consider the possibility of allocating Rs. 10 billion to implement a strategic plan for a traffic system for the Greater Colombo area;

3. Restraining a baby elephant being sent to Armenia as a gift;

4. Restraining a scheme of the Kandy Municipal Council for easing traffic in Kandy;

5. Prohibiting shops from charging customers for paper bags.

These cases show the very wide powers assumed by the Supreme Court in its fundamental rights jurisdiction. All declarations, orders and directions made by the Court are not reviewable by any authority and some, if not all, are backed by Court's contempt powers which are also not subject to review. These cases show the far-reaching consequences of the decisions and how they came to be made, deserves examination.

Acceptance of a petition under Article 126(2) from virtually any person claiming to act in the public interest or on behalf of the citizens of the country and the wide interpretation of equality before the law and equal protection of the law in Article 12(1), together with the wide powers assumed under Article 126(4) are the cornerstones of the 'new doctrine.' The authorities given for the new doctrine are: Dicey's rule of law, Wade on Administrative Law, India's public interest litigation, the public trust doctrine, and our own cases such as, *Premachandra v. Jayawickrema* (1994) (2 SLR 90), *Bandara v. Premachandra* (1994) (1 SLR 301), *Bulankuluma v. Secretary of Industries* (2000) (3 SLR 243), and *Faiz v. AG* (1990) (1 SLR 372); and it would require a separate article to analyse these.

Suffice for the moment to quote India's former Chief Justice Bhagwati who said,

> *where a person, class of persons to whom legal injury is caused by reason of violation of a fundamental right is unable to approach the Court for judicial redress on account of poverty or disability or socially or economically disadvantaged position, any member of the public acting bona fide can move the Court for relief under Article 32 and Certiorari, also under Article 226, so that the fundamental rights become meaningful not only to the rich and the well-to-do who have the means to approach the Court but also for the large masses of people who are living a life of want and destitution and who are by reason of lack of awareness, assertiveness and resources unable to seek judicial redress.*

In the book, *Indian Constitutional Law* by M.P. Jain (1998) the author states,

Public interest litigation should not however be used by a petitioner to grind a personal axe. He should not be inspired by malice or a desire to malign others or actuated by selfish or personal motives or by political or oblique considerations. He should be acting bona fide and with a view to vindicate the cause of justice. The Supreme Court has cautioned that public interest litigation is a weapon which has to be used with great care and circumspection and that the judiciary has to be careful to see that under the guise of redressing a public grievance it does not encroach upon the sphere reserved by the Constitution to the executive and the legislative.

This statement is all the more applicable to the Constitution where decisions are final and not subject to review.

Article 126 applies when executive or administrative actions—in the wide meaning given to it by case law—cause an infringement of a person's fundamental right. After this is proved, the Supreme Court is given the power to give equitable and just relief to the person who suffers the wrong. The State is not intended to benefit from a fundamental rights action.

Finally, I wish to address in the last section of this paper to the reference made in some of the judgments to the widely accepted principle that 'no one is above the law'. That being the case, can even Judges be above the law? Actions by Judges may not be the subject of complaints of infringement of fundamental rights, as held by our case law. But the judiciary as an organ of government is bound by Article 4 to respect and secure fundamental rights. In *Sudath Silva v. Kodituwakku* (1987) (2 SLR 110) the Supreme Court said that,

Article 11 prohibits every person from inflicting torture or cruel or inhuman treatment on another. It is an absolute fundamental right subject to no restrictions or limitations whatsoever. Every person in this country, be he a criminal or not, is entitled to this right to the fullest content of its guarantee. Constitutional safeguards are generally directed against the State and its organs.

This is part of the sovereignty of the people. The respondent in a fundamental rights case cannot be in a worse position than a criminal. The jurisprudence of Article 11 has expanded its meaning and now includes causing mental pain and suffering, humiliating treatment and affront to dignity. This should not happen to persons in Court whether as parties to a litigation, witnesses, persons on notice or lawyers, without violating Article 11. A person's right to engage in a lawful occupation is guaranteed by Article 14(1)(g). If the person is employed, such person is governed by the terms of his or her employment. Can a respondent in fundamental rights case be deprived of this guarantee by order of Court that he or she should cease employment? The question is *Quis Custodies Custodet.*

ECONOMIC AND SOCIAL RIGHTS IN AN 'ACTIVIST' SRI LANKAN SUPREME COURT[±]

Dinesha Samararatne[*]

1 Introduction

Controversy surrounds the recent activism of the Sri Lankan Supreme Court (S.C.). The S.C. has made wide ranging determinations in the areas of public law and fundamental rights. Some of these controversial decisions have included the enforcement of Economic and Social Rights that are considered to be non-justiciable under the Sri Lankan Constitution. This paper seeks to analyze the process whereby the S.C. reached this outcome. Based on that analysis this paper makes the argument that the time has come to reject the traditional distinction between Civil and Political Rights (CPR) and Economic and Social Rights (ESR).

2 Sri Lanka: Background

Constitutional reforms prior to independence from the British in 1948 paved the way for a comprehensive social welfare policy in Sri Lanka, mainly in the areas of education, food and health care.[1] According to Goonetilleke, the influence of British welfare policies and the introduction of universal suffrage were factors that contributed to these policies.[2] Post-independence, successive governments have continued this policy and even today primary, secondary and tertiary education and health care are provided free of charge universally.[3] Consequently, most social indicators of the country have consistently been on par with those of a developed nation; for instance, Sri Lanka's literacy rate is 92.5 percent and the net enrolment ratio in primary schools is 97.5%.[4]

Sri Lanka has a tradition of written constitutions from the early 20th century. The present Constitution of 1978 includes a bill of rights titled "Fundamental Rights", which identifies the traditional civil and political rights as being justiciable.[5] A fundamental rights application can

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[1] For instance, the policy of "free" education from the primary up to tertiary level was introduced as early as 1945.

[2] Godfrey Goonetilleke, *Social Security in Shri Lanka,* Marga Institute, p.5, http://www.margasrilanka.org/SOCIAL%20SECURITY%20IN%20SRI%20LANKA.pdf.

[3] For a detailed analysis of the welfare policies in Sri Lanka see, Laksiri Jayasuriya, *Welfarism and Politics in Sri Lanka: Experience of a Third World State*, School of Social Welfare and Social Policy, 2000.

[4] See the Central Bank Report, Sri Lanka 2003/2004, http://www.cbsl.gov.lk/pics_n_docs/10_publication/_docs/efr/annual_report/Ar2007/Ar_Data2007_E/4_Key_Social_Ind_e.pdf and http://www.cbsl.gov.lk/pics_n_docs/10_publication/_docs/efs/table_01.pdf.

[5] Article 17 states that "Every person shall be entitled to apply to the Supreme Court, as provided by Article 126, in respect of the infringement or imminent infringement, by executive or administrative action, of a fundamental right to which such a person is entitled under the provisions of this chapter".

be brought directly to the Supreme Court S.C.which has the power to make a "just and equitable" order.[6]

Economic, social and cultural rights are only recognized as "Directive Principles of State Policy and Fundamental Duties."[7] In this section the Constitution spells out the objectives that the State has pledged to realize in establishing a "democratic socialist society"[8] and they include, the realization by citizens of an adequate standard of living including "adequate food, clothing and housing"[9] and the "right to universal and equal access to education at all levels"[10]. However, similar to the Indian Constitution, the Sri Lankan Constitution explicitly states that the rights recognized as Directive Principles of State Policy are not justiciable.[11]

The model of Directive Principles is said to have been adapted from the Irish Constitution.[12] Unlike in India, the Sri Lankan Supreme Court has not interpreted the Directive Principles to be justiciable but has held that the non-enforceability of the Directive Principles does not devalue it, but rather, that these principles were intended to be given effect to by legislation.[13]

Sri Lanka has inherited the common law tradition of dualism from the British.[14] While the Constitution of Sri Lanka does not expressly stipulate that the legal system is dualist, interpretation of the Constitution as a whole suggests a dualist system. In the case of *Nallaratnam Singarasa v. Attorney General*[15], the S.C. affirmed that Sri Lanka was a dualist legal system and that enabling legislation was required for treaty law to become applicable within the domestic legal system.[16] Sri Lanka has had a commendable record in relation to ratification of human rights treaties. The International Covenant on Civil and Political Rights

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[6] Article 126(1) states, "The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right or language right declared and recognized by Chapter III or Chapter IV(4). The Supreme Court shall have power to grant such relief or make such directions as it may deem just and equitable in the circumstance in respect of any petition or reference referred to in paragraphs (2) and (3) of this Article...".

[7] Chapter VI of the Constitution.

[8] Article 27(2).

[9] Article 27(2)(c) states, "...the realization by all citizens of an adequate standard of living for themselves and their families, including adequate food, clothing and housing and continuous improvement of living conditions and the full enjoyment of leisure and social and cultural opportunities".

[10] Article 27(2)(h) states, "...the complete eradication of illiteracy and the assurance to all persons of the rights to universal and equal access to education at all levels".

[11] Article 29 states, "The provisions of this Chapter do not confer or impose legal rights or obligations, and are not enforceable in any courts or tribunal. No question of inconsistency with such provisions shall be raised in any Court or tribunal."

[12] Jayampathy Wickramaratne, *Fundamental Rights in Sri Lanka*, Stamford Lake, 2006, p.38.

[13] C.J. Sharvananda in *Re. Thirteenth Amendment to the Constitution Bill* (1987) 2 SLR 312 at 326 and; J. Wanasundera in *Seneviratne v. UGC* (1978-79-80) 1 SLR 182 at 216.

[14] Sri Lanka won her independence from the British in 1948. Prior to being colonized by the British Sri Lanka was colonized by the Portuguese and the Dutch.

[15] SC (Spl) L.A. No.182/99, SCM 15.09.2006.

[16] *Cf. Weerawansa v. AG* (2000) 1 SLR 386 and *Manawadu v. AG* (1987) 2 SLR; *Bulankulama v. Minister of Industrial Development,* South Asian Environmental Law Reporter 2000, Vol.7(2).

(ICCPR), its first protocol and the International Covenant on Economic, Social and Cultural Rights (ICESCR) have been ratified[17] in addition to the other major human rights treaties.[18]

3 A Proactive Supreme Court

Against the above described background, this section analyses the activist role that the S.C. has adopted over the last two years, specifically in matters relating to fundamental rights. Four decisions in the areas of the right to equal access to education, the right to be free from arbitrary eviction and the right to be free from arbitrary arrest and detention will be looked at. It will be evidenced that the methodology employed by the Court and the outcomes of these cases have significantly changed the general perception as to the authority of the Court under Article 126 in entertaining fundamental rights applications. At present the Court is perceived to have broad and radical powers to issue sweeping orders ranging from policy formulation to revision of executive decisions made regarding national security.

3.1 The 'Right to Equal Access to Education' Case

Admission to State funded schools in Sri Lanka has been carried out according to guidelines (circulars) issued by the Ministry of Education and these guidelines have been amended from time to time. Parents have previously filed fundamental rights applications when their child has been denied admission to a State funded school, claiming that their right to equality before the law has been violated. The S.C. in certain cases has upheld this claim and ordered that the child be either admitted to the school or that the child be reconsidered for admission. In *Haputhantirige v. Karunawathie*[19], a similar fundamental rights application, the S.C. declared the applicable circular to be inconsistent with the fundamental rights chapter of the Constitution and therefore set it aside[20]. The Court went a step further and ordered the National Education Commission (NEC) to develop a national policy for school admissions.

This policy was formulated by the NEC but did not receive the approval of the government, and the Secretary to the President ordered the Secretary to the Ministry of Education to formulate an interim circular which was presented to Court at a subsequent hearing of the case. This interim circular was found to be a replica of the formerly impugned circular and therefore rejected by the Court. The Court ordered interested parties to make representations as to the policy that should be drafted and eventually the Court finalized a draft policy and ordered the Registrar of the Court to submit it to the Secretary to the President recommending that "necessary action be taken" and that a national policy be developed accordingly.

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[17] Sri Lanka acceded to the ICCPR and the ICESCR in 1980.

[18] For instance Sri Lanka is also party to the Convention on the Elimination of All Forms of Discrimination, Convention for the Elimination of Discrimination Against Women, the Convention Against Torture, Convention on the Rights of the Child and the Convention on the Protection of All Rights of Migrant Workers and their Families.

[19] SC (FR) No.10/2007, SCM 30.07.2007.

[20] Admissions to state funded schools had been regulated by circular since 1961 in Sri Lanka. When the Supreme Court set aside the latest circular, it in effect removed the only regulatory mechanism that was applicable to the process.

3.2 The 'Right to Freedom from Arbitrary Eviction' Cases

3.2.1 The Case of the 'Tamil Lodgers'

In June 2007, surprise raids were carried out by the police in targeted lodges in Colombo and Tamil inhabitants were ordered into buses which took them back to either Vavuniya or Trincomalee, towns in the North and East of the country from where they came, which areas are also predominantly inhabited by Tamils[21].

A civil society activist organization, filed a fundamental rights action on behalf of the Tamils who were evicted in this manner. In the case of *Center for Policy Alternatives v. Victor Perera*[22], the petitioners argued that the eviction was in violation of the fundamental right to equality, equal protection of the law, to freedom of movement and the freedom to reside anywhere in Sri Lanka. The petitioners also argued that forcible transfer of civilians amounts to a crime against humanity under International Law[23]. The S.C. made an interim order that the Tamils who were evicted should be given the freedom to determine where they wanted to live, that the police should not prevent them from coming back to Colombo and prohibited the police from similar actions in the future. The government complied with this order immediately and brought back the evicted Tamils who wished to return to Colombo[24].

The Ministry of Defense issued the order to evict Tamils from the North and East lodging in Colombo, in the wake of several bomb attacks carried out by the LTTE in Colombo. Previously LTTE carders have been found to reside temporarily in lodges in Colombo in order to carry out bomb attacks. The eviction order therefore was claimed to be in the interest of national security. However, when the eviction of all Tamil lodgers from Colombo took place, there was widespread condemnation of the act by civil society, political parties and the diplomatic community. It is in this broader context that the S.C. issued the interim order. The litigation subsequently concluded with an undertaking by the government to refrain from similar actions in the future.

3.2.2 The Case of the 'Slum Dwellers'

Prior to the South Asian Association of Regional Cooperation (SAARC)[25] conference that was held in Colombo in July 2008, the Ministry of Defense ordered that the slum dwellers in the central part of the capital be evicted without offering them alternative housing[26]. Even

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21 For a detailed account of this event, see, "Hundreds of Tamils Dislodged from Colombo", *Daily Mirror*, 8 June 2007, http://www.dailymirror.lk/2007/06/08/front/01.asp.

22 SC (FR) No.177/2007, SCM 05.05.2008.

23 See, "S.C. stops eviction of Tamils from Colombo", *Daily Mirror*, 9 June 2007, http://www.dailymirror.lk/2007/06/09/front/6.asp.

24 See, "Dislodged Tamils Back to Colombo", *Daily Mirror*, 9 June 2007, http://www.dailymirror.lk/2007/06/09/front/8.asp.

25 See, "And their homes came tumbling down", *The Sunday Times*, 20 July 2008, http://www.sundaytimes.lk/080720/News/sundaytimesnews_17.html.

26 See, "Defence Ministry's Eviction Order Sends Shock Waves Among the City", *Lanka News*, 14 July 2008, http://www.lankaenews.com/English/news.php?id=6138.

though the fundamental rights chapter of the Constitution does not guarantee the right to housing or freedom from arbitrary eviction, an affected party filed a fundamental rights case on the basis that his right to the equal protection of the law had been violated as he had not received notice of the eviction. The S.C. stayed the order for eviction issued by the Ministry of Defense until the matter was heard before the Court[27]. Having later heard the oral arguments, the Court accepted the proposal of the government to provide alternative housing and until such housing was to be made available, to provide a monthly stipend for the slum dwellers to be used for rent. The Court ordered that the *status quo* should not be changed until an amicable settlement was reached between those who were threatened with eviction and the relevant authorities[28].

3.3 The 'Right to Freedom from Arbitrary Detention' Cases

A direct consequence of the escalation of the conflict over the last two years has been the increase in arrest and detention of persons suspected to be involved in "terrorist activities." In response to the terror attacks mainly in the capital, one of the counter-insurgency tactics employed by the government has been mass arrests of Tamils, particularly in the immediate aftermath of a bomb blast[29].

A fundamental rights application was made to the S.C. in the public interest by a political party, the Ceylon Workers Union, claiming that members of their party and others have been arrested and detained by the police in violation of their right to be free from arbitrary arrests and detention[30] under Article 13(1) and (2) of the Constitution[31]. The S.C. ordered that the Attorney General on behalf of the Government should produce a list of the names of those in detention. On considering the list that was subsequently provided, the S.C. ordered that only those against whom there was a reasonable suspicion should be detained and that the others should be released on bail[32]. Further, it was ordered that the names of those under detention should continue to be updated and furnished to Court periodically and that the Court would monitor whether persons were in fact being enlarged on bail[33]. In the last phase of this litigation the police were ordered to formulate a scheme to be followed in investigations and arrests and a committee was established for this purpose[34]. The S.C. further ordered that a

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27 See, "S.C. Stops Demolition Till July 27th", *The Island,* 19 July 2008, http://www.island.lk/2008/07/19/news11.html.

28 See, "S.C. Gives UDA and Shanty Dwellers Time to Reach a Settlement", *The Island,* 31 July 2008, http://www.island.lk/2008/07/31/news23.html.

29 See, "S.C. orders Tamils suspects in custody enlarged on bail", *The Island,* 11 December 2007, http://pdfs.island.lk/2007/12/11/p2.pdf.

30 SC (FR) No.428/07, SCM 19.12.2007.

31 Article 13(1) states, "No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest." Article 13(2) states, "Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent Court according to procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law."

32 SCM 13.12.2007.

33 For example, out of the 250 who were in detention at the time of filing this case, only 9 were continued to be detained and the rest were enlarged on bail.

34 SCM 27.02.2008.

new Court be set up to consider the applications of those under arrest[35] and translation facilities were ordered to be available for Tamils who came before this Court[36].

4 Enforcing Traditional Guarantees or Judicial Incorporation of Economic and Social Rights?

From the perspective of a petitioner in the above described cases, the S.C. is viewed as an institution taking an activist role against an indifferent and abusive government and giving a broad interpretation to the traditional fundamental right guarantees. In these cases the S.C. has guaranteed economic and social rights (ESR) even though they are not justiciable according to the black letter of the Constitution. In the schools admission case, the Court made a direct intervention by formulating a draft policy for admission of children to State schools and thereby implicitly recognizing that the right to education *is* enforceable in Sri Lanka. In the two eviction cases, the Court has guaranteed that lodgers, particularly lodgers belonging to a minority ethnic group and slum dwellers, have a right to be protected from arbitrary eviction. However, the opinion of the Court issued in these cases, as discussed below, leaves room for the argument that these cases are not a significant victory for the judicial incorporation of ESR but is only a recognition of ESR as far as they impact on the civil and political right to equality.

While the eviction case had no landmark precedent that the Court could look to, there have been several cases where the right to equal access to State schools had been upheld. In *Premalatha v. de Silva*[37], it was alleged that the right to equality was violated where a child had been denied admission to school. The Court upheld this claim and ordered that the child should be admitted to the particular school which had denied him admission. In its opinion the Court did not recognize a right to education but rather held that the right to substantive equality was violated in the denial of admission. However, the Court makes a reference to the value of education for the self-realization of the individual, thereby leaving room for the impression that the Court is implicitly recognizing that the right to education has an intrinsic value independent of the right to equality.

The *Haputhantirige* case however makes no reference to the case of *Premalatha* and the legal argumentations on which the Court reached its conclusion is not very clear. In *Haputhantirige*, the final judgment of the Court is mostly a summary of the process that culminated in the formulation of the policy and the rest of the judgment discusses the specific criteria according to which the admissions policy should be developed[38]. The only reference to the applicable law is one paragraph where the Court observes that the guidelines issued by

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35 SCM 02.04.2008.

36 SCM 28.07.2007.

37 SC App. No.334/2002, SCM 25.11.2002.

38 The Court holds, for instance, that a "Board of Management" should be consisting of the following parties—a representative from the past pupils association, a representative from the school Development Society, the Principal of the school or his/her nominee, the Director from the Ministry of Education under whose district the school is placed and a well-wisher of the school. This board is to be responsible for selecting candidates for admissions and they are expected to act independently and impartially. SC App. No.334/2002, SCM 25.11.2002 at 4-5.

the Court, "...is a just and equitable arrangement in furtherance of the Directive Principles of State Policy as laid down in Article 27(1)(h) and consistent with the fundamental right to the equal protection of the law guaranteed by Article 12(2) of the Constitution"[39].

Relying on this part of the opinion, it is possible to argue that the constitutional basis for the decision of the Court, unlike in the case of *Premalatha*, is not limited to the guarantee of equality. By referring to the Directive Principles of State Policy, the Court is assuming responsibility for ensuring that the State fulfills its responsibility according to those principles. Article 27(1)(h) identifies the "complete eradication of illiteracy and the assurance to all persons to the rights to universal and equal access to education at all levels", as one of the objectives of the Sri Lankan society which the State has pledged to establish. The reference to the just and equitable jurisdiction of the Court in making determinations regarding fundamental rights applications is an assertion of the broad discretion that the Court commands. The *Haputhantirige* case therefore can be characterized as an attempt by the Court to look beyond the guarantee for equality and establishing a broader basis whereby it could even guarantee the enforceability of ESR, such as the right to equal access to education. However the Court has not further elaborated its opinion on this approach thereby leaving open the possibility for the argument that the reference to the Directive Principles of State Policy and just and equitable jurisdiction is merely judicial rhetoric and that the Court is only enforcing the general guarantee for equality in this case.

The eviction cases involved the right of lodgers and slum dwellers to be free from arbitrary eviction. In both cases, the Court held that the right to equality and the guarantee that Sri Lankan citizens have the freedom of movement and the freedom to choose a residence within the country[40] had been violated. In the eviction of lodgers case, the petitioners also alleged the violation of their right to be free from arbitrary arrests[41]. In its final determination, the Court held that substantial relief had been received by the petitioners given that those evicted were brought back to Colombo soon after the interim order was issued. On this basis, the Court terminated the hearing *without making any judicial pronouncement as to the infringement of the rights that the application involved*[42]. Similarly, in the eviction of slum dwellers case, the Court made an interim order prohibiting further eviction pending the hearing of the application and subsequently terminated the application on the basis that the proposals made by the government for alternative housing for the petitioners were satisfactory.

The interim orders in these cases suggest that the Court is recognizing a right to be free from arbitrary eviction. Whether this right is recognized only in relation to its impact on the right to equality and the right to choose a residence within the country, or as a component of the right to housing is, however, not clear. This uncertainty is further aggravated by the fact that little legal reasoning is discernible at the termination of these cases. By failing to articulate its constitutional basis, the Court has left room for speculation as to its possible reasoning. One

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[39] *Ibid*, p.6.
[40] Article 14(1)(h).
[41] Article 13(1) and (2).
[42] SCM 05.05.2008.

criticism leveled at the Court is that, it is exceeding its boundaries and gradually establishing a Kritocracy[43], while another criticism that has been made is that the Court is moving away from an adversarial structure and adopting a mediating role between the State and its people while relying on an indeterminate constitutional and/or legal basis for its decisions. In light of these criticisms, it is not possible to hold out the eviction cases as a complete victory in the move towards the judicial enforceability of ESR.

While recognizing the validity of these criticisms it must be noted that the "on the ground" impact of these interim orders was an enforcement of the right to be free from eviction, even though there is no express pronouncement to that effect. However due to the failure of the Court to develop a jurisprudential basis for its decisions the long-term impact of these developments depend almost entirely on how a future Court will interpret them.

In all three cases discussed above, the Court has relied on traditional CPR (civil and political rights) to enforce ESR (economic and social rights). While it is debatable whether this method has been employed with the motive of recognizing the justiciability of ESR, the outcome has been that the ESR affected in each of these cases have been protected. This experience demonstrates how the indivisibility and interdependence of human rights can inevitably be used as a step in the ladder towards enforceability of ESR. This method has been employed by international human rights enforcement mechanisms as well. The Human Rights Committee has termed this the "integrated approach"[44]. The Committee has interpreted the non-discrimination provision of the ICCPR (Article 26) to be applicable to social rights as in the case of *Zwaan-de-Vries* where the right to social security was guaranteed through the non-discrimination clause[45].

As the Sri Lankan experience demonstrates, the disadvantage of this method is that ESR are recognized only as far as they impact on the right to equality, rather than as rights having intrinsic and independent worth. However, in a situation where the alternative is to not have *any* recognition for ESR, the strategy should be to develop a jurisprudence that enforces ESR through this integrated approach and to rely on that precedent in advocating for the formal and independent recognition of the justiciability of ESR.

5 Rights, Policy and Resource Allocation

The "activism" of the S.C. and its outcome has had the effect of demonstrating that irrespective of the type of human right that the Court is enforcing, i.e. whether it is a CPR or ESR, such enforcement could have implications for resource distribution and policy formulation.

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[43] Thishya Weragoda, *Awakening of the Sentinels: Recent Judicial Decisions Against Corruption and Malpractice*, Sri Lanka Governance Report, Transparency International, Colombo, 2008, pp.19-35.

[44] For a discussion of this approach see, Martin Scheinin, *Economic and Social Rights as Legal Rights*, p.44 in Asbjorn Eide, et al (eds.), *Economic, Social and Cultural Rights: A Textbook*, Martinus Nijhoff Publishers, 1995.

[45] *Zwaan-de Vries v. The Netherlands*, Communication No.182/1984; *Broeks v. The Netherlands*, Communication No.172/1984 and *Danning v. The Netherlands*, Communication No.180/1984.

The traditional distinction between ESR and CPR has been largely justified by the argument that CPR are mainly negative rights and are therefore enforceable in Courts while ESR are program rights that are not justiciable but rather involve executive decisions on resource allocation and policy formulation. In guaranteeing CPR within the last two years however, the S.C. in Sri Lanka has issued orders that have directly impacted on resource allocation and policy formulation.

In *Ceylon Workers' Congress v. Minister of Defense*[46], the right to be free from arbitrary arrests and detention of a large number of persons was found to have been violated as a result of widespread disregard for following due process in making arrests and detention orders under Emergency Regulations. The Court looked beyond the traditional remedies of a declaration or payment of compensation in this case. The remedies ordered by the Court included, a census of persons detained, the setting up of a committee to entertain complaints regarding future arrests, and the setting up of a new Court. The Court gave leadership to the Executive in developing policy, setting up of new institutions and bearing the related expenses. If the Court is capable and effective in guiding the formulation of policy and resource-related orders in CPR, then it is possible to perceive of the Court as being equally effective in enforcing ESR even if it requires resource allocation and development of policy. In fact, the eviction of slum dwellers case and the *Haputhantirige* case are evidence that the Court is in fact capable of enforcing ESR that have policy and resources implications.

At one level, these cases make it possible to argue that ESR can be enforced by Courts. At another level, it is also possible to argue that rather than preserving the distinction between ESR and CPR and progressively moving towards the justiciability of the former, it might be more effective to consider human rights as one category and determine their justiciability in context of their violation. According to this approach, the Court can entertain an application alleging the violation of a *human right*. If the right requires formulation of policies and resource allocation, the Court could initiate a process of dialogue between the Executive and the petitioner, thereby fulfilling its role as a check on the Executive. If the alleged infringement only requires a negative action on the part of the State, the Court could make an order irrespective of whether it is a CPR or an ESR. This approach would bring focus to the violation of the right and the remedy required rather than the categorization of that right.

The distinction between CPR and ESR was a by-product of the ideological differences related to the cold war. The Universal Declaration of Human Rights (UDHR), the founding document of the modern human rights movement makes no distinction between CPR and ESR. The distinction was artificially introduced to contemporary perception of human rights due to the polarization of states based on their political perceptions of human rights[47]. This historical account as to how the distinction between these rights came about should be added reason to reconsider the movement away from this categorization today.

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[46] SC (FR) No.428/2007, SCM 22.09.2008.

[47] See Jeffrey Dunoff et al, *International Law, Norms, Actors, Process,* Aspen Publishers, 2006, pp.487-88.

Existing scholarship supports this argument. Langford for instance points out that the overwhelming practices of various domestic courts in enforcing ESR have in effect chipped away at this traditional position. He considers it to be an established fact that both CPR and ESR have resource implications and if courts are to be prevented from enforcing rights based on cost implications, then they should not be permitted to enforce *any* rights. According to Langford, while both groups of rights require resources, ESR could require *more* resources and the difference between CPR and ESR is only one of degree[48]. Plant comes to the same conclusion by arguing that both CPR and ESR have positive and negative obligations that require budgetary and policy decisions. Therefore, if one is to argue that ESR are not justiciable rights, logically speaking, Plant concludes that CPR too cannot be considered to be justiciable[49].

Relying on empirical studies and logic, Holmes and Sunstein illustrate that there is a price attached to the realization of any right.

> *To the obvious truth that rights depend on government must be added a logical corollary, one rich with implications; rights cost money. This is just as true of the old rights as of new rights...Both the right to welfare and the right to private property have public costs. The right to freedom of contract has public costs no less than the right to decent housing. All rights make claims upon the public treasury.*[50]

Even though they make this argument in the context of rights in the United States Constitution, the argument presented is applicable to human rights in general.

The artificial distinction that has been maintained between CPR and ESR has prevented a sincere inquiry as to the content and implications of these rights. Gross and Barak-Erez argue that the most negative outcome is that:

> *...questions of distribution are excluded from the rights discourse twice over by both the exclusion of social rights and the exclusion of distribution concerns from the realm of civil rights.*[51]

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[48] Malcolm Langford, eds., *Social Rights Jurisprudence*, Cambridge University Press, 2008, p.42.

[49] Raymond Plant, *Social and Economic Rights Revisited,* 11 KCLJ (203) pp.1-20: "If...the enforceability of a right is not just a contingent condition for the protection of rights but part of what makes a right a right, then it is difficult to argue that there is a fundamental asymmetry between social rights which imply resources, and negative rights which do not. Enforceability, which is a condition of a right being a right, or a "genuine" right, is going to involve costs and those costs are going to involve questions of justice and fairness in the distribution of the resources necessary to enforce rights. So if enforceability is a necessary condition for a right being a right, then all rights necessarily involve the costs of enforcement."

[50] Stephen Holmes and Cass Sunstein, *The Cost of Rights, Why Liberty Depends on Taxes,* W.W. Norton and Co., 1999, p.15.

[51] Daphne Barak-Erez and Aeyal M. Gross, *Exploring Social Rights, Between Theory and Practice,* Hart Publishing, 2008, p.7.

Redistribution of resources should be a focal point in the realization of human rights, not only with regard to ESR. Yuval further illustrates this point by relying on jurisprudence from international and regional human rights systems including the European Court of Human Rights, the Inter-American system and the Human Rights Committee and observes that:

> *...first generation rights have acquired, over time, 'positive obligation' features, which often entail redistributive implications; second generation rights have become more specific, and, hence, amenable to implementation through judicial or quasi-judicial mechanisms; and the borderlines between the two generations of rights have tended to fade away.*[52]

The counter argument to the above is that the history of modern human rights has evolved on the basis of this classification and that the monitoring and enforcement mechanisms have been developed accordingly. Rejecting the categorization would amount to a paradigm shift of the entire human rights discourse. However, the recent adoption of a protocol providing for an individual complaints mechanism under the ICESCR could be seen as acknowledgement at the international level that enforceability of ESR can be ensured through a model similar to that in CPR. The categorization of the rights therefore is diminishing in its practical usefulness and it is possible that a consensus will emerge in the future that the categorization should be rejected altogether.

6 A Paradigm Shift in the Supreme Court?

The cases analyzed in this paper are indicative of a new direction that the Sri Lankan S.C. has taken over the last few years. The appointment of the present Chief Justice Sarath N. Silva overlooking the then-most senior judge of the Supreme Court, Justice M.D.H. Fernando, was controversial and was considered to be an attempt by the Executive to undermine the independence of the Court[53]. Under the leadership of the new Chief Justice, the Court was increasingly seen as less sympathetic to the rights of individuals and the height of this trend were marked by cases such as *Anthony Fernando* and *Singarasa*.

In the case of *Anthony Fernando*, the applicant had made successive applications to the S.C., regarding compensation for injury at work. He was charged with Contempt of Court and sentenced to one year of rigorous imprisonment. The Chief Justice convicted Anthony Fernando for abusing the process of Court and for unruly conduct before the Court as he had at one point raised his voice in Court. The summary conviction of Anthony Fernando was

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[52] Yuval Shany, *Stuck in a Moment in Time*, in Daphne Barak-Erez and Aeyal M. Gross, *ibid*, p.102.

[53] See in this regard, comments of the Special Rapporteur on Independence of the Judiciary and the report published by the International Bar Association in 2001 titled, *Sri Lanka: Failing to Protect the Rule of Law and the Independence of the Judiciary*, November 2001, London, International Bar Association) and, *Sri Lanka: Serious Concerns Affecting Sri Lanka's Judiciary*, Statement of the Asian Human Rights Commission, http://www.ahrchk.net/statements/mainfile.php/2007statements/1043/.

criticized internationally as disregard for basic judicial guarantees that the Supreme Court itself was constitutionally bound to defend on behalf of individuals.[54]

In the case of *Singarasa*, a man convicted under the Prevention of Terrorism Act made an application for review of the refusal of the Supreme Court to hear his appeal. In making his application for review Singarasa cited as persuasive authority, the Communication of the Human Rights Committee in Geneva, which had recommended that his conviction be reviewed on the basis *inter alia* that his right to a fair trial had been violated.[55] In rejecting this application the S.C. held that Sri Lanka's accession to the First Optional Protocol of the ICCPR by the President was unconstitutional.

The Chief Justice writing for the full bench of the Court considered the ratification to be an abdication by the President of the sovereignty of the People and therefore in violation of the Constitution. In this holding, the S.C. assumed that the Human Rights Committee was acting as a supra-national judicial body and considered its Communication to be an affront to the authority of the S.C., which is the supreme and final judicial decision making body of the country, whereas the Human Rights Committee is not a judicial body and its Communications are in fact a recommendation to the Sri Lankan State which the State has an obligation to comply with under International Law. This decision was considered to be the high point of the S.C.'s conservatism and it not only brought to question the future direction of ratification of human rights treaties by Sri Lanka, but also the domestic applicability of the human rights treaties that Sri Lanka had already ratified.[56]

Within the last two years however, the S.C. has chartered a different course. In the case of *Rodrigo v. Imalka*[57], more commonly known as the "Checkpoint case", the petitioner claimed that he had been harassed at a security checkpoint in the capital, Colombo. While holding that the petitioner's right to equality and the right to be free from arbitrary arrest had been violated, the S.C. went further and ordered that all the checkpoints in the capital should be removed, as the Ministry of Defense had not followed due process is erecting them. In the case of *Ashik v. Bandula*[58], known as the "Noise Pollution case", the S.C. upheld the petitioner's claim that denial of a permit for use of a loudspeaker was a violation of his right to equality. The Court went on to observe that the use of loudspeakers particularly by religious institutions particularly early morning and at night amounted to sound pollution and

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54 *Ibid.*

55 *Nallaratnam Singarasa v. Sri Lanka*, Communication 1033/2001, http://www.alrc.net/doc/mainfile.php/un_cases/259/.

56 The events that followed culminated in the passing of the legislation titled the ICCPR Act, whereby the legislature sought to declare that the rights guaranteed by the ICCPR are enforceable in Sri Lanka. However, this legislation has been considered to be a whitewash. See, "Eschewing the dangerous satirical 'ICCPR Act'" by Kishali Pinto-Jayawardene in *The Sunday Times*, 14 October 2007, http://sundaytimes.lk/071014/Columns/focus.html.

57 SC (FR) No.297/2007, SCM 03.12.2007.

58 SC (FR) No.38/2005, SCM 07.11.2007.

ordered that new guidelines should be formulated in regulating use of loudspeakers and specific instructions were given as to the substantive rules to be developed.[59]

There are several other fundamental rights cases where the S.C. has gone beyond the relief sought by petitioners and made general and intrusive holdings ordering the Executive to formulate policy and allocate resources according to guidelines developed by the Court.

In interviews conducted with lawyers who wish to remain anonymous, this shift in the S.C.'s attitude was attributed to two factors. One is the desire of the Court to curb the excesses of the government. The other contributing factor is identified as the desire of the Court to assert its authority as an independent, problem solving and effective arm of the State. Focusing on a military solution to the conflict, the Sri Lankan government has committed many excesses and had sought to justify them on the basis of the war over the last two years. Corruption and lack of accountability of the government for its human rights abuses has increased. The low degree of political achievement of rights in the area of personal freedoms, particularly of the Tamil minority due to the government's counter-insurgency strategy of mass arrests and detentions; and the open disregard for the rule of law by the Executive, particularly in its failure to reconstitute the Constitutional Council, both could have possibly pushed the Court to strengthen its role as the watchdog of the Constitution and become more activist. In this context, some members of the legal profession and leaders of civil society have come to see the S.C. as the only viable alternative to vindicating rights, even though a few years ago, these very actors would not have been welcomed or entertained before the very same Court.[60]

Analysts have pointed out the possible pitfalls in the new agenda the S.C. has set for itself. Kishali Pinto-Jayawardena[61] and Thishya Weragoda[62] while acknowledging that the S.C. must be creative in defending the rights of the People and curb the excesses of the other branches of government, also caution that activism of the Court also has its limits. Recent decisions of the S.C. have attracted even more extensive scrutiny on this basis. In annulling a transfer of State land to an individual recently, the Court ordered the Urban Development Authority to use the hotel that had been built on the premises as a research institute[63]. The degree of the Court's activism as indicated in this order is very high and it is unlikely that the other arms of government will continue to be tolerant of it. The caution therefore that judges command neither the 'sword nor purse' and that respect for their decisions depends also on the respect that the Court extends to the other branches of government, is timely in this regard.

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[59] For instance, the Court ordered that the use of loudspeakers should be prohibited from 10PM to 6AM.

[60] Feizal Samath, "Rights Sri Lanka: Court Steps in as Governance Falters", *Inter Press Service*, http://ipsnews.net/news.asp?idnews=44454.

[61] Kishali Pinto-Jayawardena, "I am less than a magistrate", *The Sunday Times*, 14 December 2008, http://sundaytimes.lk/081214/Columns/focus.html.

[62] Thishya Weragoda, *ibid*, note 43.

[63] See, "Court says set up Research Center at Water's Edge", 17 December 2008, *Times Online*, http://sundaytimes.lk/cms/article10.php?id=1907.

7 Conclusion

This paper has attempted to explore the implications of the new found activism of the S.C. from the perspective of ESR. In the short term, the S.C. has made significant impact in enforcing the right to equal access to education and the right to be free from arbitrary eviction, even though these rights are not guaranteed by the Constitution. The strategy employed by the petitioners and the Court has been to rely on the equal protection clause in holding these violations to be justiciable. The opinions of the Court suggest that it is also recognizing the intrinsic values of these ESR in addition to their relationship to the right to equality.

The long term implications of these decisions however, are uncertain. The true measure of the Court's sincerity and commitment to strengthening the Constitutional guarantees and interpreting them to include the enforceability of ESR, is measured in its approach to interpretation of the law and establishing precedent through carefully developed legal and policy arguments. But has the Court actually laid this foundation for the future development of its activism? For some critics, the absence of coherent and sophisticated legal arguments in support of its decisions in certain cases has posed fundamental problems. Undoubtedly, no Court must be seen as making political statements and asserting its authority in the guise of judicial 'activism.'

While the above reflection may cast this discussion in a negative light, this paper has sought to establish that there is a lesson that can be gleaned from this experience. The S.C.'s activism demonstrates that guaranteeing rights will impact on resource allocation and formulation of policy, irrespective of whether it is a CPR or an ESR. This paper has sought to use this evidence to make the argument that distinguishing between CPR and ESR is not useful anymore in that both groups of rights have been shown to have an impact on resource allocation and policy. Thus it has been argued that enforceability of rights should be determined according to the nature of the violation and the Courts can and should be entrusted with that responsibility. Additionally, these cases illustrate that a Court can go beyond its traditional adversarial role and initiate a dialogue with the other branches of government in enforcing rights or preventing its abuse. Undoubtedly, in doing so, it can employ more wide ranging measures, such as development of policy and institution building.

ACCESS TO INFORMATION – A RIGHTS-BASED APPROACH[±]

Madhushika Jayachandra[*]

1 Introduction

The interchangeable use of the terms 'right to information' and 'access to information' is misleading, since they adopt two different perspectives towards the issue of public scrutiny of government held information. However, both of these terms are based on the common ground that information in the control of public authorities is a valuable public resource and that access to such information promotes greater transparency and accountability in governance[1].

Right to information, also known as the 'right to know' or 'freedom of information', addresses the above issue from a citizen's perspective. It stems from the right of the citizens to be governed by their choice of government. Citizens of a country have a right to know what the government is doing and how the government is allocating public funds. Their ability to take informed decisions relies on the knowledge they gain and information is the key to knowledge.

A rights-based approach is all the more significant because a right necessarily implies a corresponding duty and it empowers the right holders to demand accountability from the duty bearers. It is also viewed as a corollary of freedom of expression. Nevertheless, a reappraisal of the right to information seems to suggest that this right is emerging as a separate human right, which cannot purely be classified as a civil and political right (CPR). It has implications on the meaningful realization of all other human rights, including economic, social and cultural rights (ESCR).

In contrast, the term 'access to information' merely aims at facilitating public scrutiny. It is all about recognizing that the general public is allowed to request information from public authorities. It is less concerned with the outcome as to whether the citizens do resort to these facilities or whether their claims are met with by the authorities in practice.

This paper seeks to examine the significance of adopting a rights-based approach to the issue of public scrutiny of information and intends to discuss the status of 'right to information' at the international, regional and national levels, as well as reasonable exceptions to freedom of information and the position in Sri Lanka with regard to the same. The paper begins with by analyzing the meaning and justifications for a rights-based approach.

[±] This paper is based on a presentation delivered by the author at the Academic Sessions of the *60th Anniversary* of the Faculty of Law, University of Colombo, on 24th October 2008.

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[1] Nurhan Kocaoglu, Andrea Figari and Helen Darbishire (eds), *Using the Right to Information as an Anti-Corruption Tool*, Transparency International, 2006, p.5, www.transparency.org/content/download/9633/66877/file/TI2006_europe_access_information.pdf.

2 A Rights-based Approach – Meaning and Justifications

At present, the rights-based approach to legal issues has become the most widely advocated approach among the legal community. However, what is meant by such an approach and why it is desirable over other approaches are barely discussed.

It is central to a rights-based approach that human beings have inalienable rights[2]. A rights-based approach seeks to empower each and every citizen of a country irrespective of the resources available, in comparison to a needs-based approach where the existing resources are allocated to fulfill the needs of all citizens—in particular the needs of marginalized groups. Jakob Boesen and Tomas Martin in a different context asserted the following differences between a needs-based approach and a rights-based approach[3].

Needs-based Approach	Rights-based Approach
1. Emphasizes meeting needs	Emphasizes realizing rights
2. Recognizes needs as valid claims	Recognizes individual and group rights as claims toward duty-bearers
3. Individuals are objects of interventions	Individuals and groups are empowered to claim their rights
4. Individuals deserve assistance	Individuals are entitled to assistance

A careful analysis of the above distinctions shows that a rights-based approach seeks to equally strengthen the ability of all citizens to vindicate their rights. It guides us not to campaign for the needs, but to stand for our rights. Rights give rise to duties, while needs do not entail duties. Accordingly, the facilitation of mere access to information will only provide a means to fulfill the need of citizens to know information. It will not empower the citizens to hold the information holders accountable.

Unlike mere access to information, a rights-based approach is not concerned with the reasons for a request of disclosure and does not require a person seeking information to prove any interest in disclosure. Philip Coppel reiterates this view in his statement that,

> *...from the perspective of an individual seeking to elicit official information, the paramount concern is the existence of a right to obtain that information, rather than the statutory provenance of that right.*[4]

A rights-based approach to access to information, obviously, means the recognition of access to information as a human right. It is, *"...a right, described without reference to a subject*

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[2] Jakob Boesen and Tomas Martin, *Applying a Rights-based Approach: An Inspirational Guide for Civil Society*, The Danish Institute of Human Rights, 2007, p.10, http://www.humanrights.dk/files/pdf/Publikationer/applying%20a%20rights%20based%20approach.pdf.

[3] *Ibid.*

[4] Philip Coppel, *Information Rights*, Sweet & Maxwell Ltd., London, 2004, p.4.

matter, bestowed upon every person..."[5]. However, when it comes to the recognition of the right at the national level by States, it does not necessarily mean that the right to information should be incorporated into the fundamental rights chapter of the Constitution of a State. For such a right to be meaningful, the procedure that should be followed for the exercise of that right should be expressly spelt out by separate legislation. The *Practical Guidance Note on Right to Information* published by UNDP states that, a general right to information in the Constitution,

> *... will often lack real teeth without specific right to information legislation. Information rights and real openness needs to become part of the institutional fabric rather than an option for public officials. Legislation provides this fabric.*[6]

However, the ideal would be to have a constitutionally guaranteed right to information supplemented with a freedom of information law laying down the procedures for practical enforcement of the right. A rights-based approach to access to information can be justified on the following grounds.

2.1 Normative value

Recognition as a human right seeks to attribute normative value to the concept of access to information, as human rights are considered to be an integral part of human dignity. Since human rights are universal, every citizen becomes entitled to claim the right to information irrespective of any differences based on any ground.

2.2 Realization of other human rights

The right to information, undoubtedly, is a tool for the full realization of all other human rights[7]. It is essential for the exercise of freedom of expression. Abid Hussain, the UN Special Rapporteur on Freedom of Opinion and Expression, asserted in 1995 that, *"freedom will be bereft of all effectiveness if the people have no access to information."*[8] It also underpins other civil and political rights such as right to a fair trial. Such a right is meaningless without the right to know the charges raised against a person or the right to access case records.

Even though economic, social and cultural rights such as the right to education and the right to health are not justiciable, citizens can lobby for the fulfillment of those rights, if they have

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[5] *Ibid.*

[6] Andrew Puddephatt, *Right to Information: Practical Guidance Note*, Democratic Governance Group, Bureau for Development Policy, United Nations Development Programme, July 2004, p.19, http://www.undp.org/governance/docs/A2I_Guides_RighttoInformation.pdf.

[7] ARTICLE 19, Global Campaign for Free Expression, ADC – Asociacion por los Derechos Civiles, London, p.6, http://www.article19.org/pdfs/publications/ati-empowerment-right.pdf.

[8] Abid Hussain, the UN Special Rapporteur on Freedom of Opinion and Expression, Report to the UN Commission on Human Rights, 1995, UN Doc. E/CN.4/1995/32, para.35.

a right to access information pertaining to the government policies on those areas. Therefore, it is clear that the denial of right to information renders all other rights nugatory in effect.

Further, Justice Weeramantry brings forward the significance of the right to information at the international level as a peace keeping tool and makes a remote connection between right to peace and right to information. He suggests that world peace depends upon international goodwill and the distorted information results in tensions which disturb the international harmony and this may eventually lead to breaches of international peace[9].

2.3 Improvement of participation and accountability

Today, owing to the enormous discretion vested with administrators, there is greater possibility for abuse of power. A person who is aggrieved by an administrative decision should be entitled to know the reasons for such decision. Thus, looking at access to information from a rights perspective contributes to ensure good governance and acts as a vehicle for increasing participation of citizens in the decision making process and accountability of administrators.

2.4 An anti-corruption tool

Misuse of funds by public officials including foreign aid can be minimized if the information as to government financial deals is open for public inspection. Right to information demands transparency of government policies and therefore can be used as a mechanism for combating corruption[10].

2.5 Increasing the participation in the development process

The right to information allows disadvantaged groups of society to have control over the development initiatives that affect them, which will in turn contribute to eradicate poverty.

3 Recognition at the international and regional levels

The international community first paid attention to access to information way back in the 1940s. The United Nations General Assembly in 1946 asserted that,

> *Freedom of information is a fundamental human right and ... the touchstone of all freedoms to which the United Nations is consecrated.* [11]

Since then freedom of information has been pronounced as a corollary of Freedom of Expression in several international and regional treaties.

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[9] C.G. Weeramantry, *Suppression of Information - A new Human Right: The Right to Know*, and *Justice without Frontiers: Furthering Human Rights*, Vol.1, Kluwer Law International, 1997, p.252.

[10] Nurhan Kocaoglu, *op cit.* at p.5.

[11] UN General Assembly, Resolution 59 (1), 65th Plenary Meeting, 14th December 1946.

Subsequent to the initial pronouncement in the Universal Declaration of Human Rights (UDHR)[12], Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) recognized that,

> *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers....*[13]

Both these instruments have recognized it as an integral part of freedom of expression.

Anthony Mason argues that the language used in this Article implies a protection to receive information but not an obligation on governments to impart information, unless that information is relevant to the individual seeking it[14]. Tony Mendal on the other hand adopts a broader view and suggests that Article 19 implies freedom of information[15].

When one analyses the Human Rights Committee decisions on Article 19, very little assistance can be obtained in determining whether Article 19 implies a right to information or not. In *Gauthier v. Canada*,[16] where the denial of access of one newspaper publisher to the Canadian Press Gallery was discussed, the Committee stated that this denial was a restriction on his right guaranteed under paragraph 2 of Article 19 to have access to information. Though the decision seems to imply a right of access to information, Cheryl Ann Bishop suggests that the decision is more about equal access to press privileges[17]. Thus, the jurisprudence is indecisive as to whether access to information has been elevated to the level of a separate human right.

However, this has received limited recognition in regional instruments. For instance, Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and, Article 13 of the Inter American Convention of Human Rights reinforce the freedom of information as a part of freedom of expression. This is also reflected in the decisions of the European Court of Human Rights. For example, in the case of *Leander v. Sweden*,[18] the Court held that,

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[12] Article 19, Universal Declaration of Human Rights, adopted in 1948.

[13] Article 19, International Covenant on Civil and Political Rights, adopted in 1966, came into force in1976.

[14] Anthony Mason, "The Relationship between Freedom of Expression and Freedom of Information" in Jack Beatson and Yvonne Cripps (eds), *Freedom of Expression and Freedom of Information*, 2000, p.225.

[15] Tony Mendel, Head of the Law Programme of the Nongovernmental Organization Article 19, The Global Campaign for Freedom of Expression. .

[16] CCPR/C/65/D/633/1995, 5th May 1999.

[17] Cheryl Ann Bishop, *Access to information as a Human Right: Analysis of the United Nations Human Rights Committee Documents*, Paper accepted to the Communication Law and Policy Division, International Communication Association, Dresden, Germany, 2006, p.20, http://www.allacademic.com/meta/p91640_index.html.

[18] (1987) 9 E.H.R.R. 433, Stephen Gosz, Jack Beatson, Q.C. and Peter Duffy, Q.C., *Human Rights: The 1998 Act and the European Convention*, Sweet and Maxwell Ltd., 2000.

...the right to receive information basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him.

In addition, the Aarhus Convention on Access to Environmental Information[19] adopted by the European States recognizes the right to information in the realm of environmental law, which sets out the right of everyone to receive environmental information held by public authorities and the right to participate in environmental decision making.

4 Reasons for Incorporation by States

In contrast, at the national level the right to information experienced a slow process of recognition due to the reluctance of many governments to do away with the culture of secrecy. It is only within the last decade that freedom of information became a priority of most of the States. Today more than 50 countries have freedom of information legislation guaranteeing their citizens the right to government held information.[20]

Different reasons have persuaded these countries to enact freedom of information laws. Political transition, corruption concerns, external pressures for reform and environmental concerns are some of these reasons.[21] In countries like Peru[22] and the Philippines[23] concerns about corruption have triggered the need to enact freedom of information legislation. The Promotion of Access to Information Act in South Africa,[24] on the other hand, was a result of the transition of the government from Apartheid to a democracy.

An initiative taken by the Pakistan government is an example of external pressures resulting in freedom of information legislation. Though civil society groups in Pakistan had been pressing for a freedom of information legislation for years, the campaign finally flourished as a result of a condition imposed by the Asian Development Bank when granting a loan, that public should have access to the records of all financial deals of the Government.[25] Bangladesh also has seen recent developments in this regard towards a Right to Information Act. In Bulgaria, the environmental issues that arose in the aftermath of the Chernobyl nuclear accident triggered the adoption of the Access to Public Information Act.[26]

5 Limitations on Freedom of Information

Given the need to balance freedom of information with reasonable confidentiality, the right to information cannot be guaranteed as an absolute right. In terms of Article 19(3) of the

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19 Articles 4 and 5, Aarhus Convention on Access to Environmental Information, adopted in 1988, http://www.unece.org/env/pp/.
20 Cheryl Ann Bishop, *op cit.*, at p.2.
21 Andrew Puddephatt, *op cit.*, at p.12.
22 *Ibid.*, at p.13.
23 *Ibid.*, at p.14.
24 *Ibid.*, at p.12.
25 *Ibid.*, at p.16.
26 *Ibid.*, at p.15.

International Covenant on Civil and Political Rights, freedom of information, as an ancillary right of freedom of expression, may be subjected to the following restrictions:

- respect of the rights or reputations of others;
- the protection of national security or of public order;
- the protection of public health or morals.

However, these restrictions, wherever possible, should be interpreted as narrow exceptions to the general rule in favour of the right[27]. For instance, the European Court of Human Rights in the case of *The Sunday Times v. the United Kingdom*,[28] held that the decision-maker,

> *...is faced not with a choice between two conflicting principles but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted.*

Moreover, these exceptions should not be allowed to be abused to bypass the obligation of the government to make available the information for public inspection as discussed in the Australian case of *Attorney General v. Hearney*.[29] The claimant in this case, on one hand, alleged that certain regulations were drafted to defeat the Aboriginese people's right to claim land. The government, on the other hand, raised the privilege of confidential information between the government and its legal advisers. The Australian High Court observed that,

> *...it would be contrary to the public interest which the privilege is designed to secure... to allow it to be used to protect communications made to further a deliberate abuse of statutory power.*

In order to avoid misuse of exceptions, any freedom of information law,

> *...should establish a harm test and a public interest test which should be applied to all information before its disclosure is denied.*[30]

For instance, the Freedom of Information Act 1982 of Australia, recognizes two types of exceptions.[31] They are:

- Specific exemptions which protect documents falling under certain prescribed classes; e.g., documents subject to legal professional privilege,

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[27] Philip Coppel, *op cit.*, at p.11.
[28] (1979-80) 2 EHRR 245.
[29] (1985) 61 ALR 55.
[30] Open Society Justice Initiative, *Principles on the Right of Access to Information in Chile*, December 2004, http://www.justicecinitiative.org/db/resource2?res_id=102436.
[31] Philip Coppel, *op cit.*, at pp.53-59.

- Harm-based exemptions which depend on the likelihood that a particular harm would result from disclosure; e.g., it would or could reasonably be expected to cause damage to the national security, defence or international relations of Australia.

Further, the onus of proving that a particular piece of information falls within an exception lies with the authority holding such information.

6 Whither Sri Lanka

6.1 Legislative denial and judicial acceptance

Given the continuing culture of secrecy and high incidence of corruption in Sri Lanka, there is a long felt need to adopt legislative measures to facilitate freedom of information. In fact, an attempt was made in 2003 to introduce a Freedom of Information Bill with the objective of providing for freedom of access to official information. The preamble to the Bill emphasized the need to foster a culture of transparency and accountability in public authorities. Though the Bill was almost comprehensive on paper, including even a clause on whistleblower protection, it failed due to a lack of political will.[32]

Clause 16(1) of the 2000 Draft Constitution which recognized the right to seek, receive and impart information as an ancillary right of freedom of speech and expression, also proved to be a failure as this Draft was never implemented.[33] The recently enacted International Covenant on Civil and Political Rights (ICCPR) Act[34] has not given effect to the freedom to seek, receive and impart information recognized under Article 19(2) of the International Covenant on Civil and Political Rights. However, Section 6(1)(b) of the said Act has recognized that every citizen shall have the right and the opportunity to have access to services provided to the public by the State. The wording of the Section seems to have no meaningful impact on the advancement of the right to information, since information held by public authorities is not available for public inspection yet. Nevertheless, if at all access to information is facilitated by the Government, this Section may be used to recognize a right in every citizen to resort to that facility and seek information.

However, the right to information has gained recognition in several judicial pronouncements. In the fairly recent judgment of the Supreme Court, in *Environmental Foundation Ltd. v. Urban Development Authority*,[35] Chief Justice Sarath N. Silva held that, right of a person to secure relevant information from a public authority in respect of a matter should be implicit within the freedom of speech and expression guaranteed under Article 14(1)(a) of the 1978 Constitution. The Court further stated that disclosure is all the more important where the public interest outweighs the confidentiality attached to State affairs. Even though the

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[32] Kishali Pinto-Jayawardena, "Right to Information; Illusionary Court Victories and its Continuing Denial, *LST Review*, Vol.17, Issue 229, Nov. 2006, p.3.

[33] *Ibid.*

[34] No.56 of 2007.

[35] SC(FR) Appl. No.47/2004, S.C.M. 28.11.2005.

decision in one odd case cannot influence the government, it has certainly laid the foundation for future discussion on the right to information in Sri Lanka.

Justice Amerasinghe's observation in the leading case of *Bulankulama v. The Secretary, Ministry of Industrial Development*[36] that, *"access to information on environmental issues is of paramount importance"*[37], is another instance where the judiciary was willing to uphold the public's right to know information and participate in decision making. In this case, the procedure laid down under the National Environmental Act[38] for conducting an Environmental Impact Assessment (EIA) and the public's right to scrutinize the assessment report was extensively considered by the Court in coming to the conclusion that nothing less than an EIA will suffice to fulfill the requirements of the law.

6.2 Current challenges and the way forward

Practical implementation of access to information is fraught with many challenges and difficulties such as language, poverty and illiteracy. On one hand, information needs to be equally accessible to all the different language speakers and on the other hand, whether access should be allowed for a charge or not needs to be looked at, as information should be accessible even by the poor without being discriminated.

Another recurring concern in this area is the need to lay down reasonable tests to determine which information should be exempted from public scrutiny. More importantly, effective implementation will necessarily require inculcating within the public sector employees the importance of the speedy provision of information to those who seek it without any discrimination. Towards achieving that, the appointment of information officers, the supply of infrastructure facilities and training current employees in the public sector is a must. Once these provisions are made, delays in providing information could also be dealt with.

No matter how strong the law is on paper, it will only have a meaningful impact on public authorities if citizens make use of it and request for information. Therefore, measures should be taken to increase public awareness in seeking the right to information.

There is emerging concern as to whether freedom to seek information should be restricted to the information held by public authorities or it should be extended to the private sector as well. The writer believes that this issue needs separate consideration and does not attempt to address it within the scope of this paper.

The above challenges can effectively be dealt with by adhering to the principles developed by several non-governmental organizations on the salient features of a freedom of information law. A human rights organization named, ARTICLE 19, has laid down nine broad principles

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[36] (2000) 3 SLR 243.
[37] *Ibid.*, at p.316.
[38] No.47 of 1980 as amended by Act No.56 of 1988 and Act No.53 of 2000.

that should be present within such a law[39]. However, the writer prefers to highlight the following ten principles recently drafted by the Open Society Justice Initiative in Chile, which are more specific in content[40]. Attention will be drawn to the fact that the essence of most of these principles was present in the 2003 draft Freedom of Information Bill of Sri Lanka.

Principle 1 – Maximum Openness: All information held by governments is in principle public, and may only be withheld if there exists legitimate reasons for not disclosing it.

Principle 2 – All Public Bodies should be subject to the Access to Information Law: The right of public access to information should extend to all institutions receiving funding coming from the public funds or performing public functions.

Principle 3 – Access to Information is a Right for Everyone: To exercise the right of access to information, it is neither necessary to justify any legal interest, nor to explain the reasons for requesting the information from government. All requests should be treated without discrimination as to the nature or profession of the requestor.

Principle 4 – Free Access to Information: Costs for exercise of the right to information should be kept to an absolute minimum for the requestor, who may be charged only for the reproduction of documents that contain the requested information.

Principle 5 – Simple and Speedy Processes: The process for requesting information should be the least complicated and most efficient possible, and the provision of information should be quick and complete. Delivery of requested information should be either immediately or within the timeframes established by law, which, in any case, should not exceed ten working days.

Principle 6 – Exemption Provisions should be clearly defined: The grounds for withholding information should be clearly and specifically established by law with the goal of protecting legitimate interests. The law should establish a harm test and a public interest test which should be applied to all information before its disclosure is denied. The principle of partial access should be applied to all documents containing information that can legitimately be exempted from release.

Principle 7 – Independent Regulatory Body: Decisions to withhold information should be subject to review by an independent body empowered to order compliance with the law and release of information.

Principle 8 – Duty to Assist Public Officials: Public Officials charged with information provision should assist requestors in the formulation of their questions in order to guarantee

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[39] ARTICLE 19, *The Public's Right to Know: Principles on Freedom of Information Legislation*, June 1999, http://www.article19.org/work/regions/latin-america/FOI/english/elements/index.html.

[40] Open Society Justice Initiative, *Principles on the Right of Access to Information in Chile*, December 2004, http://www.justicecinitiative.org/db/resource2?res_id=102436.

the exercise and enjoyment of the right of access to information. When the information being sort is held by a different body these officials should refer requestors to the correct institution.

Principle 9 – Proactive Publication of Information: Every public body should make readily available all information related to its functions and responsibilities without the need for a formal information request. This information should be in clear, plain language and should be up-to-date.

Principle 10 – Harmonization of Right of Access to Information with other Law: All laws that limit the right of access to information should be amended or revoked in order to guarantee the principle of maximum openness.

7 Conclusion

While moving towards increasing recognition of right to information by the States, the initiatives so far taken at the international level are promising of a future with enhanced openness and information sharing.

However, a lack of political will in Sri Lanka has resulted in the country lagging behind developments that has taken place in relation to freedom of information in other South Asian countries, such as India, Pakistan and Bangladesh.

Through the process of interpretation the Supreme Court has placed the first step towards recognizing freedom of information in Sri Lanka and has upheld the citizen's right to demand accountability from public authorities. These values brought to light by the Court should be given legislative pronouncement and should be utilized to develop a culture of transparency, accountability and participation.

A common characteristic of most of the States which have introduced freedom of information laws within the last decade is the constant pressure put on governments by their civil society groups. Thus, lobbying for freedom of information should come from the grassroots level. Even after the enactment of a freedom of information law, its successful implementation will inevitably depend on the willingness of the public to make use of it and to convert what is there on paper into practice.

Preview – RECOVERING THE AUTHORITY OF PUBLIC INSTITUTIONS: A RESOURCE BOOK ON LAW AND HUMAN RIGHTS IN SRI LANKA*

Asian Human Rights Commission

The forthcoming publication, *Recovering the authority of public institutions: A resource book on law and human rights in Sri Lanka* (Hong Kong, 2009, 545pp.), consists of two parts. In the first, there is a study on the drift of Sri Lanka from a rule-of-law system to a non-rule-of-law system. It examines the loss of supremacy of the law, where a paradigm shift has taken place from a system recognising the separation of powers to one based on the absolute power of the executive president. This has brought the military in as the arbiter of national issues, which has in turn involved changes in law and methods of investigation into crimes and human rights abuses, the loss of the binding character of law, loss of prestige of the Constitution as the paramount law, loss of respect for treaty obligations, weakening of investigative mechanisms, undermining of the prosecutorial system of the Attorney General's Department and practices of impunity negating long accepted guarantees of fair trial and the independence of the judiciary.

The publication then examines government actions and inactions on the recommendations of several United Nations agencies, point-by-point. Thereafter it contains detailed analysis on five overlapping conflicts in the country and their implications for the Sri Lankan legal system which is succeeded by a comprehensive study on torture and the failures in prevention, together with a praxis perspective on subverted justice and the breakdown of the law in the country. The problem of police reform initiatives within a dysfunctional system is contained in a further chapter.

The second part of the book consists of the study of 200 complaints about torture, which are mostly from the South and from areas far away from the conflict in the North and East. These cases have taken us to the Magistrate's Courts, High Courts, the Court of Appeal, the Supreme Court and on some occasions, the UN Human Rights Committee (UN-HRC). They are cases in regard to which efforts have been made for many years to find redress but have failed.

That is, of course, no surprise. Where a rule of law system so seriously fails, it is not possible to safeguard any of the rights recognised in the International Covenant on Civil and Political Rights (ICCPR). Human rights efforts often become artificial, when no real attempt is made to address the overall rule of law issue. Mere pressure on governments to investigate torture can have little impact when the total system of criminal investigations suffers from serious flaws. Authentic attempts to improve human rights require new strategies that also take into consideration measures to address failures of the rule of law like these.

The overall conclusion is summed up on the back page of the book, thus:

> *This book makes a shocking revelation. It confirms that all those who suffer human rights abuses face the same fate that the assassinated journalist,*

* The book will be available in bookshops in Sri Lanka by January 2009.

Lasantha Wickramatunga, predicted for himself in addressing the President of Sri Lanka. "In the wake of my death I know you will make all the usual sanctimonious noises and call upon the police to hold a swift and thorough inquiry. But like all the inquiries you have ordered in the past, nothing will come of this one, too."...

For many years the AHRC has commented on the crisis of the rule of law system in Sri Lanka and these views have been shared with a large audience for a considerable time. The analysis of the problem has found the agreement of almost everyone, except those who are professionally obliged to deny that human rights violations exist in the country. No part of this book can be said to be an exaggeration. Perhaps on the other hand, it may be justified to say that these revelations are, in fact, an understatement of the actual situation.

This book, while about Sri Lanka, is not just only about Sri Lanka. The study of this one country speaks to the situation of many other countries in which the rule of law is in grave danger or has collapsed. In Asia these include, allowing for marked differences: Bangladesh, Burma, Cambodia, China, India, Indonesia, Pakistan, Philippines, Sri Lanka and Thailand. Many countries in Africa and South America face similar situations. The countries in the Middle-East also have similar institutional problems but perhaps for different reasons. Despite this, in-depth studies of the effects of the endangered or collapsed rule of law on human rights, and particularly on due process rights, have not come to the fore. Most reporting on such matters is confined to condemning particular violations and sometimes making suggestions to remedy these, rather than looking at the total picture within which all rights are undermined.

The judiciary has to work in this context. While statutes may give judges various powers and even recognise their independence, their actual working may consist of the opposite of this. In fact, even where there are competent and independent judges, they cannot but fall victim to this situation. They are merely persons trying to swim against the current, which is far more powerful than them. Unfortunately, such efforts to appear independent may only create a false illusion of the possibility of justice when in fact such a possibility does not exist.

It is within that context that the place and the role of the legal profession need to be reappraised. When the system has collapsed what can the lawyers do? A part of the profession may decide to adjust to the situation and compromise with engaging in 'dispute settlement' outside the framework of the rule of law which is unprofessional at the least and fraudulent at the worst. Others may suffer silently, and a few may try to fight back. The few that do try to fight are often exposed to serious danger.

Such is the reality that the global legal profession as a whole needs to understand if it is to contribute to the Rule of Law debate in countries like Sri Lanka, and also if it is to assist in the efforts to sustain the independence of the judiciary and the dignity of the legal profession.

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LANGUAGE RIGHTS IN SRI LANKA:
Enforcing Tamil as an Official Language
B. SKANTHAKUMAR (Ed.)

Since 1987, and through the enactment of the 13th Amendment to the Constitution, Tamil has joined Sinhala as an official language in Sri Lanka. This elevated status for the Tamil language endows Tamil speakers living in any part of the country with the right, *inter alia*, of communicating with any government office or officer in their own language and of receiving communications too in that language.

However, outside of the Northern and Eastern provinces (and imperfectly even there), Tamil speakers continue to be discriminated against in their access to, treatment within, and experience of public services such as government departments, police stations, courts, public transport and health service – through non-compliance of state agencies with the official languages law – thus denying them *de facto* equality.

This book is a compilation of papers from a Consultation on the enforcement of Tamil as an Official Language. It includes analysis of Tamil language needs and proficiency among public officers in Colombo, Nuwara Eliya, Puttalam, Trincomalee and Vavuniya; elaboration of recent measures by the Government of Sri Lanka to bilingualise the public service; the role of civil society organisations in enforcement of language rights; and rights-based critiques of the official languages policy as well as recommendations for its improvement and application.

It also includes a valuable compendium of Constitutional and statutory provisions such as Chapter IV of the 1978 Constitution and the 13th and 16th Amendments; Public Administration Circulars Nos. 3 and 7 of 2007; historical documents such as section 29 of the Soulbury Constitution, the 1956 Official Language Act, 1958 Tamil Language Act; and international human rights law instruments such as relevant provisions of the UN Covenant on Civil and Political Rights and the UN Minority Rights Declaration in its entirety.

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