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OBJECTIVES

The Law and Society Trust Fortnightly Review keeps the wider Law and Society community informed about the activities of the Trust, and about important events of legal interest and personalities associated with the Trust.

On 4 July 1991 the Trust organized a symposium on 'The Bill of Rights: Comparative Perspectives' at the Sri Lanka Foundation Institute. This was part of the first Law & Society Week. We reproduce in this issue the text of the speeches delivered at this symposium. Unfortunately we were not able to obtain the speech made by former Indian Chief Justice P N Bhagwati. We hope to re-produce this in a subsequent issue.

We also carry in this issue, a contribution by Sunil de Silva, Attorney General of the Republic, on the issue of equity in employment. This is a sequel to the material carried in our last issue, which focused on the same question.

THE BILL OF RIGHTS: COMPARATIVE PERSPECTIVES

and

THE ATTORNEY GENERAL

on

EQUALITY IN RECRUITMENT AND PROMOTION

IN THIS ISSUE

OPENING ADDRESS

by Parinda Ranasinghe

Chief Justice of the Supreme Court of Sri Lanka

I thank the Chairman and the other office bearers of the Law and Society Trust, for asking me here this evening to preside over this Symposium being held to celebrate the Law and Society week. In their invitation to me, they have specifically stated that they desire me to speak for only a few minutes on the broad theme of this Symposium, which was stated to be: "Bill of Rights: Comparative Perspectives." As several distinguished speakers, both from home and abroad are down to address this gathering, I have decided to follow strictly the terms of the invitation extended to me.

In the popular sense, a Bill of Rights is a document setting out the liberties of the people and stating that their rights so set out are reserved for them.

There are several Bills of Rights which are commonly acclaimed, widely recognized and which have evoked universal discussion down the centuries: The Magna Carta which was wrung from King John by the English Barons at Runnymede in 1216. Although it could scarcely be said to be a charter of individual rights for the common man, yet it was a significant beginning made in the course of the struggle for rights and liberties for one and all: In 1628 the indignant and persistent clamor that there be "no taxation without representation," brought forth the Petition of Right, which, inter alia, prohibited the quartering of soldiers in private houses. Then came the Declaration of Rights consequent upon the "Bloodless Revolution" of 1688 before the accession of William and Mary to the throne of England, guaranteeing the right to petition the sovereign, the right to bear arms and the freedom of debate in Parliament: the year 1787 heralded the Declaration of the Rights of Man in France: Thereafter the 1st to 10th Amendment to the U.S. Constitution became operative as from the 15.12.1791: they constitute the American Bill of Rights: coming down to more recent years we have the International Bill of Rights, comprising the Universal Declaration of Human Rights of December 1948, the International Covenant on Civil and Political Rights, and Optional Protocol thereto of 1966, the International Covenant, Economic, Social and Cultural Rights of 1966.

It seems most fitting that any discussion in regard to Bills of Rights and constitutions should begin with a reference to the Constitution of the United States. The United States has been and remains the great constitutional laboratory for the entire world. More than 160 countries have written constitutions modelled directly or indirectly on the US Constitution. Chief Justice Warren Burger once referred to the U.S. Constitution as "the most durable Constitution in the history of nations" and as one that was meant "for the ages." Thomas Paine – the revolutionary pamphleteer – wrote in 1792 that participatory democracy did not exist on a national level before the founding of the United States: that it was an event which would interest the whole world with its political liberty: that "from a small spark kindled in America a flame has arisen not to be extinguished."

The U.S. Constitution, as drafted, provided for a limited Federal Government, with power divided among three branches: the Executive, Legislative and Judicial. Though it is literally true that the original Constitution of the United States did not contain a Bill of Rights, yet, some important provisions in regard to the protection of liberty were included. Articles 1 and 9 placed limits on the federal power, limited the suspension of the writ of Habeas Corpus, limited the power of the States: both articles prohibited ex post facto laws. To many who debated the draft Constitution in the ratifying conventions held in the 13 States what it contained didn't seem enough; and strong sentiments were expressed that there ought to be a Bill of Rights. The Americans, who had won their independence, not only recalled the ancient evils, which they have known at first hand and which had also forced their ancestors to flee their homeland to the new country, and the dangers of tyrannical governments, but also remembered an oppressor closer home, the Parliament which had imposed the Stamp Tax, enacted the Navigation Law, and also imposed the Tea Tax which had led to the Boston Tea Party in 1774. Their idea of limited government, therefore took in not merely restraint upon the Executive branch but also restraints upon the Legislative branch as well.

The agitation for a Bill of Rights then gathered momentum and culminated in the 1st to 10th amendments which came into operation in 1791 and which are now accepted as the Bill of Rights.

These Amendments provide for, inter alia, Freedom of speech, press, religion, jury trial in criminal cases and right to counsel.

After the adoption of these Amendments it remained to be seen whether the written constitution together with the Bill of Rights had teeth in them, or whether it was in effect only a (toothless lion) paper tiger. The answer to this question was supplied by the Supreme Court of the U.S. in the year 1803 in the now internationally famous case of Marbury vs. Madison, in which Chief Justice John Marshall declared unconstitutional a rather obscure portion of an Act of Congress dealing with the original jurisdiction of the Supreme Court.

The idea that individuals have rights against the government has been said to be probably the most profound influence the U.S. Constitution has had over other Constitutions. Chief Justice Rehnquist has, in a recent article, observed: that the two concepts, namely, that the courts should have the authority to declare acts of the legislature unconstitutional, and that those who exercise each of the three separate powers of a government should be independent of one another, are the unique American contributions to the art of government and to political philosophy: and that without these two concepts of judicial review and the separation of powers the Bill of Rights could be worth little more than the paper it is written on.

The trial of Aaron Burr in the United States before the Chief Justice John Marshall in the first decade of the 19th century clearly shows, as no volume of debate and argument could, that it is not enough to have an impressive category of human rights in Constitutions and that the judges who are called upon to enforce such rights must also be truly independent of the executive. No constitutional guarantee is effective unless the citizen and the leadership of a country determine that enforcement is a priority and they commit and address themselves with sincere determination to fulfill such constitutional provisions. In common law countries the judiciary also play a significant role in advancing or impeding constitutional guarantees. Constitutional guarantees could be a hollow mockery unless the leaders the officials and the citizens demonstrate their willingness to enforce them.

We in Sri Lanka have in drafting our Constitution of 1978 been greatly influenced by the constitutions of both the United States and India.

Our preamble too commences with those stirring words, with which both the American and the Indian preambles herald their respective Constitutions: "We the People....." Whilst these words in the American Constitution are said to have been finalized by a one legged but rather rakish Philadelphian named Morris, who boasted of a muscular prose style, the preamble to the Sri Lankan Constitution was drafted by a two legged sober, clear thinking eminent Queen's Counsel from Hultsdorp with a flair for simple and easy prose. Provision has also been made to inscribe the entirety of the text of the Declaration of Human Rights on the central column of our Superior Courts Complex building,upon which rests the Ceremonial Court of the Supreme Court,in four languages; Sinhalese, Tamil, English and Sanskrit.

The concept of "judicial review" as understood in the United States, does not obtain, in the same sense in Sri Lanka. Our Constitution vests the Supreme Court, the highest judicial tribunal of the land, with the sole and exclusive jurisdiction to determine any question as to whether any Bill or any provision thereof is inconsistent with the Constitution, and the Supreme Court does, in the exercise of such jurisdiction, examine the constitutionality of Bills, which are presented to Parliament, before they are enacted by Parliament.

We in Sri Lanka too have no separate Bill of Rights. The Constitution does, however, set out, in Chapter 111 under the heading of "Fundamental Rights," rights which are declared and recognized by the Constitution and which have to be "respected, secured and advanced by all the organs of Government, and shall not be abridged, restricted or denied save in the manner and to the extent "provided in the Constitution."

The Fundamental Rights so embodied are similar to the individual rights set out in the Universal Declaration of Human Rights, to those in the several Amendments to the Constitution of the United States, and also to those in the Indian Constitution. These rights are made justiciable; and the Supreme Court is vested with the

sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by Executive or Administrative action of any such fundamental right. Sri Lanka has subscribed to the Universal Declaration of Human Rights. although the provisions of the said Declaration, and of the connected instruments are not directly enforceable in this country yet, our courts, in common with the courts of the other nations, would no doubt have regard to the norms contained in such international human rights instruments.

In regard to the Indian Constitution it has to be noted that India has also been, to a considerable extent, influenced by the provisions of the U.S. Constitution. This was duly acknowledged by independent India's first Prime Minister, Pandit Jawaharlal Nehru, when he, in 1949, told the United States Congress that: "We have been greatly influenced by your own Constitution."

May I conclude by commending the officials of the Law and Society Trust for organizing this Law and Society Week. It is indeed fitting and extremely appropriate that commemorative events of this nature be made the occasion to study and foster thoughtful discussion upon the Constitutions of various nations. It also provides a very rare opportunity to reflect upon the basic and founding principles of the Constitutions of various nations and their impact upon the progress of such nations. Such discussions would undoubtedly lead to a better understanding and appreciation of such Constitutions which in turn would lead to better international relations.

Speakers at the symposium on the 'Bill of Rights'. (L to R) Noel Lyon, William D Rogers, Chief Justice Parinda Ranasinghe, Justice Mark Fernando, Dr Neelan Tiruchelvam and former Chief Justice P N Bhagwati.

SOME THOUGHTS ON THE BILL OF RIGHTS OF THE CONSTITUTION OF THE UNITED STATES

by William D Rogers

Former Under Secretary of State and Lecturer, Cambridge University and Senior Partner, Arnold and Porter

Mr. Chairman. First let me say how honored I am to be here, and to have been asked by you to say a few words on the American Bill of Rights. This is my first visit to Colombo. It is heartwarming that I should do so in the company of a distinguished band of fellow lawyers, in an exchange of ideas about the constitutive legal documents of our respective nations on the day on which my own is celebrating the 215th year of its independence.

It is perhaps obvious that there is no legal writing which so dominates American life as the Constitution, but it would be hard for me to overstate to you the extent to which it pervades our national experience, our ways of relating to each other, our social norms, the ways which we allocate our resources. If Ireland is a priest ridden society, America is a law ridden society. Issues of political conflict and contention sooner or later emerge as a legal issue. It has become a part of our tradition that all issues are translated into legal cases. The truly fundamental find their way into constitutional conflicts. The statement of constitutional rights in the Bill of Rights, the first ten amendments of the American Constitution are more than abstract expressions because the courts have made them vitally relevant.

Our Constitution decreed that the nation would have a double system of courts to choose from. It established a system of national tribunals which function side by side with the courts of the respective states. This dual system of courts has been, to paraphrase the great constitutional scholar Edwin Corwin in another context, a virtual invitation to litigate. The contentious issues of our society are litigated, and they continue to be, from the question of a woman's right to abortion to the precise definition of the appropriate boundaries of the tens of thousands of voting districts of the nation to the precise words which a police officer must recite to every person he arrests. It is the courts which have woven a major share of the fabric of rules, requirements and constraints which govern our daily lives, a fabric of judge made strictures far richer than the output of any other judicial system in the world.

The American Constitution has been transformed, through the process of judicial determination, from an abstract prescriptive document of how government should function and what the freedoms of its citizens should be, into a body of prescriptive principles. Those principles penetrate every corner of American society. Ours is a truly living Constitution -- living, in the sense that it is a real, an almost tangible element of our lives, because the courts have made it so.

This was not foreordained in the original written text. Indeed, it was three decades after the Constitution became effective in 1791 before Justice Marshall in the famous pair of cases of Marbury v. Madison and Cohens v. Virginia, 1821 determined that the Constitution was to be used by the courts to measure and invalidate if need be, the legislative pronouncements of either the national government or the states.

There were those who objected to the power of the Courts to void executive acts. President Andrew Jackson declaimed that, "The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution." And almost a century later Franklin Roosevelt continued strenuously to object that in exercising its authority to declare acts of Congress unconstitutional the Supreme Court "has improperly set itself up as a third House of the Congress -- a super legislature, as one of the justices has called it -- reading into the Constitution words and implications which are not there, and which were never intended to be there."

Yet the power lives on, and with it the consequence that the judiciary, through the exercise of its authority to review the constitutionality of legislation and executive action, has transformed the American Constitution.

That Constitution has stood to the test of time in major part because of the adaptability which judicial review has provided. The original text has survived for almost exactly 200 years and it has been effectively amended only 14 times. (My count here excludes the first 10 amendments which were essentially part of the original document, though not written by the framers, as well as the Eighteenth and Twenty First Amendments, which began and brought to an end our experiment in alcoholic beverage prohibition).

In short, an independent judiciary with a common law tradition has been fundamental to the success of constitutionalism in the United States. Flexibility is the hallmark of that tradition of common law judicial interpretation. This flexibility has permitted the American constitutional system to absorb the dramatic changes of issues, social preferences and political values which have occurred in our civilization in the last two centuries. I strongly suspect the same is true in Sri Lanka and India. And I am prepared to believe that this is a critical reason why constitutionalism in our three countries has been so much more effective than it has been, for example, in Latin America where, between 1930 and 1990, there were 139 extra constitutional changes in government, an average of 6.95 per country (Rosenn, p.8).

A word or two now about that Constitution and the characteristics of it which give it its distinctive character.

First, to anyone who has spent a professional lifetime in the vineyard of legal regulation, it is a remarkably simple document. Its declarations are statements of dazzling -- and often puzzling -- generality.

The American Constitution proves that there is no direct correlation between the length of the document and its success as a charter of government. The recent Brazilian Constitution, to cite another Latin American example, has 245 permanent articles and 70 transitional articles that cover 193 pages in the official version, whereas the U.S. Constitution takes barely five pages in the U.S. Code.

Beyond its generality, and its sparing use of words, the Constitution is noteworthy for the precision of its architectural design. I have a sense that this is a reflection of the visual inclinations of our Eighteenth Century framers, who tended to see perfection in the symmetry of Greek and Roman buildings. It is scarcely surprising that the authors of the Constitution should have been so comfortable with the -- then rather new -- notions that the governance of humankind was simply the exercise of three functions, legislative, executive and judicial, and that the constitutive document could be tidily divided into three major components treating of these three powers.

But it is remarkable that for a people who had so recently fought for their independence from arbitrary power, so little is said in the original Constitution about the rights and freedoms of the citizens. It is not to be forgotten that the Bill of Rights was an afterthought. The need was mentioned at the Convention in Philadelphia in 1787 but nothing was drafted for presentation to the states as part of the original document. This was, some said, because the government contemplated by the original constitution was a government of strictly limited powers; a bill of individual rights was therefore unnecessary. At least equally important may have been the fact that the delegates, having completed their basic work of constructing a government, were too exhausted to continue.

In any event, the desirability of a statement of individual liberties emerged in the course of the ratification debate that followed in 1788. First in Massachusetts and then in the other states, a strong demand for such a Bill of Rights accompanied the approval of the state ratification conventions of the new Constitution. Accordingly, the first Constitutional Congress drafted 12 amendments to the Constitution for presentation to the states, of which 10 were adopted in 1791 -- the 10 amendments which now constitute the Bill of Rights of the Constitution of the United States.

It is these, not the original Constitution, which guarantee freedom of speech, the press and religion, freedom from unreasonable searches and seizures and the rights of criminal defendants to due process of law, a jury trial and to confront one's accusers.

The individual rights enunciated in the Bill of Rights were necessarily and by definition restraints on the exercise of the majority will. This was consistent with the philosophical underpinnings of the Constitution itself. The framers had divided the exercise of governmental power between the states and the Federal Government, and on the federal plane between the legislature, the executive and the judiciary. An extremely complex system of

checks and balances was built into the original Constitution. The additional limitations on the exercise of popular will incorporated in the Bill of Rights was consistent with the intricate mechanisms of the original document, and of its underlying distrust of pure unfettered democracy.

For, as Madison said in No. 51 of the Federalist, "What is government itself, but the greatest of all reflections of human nature? If men were angels no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary." And Hamilton asked in No. 15, "Why has government been instituted at all?" And he answers, "Because the passions of men will not conform to the dictates of reason and justice, without constraint." Government was, in their view, plagued by "factions." From this emerged their fundamental argument in favor of the new union, that by enlarging the "sphere" of the nation, the larger array of factions contending for power would tend to offset each other, to the greater harmony of the whole.

It is important to note that the rights protected in the first 10 Amendments are essentially political rights.The U.S.Constitution does not impose an obligation on government to enhance the social and economic well-being of its citizenry.This was left to the marketplace.Hence there is no constitutional right - as opposed to legislated rights - to employment,housing,medical service,health,environment or education.
One great issue was left unattended in the original Bill of Rights.That issue was slavery.Within less than ten years it plunged the nation into a conflict bloodier than any before in human history.It was only after the end of the Civil War in 1865 that slavery was formally abolished by the Constitution,and the equality and right to vote of all citizens affirmed in the Fourteenth and Fifteenth Amendments of the Constitution.

The original Bill of Rights did not apply to the states,only to the national government. Hence, according to the strict reading of the original Constitution,the states were quite free to violate freedom of the press,freedom of religion,the right of assembly,and so forth,but for their own constitutions,and those constitutions were not the law applied in the Federal Supreme Court.In the past 60 years,however,through a process of judicial interpretation of the process clause of the Fourteenth Amendment,known as "selective interpretation,"most,but not all of the guarantees of the Bill of Rights have been applied to the states.They include ; the right to just compensation,the First Amendment freedoms of speech,press assembly and petition;the free exercise and non-establishment of religions;the Fourth Amendment rights to be free of unreasonable searches and seizures and to exclude from criminal trials evidence illegally seized; the Fifth Amendment rights to be free of compelled self incrimination and double jeopardy, the Sixth Amendment rights to counsel, to a speedy and public trial before a jury, to an opportunity to confront opposing witnesses and to compulsory process of the purpose of obtaining favourable witnesses and the eight amendment right to be free of cruel and unusual punishments.

In applying these rights against the states, the Supreme Court exercised considerable judicial creativity. It has felt itself called upon to identify " Principles of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental " and thus "implicit in the concept of ordered liberty ." Palco v Connecticut, 302 U.S. 319, 325, or as has been said elsewhere, those principles which were " basic to our system of jurisprudence." In re Oliver, 333 U.S 257, 273 (1948). Indeed, at one point the Supreme Court has even allowed itself to characterise its inquiry as the definition of those principles " necessary to an Anglo- American regime of ordered liberty. " Duncan v Louisiana, 391 U.S. 145, 149 n 14 (1968).

The Supreme Court has been creative of individual liberty in another way as well. The list of defined rights set forth in the text of the Bill of Rights is by no means the full scope of liberties protected under the Constitution. The Ninth Amendment to the Constitution provides that the "enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." This has been the window through which the Supreme Court has brought into existence a number of other rights not explicitly set down in the original Bill of Rights. James Madison introduced the Ninth Amendment in order to insure that "those rights which were not singled out" by the original Bill of Rights would not for that reason be insecure. Through the Ninth Amendment the court has been able to affirm a variety of what Lawrence Tribe calls "unenumerated aspects of liberty." These include the right to teach one's child a foreign language, the right to send one's child to private school, the right to procreate, the right to be free of bodily intrusions and the right to travel abroad.

This inquiry as to rights not specifically defined in the constitution culminated in the great 1965 case of Griswold

v. Connecticut, in which the court held that a married couple could not be sent to jail for practicing birth control. The Court found this to be an unwarranted intrusion into the right of privacy of the married couple, for which there was "no sufficiently compelling justification." Justice Harlan was of the view that the law violated what he called "basic values implicit in the concept of ordered liberty", and he was quite prepared to admit that right of privacy was not anchored in an explicit provision of the Constitution but rather ought to be affirmed by virtue of "the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great role that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms."

It must be admitted that this and other efforts to explain the precise source and definition of these unwritten rights have not been entirely successful. The reason for this is that the Supreme Court has never been able to point unerringly to the dividing line between those rights which are protected by the Constitution -- the right to use birth control methods, for example, and the right to an abortion set forth in Roe v. Wade -- as opposed to those rights such as the right to have enough to eat or to shelter -- which are not protected.

It may even be said that there is a perversity to the distinction. For as Lawrence Tribe has pointed out, the freedoms of speech, of the press and of worship are important, but they are by no means beyond contention; witness the regular challenges to the activities of newspapers in the United States for libel. On the other hand, there is no dispute amongst mankind that all human beings should have access to the basic necessities of life. Indeed, it is the poorest and the most deprived who are most lacking in political power and most in need of the legal protections of a Bill of Rights. It is the absence of protection of these most vital economic rights which I take to be the unfinished constitutional business of our age in the United States.

Furthermore, it would be misleading, if I gave you the impression that everything I have said about the scope of established legal rights in America represents a solid and enduring consensus. The core principles are beyond question; political speech will remain free of prior restraints; there will be no established religion; the right to counsel, to a jury trial and to meet one's accusers are beyond the reach of even the most dedicated authoritarian. But on the fringes of these fundamental rights, a debate rages. Indeed, I doubt if there has ever been a time in our two centuries' history when the outer edge of the Bill of Rights has been the subject of such active controversy as it is today. Hardly a Supreme Court opinion session passes without a decision announcing a new principle of individual liberties.

Virtually all of these in recent years have been decisions diluting the scope of the Bill of Rights. Within the month, as the 1990-1991 Supreme Court term draws to an end, we have seen decisions that Congress did not violate the principle of free speech by prohibiting federally-funded medical clinics from discussing abortion with their patients. Evidence about the victim was ruled admissible against a criminal convict on sentencing only last week.

As you will have noticed, Justice Marshall, our only black Supreme Court judge, resigned from the court on Thursday. He and Justice Brennan, who retired last year, were the last of the stalwart band of liberals who pushed the scope of the Bill of Rights forward so remarkably during the decade of the Seventies and Eighties. President Bush will doubtless appoint to replace Marshall a conservative who shares his view of the need for judicial restraint, who opposes abortion and who favors more stringent penalties for criminals. The Bill of Rights, in short, is by no means a document of settled content. It will be a part of the debate over what kind of nation we shall be in the third century of its existence, perhaps more centrally even so than during the first two.

Nonetheless, looking at the broad sweep of history since the enactment of the Bill of Rights of the American Constitution in 1791, it has been a remarkable achievement in statecraft. And its consequences have not been limited to North America. I like to recall what Governor Morris said at the Constitutional Convention in 1787: "He came here as a representative of America; he flattered himself he came here in some degree also as a representative of the whole human race; for the whole human race will be affected by the proceedings of this Convention."

THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

by Noel Lyon

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The Canadian Charter of Rights and Freedoms is Part I of the Constitution Act, 1982. It came into force on April 17, 1982, except for section 15, the equality rights provision, whose coming into force was delayed for three years to allow the eleven governments in Canada's federal system to examine their laws and eliminate discriminatory laws in advance, to reduce the amount of litigation of equality rights.

The response of the Supreme Court of Canada to the Charter has been greatly affected by the inclusion in the new constitution of a supremacy clause, which makes the Constitution the supreme law of Canada and expressly provides that any law that is inconsistent with the provisions of the Constitution is of no force and effect. If we had not enacted a supremacy clause along with the Charter, it is likely that the judges' long habit of deference, induced by the doctrine of parliamentary supremacy, would have made them hesitant to apply the Charter in the same vigorous way that they have always applied the common law. The supremacy clause gave them not only a sense of legitimacy in performing judicial review under the Charter but also led them to see it as a duty rather than a power. This was important because there was substantial opinion that we were substituting judicial supremacy for legislative supremacy by adopting a constitutional charter of rights on the American model. That opinion is still heard from time to time, but there seems to be a general acceptance now of the proposition that the judges are applying the higher will of the people when they apply the charter, not usurping the powers of elected legislators.

The Charter reflects the Canadian experience, but that experience has been affected by the English constitution, by international law and by the United States experience, of which we have been close observers. Our first venture in human rights laws was the Canadian Bill of Rights, 1960, which was an Act of Parliament that enacted standards for the interpretation of laws that come under the jurisdiction of the Parliament of Canada. It did not apply to provincial laws. While it was not a great success and judges had little enthusiasm for the generalities, the Canadian Bill of Rights did serve to introduce Canadian judges to the idea of judicial review under human rights standards. It was a kind of dress rehearsal for the real thing, which came in 1982.

Equally important with the supremacy clause was the judicial awareness that the Charter represents the fundamental values of Canadian Society. A special committee of the Canadian Senate and House of Commons conducted extensive public hearings before the final version of the Charter was written. The common law's claim on the loyalty of the judges yielded to the stronger claim made by the Charter, which is rooted in the sovereignty of the Canadian people, as the judges now understand.

In addition to the usual political and legal rights, the Charter introduced equality rights into the Canadian Constitution and substantially increased the language rights that enjoy constitutional protection. We avoided the term "due process of law" for fear of attracting the American experience with substantive due process. Instead, we adopted the term "fundamental justice", which is the standard imposed by the key provision that is section 7.

> Everyone has the right to life, liberty and security of the person and the right not be deprived thereof except in accordance with the principles of fundamental justice.

The Supreme Court of Canada has reflected the argument that this provision imposes only procedural standards on governments, but the Court has not yet indicated the scope of the protection offered by it. I believe that as judicial perceptions alter over the next decade in response to growing awareness of the state of the world. The Supreme Court of Canada will interpret section 7 to include a right in all citizens to a healthy environment and to impose a concept of inter-generational equity in relation to the question of sustainable development.

The equality rights are set out in section 15, which says

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The verbose formulation of equality rights was inspired by a determination to avoid repeating the experience with the Canadian Bill of Rights, which was ultimately interpreted by the Supreme Court of Canada as meaning that discrimination is acceptable as long as those subject to it are discriminated against equally. That was the gist of the Lavell case, which was condemned by the U.N. Human Rights Committee when it heard the case of Sandra Lovelace, who like Mrs. Lavell, lost her Indian status when she married a non-Indian man.

Section 15 goes on to authorize affirmative action in favour of disadvantaged individuals or groups. We have thus spared ourselves the long debate over "reverse discrimination" when we move to eliminate systemic discrimination and its effects.

Some general questions of interpretation can be dealt with rather summarily. First, the scope of the Charter's application, has now been select with the Supreme Court's ruling that section 32 makes the Charter applicable to governments to the exclusion of private conduct. The power of legislatures to override section 2 or sections 7 to 15 of the Charter was used by Quebec to render all of the laws of that province immune from Charter review, and the Supreme Court has said that such wholesale use of section 33 is proper.

The most important interpretive guidance for the Charter is provided by section 1, which says

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

This provision allows judges to give a generous interpretation to rights and freedoms set out in the Charter, knowing that governments can still impose limits if they can show justification, provided the limits are reasonable. This has brought into the open the process of balancing one right or freedom against another. In the absence of a provision like section 1, which is inspired by international human rights documents, judges often seek this balancing through the restrictive definition of rights and freedoms.

Section 1 induces a much more contextual approach to Charter interpretation than would prevail without it, by forcing judges to deal openly with the realities of justification. Combined with the purposive approach that the Supreme Court of Canada adopted at the outset, this contextual approach makes for an intelligible human rights jurisprudence that serves the needs of public education as well as providing better guidance to lower courts than abstract analysis provides.

A concept of equality is emerging in Canadian law that is quite unlike that which has developed in the United States. The "similarly situated" test that has shaped American thinking about equality is about difference, so that equality rights are secured by taking account of relevant differences. One reason why this has happened is that is too obvious to be ignored that aboriginal peoples are denied most if not all of their fundamental rights when they are treated in the same way as non-native Canadians. The judges' understanding of the values that underlie equality rights has been greatly enhanced by learning about the very different traditions and values of aboriginal peoples.

This may become Canadian law's most important contribution to human rights theory and practice, for there is a growing body of literature in Canada that argues that the Charter, being an expression of Western liberal values, should not apply to aboriginal peoples. Instead, the recognition and affirmation of aboriginal and treaty rights, by Part II of the Constitution Act, 1982, requires a separate elaboration of the fundamental rights of the aboriginal peoples of Canada. This idea is anathema to those who consider uniformity and symmetry essential to an ordered society. To others it smells of apartheid. However, a growing number of constitutional scholars in Canada see the development of a district Charter of rights and freedoms for aboriginal peoples as demanded by the fundamental principle of self determination. The accommodation of differences within a community of communities, a very asymmetrical idea, may shape the interpretive framework of Canadian constitutional law.

HUMAN RIGHTS IN SRI LANKA

by Mark Fernando

Justice of the Supreme Court of Sri Lanka

At a Symposium on human rights held on American Independence Day, attention could properly have been focussed on the American Bill of Rights alone. The Law and Society Trust, however, has chosen to look at human rights in four different nations: two developed countries, neighbours in North America, and two developing countries, neighbours in South Asia.

That decision has great significance for many reasons. It reminds us, particularly in Sri Lanka, that nations have borrowed from others in enacting Bills of Rights; that Judges and lawyers in different jurisdictions can usefully share experiences. That decision emphasises the need to understand the interaction between, and interdependence of, nations in the field of human rights whether they be neighbours or at opposite ends of the globe, from the developed North or the developing South: that what is done or not done in one nation can, directly or indirectly, promote or hinder respect for human rights in other nations; that it is essential to look at human rights, not narrowly, as through a microscope, in closed national compartments, but broadly, through a wide-angled lens, so as to appreciate all the many facets and complexities of universal and indivisible international human rights.

Internationally there is great interest, and concern, and controversy, as to human rights in Sri Lanka. This is therefore an appropriate occasion to take stock of human rights in Sri Lanka, to review the approaches to the assessment of human rights, and to reflect on the path of future development. In looking at human rights in Sri Lanka, therefore, the aspect which I wish to stress is this international dimension. It is not my intention to look narrowly at the treatment of human rights in the Constitutions of 1972 and 1978, or, by analysing textual and structural changes, to attempt an assessment of the increase or decline in respect for human rights during the period from 1972 to 1991. Instead, I will endeavour to define the ambit of human rights in Sri Lanka; to identify the norms by which respect of human rights ought to be determined; and to examine, subject to the constraints of time, some human rights and the questions which arise in a meaningful assessment thereof.

What are human rights?

Sometimes we speak of human rights as if the entire body of human rights in relation to Sri Lanka consists only of the freedom from torture and cruel, inhuman, or degrading treatment, the freedom from arbitrary arrest, detention and punishment, the guarantees in regard to a fair trial, the presumption of innocence and the prohibition against retroactive penal legislation.

These rights under Articles 11 and 13 are undoubtedly of great importance. Nevertheless, human rights include all fundamental rights recognised in the Constitution: a few which are unalterable, (1) save by a Referendum; some which Parliament may abolish or abridge by a two-thirds majority, (2) but which may not otherwise be restricted; others which may not only be amended by a two-thirds majority, (3) but may also be subjected to restrictions of a specified kind.

There are, however, many other rights, especially economic, social and cultural rights (which I will, for convenience, refer to as 'rights relating to the physical quality of life'), which though not constitutionally recognised, are nevertheless widely accepted as being important human rights. In Britain, for instance, there are no fundamental rights entrenched in a Constitution; but there are rights recognised by law, which are considered to be human rights, despite Parliament's power to abolish or amend them at will. (4) Article 8 of the Universal Declaration (5) recognises that human rights include those which are not constitutionally granted.

This broad view of human rights appears to be implicit in Article 3. (6) Article 3 does not purport to vest sovereignty in the People, or to confer rights on the People; it appears to proceed on the basis that sovereignty is already (and independently of the Constitution), vested in the People; it appears to recognise that by virtue

of such sovereignty, the People already possess certain rights. Article 3 mentions, inclusively and not exhaustively, some of these rights. Thus Article 3 seems, by necessary implication, to recognise other rights, powers and attributes not specifically enumerated. (7) This possibility that there may be rights and powers not expressly enumerated is not unique or peculiar to Sri Lanka, for the Ninth and Tenth Amendments (8) to the U.S. Constitution also provide a 'window' (as Mr William D. Rogers put it) through which rights not enumerated in the Constitution may nevertheless be protected.

Further, Article 4(d) refers only to "the fundamental rights which are by the Constitution declared and recognised." But Article 3 refers to "fundamental rights", without any words of qualification or description, and would thus seem to recognise a wider class of fundamental rights.

Viewed in that way, the "Bill of Rights" in Sri Lanka cannot properly be confined to Chapter III; human rights in Sri Lanka must therefore be considered as including:

- the fundamental rights enumerated in Chapter III;

- the language rights described in Chapter IV;

- the franchise, defined in Article 4(d), and required by Article 93 to be free, equal and by secret ballot; inclusive of the right to participate in a Referendum (Chapter XIII);

- certain citizenship rights referred to in Chapter V;

- that aggregate of other rights, which for convenience I refer to as the 'physical quality of life' rights;

- the remedies for the enforcement of human rights.

How should respect for Human Rights be assessed?

The form, or the text, of a Bill of Rights is not what is most important;

> 'For **forms** of government, let fools contest,
> Whatever is **best administered** is best.'

What is crucial then is how the Bill of Rights is administered: how, from day to day, human rights are protected and advanced. And that is the test which is implicit in Article 4(d) (9) of the Constitution. So we need to ask, in relation to each human right:

Has **legislative** power been exercised so as to expand, or to abridge fundamental rights ? To give greater protection, or less ?

Has **executive power** been used to perpetrate, or to prevent, infringements of fundamental rights? To give or to deny administrative remedies ?

Has **judicial** power been wielded beneficially, thereby advancing fundamental rights, or, has the ambit of fundamental rights been narrowed by strict or restrictive interpretation ? Has it expanded the scope of existing remedies, or placed restrictions, qualifications and barriers ?

Often, those questions are asked and considered narrowly -

(a) Sometimes, and with great emphasis, only in relation to some civil and political rights, to the virtual exclusion of other human rights, particularly the "physical quality of life" rights;

(b) Sometimes purely in a national context, without attempting to identify and evaluate the external linkages, influences and causes (**10**) affecting respect for human rights;

(c) Sometimes by applying criteria which are not generally accepted in all democratic societies; some may even be selected purely by reference to the practices and prejudices prevailing in a few societies; (11) and

(d) Sometimes by concentrating on the negative aspects, namely the violations of some human rights, and with little consideration of the positive aspects, namely the extent to which other human rights have been safeguarded and advanced.

A comprehensive and balanced assessment of human rights requires a consideration of all human rights; the examination of violations as well as the accomplishments; reference to generally accepted standards; and judgements regarding responsibility or culpability must probe and evaluate all contributory causes, local as well as foreign.

That is not all. Can any meaningful assessment of human rights end with just a condemnation or an exculpation ? Or must it have a two-fold objective: to remedy past infringements and to prevent future recurrences ? If so, should such an assessment consciously and conscientiously seek and propose remedial measures – whether legislative, judicial or executive ? Not expressed in abstract generalisations, but specifically and concretely ? A Bill of Rights is more a shield than a sword; if violations of human rights do occur, can it be presumed that there is no respect of human rights ? If the system provides expeditious and effective remedies – judicial or administrative – for the violations of human rights, is that a factor indicative of respect for human rights ?

Some groups of human rights may now be viewed in this broader perspective.

TORTURE & ARBITRARY DEPRIVATION OF LIFE & LIBERTY

Undoubtedly this is an area of grave and legitimate concern. There have been allegations of extensive violations: disappearances, extra-judicial killings, torture, arbitrary detention, and the like. My office precludes me from commenting upon the truth or otherwise of these allegations, and I refrain from comment. However, some of these allegations have been proved in proceedings in the Courts; and if, in any appropriate forum, other violations are also satisfactorily proved – whether at the hands of the State or private citizens; of one political party or another; or of the armed forces, or vigilantes, or terrorists – all such findings would be relevant to any human rights assessment. Condemnation must follow upon such findings.

But even in this area, should any human rights assessment restrict itself to such findings and condemnation or exculpation ? If a human rights assessment is not made in a hostile or antagonistic spirit, and is genuinely intended to promote respect for human rights, must it not have a remedial and preventive aspect ? Can genuine and effective remedial and preventive measures ever be proposed without an identification of the root causes of such violations ? If so, must not the real and effective causes of such violations be investigated ? If torture has been inflicted by means of the rack and the thumbscrew, is it enough to condemn those who use those devices ? Will torture then cease ? Or is it vital to determine who made the rack, and who sold or supplied the thumbscrew to the user ? Who financed the purchase, and who trained the user ? Who instigated, or gave aid, comfort and shelter ? If it is a matter of condemnation, are they not equally guilty ? If condemnation alone will not result in the cessation of human rights violations – is it necessary to ascertain the political, economic, social and other causes which gave rise to the situations in which those violations occurred ? Did those causes arise solely from internal factors, or were they mainly or substantially the result of external factors ? Are there external factors which inhibit the implementation of remedies ? Is it proper for an assessment to ignore such external factors ? Illustrations are superfluous.

Identifying the other persons or bodies responsible, and the causes which gave rise to violations, will in no way exonerate culprits, or mitigate their offence. But the question is whether an assessment which fails to probe responsibility and causation, which does not address the issues of remedies and prevention, can ever be complete or adequate.

Let me turn to the neglected area of 'physical quality of life' rights.

RIGHTS RELATING TO THE PHYSICAL QUALITY OF LIFE

The Universal Declaration (13) and the International Covenant on Economic Social and Cultural Rights (14) recognise human rights relating to the physical quality of life. Although not constitutionally entrenched in Sri Lanka, the recognition of these rights is the foundation of the principles of State Policy set out in Articles 27(2)(c) and (h):

> 'an adequate standard of living for themselves and their families, including adequate food, clothing and housing, the continuous improvement of living conditions . . . . . '
>
> 'the complete eradication of illiteracy and the assurance to all persons of the right to universal and equal access to education at all levels.'

It follows, therefore, that any assessment of 'human rights' must necessarily consider, in relation to a nation's circumstances and capacity, both the adequacy of its physical quality of life, and whether the quality of life is improving or declining. Sri Lanka cannot rest content with having been once rated high in the Physical Quality of Life Index; respect for human rights requires continuing progress in satisfying these rights. There must be an assessment in regard to traditional spheres, such as infant mortality, malnutrition, maternal mortality, literacy and education, as well as in new programs for the alleviation of poverty, and the provision of rural housing.

In this area, one question is as to the objective criteria to be applied in making that assessment; another question is in regard to the adverse effects of external factors.

The external factors which affect human rights are of even greater importance. Let me illustrate this in relation to the right to health and medical care. Sri Lanka has for many years endeavoured to provide, virtually free, health services for the entire population. A gradual decline in infant and maternal mortality is one indication of progress. Educating and training doctors is an essential pre-requisite, and hence free education, including University education, is one of the pillars of health policy. (It must be remembered that free University education is not available even in some First World nations.) However, published statistics show that during the period 1981-1987 the number of doctors in public health institutions increased by only about 300, although in that same period about 2,000 students graduated in medicine and dentistry; it is therefore likely that a large number of doctors had migrated. The number of persons per physician continued to exceed 5,000, and showed no significant decline.

A superficial judgment, looking narrowly at these facts, and nothing else, might well be that Sri Lanka has shown no significant improvement in satisfying the human right to health.

But is that the reality ? Is that how the issue should be judged ? Do we need to look at external factors which inhibited progress ?

Let me contrast that with a First World country, struggling to satisfy the same right. A recent news item in an American newspaper reported a case where the State of Virginia had provided $ 100,000 to a particular medical student, for her medical studies, on condition that after graduation she would serve in an under-privileged area. In effect, Virginia provided free medical education, in an endeavour to serve the needs of the poorest - in much the same way as Sri Lanka. The doctor defaulted, the State sued, and recovered the $ 100,000, plus contractually agreed penalties, plus interest, aggregating to $ 700,000. I have no doubt that if that doctor had been actively induced to default by some institution which offered her a tempting financial package, that institution too would have been held liable.

We thus see both Third World and First World countries face a common problem of a shortage of doctors. The difference is that First World countries have the ability and the resources to induce Third World doctors (and other professionals) to migrate; immigration policies, adopted in the furtherance of perceived national

interests, facilitate the inflow of professionals, and are not, currently, designed to extend a welcome to the unskilled, the poor, the hungry or the homeless.

The real question that we have to face then is a much more complex problem: two nations (or two groups of nations) endeavouring to solve similar problems; but their policies result in a loss of doctors by the nation whose need is greater, and a gain by the nation whose need is less urgent. Third World nations lose doctors after spending scarce resources on education and training; First World nations gain doctors, without any investment in education, without waiting 20 years for training to be complete, without any risk that trainees might fail to qualify; and often they attract the best. The State of Virginia recovered damages; Sri Lanka cannot. (15)

Two solutions have been suggested for Third World countries: ban the migration of doctors and professionals, and enforce compulsory public service; (16) make them pay for their education. But the International Covenants recognise the right of citizens to leave their own country; they lay down the ideal that even University education should be free and equally accessible to all. Sri Lanka complies with those provisions, and loses professionals to other nations which do not have free University education.

When the right to health is looked at in this broader perspective, should we condemn either Third World or First World nations, if they are endeavouring to satisfy the needs of their own people ? Should we condemn the individuals concerned who are acting in the exercise of their human rights ? But the net result of these external factors is that the Third World nation is prejudiced. Should we then look at the right to health narrowly, in relation to each nation ? Or should we look at it as a single universal indivisible right of unvarying content ? Is the right of an average Sri Lankan to health based on a persons per physician ratio exceeding 5,000 :1, while his counterpart in a First World nation enjoys a right to a ratio of less than 1,000 : 1 ? Has a Sri Lankan a right only to "aspirin and kothamalli" health and medical care, while the right of a First World citizen extends to open heart surgery and organ transplants ? The International Covenants permit no such distinction in the content of human rights. Article 12 of the I.C.E.S.C.R. recognizes the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The steps to be taken by the State Parties to achieve the full realization of this right include those necessary for, inter alia, the creation of conditions which would assure to all medical service and medical attention in the event of sickness. Clearly, not a multiplicity of severable and distinct national obligations, but a single indivisible international obligation, to be fulfilled by nations collectively. Looked at in that perspective, should not the assessment of human rights cease to be a matter of apportioning blame to one nation or another, and become a process of collective soul-searching and collaborative action to undo the damage of the past and to prevent future recurrence ? What remedies should international human rights law devise to rectify patent non- compliance with Article 12 ? Would the Roman Dutch law, faced with this situation in a national context, have provided a remedy through the doctrine of unjust enrichment ? In other systems of law, in varying national contexts, would equity have required some form of compensation or restitution ? Then would international human rights law fold its arms and solemnly pronounce that, as between two innocent parties, the loss must lie where it falls ? Should we be looking at a truly international human right, and at the collective responsibility of the community of nations to provide remedies based on principles of enrichment or compensation?

I have dealt at length on one human right for the sake of illustration and emphasis. But these same linkages exist, and the same questions arise, in relation to other PQL rights.

A few years ago, a controversy raged as to whether the active promotion of bottle-feeding by First World manufacturers of infant milk powder adversely affected the life, health and growth of Third World infants. Can we determine whether motherhood and childhood receive special care and assistance, whether there has been a reduction of the still birth rate and of infant mortality, and provision for the healthy development of the child, without considering these and similar external factors ?

Policies designed to advance living standards in some countries, for instance by maintaining the prices of farm products, whether by subsidies or by restricting production, reduces the food supply of the world; Third World countries, unable to afford rising costs of fertilizer and pesticides, find that their citizens have less food. While in one part of the world food surpluses accumulate and living standards rise, may be from comfort to

affluence, the same policy results elsewhere in living standards falling – and sometimes falling from subsistence to starvation. When Article 25 of the Universal Declaration proclaims that everyone has the right to a standard of living adequate for the health and well-being of himself and his family, does it contemplate two standards ? Article 11 of the I.C.E.S.C.R. not only contemplates an indivisible right, but goes beyond recognition of the duty of a State vis-a-vis its own citizens: it requires States Parties (i.e. collectively) to take appropriate steps to ensure the realization of this right, recognizing " the essential importance of international co-operation based on free consent".(17) Do we need to look more closely at the consequences of efforts to raise living standards, to examine whether these have a disproportionate effect on the environment, in respect of acid rain, global warming, damage to the ozone layer, etc ? At their effects on other nations ? Studies claim that damage to the ozone layer could cause an additional 200,000 deaths in the U.S. alone over the next 50 years: when Man mourns a child lost today through violation of civil and political rights, can he ignore his faceless, yet unborn, grandchildren inevitably doomed in the years to come through damage to the environment ?

There is no question of attaching greater importance to physical quality of life rights, than to civil and political rights; of postponing respect for the latter until after fulfillment of the former. But the interaction between them must be recognised. Civil and political rights are often violated because of situations caused by social injustice and unrest, which in turn results from the refusal or inability to satisfy economic and social rights. Would international co-operation and assistance in raising living standards alleviate social unrest, and thereby promote greater respect for civil and political rights ? Would the denial of such assistance, linked to violations of civil and political rights, aggravate social disparities, and thus stimulate further violations ? (18) Or should the grant of such assistance be directly proportional to the failure of international co- operation to ensure adequate living standards and continuous improvement of living conditions as envisaged by the International Covenants ?

Does the history of nations, which today display a reasonably high standard of respect both for civil and political rights as well as for physical quality of life rights, reveal a uniform course of development ? Was respect for civil and political rights first achieved, and followed by a steady improvement in the physical quality of life ? Or conversely ? Was material prosperity achieved, perhaps by the denial of human rights – whether by the marginalisation of indigenous people supplanted by immigrants, or by the exploitation of slaves, or migrant workers, or colonial subjects ? If so, certainly such a process must never be repeated: but can human rights be compartmentalized as if their development runs in two parallel streams, or should their interdependence be affirmed ?

LANGUAGE RIGHTS: (Chapter IV)

Article 27 of the International Covenant on Civil and Political Rights recognises the right of linguistic minorities to use their own language. Language rights have been a source of dissension and unrest for over 30 years, and in 1987 Tamil was recognised as an official language; resulting in full legal compliance with Article 27. An assessment of compliance would not be complete without an evaluation of the implementation of these provisions.

THE FRANCHISE AND THE REFERENDUM

The Universal Declaration provides in Article 21:

> 1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives;
>
> 3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections, which shall be by universal and equal suffrage, and shall be held by secret vote or by equivalent free voting procedures.

In the past, there were certain deficiencies in the electoral system. While in some electorates 25,000 voters were entitled to one representative in Parliament, in other electorates 75,000 voters were entitled only to one representative: their vote thus appeared to be of less value. Electoral boundaries were regularly re-drawn, and thereby a majority sometimes became a minority. The system also resulted, at times, in significant disparities in Parliamentary representation, whereby, for instance, a political party obtaining 40% (or 50%) of the popular vote might secure 70% (or 85%) of the seats in Parliament: again, an inequality in the franchise.

The Constitution now incorporates several changes; the system of proportional representation ensured that representation in Parliament more closely approximated to the popular vote; electoral boundaries were fixed; there was no longer a significant difference between the value of a vote in one electoral district and another. In 1988, voters were also given a choice among candidates on the party list.

Apart from these changes, the franchise has been broadened. In addition to choosing representatives, citizens have a more direct role in government through the right to vote at a referendum. Articles 85 and 86 refer to three situations in which this right may be exercised: to enact laws which are beyond the competence of Parliament (as set out in Article 83); to enact laws (other than those inconsistent with, or for the amendment of, the Constitution) which Parliament has refused to pass; and to determine questions of national importance submitted to the People by the President. This right, legislative in character, is both important and valuable, and must be regarded as a human right.

In determining compliance with human rights, in respect of the franchise, one aspect is whether these constitutional changes bring our law into close conformity with human rights; but other questions have also to be considered. In actual practice, has the exercise of the franchise been free, equal and secret ? Have there been improper restraints impeding the exercise of the franchise ? Does the percentage of spoilt votes indicate a need for voter- education ? Is the practice of inviting outside observers desirable ? If so, how effective has it been, and should its scope be extended to cover earlier stages of the electoral process, such as nomination and even the preparation of the electoral lists ?

However should any such assessment, particularly by international agencies, focus only on an individual nation ? Being international human rights, is it not appropriate that in assessing the freedom and equality of the franchise some reference be made to accepted international customs and practice ? Should higher standards be demanded of individual nations than those collectively observed by the international community ? Do international organisations, including the U.N.O., function on a basis objectively and rationally reconcilable with the principle of the equality of member States (or their citizens) and their voting rights ? Is the veto compatible with equality, or does it create a privileged category of States whose actions (individually or collectively) can never be effectively questioned, or be the subject of sanctions ? Does this impair the moral authority of the U.N.O. to advocate the implementation of Article 21, and legitimately, provoke the query "Who made thee Judge and Ruler over us ?" Has the will of member States, as expressed in resolutions adopted from time to time, been uniformly implemented with equal vigour, enthusiasm and promptitude, or in a discriminatory manner ?

CITIZENSHIP

It was for many years a controversial question whether Sri Lankan citizenship should be granted to all migrant workers brought from India as migrant workers in colonial times; it is not relevant to discuss the rival contentions. Article 15 of the Universal Declaration stipulates that:

1. Everyone has the right to a nationality
2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Did Sri Lanka act in violation of these provisions when the Citizenship Act of 1948 was enacted ? Did it comply with these provisions only belatedly, and in stages, over the next 40 years ? In assessing Sri Lanka's compliance with this human right are there external factors which should be considered ?

Prior to Independence, there was no status of citizenship; all enjoyed one nationality, namely that of British Subjects. At the 1947 general elections, before Independence, British Subjects were entitled to vote. Prior to the next general election (of 1952), the Citizenship Act was enacted; most British Subjects became citizens of Ceylon (Sri Lanka); some did not. Most migrant workers "of recent Indian origin" failed to acquire citizenship of Ceylon, but the Citizenship Act did not affect their nationality as British Subjects. What was the effect of the Citizenship Act: did it arbitrarily deprive them of nationality, or did it merely fail to confer on them the newly created status of "a citizen of Ceylon" (Sri Lanka), and consequentially deprive them of the franchise ? The Privy Council in *Kodakkan Pillai v Madanayake*, (1953) 54 N.L.R. 433, 439, held that it was 'a perfectly natural and legitimate function of the legislature of a country to determine the composition of its nationals.' In that background, can subsequent legislation to conferring citizenship on them be considered as remedying the arbitrary deprivation of nationality ?

Even if the Citizenship Act of 1948 was not an arbitrary deprivation of nationality, can it be said that these Sri Lankan residents had no nationality, that their right to a nationality was denied, and that subsequent Sri Lankan legislation was a belated recognition of this right ? All these questions cannot be fully answered without probing the issue of nationality. Were these migrant workers British Subjects at all material times upto 1948 ? Upon the enactment of the Citizenship Act, did they continue to be British Subjects ? Did the British Nationality Acts of that period substitute for the status of British Subject, a new status of U.K. Citizenship ? Did some British Subjects fail, under the terms of British legislation, to acquire the status of U.K. citizenship, and thereupon become British Subjects without citizenship ? Were they thereby denied or deprived of nationality ?

An assessment of human rights compliance involves both Nationality and the franchise. In consequence of the Citizenship Act, persons of 'recent Indian origin' lost their right to vote, and this was fully restored 40 years later. In respect of nationality, different questions arise – What nationality did they enjoy ? Did the Citizenship Act deprive them of that nationality ? Or were they persons without a nationality, and did the Citizenship Act deny their right to a nationality ? Or did they have a nationality, which British legislation took away (or devalued) ? Which law effectively denied their right to a nationality and/or deprived them of nationality ? Was that denial or deprivation remedied by the nation which was in breach of Article 15, or another ? These are questions worthy of serious consideration before a final judgement is passed.

There are conflicting views as to whether there was a moral obligation on Sri Lanka to grant citizenship: on the one hand, it is urged that these are people brought by a Colonial ruler for its own economic gain, dispossessing the original inhabitants of their lands; on the other hand, it is pleaded that whatever their country of origin, they were, through economic exploitation compelled to contribute significantly to the economy of Sri Lanka, and that they have won the right to citizenship by their sweat and toil. But that apart, this vexed question of Citizenship serves to caution us against hasty judgements in respect of apparent violations of human rights in one country viewed narrowly, and isolated from historical and external factors which may well be the sole or effective causes of such violations.

REMEDIES

The right to effective remedies in respect of violations, and the duty to adopt legislative and other measures to give effect to fundamental rights, are recognised in the International Covenants.

Many aspects of human rights require constructive review. Pre–Constitution legislation is not invalidated by reason of inconsistency with fundamental rights (Article 16(1)). Would the tedious task of scrutinising and, where necessary, suitably amending such legislation enhance respect for human rights ? There has been discussion regarding the amendment of Chapter III: have all possible improvements been considered ? Two matters which have surfaced in regard to Article 126 are the time limit for making an application, and locus standi in respect of individual grievances; should other aspects be considered – such as "class" actions in respect of general grievances, the extension of the period within which an application should be disposed of, the need for an investigative role for the Courts, and for post–adjudication directions and enforcement ? Whether the jurisdiction of the Court should extend to ex mero motu investigations ? The provision of legal aid for indigent

applicants ? Rules made under Article 136(1) as far back as September 1990 remain unpublished thus hindering the implementation of many procedural improvements in regard to fundamental rights application. Widely different views may reasonably be possible on these and other questions – but should a review of human rights address these questions ?

While our Courts lack the power to strike down unconstitutional legislation (unlike the U.S. and India), they are not totally devoid of power, as in the U.K. However, should the procedures in regard to the review of Bills, particularly urgent Bills, be reviewed so as to afford persons and bodies who may be affected thereby, or who are interested therein, a meaningful opportunity to intervene, and generally to allow more time for argument and consideration ? And where any provision is found to be inconsistent, to enable the Court more precisely to specify any necessary amendments ?

The phraseology of the rights enshrined in Chapter III is in many instances significantly different to the corresponding American and Indian provisions, giving rise to the question of liability for private violations (i.e. otherwise than by executive or administrative action). Should not the law and procedure in this respect be scrutinized ?

Pursuant to Article 156 of the Constitution, Parliament established an Ombudsman by the Parliamentary Commissioner for Administration Act, No 17 of 1981, "charged with the duty of investigating and reporting upon complaints or allegations of the infringement of fundamental rights and other injustices by public officers and officers of public corporations, local authorities and other like institutions". Did Article 156 contemplate a direct invocation of the jurisdiction of the Ombudsman, but enabling the procedure to be prescribed by law ? Or did it contemplate that the jurisdiction could be invoked only upon compliance with conditions prescribed by law ? After a decade, is a review of the work of the Ombudsman necessary, in order to ascertain whether the objective of Article 156 has been realized ? Whether improvements are possible ? Is a similar review necessary in respect of the Commission for the Elimination of Discrimination and the Monitoring of Fundamental Rights established by regulations made under the Sri Lanka Foundation Law, No 31 of 1973 ?

CONCLUSION

Human rights cannot be seen in their proper perspective – whether nationally or internationally – unless these questions are considered.

The fundamental issue that confronts all concerned with human rights, as embodied in the International Covenants, is whether the evaluation of respect for human rights is to be merely a stick with which the big or the strong may chastise the small or the weak; or whether an assessment of human rights compliance is to be made only after considering, impartially and objectively, all the causes of violations, whether proximate, effective or indirect; whether that is to be done by the uniform application of generally acceptable norms and standards, and not by criteria arbitrarily selected by those who make the assessment; by weighing both violations in some spheres, and accomplishments in others; by identifying the international constraints and linkages which promote violations and hinder observance of human rights, with a view to proposing and implementing remedies and solutions; whether human rights are to be regarded as international, and whether nations will acknowledge their interdependence and collective responsibility in respect of violations and achievements.

Notes

1. e.g. Articles 10 and 11; cf. Article 3 and 4(e): the franchise.

2. e.g. Article 13(3) and (4); cf. Article 26(3) and (4).

3. e.g. Article 12, 13(1), (2), (5) and (6), 14.

4. It is doubtful whether any assessment of human rights compliance in Britain would consider the total lack of constitutional entrenchment as a blemish; (see, however, "Britain: Justice issues" by Craig R. Whitney, "Island", 20.7.91).

5. " Everyone has the right to an effective remedy . . . . for acts violating the fundamental rights granted by the Constitution or by law."

6. " In the Republic of Sri Lanka, Sovereignty is in the People and is inalienable. Sovereignty includes the powers of government, fundamental rights, and the franchise. "

7. See "The Sovereignty of the People", an article by the writer published in the "Ceylon Daily Mirror" of 6.3.71.

8."9. The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people . . . . ."

10. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. "

9. " The fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government, and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided."

10. Are these not included among "..... the factors and difficulties affecting the implementation of the present Covenant" (Article 40.2, I.C.C.P.R. ?

11. e.g. a recent newspaper article (CDN 20.6.91) reported strong criticism of a "Human Freedom Index" based on 40 "key indicators of freedom", one of which was "the personal right to homosexuality between consenting adults".

12. Today there may be more complex issues, and a more tangled web of relationships, but do the same basic questions arise in relation to "weapons of mass destruction", chemical weapons, carpet bombing, cross-fire deaths, "collateral damage", "environmental terrorism", and the like ?

13." Article 25:

> 1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control
>
> 2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection. "

" Article 26:

> 1. Everyone has the right to education. Education shall be free at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit. "

14. " Article 11:

> 1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard

of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties . . . recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food . . .

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need. "

Article 12: ".....the right of everyone to the enjoyment of the highest attainable standard of physical and mental health...."

Article 13 refers to education, equally accessible to all, and the progressive introduction of free education.

15. How much could Sri Lanka recover if an action did lie ? Perhaps Rs 1,000 p.a. for 13 years of primary and secondary education, and Rs 30,000 p.a. for six years of University education: maybe Rs 200,000 in all. Comparable figures for a First World nation may be US $ 5,000 p.a. for 13 years, and US $ 15,000 p.a. for six years: not less than US $ 150,000.

16. Such as an exit permit system and Compulsory Public Service laws.

17. See also Article 2.

18. A study of the factors which have at various times affected such assistance (such as the Rubber-Rice pact, the nationalisation of foreign undertakings, nuclear non- proliferation, the treatment of minorities, etc) would be illuminating if it were to reveal the application of a uniform and consistent principle.

EQUALITY IN RECRUITMENT AND PROMOTION

by P Sunil C de Silva

Attorney General of the Republic of Sri Lanka

The two articles "The Reluctant Dragon" and "Supreme Court Vetoes Ethnic Quotas" published in the Special Issue of the Law and Society Trust's Fortnightly Review, opens a new chapter in our legal history. I must thank the Law and Society Trust for providing a forum where a judgement of even the highest court in our country can be subjected to an in depth analysis by academicians of repute.

I would however urge that the analysis should be based not only on the judgement of the court and the arguments of counsel as reflected in the judgement itself but on the pleadings and the arguments taken as a whole.

The procedure for the vindication of 'Fundamental Rights' under Article 126 and the Rules of the Supreme Court, involves the filing of the petition, affidavits and written submissions of the contending parties. The leave to proceed application and the subsequent arguments at the hearing are both held in public and any one is free to attend court and take note of the arguments.

It is my suggestion that an academic critique should either be confined within the four corners of the judgement, or if the writer ventures further afield as to comment on what should or should not have been pleaded or supported by argument, then it is only fair that due care should be taken to observe or obtain the full text of the pleadings and argument.

Even counsel in a case are entitled to the benefit of the principle of `audi alteram partem' before condemnation in print. I hope that the brief note herein contained, would in some measure contribute towards that end.

The two articles quoted above appear to be critical of the Attorney General's approach to the case of Ramupillai Vs Festus Perera et al. on the following points:

i. that the affidavit filed had been `badly drafted' and did not aver that members of the Tamil community had in fact suffered past discrimination at the point of recruitment or promotion but merely stated that they entertained a "perception" of such discrimination.

ii. that even though such discrimination had taken place, the State cannot, for political reasons, make such an admission,

iii. that the State did not adopt the argument that ethnic quotas are a `compromise' formula which would have satisfied the argument of discrimination flowing from both the Sinhala and Tamil communities.

iv. that affirmative action must be supported by Counsel other than State Counsel.

If I may take these points separately,

1. that the affidavit filed had been `badly drafted' and did not aver that members of the Tamil community had in fact suffered past discrimination at the point of recruitment but merely stated that they entertained a "perception" of such discrimination.

The argument that the members of the Tamil community have in fact experienced discrimination in recruitment to the public service, is sought to be supported by reference to the numerical strength in the public service in relation to the percentage of a given community on a national census.

Whilst the author of an article may take such liberties, the deponent of an affidavit has to swear or affirm to a fact which is either known to him or is the inexorable consequence of facts known to him at the very least, is a reasonable inference from such facts.

Relevant also is the comment by the writer of one of the articles that the affidavit of the respondent was `badly drafted'. I do not think the writer of a serious article would have made this point on the basis of an obvious error in spelling, and therefore conclude that he makes the criticism of the deponent either on the basis of incompetence or the lack of will to succeed. Perhaps when taken in the context of the `reluctant dragon' the imputation is that the deponent of the affidavit did not, even though he could have so done, wish to aver past discrimination against the minorities in positive terms.

May I request the writer to consider whether the deponent was not prepared to swear or affirm to an averment which he did not accept, merely to obtain the verdict which the state wished to secure. I am sure that the writer will agree that no counsel can compel a deponent to forswear his conscience in order to succeed in his litigation.

It would not be out of place to point out that a few decades ago, a particular ethnic group was alleged to enjoy unfair patronage from members of their community established in the senior echelons of the public service resulting in unfair advantage at the point of recruitment and promotion.

Those making the allegation quoted the disparity between the national ethnic ratio and the ethnic ratio in the public service as proof of unfair discrimination. Those countering the allegation stated that the relative paucity of members of a given community in a particular sphere of activity, may be a result not from conscious discrimination against them but from a disinclination whether traditional or seasonal, to engage in the given field of activity.

They maintained that it would require an in depth study of the applicants for a given service in relation to the numbers from each ethnic group, their relative academic and other qualifications and where recruitment is preceded by an interview, their respective personality projection, before a conclusion whether a given ethnic group had been the subject of adverse discrimination could be reached.

Does not the same argument militate against the use of statistics to conclusively establish cause and effect. Of course the converse that the reflection of the national ethnic ratio in the recruitment statistics does not conclusively establish non-discrimination, is equally true.

In these circumstances, the respondents argued that one of the causes for the large scale resort to violence and sabotage, by members of minority groups and disadvantaged sections of the majority, was a perception based on statistical inequality in (among other areas of state activity, such as education) the membership of the public service, and that it would be necessary to formulate national policy to eliminate this perception.

Since it would be equally difficult to convince the majority that the minorities had been the subject of discrimination, as to convince the minorities of the converse, it was considered that the two opposing views could be dealt with at the level of perceptions rather than proven fact.

This conception was based on the assumption that discontent leading to violence flows equally from an actual as well as a perceived grievance, and that statistical proof of equality would reassure the discontented.

In fact the state supported the respondents stand by arguing that by compelling proportionate selection it would be possible and feasible to prevent prejudice, whether deliberate or subconscious, on the part of the selectors for recruitment or promotion, in deeming that merit or demerit attached to a particular ethnic group. It was argued that if adopted, the scheme would prevent a selection board using an overt argument of merit to secure a concealed desire for ethnic preponderance. An evil to be avoided in equal measure whether in favour of or against a particular ethnic group.

2. That even though such discrimination had taken place, the State cannot, for practical reasons, make such an admission.

This argument flows from an assumption that those in charge of the executive at a given moment in time, are incapable, either of admitting their own mistakes or the mistakes of their predecessors.

I make no comment on this argument as it flows from a value judgement of the morality of the executive. The reader I am sure has adequate experience of the factual position to determine whether or not the executive of today would be shy to place the blame for any current evil, on the executive of yesterday.

3. That the State did not adopt the argument that ethnic quotas are a `compromise' formula that satisfies the argument of discrimination flowing from both the Sinhala and Tamil communities.

The entire scheme of securing quotas for all ethnic groups, both the majority and the minorities, is essentially a compromise formula. Not only are the minorities assured of such number of places in the process of recruitment and promotion (modified now in accordance with the ruling of the Supreme Court, to exclude promotions) as would reflect their numerical strength, but the majority is also sought to be reassured that the proposed scheme will not deny them the number of places which their numerical strength demands.

Thus it would be unfair to level the criticism that the `compromise formula' argument was not presented with adequate force.

4. That affirmative action must necessarily be supported by Counsel other than State Counsel.

This recommendation is based on the assumption that the State, for which the State Counsel appears, is not in fact interested in remedying the problem, but `reluctantly' conducted a mock battle merely to satisfy the minorities that war in fact is being waged on their behalf.

As to whether the State conducted a `half hearted' battle in this case, or to put it as underlined by the article, sent a `reluctant dragon' into the fray, can best be answered by the adversary, Mr. Ramupillai the petitioner, or his counsel.

Perhaps the writer suggests that we abandon the belief that counsel should not personally identify himself with the issue before court so that his role as an officer assisting the court to hold the scales of justice evenly will not be jeopardized by his feeling that his interests lie in one of the pans.

I do not accept this criticism, but in order to avoid any `perceptions' of reluctance on the part of the State to make a positive effort in the direction of redressing minority grievances, I would recommend that when legislation involving ethnic quotas are sought to be introduced, that the writers or Attorneys at Law on their behalf, participate in the Court process and enter the fray as full blooded champions of the rights sought to be protected and make a bid to support the Constitutionality of the proposed legislation.

Calendar of Events

A 3 day residential para-legal workshop, with an all-island reach, was organised by Sarvodaya in association with the Law & Society Trust, from 20 to 23 June 1991 at the Sarvodaya Headquarters in Moratuwa.

Shantha Pieris of LST co-ordinated the training in association with Mohan Seneviratne (Lawyers for Human Rights and Development) Dharshini Polonnowita and Renuka Lalani (Rural Women's Development Network) N Somalatha and Sumith Wijesinghe (Sarvodaya) and Ranjan Nayakaratne, Channa Gooneratne and Kamal Peiris (Law Faculty, University of Colombo).

The workshop was targetted towards legal aid officers of Sarvodaya working with rural people in all Districts of the country outside the North-East. 25 local trainees and 3 foreign trainees from the U.S.A. and West Germany took part.

On the 4 and 7 August, the Trust will be conducting a paralegal workshop for the students of the Faculty of Law, University of Colombo. The workshop will be conducted by Shantha Pieris in association with the Legal Aid Centre of the university, and will aim to give the students an exposure into the nature of paralegalism and offer them alternative perspectives on the law and legal system.

TO OUR READERS.....

With our 20th issue (July 1st and 16th 1991) the LST Fortnightly Review completed its first year of publication. There is an increasing demand for copies but we regret to say that we cannot afford to distribute more free copies.

Sri Lankans who wish their names and addressed to be added to our mailing list are kindly requested to pay a subscription of Rs. 125/ for half a year (July - December 1991) or Rs. 250/ for a full year (July 1991 - June 1982), to cover our photocopying and postage costs. Cheques should be made payable to the Law & Society Trust, 3, Kynsey Terrace, Colombo 8. Personal callers may buy copies of the current issue at Rs. 12.50 at our office.

Overseas readers: we would be grateful if you could help to defray postage costs with US $ 10 for half a year (July - December 1991) or US $ 20 for one year (July 1991 to June 1992).

Members of donor organizations or groups with whom we have existing arrangements for the reciprocal exchange of publications are exempted.

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