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ANTI - RAGGING LEGISLATION AND FREEDOM OF EXPRESSION

LAW & SOCIETY TRUST

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Editor's note.....

This issue of the LST Review is devoted to the Anti-Ragging Bill (Bill entitled "Prohibition of Ragging and other Forms of Violence in Educational Institutions") which caused much controversy and debate in many circles. The Bill was challenged in the Supreme Court by the Inter-University Students' Federation of the University of Sri Jayawardenapura and another student of the same university as being unconstitutional.

The Supreme Court determined that some provisions of the Bill were indeed unconstitutional. The text of the Supreme Court determination is reproduced in this issue. The Court also referred to its own judgment in *Navaratne and others* v. *Chandrasena and others* decided last year in which the Court had occasion to pronounce upon ragging. In view of its importance and relevance to the present discussion, this judgment is also published. In a very harsh judgment the Court reprimanded the petitioners for their conduct and said that "ragging is easily done, but difficult to prove; victims are afraid to complain, because reprisals are likely; those in authority often fear to get involved....." This aptly sums up the situation that is prevailing in our educational institutions in relation to ragging. The Court also referred to ragging as amounting to cruel, inhuman and degrading treatment and said that deterrent rather than lenient punishment should be imposed on perpetrators.

In its determination the Court said that the word "embarrassment" should be omitted from the definition of "ragging." It also said that the provisions in the Bill on mandatory minimum sentences, automatic expulsion, disability, and granting of bail are inconsistent with the Constitution and should be amended.

Dr Neelan Tiruchelvam in his article discusses whether ragging should be a distinct offence, whether the definition of ragging is too broad, problems of enforcement and discusses the amendments that have been made to the Bill in the light of the Supreme Court determination. We also publish a report on a discussion held at the Law & Society Trust on the Anti-Ragging Bill.

Special legislation making ragging a distinct offence became necessary due to the irresponsible and criminal behaviour of students which resulted in the death of two students recently. Legislation alone, however, is insufficient. It is our moral and social responsibility to ensure that ragging is eliminated from our educational institutions. Ragging should not be condoned on whatever grounds. Civil society must get together to eradicate this menace from educational institutions.

The amendments that were made to the Anti-Ragging Bill pursuant to the Supreme Court determination were unavailable at the time of publication of this issue. We hope to publish the amendments in a subsequent issue of the LST Review.

THE GAZETTE OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Part II of March 06, 1998

SUPPLEMENT

(Issued on 09.03.1998)

PROHIBITION OF RAGGING AND OTHER FORMS OF VIOLENCE IN EDUCATIONAL INSTITUTIONS

A

BILL

to eliminate ragging and other forms of violence,
and cruel, inhuman and degrading treatment,
from educational institutions

Ordered to be published by the Minister of Education and Higher Education

Prohibition of Ragging and other Forms of Violence in Educational Institutions

L.D. - 0.7/98.

AN ACT TO ELIMINATE RAGGING AND OTHER FORMS OF VIOLENCE, AND CRUEL, INHUMAN AND DEGRADING TREATMENT, FROM EDUCATIONAL INSTITUTIONS

BE it enacted by the Parliament of the Democratic, Socialist Republic of Sri Lanka as follows:-

Short title

1. This Act may be cited as the Prohibition of Ragging and other Forms of Violence in Educational Institutions Act No. .... of 1998.

Ragging

2. (1) Any student or a member of the staff of an educational institution who commits, or participates in, ragging, within or outside an educational institution, shall be guilty of an offence under this Act and shall on conviction after summary trial before a Magistrate be liable, to rigorous imprisonment for a term not exceeding two years and may also be ordered to pay compensation of an amount determined by court, to the person in respect of whom the offence was committed for the injuries caused to such person.

(2) A student or a member of the staff, of an educational institution who, whilst committing ragging causes sexual harassment or grievous hurt to any other student or a member of the staff, of an educational institution shall be guilty of an offence under this Act and shall on conviction after summary trial before a Magistrate be liable to imprisonment for a term not less than five years and not exceeding ten years and shall also be ordered to pay compensation of an amount determined by court, to the person in respect of whom the offence was committed for the injuries caused to such person.

Criminal intimidation

3. A student or a member of the staff, of an educational institution who, within or outside such educational institution, threatens, verbally or in writing,

to cause injury to the person, reputation or property of any other student or a member of the staff, of an educational institution (in this section referred to as "the victim") or to the person, reputation or property of some other person in whom the victim is interested, with the intention of causing fear in the victim or of compelling the victim to do any act which the victim is not legally required to do, or to omit to do any act which the victim is entitled to do, shall be guilty of an offence under this Act and shall on conviction after summary trial before a Magistrate be liable to rigorous imprisonment for a term not less than two years and not exceeding five years.

Hostage taking

4. Any student or a member of the staff of an educational institution who does any act, by which the personal liberty and the freedom of movement of any other student or member of the staff of such educational institution or other person, within such educational institution or any premises under the management and control of such educational institution, is restrained without lawful justification and for the purpose of forcing such other student, member of the staff or person to take a particular course of action, shall be guilty of an offence under this Act and shall on conviction after summary trial before a Magistrate, be liable to rigorous imprisonment for a term not less than three years and not exceeding seven years.

Wrongful restraint

5. A student or a member of the staff, of an educational institution who unlawfully obstructs any other student or a member of the staff of such educational institution, in such a manner as to prevent such other student or member of the staff from proceeding in any direction in which such other student or member of the staff, has a right to proceed, shall be guilty of an offence under this Act and shall on conviction after summary trial before a Magistrate be liable to rigorous imprisonment for a term not less than three years and not exceeding seven years.

Unlawful confinement

6. A student or a member of the staff of an educational institution who unlawfully restrains any other student or a member of the staff of such educational institution in such a manner as to prevent such other student or

member of the staff from proceeding beyond certain circumscribing limits, shall be guilty of an offence under this Act and shall on conviction after summary trial before a Magistrate be liable to imprisonment for a term not less than three years and not exceeding seven years.

Forcible occupation and damage to property of an educational institution

7. (1) A student or a member of the staff of an educational institution or any other person who without lawful excuse, occupies, by force, any premises of, or under the management or control of, an educational institution shall be guilty of an offence under this Act, and shall on conviction after summary trial before a Magistrate be liable to imprisonment for a term not exceeding ten years or to a fine not exceeding ten thousand rupees or to both such imprisonment and fine.

(2) A student or a member of the staff of an educational institution who causes mischief in respect of any property of, or under the management or control of, such educational institution shall be guilty of an offence under this Act and shall on conviction after summary trial before a Magistrate be liable to imprisonment for a term not less than one year but not exceeding twenty years and with a fine of five thousand rupees or three times the amount of the loss or damage caused to such property, whichever amount is higher.

Failure to investigate complaints of ragging, an offence

8. Any member of the administrative staff of an educational institution who fails or neglects, without reasonable cause, to investigate and report, a complaint made to him that an act constituting the offence of ragging has been committed by, or in respect of, a student or a member of the staff of such educational institution shall be guilty of an offence under this Act and shall on conviction after summary trial before a Magistrate be liable to a fine not exceeding ten thousand rupees.

Effect of conviction

9. Where a person is convicted of an offence under this Act, other than an offence referred to in section 8, such person shall -

(a) if he is a student of -

(i) an educational institution, not being a Higher Educational Institution, be deemed to have been expelled from such institution, with effect from the date of such conviction;

(ii) a Higher Educational Institution be deemed to have been expelled from such institution with effect from the date of such conviction and shall not be admitted to any other higher educational institution or other institution for tertiary education;

(b) if he is a member of the staff of an educational institution be deemed to have been dismissed from such educational institution with effect from the date of such conviction, by the authority empowered by law to dismiss him.

Bail

10. (1) Notwithstanding anything to the contrary in any other law, a person suspected or accused of committing an offence under subsection (2) of section 2 or section 4 of this Act shall not be released on bail except by the judge of a High Court established by Article 154p of the Constitution, as provided in subsection (2).

(2) A Judge of the High Court established by Article 154p of the Constitution, may in exceptional circumstances, release on bail a person suspected or accused of committing an offence under subsection (2) of section 2 or section 4 of this Act, who has been in remand for a continuous period of six months or over after his arrest.

(3) Where a person is convicted of an offence under subsection (2) of section 2 or section 4 of this Act, and an appeal is preferred against such conviction, the Court convicting such person may, taking into consideration the gravity of the offence and the antecedents of the person convicted either release or refuse to release, such person on bail.

Certain provisions of the Code of Criminal Procedure Act not to apply to persons convicted or found guilty of an offence under this Act

11. Notwithstanding anything in the Code of Criminal Procedure Act, No. 15 of 1979 -

(a) the provisions of section 303 of that Act shall not apply in the case of any parson who is convicted.

(b) the provisions of section 306 of that Act shall not apply in the case of any person who pleads or is found guilty,

by or before any court of any offence under subsection (2) of section 2 or section 4 of this Act.

Code of Criminal Procedure Act to apply to investigations under this Act

12. For the avoidance of doubt it is hereby declared that all offences under this Act shall be investigated according to the provisions of the Code of Criminal Procedure Act, No. 15 of 1979 (including section 124 of that Act as amended by section 2 of the Criminal Procedure (Amendment) Act, No. 11 of 1988).

Certificate

13. Where in any prosecution for an offence under this Act, a question arises whether any person is a student or a member of the staff of an educational institution or whether any premises or property is the property of, or is under the management and control of, an educational institution a certificate purporting to be under the hand of the head or other officer of such educational institution to the effect that the person named therein is a student or a member of the staff of such educational institution, or that the premises or property specified therein is the property of, or is under the management and control of, such educational institution, shall be admissible in evidence without proof of signature and shall be *prima facie* evidence of the facts stated therein.

Admissibility of statement in evidence

14. (1) If in the course of a trial for an offence under this Act, any witness shall on any material point contradict either expressly or by necessary implication a statement previously given by him in the course of any investigation into such offence, it shall be lawful for the Magistrate if he considers it safe and just in all the circumstances -

(a) to act upon the statement given by the witness in the course of the investigation, if such statement is corroborated in material particulars by evidence from an independence source; and

(b) to have such witness at the conclusion of such trial, tried before such court upon a charge for intentionally giving false evidence in a stage of a judicial proceeding.

(2) At any trial under paragraph (b) of subsection (1) it shall be sufficient to prove that the accused made the contradictory statements alleged in the charge and it shall not be necessary to prove which of such statements is false.

Provisions of this Act to be in addition to and not in derogation of the provisions of the Penal Code &c.

15. The provisions of this Act shall be in addition to, and not in derogation of, the provisions of the Penal Code, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Act, No. 22 of 1994 or any other law.

Sinhala Text to prevail in case of inconsistency

16. In the event of any inconsistency between the Sinhala and Tamil texts of this Act, the Sinhala text shall prevail.

Interpretation

17. In this Act unless the context otherwise requires -

"Criminal force", "fear", "force", "grievous hurt", "hurt" and

"mischief" shall have the respective meanings assigned to them in the Penal Code;

"educational institution" means -

(a) a Higher Educational Institution;

(b) any other Institution recognised under Chapter IV of the Universities Act, No. 16 of 1978;

(c) the Buddhist and Pali University established by the Buddhist and Pali University of Sri Lanka Act, No. 74 of 1981;

(d) the Buddha Sravaka Bhikku University, established by the Buddha Sravaka Bhikku University Act, No. 26 of 1996;

(e) any Institute registered under section 14 of the Tertiary and Vocational Education Act, No. 20 of 1990;

(f) any Advanced Technical Institute established under the Sri Lanka Institute of Technical Education Act, No. 29 of 1995;

(g) a Pirivena registered under the Pirivena Education Act, No. 64 of 1979 and receiving grants from State funds and includes a Pirivena Training Institute established under that Act;

(h) the Sri Lanka Law College;

(i) National Institute of Education established by the National Institute of Education Act, No. 28 of 1985;

(j) a College of Education established by the Colleges of Education Act, No. 30 of 1986, or a Government Training College;

(k) a Government school or an assisted school or an unaided school within the meaning of the Education Ordinance (Chapter 185);

and includes any other institution established for the purpose of providing education, instruction or training;

"head of an educational institution" means the Vice-Chancellor, Mahopadyaya, Director, President, Principal or any other person howsoever designated charged with the administration and management of the affairs of such educational institution;

"Higher Educational Institution" has the meaning assigned to it in the Universities Act, No. 16 of 1978;

"member of the administrative staff" when used in relation to an educational institution means, a person in a position of administrative authority in such educational institution and includes a Vice-Chancellor, Dean, Director and Rector;

"ragging" means any act which causes, or is likely to cause, physical or psychological injury or mental pain or fear or embarrassment to a student or a member of the staff of an educational institution and includes verbal abuse;

"student" means a student of an educational institution;

"sexual harassment" means the use of criminal force, words or actions to cause sexual annoyance or harassment to a student or a member of the staff, of an educational institution;

"verbal abuse" means the use of words which are in contempt of the dignity and personality of a student or a member of the staff, of an educational institution.

SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

An Act to Eliminate Ragging and Other Forms of Violence, and Cruel, Inhuman and Degrading Treatment, from Educational Institutions

SC Special Determination No 6/98 (SD)	In the matter of a petition under Article 121 of the Constitution by the Inter-University Students' Federation of the University of Sri Jayawardenapura, Gangodawila, Nugegoda.
	Petitioner
SC Special Determination No 7/98 (SD)	In the matter of a petition under Article 121 of the Constitution by Adikari Mudiyanselage Priyantha Chandana Thilak Bandara, of No. 70, Jayawardenapura, Ampara.
	Petitioner

BEFORE: Fernando, J.,
Gunawardana, J., and
Gunasekera, J.

COUNSEL: Manohara de Silva for the Petitioners.
Upawansa Yapa, PC, SG, with A. Obeysekere, SC, for the Attorney-General.

DETERMINATION:

The two Petitioners filed these petitions alleging that sections 2, 3, 4, 5, 6, 7, 8, 9, 10 and 17 of the Bill entitled "Prohibition of Ragging and Other Forms

of Violence in Educational Institutions" ["An Act to Eliminate Ragging and Other Forms of Violence, and Cruel, Inhuman and Degrading Treatment, from Educational Institutions"] were inconsistent with Articles 12(1) and 14(1)(a) of the Constitution. Both petitions were taken up for consideration together on 30.3.98.

It is common ground that the Bill is a response to the increase in the ragging, and the brutality of the ragging, that takes place in many educational institutions.

Recently this Court after considering an outbreak of ragging in a training College for teachers, observed (in *Navaratne* v. *Chandrasena*, SC 172-179/97, SCM 16.12.97):

> "Ragging is sometimes sought to be justified as being a necessary part of orientation to life in Universities and other institutions of higher learning. Such ragging may be tolerated, if at all, if it is clean fun; but it is totally unacceptable if it causes pain or suffering, or physical, mental or emotional distress, to the victims. No normal person could possibly have considered what happened in this case to be fun: on the contrary, it was cruel, inhuman and degrading to ill-treat or torment persons to the point of pain and exhaustion requiring hospitalisation, not to mention the possible long-term adverse mental effects, even on the victims who did not need hospitalisation ..... the ragging took place in the College premises openly, and for some time, and the fact that persons in authority did not intervene indicates that what took place was a form of terrorism ..... Ragging is easily done, but difficult to prove; victims are afraid to complain, because reprisals are likely; those in authority often fear to get involved, whether by intervening, reporting, or otherwise. The disciplinary authorities are sometimes intimidated into mitigating or even cancelling punishments. In these circumstances, the public interest demands deterrent, rather than lenient, punishment for admitted or proved misconduct....."

At the outset Mr de Silva stated that the Petitioners do not in any way support, encourage or condone ragging in the ordinary sense of the term, or inflicting injury on any person.

Relevant provisions

Section 17 contains the following definitions:

"ragging" means any act which causes, or is likely to cause, physical or psychological injury or mental pain or fear or *embarrassment* to a student or a member of staff of an educational institution and includes verbal abuse:

"sexual harassment" means the use of criminal force, words or actions to cause sexual annoyance or harassment to a student or a member of the staff, of an educational institution;

"verbal abuse" means the use of words which are in *contempt* of the dignity and *personality* of a student or a member of the staff, of an educational institution [emphasis added throughout]

Section 2 creates the offence of "ragging":

2(1). Any student or a member of the staff of an educational institution who commits, or *participates* in, ragging, within or outside an educational institution, shall be guilty of an offence under this Act and shall on conviction after summary trial before a Magistrate be liable, to rigorous imprisonment for a term not exceeding two years and may also be ordered to pay compensation of an amount determined by court, to the person in respect of whom the offence was committed for the injuries caused to such person.

2(2). A student or a member of the staff, of an educational institution who, whilst committing ragging causes sexual harassment or grievous hurt to any other student or a member of the staff, of an educational institution shall be guilty of an offence under this Act and shall on conviction after summary trial before a Magistrate be liable to imprisonment for a *term not less than five years* and not exceeding ten years *and shall also be ordered to pay compensation* of an amount determined by court, to the person in respect of whom the offence was committed for the injuries caused to such person.

Sections 3, 5 and 6, create offences of "criminal intimidation." "wrongful restraint," and "unlawful confinement" - which broadly correspond to similar offences under the Penal Code, though perhaps more serious. What is relevant to the matter now before us is the great disparity in punishments:

Section 486, PC (criminal intimidation)	: imprisonment upto two years
Section 3, Bill	: minimum term of two years
Section 332, PC (wrongful restraint)	: simple imprisonment upto one month
Section 5, Bill	: minimum term of three years
Section 333, PC (unlawful confinement)	: imprisonment upto one year
Section 6, Bill	: minimum term of three years
Section 345, PC (sexual harassment)	: imprisonment upto five years
Section 2(2), Bill	: minimum term of five years

Section 8 penalises the failure of a member of the administrative staff to investigate and report complaints of ragging:

> 8. Any member of the administrative staff of an educational institution who fails or neglects, without reasonable cause, to investigate and report, a complaint made to him that an act constituting the offence of ragging has been committed by, or in respect of, a student or a member of the staff of such educational institution shall be guilty of an offence under this Act and shall on conviction after summary trial before a Magistrate be liable to a fine not exceeding ten thousand rupees.

Section 9 of the Bill prescribes further penalties and disabilities:

> 9. Where a person is convicted of an offence under this Act, *other than an offence referred to in Section 8,* such person shall -
>
> (a) if he is a student of -
>
> (i) an educational institution, not being a Higher Educational Institution, be deemed to have been *expelled* from such

institution, with effect from the date of such conviction;

(ii) a Higher Educational Institution be deemed to have been *expelled* from such institution with effect from the date of such conviction *and shall not be admitted to any other higher educational institution or other institution for tertiary education;*

(b) If he is a *member of the staff* of an educational institution be deemed to have been *dismissed* from such educational institution with effect from the date of such conviction, by the authority empowered by law to dismiss him.

Section 10 severely restricts the right to release on bail:

10(1). Notwithstanding anything to the contrary in any other law, a person *suspected or accused* of committing an offence under subsection (2) of section 2 or section 4 of this Act *shall not be released on bail* except by the judge of a High Court established by Article 154P of the Constitution, as provided in subsection (2).

10(2). A Judge of the High Court established by Article 154P of the Constitution, may in exceptional circumstances, release on bail a person suspected or accused of committing an offence under subsection (2) of section 2 or section 4 of this Act, who has been in remand for a continuous period of six months or over after his arrest.

10(3). Where a person is convicted of an offence under subsection (2) of section 2 or section 4 of this Act, and an appeal is preferred against such conviction, the Court convicting such person may, taking into consideration the gravity of the offence and the antecedents of the person convicted, either release or refuse to release, such person on bail."

Considerations

1. Section 17: The Petitioners contend that the definition of "ragging" in the Bill is much too wide, so that minor acts or omissions could result in enormous punishments. They argue that "personality" embraces a host of

factors: everything which is involved in or contributes to the understanding of the individual, including his habits, character, temperament and personal opinions; and that "contempt" means disobedience or disrespect. So, they conclude, that acts or words critical of the conduct or opinions of a student or a member of the staff, would constitute "ragging;" and that is an infringement of Article 14(1)(a), and does not fall within the restrictions permitted by Article 15(2) or 15(7) of the Constitution. Mr de Silva submitted that Article 15(2) permitted restrictions in relation to "defamation," and said that the definition of "verbal abuse" would have been acceptable if it had read "and which are *defamatory* of a student or a member of the staff."

It appeared to us that not only is the impugned definition referable to the law of defamation, but it is in fact narrower than the formulation which Counsel finds acceptable. We drew Counsel's attention to the *actio injuriarum*, in relation to which McKerron (Law of Delict, 6th ed, p.51) says:

> "there are two essentials of liability in the *actio injuriarum*; first, an act constituting an impairment of the plaintiff's personality; and, secondly, *dolus* (wrongful intent), or, as it is usually termed in this connexion, *animus injuriandi*.
>
> IMPAIRMENT OF PLAINTIFF'S PERSONALITY
>
> The interests of **personality** protected by the *actio injuriarum* are those interests which every man has, as a matter of natural right, in the possession of an unimpaired **person**, **dignity** and reputation. The plaintiff must therefore show that the act complained of constituted an impairment of his **person**, his **dignity**, or his reputation.

Mr Yapa agreed that the definition seeks only to prohibit words which violate rights in respect of dignity and personality (but not reputation), and do not restrict the legitimate exercise of the freedom of speech; and that those expressions must be construed in criminal proceedings for ragging in the same way in which the Courts will interpret them in a civil action for defamation. Students, especially newcomers, are entitled to have their personality respected by not being subjected even to words which affect their dignity and personality - whether those words are obscene, abusive, derogatory, humiliating, degrading, or contemptuous. He submitted further that the word "contempt" also had the effect of making necessary a mental element - of the same

character as *animus injuriandi* but even stronger; not just an intention to infringe another's rights of "person and dignity" but a contemptuous intention, such as an intention to humiliate or to degrade, or malice. We agree that this is what that definition means. If students use words which satisfy those requisites, punishment will be no violation of their freedom of speech.

We must observe also that one of the restrictions on Article 14(1)(a) which Article 15(7) permits is "for the purpose of securing due recognition and respect for the rights and freedom of others;" and if section 17 does place restrictions on speech and expression they are reasonably necessary to ensure the peace of mind which new students, in particular, need in order to benefit from their stay in educational institutions.

We drew Mr Yapa's attention to the inappropriateness of including the word "embarrassment" in the definition of "ragging." Embarrassment can result from acts and words which are hostile or malicious, as well as from those which are friendly and well-intentioned - such as a sincere compliment, or a genuine expression of admiration. It includes awkwardness and self-consciousness. The mischief which the Bill seeks to prevent is embarrassment which brings tears to the eye or distress to the mind, but not that which merely brings a blush to the cheek - for which any punishment would be too harsh. Mr Yapa agreed that a more appropriate word should be substituted. We suggest that "humiliation," "suffering" and/or "distress" be substituted.

Subject to the omission of the word "embarrassment" we hold that section 17 is not inconsistent with any provision of the Constitution.

We asked Mr Yapa whether the purpose of the Bill was to deal with the ragging of students, and if so whether the inclusion of "members of the staff" was appropriate. He replied that (in addition to hostage taking, which section 4 deals with) ragging of members of the staff may also be a real problem. The inclusion of that phrase is not inconsistent with the Constitution.

2. Section 2(1): Mr de Silva submitted that the word "participates" would make criminal even mere presence, while ragging was going on. Mr Yapa submitted that "commits, or participates in, ragging" requires proof of active, deliberate, participation, and that the section is intended to cover only "participatory presence." We agree.

Section 2(1) is not inconsistent with any provision of the Constitution.

3. Sections 2, 3, 4, 5, 6, 7 and 8: Equality before the law: The Petitioners also complained that the Bill exposes students to criminal liability for certain acts, which would not attract any liability if done by others who are not in educational institutions, thereby denying students the equal protection of the law guaranteed by Article 12(1).

Even assuming that there is some difference in treatment, the simple answer to that contention is that there is no comparable problem of ragging in such other institutions. Further, although the problem is more in higher educational institutions than in primary and secondary schools, the provisions of the Bill are applicable to the entire class of educational institutions.

These provisions are not inconsistent with Article 12(1) on that ground.

4. Sections 2(2), 3, 4, 5, 6 and 7(2): Mandatory minimum sentences; and Section 9: Automatic Expulsion and Disability: Several issues arise for consideration.

(a) Mr de Silva submitted that mandatory minimum sentences were unconstitutional. A mandatory minimum sentence involves a legislative determination of punishment and a corresponding erosion of a judicial discretion; and what is more, it is a general determination, in advance, of the appropriate punishment, without a consideration of relevant factors which proper sentencing policy should not ignore; such as the offender, and his age and antecedents, the offence and its circumstances (extenuating or otherwise), the need for deterrence, and the likelihood of reform and rehabilitation.

Although the legislative prescription of a minimum sentence seems inconsistent with the entrustment - by Article 4(C) - of the judicial power which includes the power to determine both guilt and punishment) to the Judiciary, Article 13(6) seems by implication to recognise a legislative power to prescribe a minimum penalty. However, Article 13(6) only provides that a minimum penalty does not contravene *that Article*: it certainly does not purport to provide that a minimum penalty will necessarily be constitutional even if it contravenes other Articles, such as Articles 4(C), 11 or 12(1). It is not necessary to determine in this case whether a mandatory minimum sentence is *per se* unconstitutional, for there are other reasons for holding that the mandatory minimum sentences which this Bill imposes are inconsistent with the Constitution.

(b) Mr de Silva urged that the Bill will necessarily result in a gross disparity in the punishments imposed for offences which are very similar in nature. Thus while sexual harassment (however serious) in an office, work place, bus or in a public place attracts a maximum punishment of five years under the recent amendment to section 345 of the Penal Code, he submitted that much less serious harassment ("sexual annoyance" as specified in section 17), where it also involves ragging of a student, would attract a mandatory minimum term of five years. Likewise, the maximum punishment under section 332 of the Penal Code for wrongful restraint is simple imprisonment for one month, while section 5 of the Bill lays down a minimum of three years for similar conduct. He contended that this was unequal treatment infringing Article 12(1).

Section 2(2) operates to compel unequal treatment of offenders in another way as well. A person guilty of ragging is liable to a maximum sentence of two years under section 2(1). The circumstances of a particular case may be such that a Magistrate may consider six months appropriate. However, another person guilty of identical conduct, but aggravated by words causing mild sexual annoyance - which amounts to sexual harassment for the purpose of section 2(2) - will receive a grossly disproportionate mandatory sentence, as to which the Magistrate has no discretion. Even if he considers that an additional six or twelve months will be more than enough, he will be forced to impose a minimum sentence of five years.

Likewise, despite greatly differing circumstances of aggravation, a Magistrate will be obliged to impose identical sentences of five years both in cases where he thinks five years appropriate, as well as in others where he thinks it is most inappropriate. Section 2(2) thus compels a Magistrate to treat unequals as if they were equals, in violation of Article 12(1).

We note that these provisions apply not only to undergraduates in their twenties, but also to school-children not yet in their teens. Age is an important factor in relation to sentencing - but section 2(2) requires youth and children to be treated as if they were equal in maturity and responsibility. Indeed, a school-child who is guilty of less serious conduct will have to be given the same minimum sentence as a youth twice his age.

The cumulative effect of all this will be an erosion of an essential judicial discretion in regard to sentencing. There will be gross disparities in

sentences, which will not only violate the principles of equal treatment, but may even amount to cruel punishment.

If the background to the Bill had been that persons guilty of ragging had been charged and convicted under various provisions of the Penal Code, and that the judiciary had displayed undue leniency, thereby seemingly condoning ragging, there might have been a need for a legislative fetter on judicial discretion in the form of mandatory sentences. But there is no suggestion of any such leniency.

(c) We intend to rule on the issue of mandatory minimum sentences not in isolation, but in conjunction with the penalties and the disabilities which by virtue of section 9 will automatically result upon conviction.

In order to appreciate their gravity, we list below the punishments which must inevitably result upon a conviction under sections 2(2), 3, 4, 5, 6 and 7(2):

(i) a mandatory minimum sentence, without any discretion to impose a fine;

(ii) automatic expulsion from the educational institution of which he is a student;

(iii) life-long disability for admission to any higher educational institution, if he is a student of such an institution.

That disability, however, will not apply upon conviction of school-children.

Section 2(2) further provides for a mandatory order for compensation, while section 7(2) prescribes a mandatory fine of Rs. 5,000, or three times the amount of the loss or damage caused, whichever is higher. Convictions under section 2(2) and 4 will often be preceded by six-month remand orders which, as we note later in this Determination, are punitive in nature.

It is only sections 2(1) and 7(1) which do not provide for mandatory minimum sentences. We will refer later to section 8 which provides for relatively very lenient punishments for the defaults of administrative staff (a fine not exceeding Rs. 10,000).

Not only does the Bill take away the judicial discretion to consider the antecedents of the offender (particularly age), and the nature and circumstances of the offence, but it "piles up punishment on punishment:" mandatory minimum sentence and expulsion for school-children, regardless of age, and mandatory sentence, expulsion and disability for other students. That raises the question whether they constitute "cruel and inhuman punishment" within the meaning of Article 11.

In considering the enormity of the punishments, we take account both of the exclusion of sections 303 and 306 of the Code of Criminal Procedure Act (section 11) and of the provision for mandatory remand (section 10).

A similar question was considered in the Determination of this Court, dated 2.10.79, in respect of the Essential Public Service Bill (*Ratnasiri Wickremanayake* v. *The State*, SC Application No 58/79), to which we drew Mr Yapa's attention during the oral hearing. That Bill sought to impose severe punishments - though less severe than those which this Bill imposes - on persons engaged in essential public services, for offences such as the refusal to work:

(i) imprisonment for not less than two years OR a fine of not less than Rs. 2,000/- OR both;

(ii) a mandatory order of forfeiture of all property movable and immovable; and

(iii) if the offender's name was registered in any register maintained under any written law as entitling such person to practise any profession or vocation, a mandatory order that his name be erased from such register.

An offender who was not so registered, and who had no property, might have ended up with only a fine, if that was what the trial Judge thought fit.

While there is undoubtedly a difference between the forfeiture of property and the denial of entry to higher educational institutions, yet for students likely to be affected by the Bill the latter, life-long, disability is probably far more serious than the forfeiture of all their property. For those with little or no property, the right to education is far more precious, and may be their only

means of acquiring property.

We note that the conclusion which this Court reached in that matter was despite the fact that ***that Bill did not provide for a mandatory sentence of imprisonment*** for it left intact the discretion of the trial Judge to impose only a fine. Nevertheless, it was held:

> "... This piling up of punishment on punishment makes these penal provisions one of extreme severity ... covering all offenders, irrespective of the kind of offence they are involved in, or their degree of blameworthiness."

The Court rejected the Attorney-General's contention that those were forms of punishment recognised by Article 16(2), and that therefore Article 11 did not apply. (We would add that Article 16(2) refers to subjection of any person on the order of a competent court to a punishment - the Bill with which we are dealing does not provide for a punishment to be imposed by the order of a court, but provides instead for a penalty which is a consequence of a conviction.)

The Court concluded:

> "..... the piling of punishment on punishment indiscriminately, as in this case, whether they be old forms of punishment or new, must pass the test of Article 11, if they are to be valid. In our view, this is not a case of the mere excessiveness of the punishment, but one of inhuman treatment and punishment. The learned Attorney-General stated that these terms suggested some wrongful and wicked application of force on the prisoners. We are unable to agree ..... In *Trop* v. *Dulles*, 356 US 86, ... the U.S. Supreme Court held that a statutory provision for forfeiture of citizenship, on conviction by a Court Martial for desertion in time of war, could not be validly applied to a citizen by birth, whose Court Martial conviction was based solely on one day's absence without leave from his base. The Court said that the sole purpose of forfeiting citizenship was to punish for desertion, and punishment of such magnitude was 'cruel and unusual' ..... In *Robinson* v. *California*, 370 US 660, the U.S. Supreme Court said ..... a punishment out of all proportion to the offence may bring it within the bar against cruel and unusual punishment."

The Court stressed that the punishments were not inherently bad, and that they could all be applied together in a serious and fit case:

> "..... Our objection is to their mandatory nature and to their indiscriminate application *ad terrorem*, irrespective of the nature of the offence or the culpability of the offender."

This Court suggested in that case that all the punishments be left to the discretion of the trial judge; and Parliament substituted "may" for "shall" in the relevant provision.

We find those observations and conclusions to be even more applicable to this Bill. Ragging has far too long been cruel, inhuman and degrading. Our society has been unable to deal within the root causes of ragging, and the anxieties, fears and frustrations of youth on which ragging has fed and flourished. Ragging warrants severe and deterrent punishments. However, such punishments must be just and commensurate with the offence, and not a cruel or inhuman over-reaction to the problem.

The provisions of sections 2(2), 3, 4, 5, 6, 7(2) and 9 insofar as they require mandatory minimum sentences, and automatic penalties and disabilities, are inconsistent with Articles 4(c), 11 and 12(1).

We suggest that mandatory minimum sentences should not be prescribed, and that the imposition of different disabilities and penalties should be left to the discretion of the trial judge.

5. Section 9: Equality before the Law: Upon conviction for an offence under sections 2 to 7, section 9(a)(ii) provides in addition to expulsion or dismissal, for a disability - but that only applies in regard to students of higher educational institutions, and not to school-children and members of the staff. As between such students and school-children, there is a reasonable basis for the difference in treatment, because young offenders ought in general to be more leniently treated. However, there is no justification for adult staff members guilty of ragging and the like to be more leniently treated - being put in the same class as school-children - by not being subjected to any disability comparable to that imposed on a student convicted of similar offences. That is an additional reason why the automatic disability is contrary to Article 12(1).

6. Section 8: Equality before the Law: Mr de Silva submitted that the exemption of members of the administrative staff convicted of offences under section 8 from the penalties and disabilities prescribed by section 9 was discrimination.

As Mr Yapa pointed out, those liable to the penalties and disabilities under section 9 were persons ***actively*** involved in ragging and the like, while section 8 applied to those guilty of *inaction*: failing to investigate and report complaints of ragging. We hold that classification on that basis is not inconsistent with Article 12(1). However, it then transpired that the Bill makes no provision at all as to the liability, of administrative staff members guilty of more serious defaults - as, for instance, being present when a student (or even a staff member) engages in ragging, but failing to exercise their authority in order to stop it, and/or failing to report it. In that respect, section 8 is inconsistent with Article 12(1).

7. Section 10: Mandatory remand: Articles 4(c), 12(1), 13(2) and 13(4): Although the petitions contain a bare allegation that section 10 is unconstitutional, that point was not elaborated either in the written submissions or in the oral arguments. As we later realised that a serious question arose, we directed both Counsel to file further written submissions, which they did.

Section 10 takes away the discretion of a Magistrate - and indeed, of a Judge of the High Court or of a Superior Court - to release suspects on bail. There may be no material on which a person can be reasonably suspected of an offence: the investigations may not be hampered by his release on bail, and, indeed, they may be over; the police may be dawdling about whether to prosecute, and may even have decided not to; and the Attorney-General himself may consent to his release on bail. Nevertheless, section 10 says, he "shall not be released on bail" by the Magistrate not just for six months, but even thereafter.

It is the High Court alone which can grant bail, and that, too, only in "exceptional circumstances," and only after he has been in remand for a continuous period of six months after his arrest.

Article 13(2) provides that an arrested person "shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of

the order of (a) judge made in accordance with **procedure established by law.**"

Article 13(4) provides that no person shall be punished with death or imprisonment except by order of a competent court, made in accordance with **procedure established by law**; and that the arrest, holding in custody, detention or other deprivation of personal liberty of a person, pending investigation or trial, shall not constitute punishment.

In Mr Yapa's written submissions he acknowledged that a provision similar to section 10 does not appear in any other enactment in Sri Lanka. He conceded that:

> "Clause 10 of the Bill, worded as it is, **appears to have the effect of compelling a judicial officer to remand a person for six months** [in the aggregate]. Therefore, it will be suggested that the clause be amended so that the High Court may in exceptional circumstances grant bail, and in any case shall grant bail after the expiry of six months."

He further submitted that the relevant provisions of the Code of Criminal Procedure Act provide "adequate safeguards ... to cover situations where there isn't sufficient evidence or reasonable grounds of suspicion;" and make it clear that a Magistrate **"need not make an automatic order of remand"** because it is his duty to examine the report and summary of statements produced by the Police before making his order. "If he is **satisfied** that it is expedient to detain the suspect in custody pending further investigations, [he] may after recording his reasons authorise the detention." It is implicit in these submissions that if the Magistrate is **not satisfied**, he should not order remand. And that is, without doubt, what Article 13(2) and respect for personal liberty demands.

However, even if the Magistrate does go through that procedure, and is then satisfied that the suspect should **not** be detained, nevertheless the provisions of section 10, as they stand, contain a binding direction to the Magistrate not to release him on bail, resulting in a deprivation of liberty without a judicial decision that detention is really necessary.

Some consideration is necessary of the meaning of the phrase "upon and in terms of the order of [a] judge made in accordance with procedure established by law." Clearly, that phrase includes an order (authorising further deprivation of liberty, with or without conditions) made by a judge after judicially considering the material before him; and also an order imposing a punishment after exercising a judicial discretion: But does it also include an order made by a judge without any attempt to exercise his judicial discretion - an order which he makes not because he thinks it right, but simply because he has no choice but to make it? A "procedure established by law" does not mean or include a direction to the Court as to how it should exercise its judicial power; it refers only to the framework within which judicial power is to be exercised - i.e. the criteria, the guidelines, the procedural forms and steps, etc., which Parliament must prescribe. As the Supreme Court of India said in *Manekha Gandhi* v. *Union of India*, AIR 1978 SC 597, 624, the procedure "must answer the test of reasonableness ... it must be right and just and fair, and not arbitrary, fanciful or oppressive."

Parliament could not have enacted a law stipulating that the police, after producing an arrested person before a judge, shall (or may) hand him over to the Remand prison for detention for six months; nor a law empowering an officer of the Executive to decide whether he should be further detained. That would plainly violate of Article 13(2).

The fundamental right under Article 13(2) (and the judicial discretion which is implicit therein) can only be restricted to the extent permitted by Article 15(7). See, for instance, the Determination of this Court, dated 21.5.79, in respect of the Proscribing of the L.T.T.E. and Other Similar Organisations Bill, (SC Special Determination No 5/79):

> "... This provision confers on the Minister power to detain persons for periods of 3 months at a time... [Article 13(2) was then quoted] ..... *Prima facie*, section 11 appears to be in conflict with Article 13(2) but Article 15(7) of the Constitution provides that .... Article 13(2) shall be subject to such restriction as may be prescribed by law in the interests of national security, public order, etc.... We are therefore of the view that section 11 is not inconsistent with the Constitution."

What Parliament cannot do directly, it cannot do indirectly. Section 10 is inconsistent with Article 13(2) because it compels a Magistrate to refuse

release on bail, even in cases in which he would have allowed bail if the matter has been left to his discretion. Mr. de Silva cited the Determination of this Court, dated 23.2.84, in respect of the Bill to amend the Poisons, Opium and Dangerous Drugs Ordinance (SC No 1/84 SD), which examined a provision that bail cannot be granted "except with the sanction of the Attorney-General."

> "This is a fetter on, and in effect a power of control over, judicial power of the Court. The granting of bail is an exercise of judicial power which can only be controlled or reviewed by a higher court. Such a power cannot be given to the Attorney-General or a non-judicial body."

If a fetter cannot be placed on the judicial power to release on bail, it follows that the power itself cannot be taken away altogether - unless the Constitution allows it.

We have therefore to consider whether section 10 constitutes a restriction permitted by Article 15(7). It is possible that there may be circumstances in which an order for remand is in the interests of national security, public order, or the protection of public morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society. However, section 10 goes far beyond what is reasonably necessary for any of those purposes, for it extends to all who are suspected of offences under sections 2(2) and 4, even where manifestly none of those considerations arise. And, we must repeat, those are provisions which apply even to school-children.

The Bail Act, No. 30 of 1997, is of some relevance. It recognises that the grant of bail shall be the rule, and the refusal to grant bail the exception, subject to the exceptions specified in that Act. One exception is that the Act shall not apply to any person accused or suspected of offences under the Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979, Emergency Regulations, and any other written law which makes express provision in respect of the release on bail of persons accused or suspected of offences under such written law. If section 10 is valid, then this Bill, when enacted, would be one of those exceptions. Section 14 of the Bail Act provides that the Court may refuse bail if the Court ***has reason to believe*** that

the suspect may abscond or interfere with witnesses (etc.), or may commit an offence while on bail, or that "the particular gravity of, and public reaction to, the alleged offence may give rise to public disquiet;" and section 15 compels the Court to state its reasons for refusal in writing. Those are reasonable restrictions on personal liberty.

There is no doubt that some - perhaps even many - persons suspected or accused of offences under sections 2(2) or 4 might properly have been refused bail under the provisions of the Bail Act. It would have been permissible for section 10 of this Bill to have imposed similar restrictions on Article 13(2). (Those would probably have fallen within the scope of Article 15(7).) But section 10 denies bail to <u>all</u> persons suspected or accused of offences under sections 2(2) or 4: even to those who would have been entitled to bail if the Bail Act applied. They are treated differently to other persons accused of similar offences (or even of far more serious offences) to whom the Bail Act applies.

We turn now to Article 13(4). The detention which results from a remand order which section 10 compels a Magistrate to make, is not necessarily a detention "pending investigation or trial," for as already noted, a remand order can be renewed even if investigations are complete, and if no trial is pending. That detention will not be in terms of a statutory provision constituting a reasonable restriction on Article 13(2). Our attention has not been drawn to any provision authorising any restriction on Article 13(4), and such detention cannot be justified on that basis. Without expressing any opinion as to the nature of such a detention for a few days, we hold that such a detention for six months, without any provision for a prior judicial decision, or subsequent judicial review, amounts to punishment contrary to Article 13(4).

Article 123(2) empowers, but does not oblige, this Court to "specify the nature of the amendments which could make the Bill or such provision cease to be inconsistent" with the Constitution. Notwithstanding the limited time available, we have given some consideration to Mr Yapa's suggestion - which he says would be similar to the provision which Parliament made after the Determination in respect of the Bill to amend the Poisons, Opium and Dangerous Drugs Ordinance. We find that formulation inadequate. Mr. Yapa's submission seems to accept the need for the safeguards in the Code of Criminal Procedure Act: if so, to allow bail only "in exceptional

circumstances" is to restrict unduly the right to bail (and the right to personal liberty); and it seems inconsistent with his submission to take away from the Magistrate the power to grant bail, and to vest it in the High Court. Finally, the provision that in any case bail shall be granted after six months, seems to go too far the other way, because it gives a suspect an automatic right to release on bail after six months even if there are sound reasons why he should not be (while section 16 of the Bail Act gives such a right only after twelve months, and that too subject to section 17).

Conclusion

For the above reasons, we determine that:

1. Section 2(1) and 7(1) are not inconsistent with any provision of the Constitution.

2. Section 17, subject to the omission of the word "embarrassment" and, if desired, the substitution of some other appropriate word or words, is not inconsistent with any provision of the Constitution.

3. Section 2(2), 3, 4, 5, 6, and 7(2) insofar as they require mandatory minimum sentences, and section 9 insofar as it provides for automatic penalties and disabilities, are inconsistent with Articles 4(c) and 12(1) of the Constitution, and are required to be passed with the special majority prescribed by Article 84(2). They are also inconsistent with Article 11 of the Constitution, and are required to be passed with the special majority prescribed by Article 84(2) and approved by the People at a Referendum by virtue of the provisions of Article 83.

   If amended, so that punishment, including orders for expulsion, dismissal and disability, are left to the trial court to be imposed at its discretion in fit cases, those sections will cease to be inconsistent with Articles 4(c), 11, and 12(1).

4. Section 9, insofar as it imposes a disability on students not imposed on members of the staff, is inconsistent with Article

12(1) of the Constitution, and is required to be passed with the special majority prescribed by Article 84(2). It will cease to be inconsistent if that difference in treatment is eliminated.

5. Section 8, insofar as it fails to penalise acts and omissions of members of the administrative staff of an educational institution in whose presence ragging is committed, is inconsistent with Article 12(1) of the Constitution, and is required to be passed with the special majority prescribed by Article 84(2). It will cease to be inconsistent if they too are made liable.

6. Section 10 is inconsistent with Article 4(c), 12(1), 13(2) and 13(4) of the Constitution, and is required to be passed with the special majority prescribed by Article 84(2). It will cease to be inconsistent if the discretion whether to remand a person suspected or accused of an offence, or to release him on bail, is vested in a judicial officer, such discretion being subject to reasonable restrictions permitted by Article 15(7).

7. None of the other provisions of the Bill are inconsistent with any provision of the Constitution.

M.D.H. Fernando
JUDGE OF THE SUPREME COURT

A. de Z. Gunawardana
JUDGE OF THE SUPREME COURT

D. P. S. Gunasekera
JUDGE OF THE SUPREME COURT

7th April 1998

Ragging: Will the New Law Be Effective?

Dr Neelan Tiruchelvam

1. Should ragging be a distinct offence?

The phenomenon of ragging in universities and other educational institutions has reached alarming and disturbing proportions and there is agitation amongst parents on the need for effective action. The Supreme Court in the unreported judgment in *Navaratne* v. *Chandasena* (1997) accurately summed up our concerns with regard to the phenomenon of ragging.[1]

There are several reasons why ragging needs to be distinguished from other forms of student misbehaviour. First, ragging invariably causes pain or suffering, physical or emotional distress to the victims. Second, it often takes the form of cruel, degrading and humiliating treatment and even the torture of the victim. Third, it often takes place in open and in full defiance of persons in authority who are generally afraid to intervene. Fourth, like torture it is difficult to prove, victims are afraid to complain, senior students protect the perpetrators however heinous the offence, and the authorities are reluctant to get involved. Fifth, even where disciplinary proceedings are instituted the authorities are intimidated into mitigating or cancelling punishment.

The recent death of Varapragash, an engineering student at University of Peradeniya and other highly publicised incidents where ragging has resulted in loss of life has triggered public opinion to demand that the state intervene and this legislation is a clear response to this demand.

However, we need to ask ourselves the question as to whether the proposed legislation would be effective in deterring the recurrence of widespread and severe incidents of ragging. There has always been a live debate about what is the proper role of criminal law and of the criminal process. The utilitarian view is that the 'proper role of the criminal process is the prevention of anti-social behaviour." The opposing view is the theory of retribution. According to this position, it is legitimate for society to demand the authorities

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1 See judgment in this issue.

to punish those who are morally derelict or who unjustifiably inflict injury on others. The Victorian jurist Fitzjames Stephen colourfully summed up the retributive position stating that "the sentence of the law is to the moral sentiment of the public in relation to any offense what a seal is to hot wax." However, we need to justify this legislation not merely on the theory of retribution but on pragmatic considerations of its effectiveness.

2. The definition of the offence

The legislation is not merely directed towards the phenomenon of ragging but also seeks to cover other forms of violence in educational institutions including acts of criminal intimidation, hostage taking, wrongful restraint, unlawful confinement, forcible occupation and damage to property. All of the latter forms of violence are in any event offences under the Penal Code and the present law seeks to impose minimum punishments in respect of such offences. Since the Supreme Court ruled that mandatory minimum sentences were unconstitutional,[2] the committee stage amendment merely increased the maximum punishment. We would have been more comfortable if the legislation was more narrowly focused on the more immediate issues relating to ragging. During both the civil rights movement and the student unrest in France, the forcible occupation of buildings was part of a conscious political strategy. These acts of protests took place in the context which is totally different from that is which ragging takes place.

With regard to the definition of ragging, civil rights groups have been troubled as to whether the definition of ragging is overbroad and as to whether it would interfere with the freedom of expression and otherwise legitimate interaction between students. Some of these concerns have also been examined by the Supreme Court in relation to the permissible grounds of limitations on fundamental rights. Our concerns are as follows:

First, whether causing 'embarrassment' to a student can include hostile and abusive language and gratuitous compliments and expressions of admiration. The Court has ruled that the word 'embarrassment' be excluded from the definition. Second, the definition of ragging includes verbal abuse which, in turn, has been defined to include words which are in contempt of the dignity and personality of a student. It has been argued that students who are new

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2 See the judgment in this issue.

entrants to educational institutions are entitled to have their dignity and personality respected. The Supreme Court has been apparently influenced by the consideration that such acts could, in any event, be actionable under the civil law as an *'actio injuriarum.'* But this is no reason why such actions should also be punishable as a criminal offence. There should be some added element such as the use of obscene or degrading language for verbal abuse which impairs one's dignity to be subject to criminal penalties. I would, therefore, go beyond the determination of the Supreme Court and urge a more restrictive definition. During the Committee Stage, the reference to 'verbal abuse' was excluded from the definition. Third, the inclusion of members of staff in the definition of ragging is inappropriate. The evil that this legislation is intended to cure is ***ragging by students***. Here again, the definition was amended to substitute the word 'any person' for the words 'a student or a member of the staff.' The rationale was that there were outsiders such as former students who sometimes participate in ragging. Fourth, the definition of educational institutions seems overbroad and includes not only tertiary institutions, but also schools and any other institution established for the purpose of providing education, instruction or training. No doubt there have been incidents of ragging in schools, but this has been the exception rather than the norm. Given the scepticism with regard to the enforceability of this legislation, and the practical problems that need to be overcome, the legislation should be limited initially to institutions of higher education. As amended the new definition of ragging reads as follows:

> *ragging means any act which causes or is likely to cause, physical or psychological injury, or mental pain or fear, to a student or a member of the staff of an educational institution.*

3. The question of punishment

In addition, the punishments contemplated by the Bill for ragging, sexual harassment, and other forms of violence seem problematic. First, the removal of judicial discretion and the imposition of mandatory minimum sentences are *per se* objectionable. Second, the Supreme Court also commented adversely on the disparities in sentences in respect of offences under this law and under the Penal Code.[3] There is a need for greater internal consistency in respect of sentences if there is to be a coherent sentencing policy. Third, section 9

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[3] See the judgment in this issue.

which imposes mandatory expulsion of the student, who is further barred from entering any other educational institution is excessive as it fails to consider varying forms and degrees of ragging, and degrees of complicity of individual offenders.

The Supreme Court ruled that 'mandatory minimum sentences should not be prescribed, and that the imposition of different disabilities and penalties should be left to the trial judge.'[4] Accordingly, at the Committee Stage, the following amendments were accepted:

* The mandatory sentence of five years in respect of ragging causing sexual harassment or grievous hurt was deleted, and the maximum sentence that the court may impose was increased to ten years.

* The courts were also given the judicial discretion to determine whether the accused should be ordered to pay compensation to the victim.

* The mandatory expulsion requirement in Section 9 was deleted and the courts were given the discretion to determine whether it should order expulsion having regard to the 'gravity of the offence'.

* Similar references to mandatory sentences in respect of other offences under the Act were deleted, and judicial discretion restored. The maximum sentences were, however, increased.

4. The complexities of enforcement

The question remains as to whether the law would be effective in deterring incidents of ragging in educational institutions. Will the creation of a new offence and the enhancement of the maximum punishment for ragging which results in sexual harassment or grievous hurt make a qualitative difference? Will victims be more willing to complain, and will the authorities be more vigorous in detecting, investigating and punishing such behaviour? Who will police the law - the state or the university authorities?

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4 See the judgment in this issue.

Very little empirical work has been done in Sri Lanka on the sociology of crimes and the effectiveness of law enforcement. An important exception has been John D. Rogers study, "Crime, Justice and Society in Colonial Sri Lanka," where he looked at three specific crimes - cattle stealing, homicide and riots. One of his conclusions was that the administration of law and order failed to generate moral authority amongst most sections of Ceylonese society. Very little subsequent attempt has been to probe the relevance of this thesis to the understanding of the criminal justice system in post-colonial society. However, the weak and lax enforcement of modern statutes makes us increasingly conscious of the complexities and limitations of law as an instrument of social control.

The issues of order and discipline within the university community also pose distinct problems. Ivor Jennings conceptualised the University of Ceylon to be an "independent and autonomous institution dedicated to the highest purposes and values of higher education." But the subsequent history of university education in Ceylon has been a complex and tragic failure to meet these expectations. K.M. de Silva writing in 1995 has observed "student violence - in its many forms - has figured prominently in the life of the University of Ceylon since the mid-fifties. Even by the standards of student violence and political militancy endemic in some South Asian universities the incidence and levels of violence seen in Sri Lankan universities, in particular at Peradeniya, in recent years has been extraordinarily high."

One of the issues that university authorities had to grapple with in responding to the challenge of violence and other forms of student unrest has been to define the jurisdisdictional limits between the state and university with regard to the maintenance of order. There were many who contend that university autonomy means that the property on which a university is located is private property and that a university is a self-managed institution which must have the sole responsibility for maintaining order within its precincts. This view of the university as an autonomous, self-regulated enclave insulated from civilian authorities was contested by Ivor Jennings. Jennings writing to the Warden of James Peiris Hall in 1953 observed, "If an offence has been committed, or was about to be committed in a University in England, the police and private citizens have the same right and duties as if the offence had been committed... in a technical college, a hotel or a private house... It is of course the practice of this University ... to endeavour to maintain discipline amongst its students, including the observance of general laws, without

requiring the assistance of the police... This practice does not however deprive the police of the right and duty to take such steps as may be lawful for dealing with actual or threatened breaches of laws."

The question that arises is whether the criminalisation of ragging will result in a shift in responsibility from the university authorities to the police for the detection and investigation of such conduct? Even if such a shift in responsibility is intended, can there be effective enforcement without the co-operation of the disciplinary authorities within the university? Section 8 of the Bill in its original form was intended to provide the vital link between law enforcement and the authorities within an educational institution. This clause imposed a statutory obligation on any member of administrative staff to investigate and report a complaint of ragging. The failure to investigate without reasonable cause would expose the administrative officer to prosecution and to a fine not exceeding ten thousand rupees. The difficulty with this section was that the definition of administrative officers was too restrictive. It made no reference to proctors, marshalls, and wardens who have direct responsibility for student welfare, discipline and security. Besides, there was no reason why such a responsibility should not have been extended to the academic staff who are often able to observe incidents of ragging in the university premises. However, the government facing strong hostility from the university community decided to delete clause 8 and thereby removed the statutory responsibility of the university authorities for the enforcement of this law.

5. Conclusion

The anti-ragging Bill compels us to reflect seriously on the purposes and limits of the criminal process and of criminal sanction. Professor Herbert Packer of the Stanford University in his classic study of the *Limits of Criminal Sanctions* articulated five criteria which should influence the choice of criminal sanctions. First, the conduct in question should, in most peoples view, be regarded as socially threatening behaviour, and be not condoned by any significant segment of society. Second, subjecting such conduct to the criminal sanction must not be inconsistent with the goals of punishment. Third, suppressing such conduct should not inhibit socially desirable conduct. Fourth, the conduct should be capable of being dealt with through even-handed and non-discriminatory enforcement. Fifth, controlling it through the criminal process should not expose such process to severe qualitative and

quantitative strains. Finally, there should be no reasonable alternatives to the criminal sanction for dealing with it. Having regard to these criteria we can reach the following conclusions:

(a) there is a strong body of public opinion that considers ragging socially reprehensible behaviour and there is no responsible or significant segment of society willing to condone such behaviour;

(b) retribution cannot, however, be the basis of anti-ragging legislation; it must also have pragmatic consequences such as deterring incidents of ragging;

(c) the definition of ragging still remains overbroad and the inclusion of other acts of violence linked to student agitation detracts from the central purpose of this exercise;

(d) the weakness of the legislation is that it underestimates the complexities of enforcement. Successive commissions of inquiry into universities have drawn attention to the weakening of the disciplinary structures within the university system. These structures which include the system of wardens, proctors, marshalls, student welfare counsellors, and the boards of residence and discipline have come under immense stress during periods of breakdown and of violent student unrest. The legislation makes no effort to strengthen and empower the disciplinary structures which are internal to a university. If victims remain reluctant to complain knowledge that an offence has been committed would depend on detections by officials. This would remain a haphazard and uncertain process without the active co-operation and involvement of the university community.

Report on the Discussion on the Bill "Prohibition of Ragging and Other Forms of Violence in Educational Institutions"*

The Law & Society Trust (LST) convened a meeting to discuss the issues relating to the proposed legislation to "eliminate ragging and other forms of cruel, inhuman and degrading treatment, from educational institutions."[1] This report intends to provide a summary of issues which arose during the discussion. Participants at the meeting included a Dean from the Colombo University, a few students and recent graduates, a lecturer as well as representatives of the Trust.

Participants agreed that the methods and extent of ragging in educational institutions, particularly in universities,[2] have become unacceptable and often dangerous. The consequences include not only potentially grievous harm (both physical and psychological) to 'direct' victims of ragging but also, adverse flow-on effects on higher education as a whole. Students who may otherwise pursue higher education may be unwilling and be discouraged by their families to enter university because of the hostile environment of ragging.

It was pointed out that although the original intention of ragging as a means of 'initiation' may have been for current and incoming students to 'bond' with each other, the current practices of ragging are strongly divisive. Students present at the discussion commented on the divisions which occur between 'ragging' and 'non-ragging' students and further, between first-year students

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* Published in *The Gazette of the Democratic Socialist Republic of Sri Lanka*, Part II of 6 March 1998, in the Supplement issued on 09.03.1998. The text of the Bill is reproduced *supra*. This report was compiled by Dinusha Panditaratne and Dattathreya C.S. of the Law & Society Trust at the discussion held at the Law & Society Trust on Friday 3 April, 1998.

1 Per the Long Title of the Bill.

2 The proposed legislation applies to universities, colleges, institutes and schools and to "any other institution established for the purpose of providing education, instruction or training" - s.17(a)-(k).

and their senior raggers. The latter rift appears to continue throughout their years in education. This was contrasted with the more unified experiences that senior and first-year university students in other (particularly western) countries share, which is conducive to an atmosphere and community of higher learning.

Given these observations, the discussion then focused on whether the proposed legislation will be effective in tackling and eliminating the widespread and often severe occurrences of ragging. Participants firstly questioned why *existing* avenues of redress, such as university disciplinary inquiries, have proved ineffective. Both current students and recent graduates commented that the victims of ragging are unlikely to make official complaints. Incoming freshers are unfamiliar with their seniors and are, therefore, unable to identify the perpetrators. Moreover, the 'culture' surrounding experiences of ragging is such that victims are expected to remain silent and acquiescent. Hence, even senior students and members of staff who witness ragging are generally reluctant to intervene even when they recognise those students who are ragging.

Participants noted that there is little reason to expect that victims will be any more likely to complain under the proposed Act than under the existing mechanisms. There is a need to create an internal aversion to and surveillance of ragging within the university communities themselves. Student participants at the discussion remarked that ragging did abate in the physical presence of a university Marshall, albeit recommencing when he or she departed from the scene. Thus, other members of the university staff, including lecturers, could assist by taking a more proactive role towards ragging. Senior students could also undertake a more concerted group effort in opposing isolated occurrences and the general practice of ragging. It was noted that although 'anti-ragging' student groups and organisations have formed in some universities, they generally consist of students who have only avowed not to rag. It was suggested that perhaps these groups represent a base of students who could progress to actively preventing ragging by other students.

However, even assuming the Bill *will* be applied when enacted as legislation, participants identified several aspects of it as being unsatisfactory.

1. The definition of 'ragging' was considered to be too broad, particularly in respect of its inclusion of any act which causes, or is likely to cause

'embarrassment'. The scope of the offence is further broadened by the inclusion of 'verbal abuse' as any such act, defined as 'the use of words which are in contempt of the dignity and personality of a student or a member of a staff.'

2. Some participants expressed concern that the penalties for ragging and related offences[3] may be too severe. There was particular concern regarding section 9 of the proposed legislation, which stipulates automatic expulsion (or dismissal, in the case of a staff member) upon conviction for ragging or any other offence under the Act, except for a failure to investigate complaints of ragging pursuant to section 8. It was felt that although expulsion may well be warranted for more severe instances of ragging, section 9 fails to distinguish between varying degrees of ragging, including its more minor manifestations. Application of the section could contribute to widespread dissatisfaction and frustration among expelled students.

3. Participants questioned why only members of the 'administrative staff'[4] have a duty to investigate and report complaints made to him or her about alleged ragging. As noted above, an effective response to ragging requires the vigilance of all members and sections of the university community. While the responsibility of Vice-Chancellors, Deans, Directors and Rectors is not disputed, members of the academic staff have potentially a far greater role to play in combating ragging. Unlike the 'administrative staff', lecturers and other members of the teaching staff are more integrated into the student environment and conscious of the day-to-day activities of the student body. They are more accessible to potential complainants who are, or have been, subjected to ragging and could even be 'watchdogs' for instances of ragging in their immediate surroundings.

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[3] Related offences include sexual harassment and grievous hurt while ragging [section 2(2)], criminal intimidation (section 3), hostage-taking (section 4), wrongful restraint (section 5), unlawful confinement (section 6) and forcible occupation and damage to property of an educational institution (section 7), failure of a member of administrative staff to investigate complaints of ragging (section 8).

[4] Defined in the Bill as a "a person in a position of administrative authority and includes a Vice-Chancellor, Dean, Director and Rector."

4. It was remarked that section 14 of the Bill may contradict the established rules of evidence in a court of law. It allows, in certain circumstances, for the admissibility of statements given in a previous investigation of alleged ragging or other offence. This would include internal and informal inquiries conducted by universities or other educational institution.

5. Some participants regarded it as curious that both students *and* members of the staff were included together as potential offenders under the proposed legislation. Hence, sections 2 to 7 of the Bill refer to "any student or a member of the staff" who may commit ragging or any related offence, although in practice offenders have invariably been students rather than staff. It was observed that the Bill encourages students to view lecturers and other staff as potential raggers and could thereby exacerbate divisions within the university community.

In a broader perspective, the domain of the problem itself was discussed. Was ragging merely a university/educational institution concern or did it warrant direct state intervention and further, interference into 'university matters'? Participants considered the nature of the university community and whether it called for a strictly intra-university resolution mechanism? They deliberated on the effects of ragging on families of the students. Is their interest in the whole issue to be addressed by way of state intervention in matters of concern to society at large?

SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Application
under Article 126 of the Constitution

Navaratne Mudiyanselage Badra
Priyangani Navaratne,
62/50 Attamal Colony,
Dolosbage.

Petitioner in SC 172/97

S.C. Applications
Nos. 172-179/97

Yapa Mudiyanselage Wasanthi
Dissanayake,
329, Madatuwa, Padeniya.

Petitioner in SC 173/97

Wijesekera Vitharana Gamage
Prabath Kumari,
Rukgahamulla, Boralaeliya.
Welipitiya, Weligama.

Petitioner in SC 174/97

Wanninayake Mudiyanselage
Sri Ranganayake Bandara
Wanninayake Eriyawa,
Bamunugama, Mirihanegama.

Petitioner in SC 175/97

Jayasinghe Lekamge Chandima
Jayasinghe,
Ayurvedic Dispensary,
Kalawana.

Petitioner in SC 176/97

Madawela Maddumage
Indika Prasad,
21, First Lane, Colombo Road
Ratnapura.

Petitioner in SC 177/97

Kandambige Gamini Tilak
Habaraduwa,
Handiya Gedara, Dickkumbura,
Ahangama.

Petitioner in SC 178/97

Chaminda Wickramasinghe
Gunasekera,
"Piyal", Hingurupangala,
Kotapola.

Petitioner in SC 179/97

S.C. Applications
Nos. 172-179/97

- vs -

1. V.P. Chandrasena,
President,
Nilwala Educational College,
Wilpita,
Akuressa.

2. M.D.D. Pieris,
Secretary/Director General
Education,
Ministry of Education and
Higher Education,
Isurupaya,
Battaramulla.

3. Hon. Attorney-General,
Attorney-General's Department,
Colombo 12.

Respondents

BEFORE: Fernando, J.,
Amerasinghe, J., and
Gunasekera, J.

COUNSEL: Chula Bandara for all the Petitioners.
S. Fernando, SC, for the Respondents.

ARGUED ON: 4th December 1997.

DECIDED ON: 16th December 1997.

FERNANDO, J.

These eight applications were heard together. All eight Petitioners were admitted to the Nilawla Educational College on 28.3.94 (for a three-year course 1994/97) for the purpose of being trained as teachers. The Petitioners in the first three applications are females, while the other five are males.

On 9.10.95 a new batch of trainees was admitted for the next course, 1995/98. According to the Petitioners:

> "On the afternoon of 9.10.95 which was a Saturday, all trainees including seniors and juniors were playing at the College play ground. While at play, **the senior trainees** separated the newcomers into groups according to their sex. Thereafter **the seniors** made them to march along the grounds. After some time, the female trainees were allowed to rest while the male trainees were asked to do certain physical exercises while the seniors looked on. This group of male students were made to roll over and back several times **by the senior students**. While this was happening, a few freshers complained of dizziness and pain **due to exhaustion**. These trainees who complained

were then taken to the Akuressa Government Hospital in the College bus and were warded for treatment. All these trainees were discharged from hospital the following day."

It is clear that this was a collective effort, in which all the seniors were involved, and the Petitioners did not suggest that their involvement was in any way less than that of the other seniors.

On 30.11.95 each Petitioner received a letter from the 1st Respondent, the President of the College, stating that the Disciplinary Committee of the College had found her/him guilty of ragging the newcomers, and giving her/him an opportunity to show cause in regard to that finding. The Petitioners submitted explanations denying any involvement in the ragging of the newcomers. That denial is contrary to their affidavits filed in this Court.

The Petitioners were due to serve one-year internships commencing 1.1.96. By letters dated 21.12.95, the 1st Respondent informed the Petitioners that they had been found guilty of ragging, and that their internships were suspended: for one month in the case of the females, and for two months in the case of the males. They submitted appeals against the punishments, and commenced their internships after the period of suspension.

By a Circular dated 7.10.96 the 2nd Respondent, the Secretary to the Ministry of Higher Education, amended the Disciplinary Code of the College, to make specific mention of ragging, and to give the 2nd Respondent powers and responsibilities in regard to offences of ragging.

In the meantime, there seems to have been a further inquiry, after which, by letters dated 8.1.97 the male Petitioners were informed that they had been expelled from the College, and by letters dated 13.1.97 the female Petitioners were informed that their internship had been extended for a further one year, for breach of the terms and conditions of the agreement they had signed when they joined the College.

The Petitioners filed these applications on 12.2.97 alleging the violation of their fundamental rights under Article 12(1), on the ground that the punishment imposed in January 1997 was a second punishment for the same offence; that it was arbitrary; that the *audi alteram partem* rule had not been observed before imposing that punishment; and that the amendment of the

Disciplinary Code was retrospectively applied to them, although it contained no express provision making it retrospective.

When applying for leave to proceed, Counsel for the Petitioners said that they did not dispute the first punishment imposed in respect of offence of ragging, and that their case was confined to the second punishment and the retrospective application of the amendment.

At the hearing learned State Counsel, quite properly, submitted that he did not object to the grant of a declaration that the Petitioners' fundamental rights under Article 12(1) had been infringed by reason of the imposition of the second punishment, and the antecedent procedure; he strenuously submitted, however, that in the exercise of our equitable discretion under Article 126(4) we should not grant any other relief to the Petitioners.

Mr. Bandara on behalf of the Petitioners urged that they had been punished once, and that the second punishment, imposed contrary to law, should not be permitted to stand, or should at least be reduced because, he said, expulsion was a punishment wholly disproportionate to their offence: they were just out of school, and starting life, and had not realised the seriousness of what they were doing.

We agree that the Petitioners' fundamental rights under Article 12(1) have been infringed, and grant them a declaration to that effect. However, not only do they admit the offence of ragging, but it is quite clear that what they say they did on 9.10.95 constituted severe ragging. On the basis of their own statements and admissions, it is wholly inequitable to grant them any relief.

The Petitioners' misconduct is extremely serious. It is not just a matter between one individual and another. All the seniors were involved, and the Petitioners did not claim that they were only passive observers. Ragging is sometimes sought to be justified as being a necessary part of orientation to life in Universities and other institutions of higher learning. Such ragging may be tolerated, if at all, if it is clean fun; but it is totally unacceptable if it causes pain or suffering, or physical, mental or emotional distress, to the victims. No normal person could possibly have considered what happened in this case to be fun: on the contrary, it was cruel, inhuman and degrading to ill-treat or torment persons to the point of pain and exhaustion requiring hospitalisation, not to mention the possible long-term adverse mental effects, even on the

victims who did not need hospitalisation. Should not this Court refrain from granting relief to Petitioners who are plainly guilty of cruel, inhuman and degrading treatment of their junior colleagues.

I must also note that this was not an instance of ragging by a handful of seniors. All the seniors got together to bully the newcomers: the ragging took place in the College premises openly, and for some time, and the fact that persons in authority did not intervene indicates that what took place was a form of terrorism.

In exercising our discretion, we cannot ignore the purpose of the College: to train teachers to be entrusted with the care and education of the young. Learned State Counsel submitted, with much justification, that persons guilty of such misconduct are not fit to be entrusted with the powers and responsibilities of teachers.

Yet another relevant matter is that ragging is easily done, but difficult to prove; victims are afraid to complain, because reprisals are likely: those in authority often fear to get involved, whether by intervening, reporting, or otherwise. The disciplinary authorities are sometimes intimidated into mitigating or even cancelling punishments. In these circumstances, the public interest demands deterrent, rather than lenient, punishment for admitted or proven misconduct, and in my view the punishments first imposed were wholly inadequate for what the Petitioners did. To restore those punishments would be to condone the violation of the rights of the newcomers.

Finally, Mr. Bandara urged in mitigation that the Petitioners were young. But their victims were even younger, and needed help in adjusting to the complexities of life in a new environment; they were entitled to treatment that would bring smiles to their anxious faces, and not tears to their eyes or distress to their minds.

I therefore consider that, apart from a bare declaration, no relief should be granted to the Petitioners.

JUDGE OF THE SUPREME COURT
with Justices Amerasinghe & Gunesekera concurring