LAW & SOCIETY TRUST

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Included in this issue is the Bill on the Human Rights Commission which was tabled in Parliament recently. Dr Deepika Udagama, in her article which is based on a discussion held at the Trust to discuss the Bill, analyses the provisions of the Bill and argues that the Commission should ideally be a parent body bringing other mechanisms such as the HRTF into its fold. She also states that the distinction made in the Bill between fundamental rights and human rights should not be maintained; that the Commission should have an independent investigative unit and that the independence of the Commission should be guaranteed in the strictest terms.

We also carry the National Workers' Charter approved by the Cabinet recently and a commentary on the discussion held at the Trust on the proposed amendments to the abortion law. Professor Yash Ghai, in his article discusses the salient features of the new Constitution of Papua New Guinea.

HUMAN RIGHTS BILL IN SRI LANKA

AND

THE NEW CONSTITUTION OF PAPUA NEW GUINEA.

IN THIS ISSUE

PARLIAMENT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

HUMAN RIGHTS COMMISSION OF SRI LANKA

A

BILL

AN ACT TO PROVIDE FOR THE ESTABLISHMENT OF A HUMAN RIGHTS COMMISSION OF SRI LANKA; TO SET OUT THE POWERS AND FUNCTIONS OF SUCH COMMISSION; AND TO PROVIDE FOR MATTERS CONNECTED THEREWITH OR INCIDENTAL THERETO.

1. This Act may be cited as the Human Rights Commission of Sri Lanka Act, No.... of 1995 and shall come into operation on such date as the Minister may appoint by Order published in the *Gazette* (hereinafter referred to as the "appointed date").

PART 1

Establishment of the Human Rights Commission of Sri Lanka

2. (1) There shall be established a Commission which shall be called and known as the Human Rights Commission of Sri Lanka (hereinafter in this Act referred to as "the Commission").

(2) The Commission shall be a body corporate having perpetual succession and a common seal and may sue and be sued in its corporate name.

(3) The seal of the Commission shall be in the custody of the Secretary to the Commission and may be altered in such manner as may be determined by the Commission.

3. (1) The Commission shall consist of five members chosen from among persons having knowledge of or practical experience in, matters relating to human rights.

(2) The members of the Commission shall be appointed by the President, on the recommendation of the Constitutional Council:

Provided however, that during the period commencing on the appointed date and ending on the date when the Constitutional Council is established, members of the Commission shall be appointed by the President on the recommendation of the Prime Minister in consultation with the Speaker.

(3) One of the members so appointed shall be nominated by the President to be the Chairman of the Commission.

(4) Every member of the Commission shall hold office for a period of three years.

(5) The office of a member shall become vacant-

(a) upon the death of such member;

(b) upon such member resigning such office by writing addressed to the President;

(c) upon such member being removed from office on any ground specified in section 4; or

(d) on the expiration of his term of office.

4. A member of the Commission may be removed from office by the President, if he-

(a) is adjudged an insolvent by a court of competent jurisdiction;

(b) engages in any paid employment outside the duties of his office, which in the opinion of the President, conflicts with his duties as a member of the Commission;

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

(d) is declared to be of unsound mind by a court of competent jurisdiction;

(e) is convicted of an offence involving moral turpitude; or

(f) absents himself from three consecutive meetings without obtaining leave of the Commission.

5. Any member who vacates his office, other than by removal under section 4, shall be eligible for re-appointment.

6. (1) The Chairman may resign from the office of Chairman by letter addressed to the President.

(2) Subject to the provisions of sub-section (1), the term of office of the Chairman shall be his period of membership of the Commission.

(3) If the Chairman of the Commission becomes by reason of illness or other infirmity, or absence from Sri Lanka temporarily unable to perform the duties of his office, the President may appoint any other member of the Commission to act in his place.

7. No act or proceeding of the Commission shall be deemed to be invalid by reason only

of the existence of any vacancy among its members, or defect in the appointment of any member thereof.

8. The salaries of the members of the Commission shall be determined by Parliament and shall be charged on the Consolidated Fund and shall not be diminished during their terms of office.

9. (1) The Chairman of the Commission shall be its Chief Executive officer and shall preside at all meetings of the Commission. In the event of his absence from any meeting, the members of the Commission present at such meeting shall elect one from amongst themselves to preside at such meeting.

(2) The Chairman of any meeting of the Commission shall, in addition to his own vote, have a casting vote.

(3) Subject to the other provisions of this Act, the Commission may regulate the procedure in regard to the conduct of meetings of the Commission and the transaction of business at such meetings.

10. The functions of the Commission shall be-

(a) to monitor executive and administrative practices and procedures, with a view to ensuring compliance with the provisions of the Constitution relating to fundamental rights and to promoting respect for, and observance of fundamental rights;

(b) to inquire into and investigate complaints regarding infringements or imminent infringements of fundamental rights, and to provide for resolution thereof by mediation and conciliation in accordance with the provisions hereinafter provided;

(c) to advise and assist the government in formulating legislation and administrative directives and procedures, in furtherance of, the promotion and protection of fundamental rights;

(d) to make recommendations to the Government regarding measures which should be taken to ensure that national laws and administrative practices are in accordance with international human rights, norms and standards;

(e) to make recommendations to the Government on the need to subscribe or accede to treaties and other international instruments in the field of human rights; and

(f) to promote awareness of, and provide education in relation to fundamental rights;

11. For the purpose of discharging its functions the Commission may exercise any or all of the following powers:-

(a) investigate any infringement or imminent infringement of fundamental rights in accordance with the succeeding provisions of this Act:

(b) intervene in any proceedings relating to the infringement or imminent infringement of fundamental rights, pending before any court, with the permission of such court;

(c) monitor the welfare of persons detained either by a judicial order or otherwise, by regular inspection of their places of detention, and to make such recommendations as may be necessary for improving their conditions of detention;

(d) take such steps as it may be directed to take by the Supreme Court, in respect of any matter referred to it by the Supreme Court;

(e) undertake research into, and promote awareness of, fundamental rights, by conducting programmes, seminars and workshops and to disseminate and distribute the results of such research;

(f) do all such other things as are necessary or conducive to the discharge of its functions.

PART II

POWERS OF INVESTIGATION OF THE COMMISSION

12. (1) The Supreme Court may refer any matter arising in the course of a hearing of an application made to the Supreme Court under Article 126 of the Constitution to the Commission for inquiry and report.

(2) The Commission shall inquire and report to the Supreme Court on the matters referred to it under subsection (1), within the period, if any, specified in such reference.

13. The Commission may of its own motion or on a complaint made to it by an aggrieved person or a person acting on behalf of an aggrieved person, investigate-

(a) an allegation of the infringement or imminent infringement of a fundamental right of the aggrieved person by executive or administrative action;

(b) an allegation of the infringement or imminent infringement of a fundamental right of an aggrieved person or a group of persons as a result of an act which constitute an offence under the Prevention of Terrorism (Temporary Provisions) Act, No 48 of 1979, committed by any person.

14. (1) Where an investigation conducted by the Commission under section 13 does not disclose the infringement or imminent infringement of a fundamental right by executive or administrative action or by any person referred to in paragraph (b) of section 13, the Commission shall, record that fact, and shall accordingly inform the person making the complaint within thirty days.

(2) Where an investigation conducted by the Commission under the section 13 discloses the infringement or imminent infringement of a fundamental right by executive or administrative action, or by any person referred to in paragraph (b) of section 13, the Commission shall have the power to refer the matter, where appropriate, for conciliation or mediation.

(3) Where an investigation conducted by the Commission under the section 13 discloses the infringement or imminent infringement of a fundamental right by executive or administrative action, or by any person referred to in paragraph (b) of section 13, the Commission may, where it appears to the Commission that it is appropriate to refer the matter for conciliation or mediation, but all or any of the parties objects to conciliation or mediation, or where the attempt at conciliation or mediation is not successful-

(a) recommend to the appropriate authorities, that prosecution or other proceedings be instituted against the person or persons infringing such fundamental right;

(b) refer the matter to any Court having jurisdiction to hear and determine such matter in accordance with such rules of Court as may be prescribed therefor, and within such time as is provided for invoking the jurisdiction of such Court, by any person;

(c) make such recommendations as it may think fit, to the appropriate authority or person or persons concerned, with a view to preventing or remedying such infringement or the continuation of such infringement.

(4) Without prejudice to the generality of the recommendations that may be made under paragraphs (c) of subsection (3), the Commission may-

(a) recommend that the act or omission giving rise to the infringement or imminent infringement of a fundamental right be reconsidered or rectified;

(b) recommend that the decision giving rise to the infringement or imminent infringement of a fundamental right be reconsidered or rectified;

(c) recommend that the practice on which the decision, recommendation act or omission giving rise to the infringement or imminent infringement of a fundamental right was based, be altered; and

(d) recommend that reasons be given for the decision, recommendation, act or omission giving rise to the infringement or imminent infringement of a fundamental right.

(5) No recommendation shall be made by the Commission under the preceding provisions of this section in respect of the infringement or imminent infringement of a fundamental right except after affording an opportunity of being heard to the person alleged to be about to infringe or to have infringed such fundamental right.

(6) A copy of a recommendation made by the Commission under the preceding provisions of this section in respect of the infringement or imminent infringement of a

fundamental right shall be sent by the Commission to the person aggrieved, the head of the institution concerned, and the Minister to whom the institution concerned has been assigned.

(7) The Commission shall require any authority or person or persons to whom a recommendation under the preceding provisions of this section is addressed to report to the Commission, within such period as may be specified in such recommendation, the act on which such person has taken, or proposes to take, to give effect to such recommendation and it shall be the duty of every such person to report to the Commission accordingly.

(8) Where any authority or person or persons to whom a recommendation under the preceding provisions of this section is addressed, fails to report to the Commission within the period specified in such recommendation or where such person reports to the Commission and the action taken, or proposed to be taken by him to give effect to the recommendations of the Commission, is in the view of the Commission inadequate, the Commission shall make a full report of the facts to the President who shall, cause a copy of each such report to be placed before Parliament.

15. (1) Where the Commission refers a matter for conciliation or mediation under section 14, it shall appoint one or more persons to conciliate or mediate between the parties.

(2) The manner of appointment and the powers and functions of conciliators or mediators shall be as prescribed.

(3) The Commission may direct the parties to appear before the conciliators or mediators for the purpose of conciliation or mediation.

(4) In the event of the condition or mediation not being successful, or where one party objects to conciliation or mediation, the conciliator or mediator shall report to the Commission accordingly.

(5) Where the conciliators or mediators are successful in resolving the matter by conciliation or mediation they shall inform the Commission of the settlement reached.

(6) Where a matter is referred to for conciliation or mediation under this section and a settlement is arrived at the Commission shall make such orders (including orders as to the payment of compensation) as may be necessary to give effect to such settlement.

16. Where in the course of an inquiry or investigation conducted by the Commission a question arises as to the scope of ambit of a fundamental right, the Commission may refer such question to the Supreme Court under Article 125 of the Constitution, for the determination of the Supreme Court.

17. (1) The Commission shall for the purposes of an inquiry or investigation under this Act, have the power-

(a) to procure and receive all such evidence, written or oral, and to examine all such persons as witnesses, as the Commission may think it necessary or desirable to procure or examine;

(b) to require the evidence (whether written or oral) of any witness, to be given on oath or affirmation, such oath or affirmation to be that which could be required of the witness if he were giving evidence in a court of law, and to administer and cause to be administered by an officer authorised in that behalf by the Commission an oath or affirmation to every such witness;

(c) to summon any person residing in Sri Lanka, to attend any meeting of the Commission to give evidence or produce any document or other thing in his possession, and to examine him as a witness or require him to produce any document or other thing in his possession;

(d) to admit notwithstanding any of the provisions of the Evidence Ordinance, any evidence, whether written or oral, which might be inadmissible in civil or criminal proceedings.

18. (1) A person who gives evidence before the Commission shall in respect of such evidence, be entitled to all the privileges to which a witness giving evidence before a court of law is entitled in respect of evidence given by him before such court.

(2) No person shall in respect of any evidence written or oral, given by that person, to or before the Commission be liable to any action, prosecution or other proceeding, civil or criminal, in any court.

(3) Subject as hereinafter provided, no evidence of any statement made or given by any person to, or before, the Commission, shall be admissible against that person in any action, prosecution or other proceeding, civil or criminal in any court:

Provided that, nothing in the preceding provisions of this subsection shall-

(a) affect, or be deemed or construed to affect any prosecution or penalty for any offence under Chapter XI of the Penal Code read with section 22 of this Act;

(b) prohibit, or be deemed or construed to prohibit the publication or disclosure of the name, or of the evidence or any part of the evidence of any witness who gives evidence before the Commission, for the purposes of the prosecution of that witness for any offence under Chapter XI of the Penal Code.

19. (1) Every summons shall be under the hand of the Chairman of the Commission.

(2) Any summons may be served by delivering it to the person therein, or where that is not practicable, by leaving it at the last known place of abode of that person, or by registered post.

(3) Every person to whom a summons is served shall attend before the Commission at the time and place mentioned therein and shall answer the questions put to him by the Commission or produce such documents or other things as are required of him and are in his possession or power, according to the tenor of the summons.

20. (1) Every offence of contempt committed against or in disrespect of, the authority of the Commission shall be punishable by the Supreme Court as though it were an offence of contempt committed against, or in disrespect of, the authority of that Court, and the Supreme Court is hereby vested jurisdiction to try every such offence.

(2) An act done or omitted to be done in relation to the Commission, whether in the presence of the Commission or otherwise, shall constitute an offence of contempt against, or in disrespect of, the authority of the Commission, if such act would, if done or omitted to be done in relation to the Supreme Court have constituted an offence of contempt against or in disrespect of, the authority of such Court.

(3) If any person-

(a) fails without cause, which in the opinion of the Commission is reasonable, to appear before the Commission at the time and place mentioned in the summons served under this Act; or

(b) refuses to be sworn or affirmed or having being duly sworn or affirmed refuses or fails without cause, which in the opinion of the Commission is reasonable, to answer any question put to him touching the matters being inquired into, or investigated by the Commission; or

(c) refuses or fails without cause, which in the opinion of the Commission is reasonable, to comply with the requirements of a notice or written order or direction issued or made to him, by the Commission; or

(d) upon whom a summons is served under this Act, refuses or fails without cause, which in the opinion of the Commission is reasonable to produce and show to the Commission any document or other thing which is in his possession or control and which is in the opinion of the Commission necessary for arriving at the truth of the matters being inquired into, or investigated such person shall be guilty of the offence of contempt against, or in disrespect of, the authority of the Commission.

(4) Where the Commission determines that a person is guilty of an offence of contempt under subsection (2) or subsection (3), against or in disrespect of, its authority the Commission may transmit to the Supreme Court, a Certificate setting out such determination; every such Certificate shall be signed by the Chairman of the Commission.

(5) In any proceedings for the punishment of an offence of contempt which the Supreme Court may think fit to take cognizance of, as provided in this section, any document purporting to be a Certificate signed and transmitted to the Court under subsection (4) shall-

(a) be received in evidence and be deemed to be such a certificate without further proof, unless the contrary is proved, and

(b) be evidence that the determination set out in the certificate was made by the Commission and of the facts stated in the determination.

(6) In any proceeding taken as provided in this section for the punishment of any alleged offence of contempt against or in disrespect of the authority of the Commission, no member of the Commission shall, except with his own consent and notwithstanding anything to the contrary in this Act, be summoned or examined as a witness.

PART III

STAFF OF THE COMMISSION

21. (1) There shall be appointed a Secretary to the Commission.

(2) There may be appointed such officers and servants as may be necessary to assist the Commission in the discharge of its functions under this Act.

22. The members of the Commission and the officers and 35 servants appointed to assist the Commission shall be deemed to be public servants within the meaning of the Penal Code and every inquiry or investigation conducted under this Act shall be deemed to be a judicial proceeding within the meaning of that Code.

23. The Commission may delegate to any officer appointed to assist the Commission any of its powers and the person to whom such are powers are so delegated may exercise those powers subject to the direction of the Commission.

24. (1) At the request of the commission, any officer in the public service may, with the consent of that officer and of the Secretary to the Ministry of the Minister in charge of the subject of Public Administration, be temporarily appointed to the staff of the Commission, for such period as may be determined by the Commission, with like consent, or with like consent be permanently appointed to such staff.

(2) Where any officer in the Public Service is temporarily appointed to the staff of the Commission, the provisions of subsection (2) of section 14 of the National Transport Commission Act. No 37 of 1991 shall, *mutatis mutandis*, apply to and in relation to such officer.

(3) Where any officer in the Public Service is permanently appointed to the staff of the Commission, the provisions of subsection (3) of section 14 of the National Transport Commission Act No. 37 of 1991 shall, *mutatis mutandis*, apply to and in relation to such officer.

(4) Where the Commission employs a person who has agreed to serve to the Government for a specified period, any period of service to the Commission shall be regarded as service to the Government for the purpose of discharging the obligations of that person under such agreement.

25. (1) No proceedings civil or criminal shall be instituted against any member of the Commission or any officer or servant appointed to assist the Commission, other than for contempt, or against any other person assisting the Commission in any other way, for any act

which in good faith is done or omitted to be done, by him as such member or officer or servant or other person.

(2) A member of the Commission or an officer or servant appointed to assist the Commission shall not be required to produce in any court, any document received by, or to disclose to any court, any matter or thing coming to the notice of the Commission in the course of any inquiry or investigation conducted by the Commission under this Act, except as may be necessary for the purposes of proceedings for contempt or for an offence under this Act.

(3) No proceedings civil or criminal, shall be instituted in any court against any member of the Commission in respect of any report made by the Commission under this Act or against any other person in respect of the publication by such person of a substantially true account of such report.

(4) Any expenses incurred by the Commission in any suit or prosecution brought by, or against the Commission before any court, shall be paid out of the funds of the Commission and any costs paid to, or recovered by, the Commission in any such suit or prosecution, shall be credited to the fund of the Commission.

(5) Any expense incurred by any member of the Commission or any officer or servant thereof or any person appointed to assist the Commission in any suit or prosecution brought against him in any court in respect of any act which is done or purported to be done by him under this Act or on the direction of the Commission shall, if the court holds that the act was done in good faith, be paid out of the funds of the Commission, unless such expense is recovered by him in such suit or prosecution.

26. The Commission shall be deemed to be a schedule institution within the meaning of the Bribery Act and the provisions of that Act shall be construed accordingly.

PART IV

GENERAL

27. (1) Where a person is arrested or detained under the Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979 or a regulation made under the Public Security Ordinance (Chapter 40) it shall be the duty of the person making such arrest or order detention as the case may be, to forthwith inform the Commission of such arrest or detention as the case may be, and the place at which the person so arrested or detained is being held in custody or detention. Where a person so held in custody or detention is released or transferred to another place of detention it shall be the duty of the person making the order for such release or transfer, as the case may be, to inform the Commission of such release or transfer, as the case may be, and in the case of a transfer to inform the Commission of the location of the new place of detention.

(2) Any person authorised by the Commission in writing may enter at any time, any place of detention, police station, prison or any other place in which any person is detained by

a judicial order or otherwise, and make such examinations therein or make such inquiries from any person found therein, as may be necessary to ascertain the condition of detention of the persons detained therein.

(3) Any person who resists or obstructs an officer authorised under subsection (1) in the exercise by that officer of the powers conferred on him by that subsection, shall be guilty of an offence and shall on conviction after summary trial by a Magistrate, be liable to imprisonment for a period not exceeding five thousand rupees, or to both such fine and imprisonment.

28. (1) The State shall provide the Commission with adequate funds to enable the Commission to discharge the functions assigned to it by this Act.

(2) The Commission shall cause proper accounts to be kept of its income and expenditure and assets and liabilities.

(3) The financial year of the Commission shall be the calendar year.

(4) Article 154 of the Constitution shall apply to the audit and accounts of the Commission.

29. The Commission shall submit an annual report to Parliament of all its activities during the year to which the report relates and shall include containing a list of all matters referred to it and the action taken in respect of them, along with the recommendations of the Commission in respect of each matter.

30. (1) The Minister may make regulations for the purpose of carrying out or giving effect to the principles and provisions of this Act, or in respect of any matter which is required by this Act to be prescribed or in respect of which regulations are required to be made.

(2) Every regulations made by the Minister shall be published in the *Gazette*, and shall come into operation on the date of such publication or on such later date as may be specified in the regulations.

(3) Every regulation made by the Minister shall as soon as convenient after its publication in the *Gazette* be brought before Parliament for approval. Any regulation which is not so approved shall be deemed to be rescinded as from the date of such disapproval, but without prejudice to anything previously done thereunder.

(4) Notification of the date of which any regulations is so deemed to be rescinded shall be published in the *Gazette*.

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

32. In this Act, unless the context otherwise requires-

"fundamental right" means a fundamental right declared and recognised by the Constitution;

"head of the institution" in relation to-

(a) a public officer serving in a Government department, means the head of that department, or where such public officer is the head of that department means the Secretary to the Ministry to which that department has been assigned;

(b) a public officer who is serving in a Ministry means the Secretary to the Ministry, or where such public officer is the Secretary means the Minister in charge of that Ministry;

(c) a scheduled public officer, means the Judicial Service Commission, appointed under Article 112 of the Constitution;

(d) any other public officer, means the principal executive officer under whose general direction and control that public officer is serving;

(e) an officer of a public corporation, local authority or other like institution, means the principal executive officer of that public corporation, local authority or other like institution, or where such officer is the principal executive officer of that public corporation, local authority or institution, means the Secretary to the Ministry under which such public corporation, local authority or institution functions;

"human right" means a right declared and recognised by the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights;

"institution" includes a government department, public corporation statutory board or commission, local authority, Government owned business undertaking and a company, the majority of shares of which are held by the Government;

"local authority" means any Municipal Council, Urban Council or Pradeshiya Sabha and includes any authority created or established by or under any law, to exercise, perform and discharge powers, duties and functions corresponding or similar to, the powers, duties and functions exercised performed and discharged by any such council or Sabha;

"public corporation" means any corporation, board or other body which was or is established by or under any written law other than that Companies Act, No 17 of 1982, with funds or capital wholly or partly provided by the Government, by way of grant, loan or otherwise.

HUMAN RIGHTS COMMISSION BILL (1995)

*Dr Deepika Udagama**

This paper is largely based on ideas articulated at a discussion organised by the Law and Society Trust in September on the Human Rights Commission Bill. Among the participants were retired Supreme Court judges, academics and representatives of human rights NGOs.

1. Powers and functions of the Commission

The powers and functions of the proposed Human Rights Commission[1] should necessarily be examined in the light of powers and functions of existing human rights mechanisms such as the fundamental rights jurisdiction vested by the Constitution in the Supreme Court, the Human Rights Task Force (HRTF) and the Commission on the Elimination of Discrimination. As some of these existing mechanisms play a crucial role in protecting human rights, it is absolutely essential to coordinate the powers and functions of those with that of the Commission in order to avoid overlap of powers and confusion among those seeking redress.

In this context it is necessary to consider several principal factors:

(a) the assumption that the Commission is to be established to provide better access and effective remedies through less formal, uncomplicated and inexpensive procedures to aggrieved parties;

(b) the fundamental rights jurisdiction of the Supreme Court, which has in recent times proved to be effective in improving the human rights situation in the country, should not be eroded on account of the establishment of the Commission;

(c) the need to avoid the existence of a number of human rights protection mechanisms which, while creating a positive image regarding the incumbent government's commitment, might prove to be very ineffective in providing tangible results and bringing about meaningful changes. Past experience amply proves this point. Rather than having a proliferation of powerless mechanisms which also gives rise to confusion among the public as to who can do what, it is better to have a potent few with streamlined powers and functions.

Given these considerations it is thought that the Commission should ideally be a parent body bringing other mechanisms such as the HRTF and the Commission on the Elimination of Discrimination into its fold. Under Sections 11 (c) and 27 of the Bill, the Commission is vested with powers akin to those possessed by the HRTF. As the HRTF is established as an **ad hoc**

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1 Hereinafter, "the Commission"

measure, its "absorption" by the Commission will not only regularise its existence but also eliminate overlap of functions.

The Commission should have several departments dealing with specific issues, for example, discrimination, welfare of detainees, civil and political rights, socio-economic rights, women and children. Each department should have a Director who will be responsible for monitoring development in the assigned field and related issues and assist in the development of policy in that area.

It is also important to examine the role of the Ombudsman in the light of the role of Commission. As popular belief has it, the office of the Ombudsman deals only with instances of injustice in the administrative branch. However, section 10(1) of Act No. 17 of 1981 (as amended) confers on the Ombudsman powers, *inter alia*, to inquire into infringements or imminent infringements of fundamental rights by public officers. The Commission itself is empowered to settle through mediation and conciliation infringements or imminent infringements of fundamental rights. Further, the Commission on the Elimination of Discrimination is empowered to settle discrimination cases through mediation. These parallel powers will necessarily give rise to confusion and compel aggrieved parties to "shop around" for the most appropriate forum.

2. Distinction between "Fundamental Rights" and "Human Rights"

The distinction made in the Bill between "fundamental rights" and "human rights" should not be maintained; the Commission should deal with the broader concept of "human rights". The Bill defines "fundamental rights" as those recognised by the Constitution and "human rights" as those recognised by the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights. The Commission is to generally deal with fundamental rights; human rights come into play only when it makes recommendations to the government of the measures to be taken to bring laws and administrative practices in line with international human rights standards [section 10(d)].

The existence of the Commission is justified on the basis of the need for informal and flexible mechanisms which will view human rights issues from a broader perspective than courts of law. The courts are confined to the law of the land. Because of the dualist legal system Sri Lanka inherited from the British, ratified treaties do not become the law of the land until transformed into domestic law by legislation. On the other hand, to limit the scope of the powers of the Commission would be self-defeating. It should be empowered to deal with international human rights standards binding on Sri Lanka irrespective of whether they have been transformed into domestic law. As the Commission is to mainly engage in mediation, conciliation and in advisory and dissemination activities (section 10), this broader mandate will enhance its work.

As it is, there are strong moves to bring the fundamental rights chapter of the new constitution along the lines of international obligations of Sri Lanka pertaining mostly to civil and political

rights.[2] As far as socio-economic rights are concerned, the Commission's powers must also extend to cover them in keeping with the principle of indivisibility of rights.

3. Enhancing the powers of the Commission

If the Commission is to be the premier human rights institution in the country, adding the following functions will increase its overall usefulness:

(a) Conduct investigations into and document egregious violations of human rights which have a larger impact rather than limit itself to investigating individual complaints. For this purpose public hearings could be conducted providing opportunities for NGOs and other interested parties to make interventions. For example, the Commission should be able to conduct an investigation into incidents such as Kokkadicholai and the disappearance of the Embilipitiya school boys.

(b) Conduct in-depth studies on relevant issues. The studies could be both on theoretical and empirical levels. Empirical studies will be extremely useful from the point of view of documentation as well. This function will make the task of advising the government in formulating legislation etc. [section 10(c)] more meaningful.

(c) Provide technical assistance for the purpose of promoting and protecting human rights and also for assisting the rehabilitation of victims of human rights violations, for example, training forensic, medical personnel, counsellors to treat PTSD.

(d) Liaise with international human rights bodies, both at inter-governmental and NGO levels. The Commission should forward its own reports (independent to that of the government) to bodies such as the Human Rights Commission, treaty based bodies, special rapporteurs and working groups. This will assist in monitoring Sri Lanka's compliance with its international human rights commitments.

(e) Publish periodic reports on the state of human rights in Sri Lanka. Findings under (b) above also should be made public.

(f) Such other functions which are relevant and necessary to effectively discharge its obligations.

The Commission should be empowered to act where there has been an infringement or an imminent infringement of human rights **by state action**. The Bill restricts the Commission's powers only to infringements imminent or otherwise by **executive or administrative action**.

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[2] See in this regard, the draft amendments to the fundamental rights chapter which appeared in *Fortnightly Review*, Vol. VI, Issue 93, p 1.

The latter position is no doubt based on Article 126 of the present Constitution. However, there have been strong appeals that the new Constitution should expand the fundamental rights jurisdiction of the courts to cover state action.

While there is recognition in the current debate relating to individual responsibilities vis-a-vis human rights violations including the position of humanitarian law which imposes international obligations on non-state parties in control of territory engaged in civil war, it is nonetheless felt that empowering the Commission to investigate violations of fundamental rights by private individuals [section 13 (b)] will detract from the functions of the Commission relating to violations by the state and result in the dilution of state obligations. After all, it is the state which is subjected to a primary responsibility of protecting human rights.

In any event, it is difficult to understand why only acts constituting offences under the Prevention of Terrorism Act of 1979 have been included in the category of private actions which merit the Commission's attention. One could argue that organised crime is worse as those so engaged cannot justify their acts on any cogent grounds; such acts should, if at all, merit inclusion in the Bill over terrorist activities. In any event, criminal law ensures that those engaged in anti-state and anti-social activities are punished. On the other hand, how does one adequately punish the state for violating a sacred trust? Should violations by the state be put on the same footing as abuses by private individuals or groups?

Besides, what type of recommendations can be made by a national Commission under section 14(4) to terrorist groups regarding infringements of rights by them? It is also inconceivable that the government will engage in mediation and conciliation exercises with such groups.[3]

Amnesty International also has pointed out the need for national human rights commissions to exclusively concentrate on state obligations.[4] The Philippines Human Rights Commission has been criticised for entertaining complaints regarding abuses by private individuals and guerrilla groups.

It is thought best that the Commission study the phenomenon of terrorism and implications for human rights protection as pointed out above at 3 (b) and assist the government in adopting policies in that regard.

4. **An independent investigative unit?**

Although the Bill empowers the Commission to carry out investigations it does not specify who carries out the investigations on behalf of the Commission. Part III of the Bill which is on the staff of the Commission should expressly provide for the setting up of an independent investigate unit. Often the police is left to investigate complaints against it. The need for an independent unit to investigate human rights violations is a long felt need.

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[3] See section 14(2).

[4] AI Index: IOR 40/01/93.

5. Independence of the Commission and appointment of members

The independence of the Commission should be guaranteed in the strictest terms. Needless to say, the appointment and removal processes are crucial in this regard. Appointments by the Executive should be based on the recommendations of a representative body, which includes representatives of human rights NGOs and other independent professional groups.

The Bill declares that until the Constitutional Council[5] is established the members of the Commission shall be appointed by the President on the recommendation of the Prime Minister in consultation with the Speaker [proviso to section 2 (2)]. This is not a satisfactory arrangement for the appointments will be perceived to be tainted by political partisanship. Until the Council is established should not personnel who are to eventually constitute it be consulted in their official capacities in addition to NGO personnel and professionals?

The law setting up the Commission should categorically stipulate that members of the Commission shall hold office during good behaviour. Further, the grounds of removal should be strictly regulated preventing the Executive from exercising any discretionary powers in that regard. As such, sub-sections (b) and (c) of the Bill should be amended.

The Commission should be so constituted as to ensure that members represent a variety of backgrounds and disciplines and have **proven expertise and competence in the field of protecting and promoting human rights**, rather than be persons merely "having a knowledge of, or practical experience in, matters relating to human rights" [section 3(1)].

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[5] See *Fortnightly Review*, Volume V, Issue No 93 regarding this.

NATIONAL WORKERS' CHARTER
(Sri Lanka)

Ministry of Labour & Vocational Training
1995

Preamble

CONSEQUENT upon the mandate given by the people of Sri Lanka at the Parliamentary General Election and the Presidential Election 1994 and the commitment of the People's Alliance Government to formulate and implement a Workers' Charter.

WHEREAS Sri Lanka is committed to the ideals enshrined in the Declaration of Philadelphia in 1944 and to the Conventions & Recommendations adopted by the ILO.

WHEREAS the Universal Declaration of Human Rights states and affirms that -

(1) Everyone has a right to work, to the free choice of employment, to just and favourable conditions of work and protection against under-employment.

(2) Everyone without any discrimination has a right, to equal pay for equal work.

(3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other forms of social protection.

(4) Everyone has the right to form and to join Trade Unions for the protection of his interests.

WHEREAS the Government of Sri Lanka is committed to ratify the Conventions of the International Labour Organization wherever feasible and also to protect workers' rights to organize and to assure equal rights for women, the protection of children and prevention of child labour and child abuse.

Therefore, the Government of Sri Lanka do hereby declare as follows:

Part I

Basic Human Rights - Freedom of Association and the Right to Organize and Bargain Collectively

The State shall -

(a) guarantee and protect the right of workmen to form and join Trade Unions, and to organize and bargain collectively;

(b) ensure that employers recognize Trade Unions and deal with them on matters pertaining to their members. Anti-Union discrimination by employers will be made an unfair labour practice;

(c) ensure that the Articles of the Convention on Forced Labour of the International Labour Organization are fully implemented;

(d) take appropriate measures for equality of opportunity and treatment of workers.

Part 2

Employment Services

The State shall-

(a) ensure increased access for vocational training and for human resources development;

(b) do its utmost to promote, and guarantee the protection of the interests of Sri Lankan migrant workers;

(c) ensure the implementation of the national policy on rehabilitation of disabled persons.

Part 3

Wages, Terms and Conditions of Employment

The State shall-

(a) ensure that minimum wages stipulated by various wages boards will be reviewed from time to time having regard to the increases in the cost of living and other relevant factors;

(b) ensure that employees in un-organized sectors are guaranteed minimum terms and conditions of employment to prevent exploitation. Empower the Commissioner of Labour to fix wages and minimum terms and conditions in respect of such workers. Strictly enforce the statutory provisions regarding hours of work and paid holidays;

(c) ensure that a National Wages Commission shall be established. This body will be responsible to review wages fixed by the minimum wage fixing machinery;

(d) ensure that workers employed by contractors are granted full protection under existing Labour Laws. The employment of workers in the guise of "Apprentices" or "Trainees" for regular employment will be prohibited;

Part 7

Employment of Women, Children and Young Persons

The State shall-

(a) ensure equality of opportunity and treatment to all women in relation to employment;

(b) take meaningful steps to guarantee the welfare and protection of women workers;

(c) take steps to prevent the employment of children in industry and in domestic service;

(d) take all appropriate steps to ensure to all women -

(i) equal rights to engage in economic activities for financial benefits;

(ii) equal rights in respect of employment in the public, private and informal sectors;

(e) ensure that the Maternity Benefits Ordinance and the Employment of Women, Young Persons and Children Act will be rigidly enforced to guarantee protection to the workers covered by these Acts;

(f) ensure that regulations under the Maternity Benefits Ordinance in the implementation of Alternative Maternity benefits granted shall be repealed to ensure that maximum benefits are conferred on the workers;

(g) review the question of the employment of women at night and ensure that employment of women at night without their consent and without the approval of Commissioner of Labour and without affording them, adequate protection and sufficient welfare facilities shall be strictly enforced;

(h) ensure that nursing mothers will be granted nursing intervals and this provision will be enforced. Employers will be encouraged to provide suitable creche facilities for the children of their workers.

Part 8

Welfare of Workers

The State shall-

(a) recognizing the need for adequate housing facilities the State shall take steps to provide adequate accommodation close to their work places to solve the problem

of workers' housing. Housing loans at concessionary rates will be arranged through the lending institutions to employers volunteering to establish Housing Schemes for their employees;

(b) provide adequate transport facilities to workers;

(c) provide or secure the provision of adequate medical facilities to workers at the work places.

Part 9

Legislation

The State shall-

ensure that the foregoing proposals will be implemented effectively either by enacting new legislation or by effecting necessary amendments to existing labour or other legislation in consultation with the workers' and employers' representatives in the National Labour Advisory Council.*

* Editors Note: The Government announced recently that the National Workers' Charter will be given legal effect early next year.

through an ideology which is cultivated by the press, church and educational systems. In addition, they are able to influence state personnel, laws and policies towards their interests. They do not need to rely overtly on political or state power. It is thus possible to preserve the outward forms of state neutrality and impartiality in accordance with constitutional and legal norms.

On the other hand, the Rule of Law is problematic in societies where economic and political power do not coincide--which has been the case in most ex-colonies at independence. Politicians who gain access to the apparatus of the state have initially little independent economic base, either as individuals or as a class. They are tempted to use their access to the state for personal aggrandisement. As the state becomes for them the primary instrument of accumulation, corruption is endemic, woven into the very fabric of the state. Pressures towards corruption arise not only from economic greed, but also from the imperatives of political survival, since the primary basis of a politician's support is generally not the party or another political platform, but clientelism, sustained by regular favours to one's followers. Political control and accountability over that apparatus are unacceptable to the ruling regime; resistance to the diktat of the state is met by coercion. The state therefore becomes authoritarian. This may be termed the logic of the post-colonial state.

The pervasiveness of executive power weakens institutions of control and accountability. In these circumstances rules are bent to the interests of politicians and bureaucrats or are applied selectively--so that the Rule of Law becomes difficult. The Rule of Law disappears in more extreme versions of this development, where a dictator or at least a powerful president emerges, lending the state a "patrimonial" character, with highly personalised authority; the conversion of the top bureaucracy into an extension of the presidential household; and the undermining of the judiciary so that justice is seen to flow from the president, personal petitions to him replacing writs under the law as means to vindication, redress and mitigation. Celebrations of the goodness and greatness of the president (mandatory equally in the public and private sectors) replace other forms of legitimacy.

Those who are familiar with PNG may find that parts of this description apply here, but clearly the more extreme version does not. In particular, PNG cannot be called a patrimonial state since no dominant leader has emerged, and the public service still retains its autonomy, although ministers now tend to regard their departments as personal fiefdoms. It is interesting that PNG has remained as open a society as it has. I shall make some attempt to explain why it has avoided the more extreme version. Despite a fall from some of its standards, the Constitution has established a vitality that is remarkable given its high ambitions and the context within which it was imposed. A brief analysis of the genesis and character of the Constitution and the society over which it was to preside will help to establish the dimensions of the problem.

There are several unusual features of the making of the PNG Constitution.[3] The process was left almost entirely to the local people, the colonial power having little hand in it. Locally, the government had little hand in it either. For although Michael Somare, then Chief Minister, was the formal head of the Constitutional Planning Committee, he played almost no role in its deliberations or decisions. The decisions were therefore singularly free from the constraints and anxieties of state craft. The CPC was free to impose as many restrictions on the state and to

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[3] Lynch, CJ (1988) "Styles in the Drafting of Some Pacific Constitutions" in Ghai (ed.) op. cit. and Goldring J (1978) *The Constitution of Papua New Guinea* (Sydney: Law Book Company).

expand as widely the scope of liberty as it desired. Nowhere have I felt so free in constitutional decisions as here--no anxious metropolitan power watching over your every move, nor senior bureaucrats breathing down your neck, reminding you of the realities of power. The impulse towards these tendencies--restrictions on state and the expansion of liberty--grew as the CPC, under the de facto chairmanship of John Momis, established its own identity and autonomy, and as the distance between *Konedobu* (the seat of government) and *Waigani* (the offices of the CPC) increased. It is not fanciful to suggest that the CPC began to see itself more and more as the Opposition, holding fast to the true purpose of independence in the face of what it regarded as the capitulation of the government to the will of Canberra. The wide consultations that the CPC held with the people throughout the country, and the high moral ground it increasingly started to occupy, gave it visibility and legitimacy that was denied to the government as it engaged in various regional problems.

The CPC did not always have things its own way. Both Canberra and *Konedobu* were suspicious of decentralisation, and eventually the Chief Minister was prevailed upon to remove the mandate for it. At an even earlier stage the proposals for controls over foreign capital were successfully attacked. The CPC proposals for dispensing with a Head of State were rejected in favour of a constitutional monarchy. And it was the superb organisational and lobbying skills of the members of the CPC, forming itself into a Nationalist Pressure Group, which overcame repeated challenges to its proposals in the Constituent Assembly. Nevertheless in the end the Constitution did bear the stamp of the philosophy of the CPC.

The CPC saw the function of the Constitution as charting a new course for the organisation and development of Papua New Guinea and its institutions. It found itself with a *carte blanche*, not only for the reasons I have given above, but also because of the paucity of ideas and platforms on independence and its agenda, either from intellectuals or political parties. There was in fact widespread, popular anxiety about the difficulties that independence would bring--the CPC saw as one of its functions the allaying of these worries. In part this was done through a forward looking approach, highlighting the promise and potential of self-rule. CPC's impulses were diverse, not always consistent. It was suffused with a nationalism--anti-colonial, anti-foreign, anti-bureaucracy--that had little resonance in the country. Anti-foreign feelings are most clearly reflected in the provisions on land and citizenship and restrictions on the freedom of expression of non-citizens [(Section 46(1)(b)]; anti-colonial in the wish to establish an autochthonous constitution, drawing both its validity and legitimacy from domestic sources; and anti-bureaucracy in the desire to refashion the state. Its anti-foreign sentiments, sometimes quite virulent (in its deliberations, if not in the text) were out of place within its general humanistic approach as well as another impulse--liberation theology. It was also inspired by "populism", a belief in the capacity of the people to make "correct" decisions and to hold the government accountable.

It was more consistent in its view of the design of the state. That view was driven in large part by its vision of the political society. The primary function of society was "integral human development" which it defined as "nothing less than the unending process of improvement of every man and woman as a whole person." That was to be achieved less through material progress than the empowerment of individuals and communities. Public participation at all levels of governments was one means towards that--the centre piece of which was to be the restructuring of the state through wide ranging decentralisation. The CPC was also inspired by the vision of an equal and just society. There should be equity as between regions and as between sexes. A means to this fundamental goal was through national sovereignty (to the extent that it was considered necessary to prohibit Parliament from assigning away this

sovereignty) and self-reliance, and in particular the use of "Papua New Guinea" ways.

> *We must rebuild our society, not on the scattered good soil the tidal wave of colonisation has deposited, but on the solid foundations of our ancestral land. We must take the opportunity of digging up these political and social organisations. Wherever possible, we must make full use of our ways to achieve our national goals. We insist on this, despite the popular belief that the only viable means of dealing with the challenges of economic development is through the efficiency of western techniques and institutions.*[4]

Independence was liberation, the flowering of the genius of the people. "We must place an unswerving trust in Papua New Guineans and their wisdom." With the end of oppressive colonialism would come the New Jerusalem; participation, consultation and consensus, and, inspired by tradition, the willing sacrifice by leaders of their privileged position for the common good, would replace the tyranny of an alien bureaucracy. The CPC had an enormous faith in the indigenous political process. Fortunately it was not completely mesmerised by its own, very South Pacific, rhetoric or mystification. If it trusted the political process, it did not necessarily trust politicians, and it realised that the political process too could degenerate into petty squabbles, opportunism and abuse of authority unless adequate safeguards were built around it. And there were plenty of safeguards--more than almost any constitution I can think of.

Safeguards included tight control over rapacious and corrupting foreign capital--which as I have mentioned did not withstand the opposition of that capital and its official allies. There was also to be tight regulation of the finances, activities and foreign links of political parties. Politicians, as other public leaders, were to be subject to a comprehensive code of conduct designed to prevent abuse of office and to maintain the dignity of public institutions. The Constitution would entrench the fundamental principles of democracy, and vest the responsibility for their implementation in independent commissions, the Electoral Commission and the Boundaries Commission, as well as the courts for resolving electoral disputes. Parliament would be vested with a range of powers, embroidering on the Westminster system, to ensure the accountability of the government. Parliament's own power (and derivatively that of the government) was circumscribed by an extensive Bill of Rights protecting individual liberties and freedoms from the depredations of the state. A number of independent institutions were established to ensure accountability of public bodies and the redress of grievances of citizens, particularly the Ombudsman Commission.

If democratic politics and its potential was one overriding theme of the Constitution, another was the Rule of Law. Now it is often assumed that democracy and the Rule of Law are of one piece. This is a modern fallacy, a product of the 20th century. Democracy is based on people's power, the Rule of Law exists to curb it.[5] Democracy likes an open-ended process and discretionary powers, the Rule of Law needs a closed and clearly regulated process, substituting rules for discretion. Rights are central to the Rule of Law; the relationship of rights to democracy is problematic. It is true that certain kinds of rights may be pre-requisites to democracy. It is also true that certain kinds of rights may be better protected in a democracy than in other political systems. But the logic of rights is different from the logic of democracy.

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[4] CPC Final Report Part I, ch. 2 para 98.

[5] Ghai, Yash 1994 "Human Rights and Governance: The Asia Debate" in 15 *The Australian Year Book of International Law* 1-34.

The former are individual-centred (even when they concern social rights), while democracy is majority oriented. The scope of rights is drawn from the nature of the human person, the scope of democracy from the general will. Rights serve to limit state power, while democracy justifies its expansion. Rights may be said to be rational and purposive (and indeed ideological), while democracy is frequently messy and manipulative, oppressive of minorities and careless of individuals.

If the CPC did not see the contradictions between democracy and the Rule of Law, it did perceive the tensions between them and used one to balance the other. Consequently the Constitution is particularly strong on the Rule of Law. It provides for an independent judiciary (save in one grievous way--the limited tenure of the Chief Justice--which, whatever its historical reasons, is unjustified today). It has an impressive Bill of Rights and strong mechanisms for their enforcement. It ensures the fair and impartial administration of criminal justice through vesting prosecutorial powers in the independent Public Prosecutor. It facilitates access to courts and legal advice through the independent office of the Public Solicitor. It arms the Ombudsman Commission with considerable responsibilities and powers to enforce fair administration and honest public life. It authorises various agencies to seek the considered opinion of the Supreme Court on the interpretation of the Constitution, to test the legality of legislation or official policy or administrative acts.

In all this we have travelled a long way from "Papua New Guinea ways"--all that seems to remain are a pious National Goal and Directive Principle "to achieve development primarily through the use of Papua New Guinea forms of social, political and economic organisations" (Section 5) and the direction to Parliament and the judiciary to develop an indigenous jurisprudence, in particular any incorporating custom (Sections 20 and 21 and Sch. 2). We are now in the world of western constitutionalism--the separation of powers, democracy, limited government, the independence of the judiciary. The CPC became a captive of the system whose logic it was so keen to negate--the state. In it search for substantive "home-growness" or autochthony, the CPC was confronted with problems of constitution makers elsewhere--how to transfer or translate the principles and institutions of small scale societies in a country (even assuming they were homogenous) onto the national scene. Enlarged boundaries, and the state within them, are the abiding legacies of colonialism which entrap constitution makers. The CPC did a heroic job of getting out of the trap--trying in various ways to humanise and democratise the state, to encourage power sharing, to circumscribe its powers and to increase its accountability--but once we have disposed of flourishes and the rhetoric, the Constitution is about the state--about its institutions and how others relate to them. That the Constitution should deal with public power and its exercise is scarcely surprising; nor is it surprising that the CPC should fall back upon well tested ways to tame the state (liberation, or indeed mainstream, theology not providing a coherent theory of the state, being concerned with state and religion issues, or the superiority of religious doctrine).[6] And we must appreciate the limitations that surrounded the CPC--the virtual absence of civil society outside small rural communities, the continuing pull of ethnic loyalties and affiliations, the absence of political parties or national movements or ideologies, the incomprehension of the apparatus of the state, the uncertain and uneven penetration of capital, and so on. These circumstances give an indication of the shallow foundations on which the CPC sought to build a most ambitious constitution.

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[6] Held D (1987) *Models of Democracy* (Cambridge: Polity Press) p 36-41.

As with other independence constitutions, a major function of the Constitution was to replace foreign authority as the basis of the state. Also as elsewhere, it tried to democratise and humanise the colonial state. It became the foundation of the state and the symbol of an incipient national unity, bringing within its fold a multitude of peoples and islands. It even tried to provide a national ideology. In that way it gave greater legitimacy to the state. But it provided for a different kind of state, as I have mentioned--democratic, participatory and humane: its mission was to tame the colonial Leviathan (its vision of development being human rather than material).

In the nature of things, there was a heavy programmative bias to the Constitution. The CPC was well aware of the task, and the Constitution not only sets up an agenda but also provided guide posts, when not actually instructions, as to how to flesh out its details and implement them. It bequeathed not only a lengthy and detailed Constitution, but also an even heavier tome in the form of its Report which was accorded the status of a Testament by the Constitution itself (Section 24).[7] But the Constitution could not institutionalise the CPC (undoubtedly to the regret of its members!) and was left to the tender mercies of the state that it so bravely tried to tame--with the rapid re-emergence of bureaucrats from the woodwork, the predation of politicians and the assaults of aid agencies with their conceptions of development all pulling in the direction of strengthening state structures and minimising popular participation. Moreover the Constitution rapidly fell into the hands of professional politicians whose *raison d'etre* was the apparatus rather than the purposes of the state. But I am anticipating. The question remained: would the logic of the Constitution prevail over that of the post-colonial state?

Let me first say a few words about the structure of the Constitution. It broke every rule in the book of that well known constitutionalist of the French Revolution, the Abbé Sieyes.[8] His first rule is: Keep the Constitution short. It is neither a municipal ordinance on sewers and drains, nor a master planner's detailed blueprint for a new community welfare programme. His second rule: Keep the language clear and non-technical. It is intended to be read by ordinary citizens, and not simply by constitutional specialists and supreme court judges. Another: avoid flights of oratory (which the PNG constitution restricts to the Preamble!). Next: Keep the Constitution neutral, or at least open-ended in political ideological terms. It should never try to act in vain or to legislate the politically or socially impossible. Do not try to solve too many and too specific, purely temporary and short-range, problems, as the constitution must endure for ages. A pre-condition for any politically viable exercise in constitution-making is a prior political consensus--on the part of the society for which the constitution is intended, or at least its dominant elite as to the main goals and values. Do not forget the extra-constitutional rules that effectively condition or limit the application of a constitutional charter. Let the draftsman beware and avoid self-indulgence: it is not his/her constitution.

The first report of the CPC did pay homage to some of these rules; it argued for a short

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[7] At its publication, the CPC Report was widely considered to be the most radical and systematic political tract in the South Pacific. It influenced political discourse for some years following independence. Courts frequently referred to it in the interpretation of the Constitution as authorised by Section 24. But it is now clear that politicians and governments are uncomfortable with its vision which is inconsistent with their predilections, and less is heard of it today, although the penchant of PNG intellectuals for rhetoric and oratory provides some sustenance to the Report.

[8] As annotated by Mc Whinney, see Mc Whinney, Edward (1981) *Constitution Making: Principles, Process, Practice* (Toronto: University of Toronto Press).

constitution and warned against a pre-occupation with immediate problems. I hope I have given some indication of why the good Abbé's rules were broken: the CPC was unable to rely on an existing consensus and had to fashion one; it needed to preserve national unity and thus accommodate immediate problems of particular communities; it embodied various historic compromises such as over land where the compulsory acquisition procedures were muffled so that plantations could be transferred to the new elite intact instead of being broken up and returned to custom owners. It wanted to chart the social and economic future of the country, providing it with a vision; it believed in social engineering and the efficacy of the law; it wanted to harness social forces to the values of the Constitution rather than let the Constitution become hostage to them. The Constitution was to be an instrument, in addition to being a framework--which the Abbe would have preferred by itself. The length was a responsive to the mistrust of government, even indigenous government--the growing distance between Konedubo and Waigani that I have referred to it. And ironically, its pedagogical and practical aspirations, as recounted below.

As it eventually emerged from the pen of the draftsman, the Constitution is in the nature of a primer--it tells us what a liberal democracy is and how we might achieve it. It attempts to cover practically the whole of the legal and administrative machinery of government; and codifies (and modifies) constitutional conventions to avoid misunderstanding, especially as it was evident that they were not generally understood. It is full of definitions, perambulatory statements and guidance.[9] The structure of the Constitution--its division into Parts and Divisions, for example--and the detail on procedure also partake of the nature of a primer. There is an irresistible logic to his scheme, and despite the length of the document, there is an economy, and even elegance, of style. It is of course not everyone's cup of tea and I know that the draftsman, Joe Lynch has been castigated by many for his alleged verbosity and dense style. I believe that Lynch saw the primary addressees of the Constitution as being precisely constitutional specialists and supreme court judges--and bureaucrats, and I suspect in his more sanguine moment, politicians. I think that he was correct in his perception; for the task of the redesigning (and managing) the state according to its provisions would fall upon these persons, not many of whom may have been conversant with the principles and rules of the political system that the Constitution aimed to establish.[10] There is in any event a high degree of romanticism in the notion of people going about their every day life studying and chanting verses from the Constitution. There are other ways in which popular knowledge of and respect for the constitution must be stimulated. But it certainly behoves public servants, intellectuals and politicians to study and understand the Constitution, and I believe that for those among them who make the effort, Lynch's style is logical and accessible.

The Constitution as primer characterises it in another way. It suggests that the system that the Constitution wills did not exist, it had to be called into being; and that its values had to be internalised by those in charge of the state. In other words it was not superstructural; on the contrary it was an attempt to design society from above, through the exercise of political power. Thus the Constitution of PNG falls between the extremes of a constitution in a liberal democratic state and a communist state. The liberal constitution has grown out of and reflects

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[9] See for example his definition of what "freedom based on law" consists of, Section 32, before he launches on the substance of the Bill of Rights, or what is implied in the requirement of "consultation", Section 255, or the use of the concept "in principle", not binding, but more than exhortatory, Section 254.

[10] For a fascinating essay on the styles and purposes of drafting constitutional instruments, see Lynch, CJ (1988) "Styles in the Drafting of Some Pacific Constitutions" in Ghai (ed.), op. cit.

society and economy; there is an organic link between it and social forces. The constitution therefore corresponds to social reality and amendments are made only when society feels ready for change. The constitution's function is to provide stability and a framework for political competition.

The socialist constitution is less a framework than an instrument--technically of the proletariat but in practice of the communist party. Its mission is not stability but the transformation of society. Decisive power is political, and so the eminence of the state. The constitution offers no constraints. Nor is the socialist constitution static, as social forces change with the advance towards socialism, and indeed communism provides a teleological view of history--towards the classless society--to guide the development of society and constitution. But for a long time the constitution acts partly as a camouflage of the site and exercise of power.

The PNG Constitution is a liberal constitution, yet it is different from the constitution of a liberal state. It is more aspirational, less well connected to reality. It has a much greater task, to mould society to its imperatives. The Constitution provides a grand vision and a public morality, and at least for the latter it provides some machinery--the Leadership Code and the Ombudsman Commission. But it was not built on existing morality. Yet by itself the Constitution has little effect on the development of social forces; they may or may not grow in such a fashion as to support its philosophy.

The PNG Constitution is like a socialist constitution in that it too is "top down"; it is instrumental and aspirational (although it is also pluralistic). It does not directly transform the material basis of society as a socialist constitution would, by re-organising property and production. It was partly correct in diagnosing problems of the market economy, but its pre-occupation with the influence of foreign forces blinded it to the dynamics of domestic capitalism. Perhaps that is forgivable since PNG was still deemed a classless society, but it must be admitted that in the end it did not really come to grips with material forces or their probable trajectory, although it identified correctly the problems of political corruption. Its grand vision stands abstracted from material conditions of the country; and it relies primarily on the political process for its achievement.

How has the PNG Constitution fared? The essence of all constitutions is how they define power and provide for access to it, and particularly so is it in PNG where so much reliance was placed on the political process--by this I mean, not that in Pacific and other states the political process has not similarly been deemed salient, but that the PNG Constitution carries a more ambitious social agenda than other constitutions. In PNG the centrepiece is the westminster model of access to and exercise of power. In important ways it has been modified: the Head of State is almost completely ceremonial, playing no role in the appointment or dismissal of the prime minister or the dissolution of Parliament. These are functions given to Parliament, to emphasise popular sovereignty but also to increase the effectiveness of the legislature vis-a-vis the executive--to reverse the trend towards the executive dominance of the legislature in parliamentary system. But the modifications also recognise the lack of a firm party system and the dangers in these circumstances of relying on conventions about royal discretion.

The Constitution carefully modifies and codifies conventions; but these are conventions about the relationship between the executive and the legislature. They fail to capture another dimension of the parliamentary system--the responsibilities of the MP to his or her constituency, standards of public morality, party solidarity, the pursuit of policy and general welfare. The

westminster system in PNG has become largely procedural: of access to and removal from power; less and less about public purpose or the exercise of power. It has cleaved to certain underlying political realities of PNG. Students of comparative constitutions watch with fascination the manner in which the westminster system has unfolded in the South Pacific, particularly, Papua New Guinea.[11]

In general, a parliamentary system relies upon a system of well established parties. As the government has to command the support of a majority of parliament, and to manage its parliamentary business, it is necessary to have organised and reliable support. Similarly, for the opposition to maintain a sustained attack on the government and to offer itself as an alternative to it, it needs the organisation and consolidation of its support--hence political parties. The structure and policies of political parties become the major influences on the nature of the parliamentary system. The absence of a well established party system in PNG (as in some other South Pacific states) has, on the contrary, likewise greatly influenced the operation of government and parliament.

There would appear to be both social and structural reasons for the relative absence of parties. The structural reasons are connected with the system of elections based on "first-past-the post" or plurality whereby, in single member constituencies, the candidate with the largest number of votes wins. Although such a system is supposed to encourage two major parties (since it tends to discriminate against minority interests), in PNG it has led to a proliferation of parties, or more accurately, no effective parties. The reason is that such a system can also help independents as it encourages a multiplicity of candidates, especially when only a small percentage of votes may suffice for victory. It is not unknown for candidates with a support of less than 5% of voters to win the election. Unlike most systems of proportional representation which require an effective organisation of parties, in the plurality system as it has operated in PNG, a candidate can succeed without the assistance of parties (although the escalation of campaign costs may compel some to seek a party endorsement--but then the party itself may be willing to endorse officially or have informal understanding with more than one candidate in a the same constituency-given the importance of numbers and the fluidity of politics). The CPC rejected both preferential voting (which PNG had during the colonial period) and proportional representation, as being too complicated, and the latter additionally also as being dependent on well developed parties--not addressing the question that proportional representation may on the contrary lead to the development of parties.[12]

The plurality system has worked in this way in large part because of social forces. The arrival of independence before the emergence of nationalism denied politicians the opportunity to use anti-colonial protest as an instrument to fashion national parties; such protest as there was remained local, embedded in the cultural matrix of a particular community. Independence set in motion a process for the scramble for power, for which ethnicity provided the most ready base. Elections have been dominated by local, not national, issues; and it is more important to

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[11] Ghai, Yash (1988) "Systems of Government" (chaps. 2 and 3) in Ghai (ed.) op. cit. and Ghai, Yash (1988) "Political Consequences of Constitutions" in Ghai (ed.) op. cit.

[12] Ch. 6, paras 101-109.

be recognised as a local "big man" than as a leader of a party.[13] Parties are more dependent on the support of these "big men" than they are on the party. The low level of urbanisation, physical distances and difficulties of terrain aggravate the lack of financial resources and managerial skills for mobilisation and party organisation. Politicians who might have skills for this find their time committed to government or party manoeuvres, which, as I shall discuss shortly, the rules for the dismissal of government encourage. This suggests that another factor for the lack of party solidarity is the limited notion of what power might be used for: not public policy but personal aggrandisement. In the political market place where parliamentary membership has become a commodity, every MP wants to carry a personal price tag. The process lends itself to the practice where "parties" highjack, literally, successful candidates, isolate them, under tight security, from rival groups, to some of whom the candidates may have previously been affiliated, and ply them with liqour until the opening of Parliament and the election of the prime minister, in order to secure their votes--for a price.

The lack of firmly based parties with an ideological agenda, the pre-dominance of parliamentarians who have no clear allegiance to a party, and the turnover of parliamentarians that is the consequence of multiplicity of candidates in an ethnically deeply fragmented society, combine with constitutional rules for the formation and dismissal of government to produce a highly unpredictable and unstable government. The requirement for the formation of government--the support of a majority of parliamentarians--means that "parties" emerge after rather than before elections--suggesting that parties are more important for forming government and staying in power than for elections. Therefore they are best regarded as parliamentary groups rather than parties--certainly they do not have the structure or popular base of a party. For the same reason, "coalitions"--which have become a necessary condition for formation of government--are formed after, rather than before elections, MPs and parliamentary groups not wanting to miss any opportunities of office. Consequently, the issues involved in "party solidarity" or "coalitions" are not so much the consensus on or the pursuit of policy as personal access to power. The pursuit of personal power has led to the most unlikely of bed fellows, liberating parliamentarians from any pre-election commitments or allegiances. Because party links and ideologies are weak and the power base of MPs is ethnic and not policy oriented, there is no great anguish, or sanctions, involved in shifts of allegiances.

These circumstances would in any event produce instability or at least uncertainty, but this consequence is aggravated by the rule for the dismissal of government. Dismissal is on a vote of no confidence which, for the first 4 years of a particular Parliament, require the nomination of the alternative prime minister (Section 145). The prime minister who loses the vote has no right to ask for dissolution. Prime Minister Sir Julius Chan, nearly 10 years ago, commented on various consequences of this rule.[14] Since MPs do not have to seek re-election after a vote of no-confidence (as would be the case in most parliamentary systems), this produces in them a certain recklessness in moving no confidence motions. The prime minister has constantly to

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[13] For the concept of "big man," see Sahlins MD (1963) "Poor man, rich man, big-man, chief: political types in Malanesia and Polynesia" 5 *Comparative Studies in Society and History* 285-303 and Godelier M Strathern M (eds.) (1991) *Big Men and Great Men: Personifications of power in Melanesia* (Cambridge University Press, Cambridge) and for the role of politics, see Strathern A (1984) *A Line of Power* (Tavistock Publications, London).

[14] Chan, Sir Julius 1988 "Experience with Papua New Guinea's Constitution: A Prime Minister's Reflections" in Ghai, Yash (ed.), *Law, Politics and Government in the Pacific Island States* (Suva: IPS, University of South Pacific).

negotiate with individual politicians and groups, to maintain his or her majority. Sir Julius has written that "with many political groupings representing regional and other interests, any government has to depend on the support of a number of separate groups. This means that in order to stay in office the Prime Minister of the day has to spend a quite disproportionate amount of his time and energy keeping individual politicians *happy*. He goes on to point to the unfortunate consequences that flow:

> *One is simply that the Prime Minister has little leeway to do his real job, which is to think about the good of the country as a whole, to look ahead, to make rational choices and to pursue consistent policies designed to benefit ordinary people in the longer term.*
>
> *I will also be brutally frank and say that the system inevitably contains the seeds for political corruption. I think you would be surprised if you knew how much of my time as Prime Minister was spent coping with requests for special favours of all kinds, financial and otherwise, from individual politicians. I will be even franker and say that if a Prime Minister is determined to stay in office he can do so quite easily if he is prepared to grant enough favours. But if he follows that course, what happens to the good of the people as a whole?*

He says that the result is that politics are conducted in an atmosphere of perpetual day to day crisis.[15]

Sir Michael Somare, the first prime minister who was ousted by a vote of no confidence moved in favour of his deputy, Julius Chan, has also picked on the provision of no confidence motion as a major factor for instability.[16] Their statements undoubtedly have an element of truth, but I wonder whether they exaggerate the influence of the rules about no confidence motions. In parliamentary systems where the prime minister may have the right to ask for dissolution--India is an example--he or she may still spend a great deal of time placating his or her parliamentarian supporters. There is no reason to believe that a prime minister is keener to go to the country than parliamentarians (except when a motion has been successfully carried, and he or she has nothing to lose)--although the threat of dissolution that the prime minister wields may be more significant than the dissolution itself. The way in which the rules for no confidence have been operated may be symptomatic rather than the underlying cause of the malaise of politics.

However, it is clearly hard to follow any consistent policies in the circumstances outlined by Sir Julius. Moreover, each ministry becomes a site of profit and patronage; and consequently, a kind of fiefdom. It is therefore not surprising that the collective responsibility of the cabinet is weak. Policy issues are seldom negotiated when coalitions are formed--these may or may not emerge in the course of administration. The cabinet has not been particularly effective in resolving differences; in order to strengthen their position or win popularity, ministers take the differences into the open, thereby imposing further strain on cabinet unity and cohesion. It is not easy for the prime minister to enforce collective responsibility through dismissals of ministers for the future of the government itself may be placed in jeopardy. Parliamentary groups are based on personalities or regions; and there are "coalitions in waiting" ready to

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[15] p. 247.

[16] Somare, Sir Michael 1995 "The Challenges of Independence-- My Yesteryears Vision of Papua New Guinea" (Keynote Address, Waigani Seminar, UPNG).

embrace breakaway groups. Paradoxically a prime minister is able to maintain the unity of the coalition or the cabinet only by tolerating open dissent within its ranks.

The consequences of this state of affairs are not always what one might expect--that for example, given fluid coalitions and factions, parliament would influence and discipline the executive; that it would be able to exact responsibility from individual ministers; and that there would be a fair equilibrium in the balance of power between the parliament and the cabinet, or indeed that parliament may tend to assume the direction of executive functions (with analogies respectively with the operation of the parliamentary system in Britain in the 18th and 19th centuries and, more contemporaneously, the French system until the 5th Republic with the Gaullist constitution representing a clear shift from parliament to the executive, Vile 1967). However, parliamentarians have not seized upon the instability or weakness of government to impose their own will. Executive functions still remain with the cabinet or ministers, even though they may not be carried with vigour. Partly the explanation is that the executive has the assistance of public servants while parliamentarians have shown less interest in policy than in personal advancement. Nor on the whole have they displayed much skill in exploiting parliamentary procedures to embarrass the government or win concessions. In recent years parliamentary committees have virtually ceased to operate. There have been few adjournment motions, parliamentary questions or policy debates--but there have been motions of confidence, indicating that their purpose is not accountability. Instead, parliamentarians have concentrated on acquiring a share in the executive (leading to "politics of intrigue"). The powers of the executive to summon and prorogue parliament have been frequently used to delay or disperse meeting; it has preferred safety to the enactment of policy. Parliament has failed to be the main instrument of public accountability as the CPC had hoped and anticipated. Public accountability, such as exists, has been through other institutions.

The relationship between ministers and public servants is also affected by these developments. At independence civil servants were more experienced than ministers, and able to form policy. There now appears to be a shift--it is hard for an outsider to judge--but I was told by more than one departmental secretary on a recent visit that they rarely see cabinet submissions from other departments (or in one case, of his own department) and do not, as a rule, brief ministers before the National Executive. Departmental submissions to the cabinet are frequently drawn up by outside private interests. Perhaps this is not surprising if ministries have become fiefdoms and the politics of semi-patrimonialism have replaced collective responsibility. This has undoubtedly weakened the capacity of the state to make and implement policy.

It appeared at one stage as if political instability (and alternations in administration) were of little consequence. Changes of government were seldom based on policy disputes, the incoming government cheerfully carrying on with the legislative and administrative agenda of its predecessor. As in post-war Italy, the public service provided continuity; the concerns and the influence of the international aid agencies likewise provided continuity. However, it may be that political instability is no longer so innocuous, and the present economic and social problems facing the country may not be unconnected with the inability of governments to formulate and pursue consistent and long term policies, just as Sir Julius has feared some years ago. There seems to be little capacity to focus on any particular problem for any sustained period, even an important issue like the Bougainville "crisis", There is little consistency of policy, and the government appears to react rather than to plan or anticipate. But here again an outsider is not well qualified to judge.

Sir Julius and others have made suggestions for constitutional reform to deal with these problems. His own preference would be to give the prime minister the right to dissolve parliament on a vote of no confidence, so that if Parliament is not willing to sustain a government, it should face the voters. He would also like to give a government which survives a vote of no confidence a year's free run thereafter.[17] A constitutional amendment which I have already referred to now gives a new government some respite: it is safe from a no confidence motion for the first 18 months (and if these 18 months immediately precede the last year of Parliament, effectively for two and a half years).[18]

Providing some executive stability is undoubtedly desirable but there are other urgent problems too: the capacity to make and implement policy and public accountability. In this context let me say a word or two about provincial government. The CPC perhaps erred in placing such a heavy reliance on the devolution of power--both to restructure the state and to increase local participation. Except in a few provinces, provincial governments were bureaucratic, allowed for little public participation in the affairs of the province, and became corrupt. They were seeking to imitate Waigani, down to black cars. But at least provinces did provide sites of alternative power, and they were to some extent a check on the central government and facilitated a new group of representatives.[19] It is largely for this reason that they incurred the wrath of national government and parliamentarians. They were seen by national parliamentarians to have too much power and too much money--particularly too much money, which in their view should have gone to the national parliamentarians. After one has studied all the criticisms of and accusations against provincial government--overgoverned country, corrupt, wasteful, inefficient, irresponsive, non-accountable--they can be multiplied manifold against national governments and parliamentarians themselves.

Consequently, national governments gave provincial government little chance to develop and improve. All the powers of intervention and obstruction that were allowed to the national government under the Constitution and the Organic Law were used, mostly in arbitrary and unreasonable ways. The spirit of co-operation and consultation that underlay the Organic Law was completely ignored by the government and national parliamentarians. The politics of patronage and clientelism, and the corruption that feeds them, simply did not permit that state resources be siphoned off to provinces when instead they could be used to prop up national politicians. And so it was that parliamentarians took the resources away from provincial politicians and gave these to themselves--a brief and perhaps crude description of the latest amendment, but I expect at least some of you will detect a ring of truth in what I have said.[20]

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17 Chan, Sir Julius 1988 "Experience with Papua New Guinea's Constitution: A Prime Minister's Reflections" in Ghai, Yash (ed.), *Law, Politics and Government in the Pacific Island States* (Suva: IPS, University of the South Pacific).

18 If a motion of no confidence is successfully moved in the last 12 months of a Parliament, Parliament stands dissolved (Section 105). Under these circumstances, MPs would be most reluctant to support a no confidence motion; and in fact none has been moved.

19 For a balance sheet, see Ghai and Regan 1992, especially the concluding chapter.

20 Under the new Organic Law on Provincial Government (1995), drawn up with "bi-partisan" parliamentary support, national parliamentarians constitute provincial authorities, and the regional member of the province is the Governor of the province. They thus gain access to significant financial resources and ample powers of patronage. Little thought appears to have been given to conflict of interests and political disagreements between a Governor and the Centre; it is a singularly ill-thought out legislation.

The amendment was presaged by earlier provisions to support MPs against their provincial rivals. To compensate MPs for the decrease in their role in local affairs after the establishment of provincial government in 1976, particularly their access to development funds, two funds were created by the national government--the sectoral development fund, to which MPs could apply for agricultural or transport projects in their constituencies, and the Electoral Development Fund which gave each MP a discretionary grant for projects in his or her constituency. It has been estimated that over Kina 100 million a year are dispensed in this way, giving each MP something like Kina 4 million over the life of Parliament to nurse his or her constituency--a fine instance of the institutionalisation of the politics of graft and clientelism.[21]

This brings me to accountability. The CPC's expectation that the political process would generate responsibility and accountability has patently not materialised. I will take my illustration from the regime of provincial government. Parliament was cast in the role of the fundamental protector of provincial interests against central government arbitrariness--particularly with regard to the suspension of a provincial government. Far from being a neutral umpire, Parliament was highly partisan and countenanced wide scale abuse of the powers of suspension. The Premiers Council was another political institution which was to negotiate agreements between the provinces and the national government, and to settle inter-governmental disputes. The national government treated provincial views with total disdain (and instituted the National Public Expenditure Plan around the time of the Organic Law leading virtually to the disestablishment of the National Fiscal Commission).

Ironically, it was to the courts that provinces turned to for protection. I say ironically because the CPC was so emphatic that so far as possible courts should be kept out of intergovernmental relations, to encourage mediation and conciliation, and to prevent legalism.[22] For the most part the courts defended provinces against the most egregious abuses of power: on the question of the appointment of provincial secretary,[23] on the suspensions of government,[24] and on the calculation of unconditional grants to provinces.[25]

In other areas too the judiciary's record is, on the whole, commendable. It has delivered itself of a number of positive decisions in favour of human rights, although there are some restrictive decisions as well. It is impossible to review the case law briefly since it is voluminous--a tribute to the ingenuity of the legal profession! Through its opinions on constitutional references, it has upheld the Rule of Law. As illustrations, it has granted broad standing to those seeking

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21 This is not the only self-serving amendment passed by parliamentarians. Mention has already been made of the extension of a prime minister's "honeymoon." Another amendment overrules a decision of the Supreme Court that a requirement of a deposit of Kina 1000 for elections is unconstitutional (15th amendment, 1991)--a device to help sitting MPs. Parliament has also amended the Constitution whereby it may ***increase*** budgetary proposals for allocation of parliamentary salaries--a break from normal westminster financial rules (10th amendment, 1988).

22 CPC Report Ch. 10, paras 194-196.

23 *SCR No. 1 of 1984: Re Morobe Provincial Govt. v Papua New Guinea* [1984] PNGLR 212.

24 *Papua New Guinea v. Kapal* [1987] PNGLR 417; *SCR No. 3 of 1986: Reference by the Simbu Provincial Executive* [1987] PNGLR 151.

25 *SCR No. 1 of 1990: Re Enga Provincial Government*, unreported.

to enforce the Constitution.[26] It has protected prisoners from degrading treatment by prison staff.[27] It has ruled against the validity of collective punishments[28] and recently held the most draconian provisions of Internal Security Act 1994 unconstitutional.[29] It has supported the freedom of movement.[30] It has upheld a number of safeguards in the administration of the criminal law, particularly as regards the presumption of innocence, fair and speedy trials, and the prohibition of evidence acquired by unconstitutional means. In so far as lies within its power, it has tried to keep the political process open and honest.[31] And in the most blatant case of the abuse of the parliamentary process when a prime minister tried to evade the rule against motions of no confidence by resigning and getting re-elected in questionable circumstances, the Supreme Court upheld the spirit of the Constitution, reversing an unthinking and unimaginative decision of the National Court.[32] On the other hand, while the courts have frequently urged a "purposive" interpretation, it has taken a narrow view of some provisions, as in relation to the Leadership Code,[33] the meaning of the word according to "law",[34] and the rights of non-citizens.[35] And it has made little of the interesting and useful provision that invalidates harsh, oppressive, disproportionate or reasonable executive action, equating it, wrongly, with common law principles (Sections 41) and has been ambiguous in the application and development of the rules of natural justice as mandated by the Constitution (Sections 59-60).

PNG judges were asked to shoulder major responsibilities for the integrity of the judicial and political systems at a most difficult time when in 1979 the then Prime Minister, Michael Somare, had, in an act of defiance of the courts, released his minister of justice from her sentence for contempt of court for attempting to influence the courts in a case pending before them,[36] prompting a mass resignation of expatriate judges. They rose to the challenge magnificently, with great courage and competence. Much credit must go the late Chief Justice Buri Kidu and his Deputy Mari Kapi for restoring the morale and effectiveness of the courts.

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26 *SCR No. 4 of 1980; Re Petition of M T Somare* [1981] PNGLR 265.

27 *Amaiu v Commissioner of Corrective Institutions* (1083) unreported.

28 *SCR No. 1 of 1981; Re Inter-Group Fighting Act 1977* [1981] PNGLR 151.

29 *SCR 3 of 1993; Re Internal Security Act,* unreported.

30 *Re Vagrancy Act* [1988] PNGLR 1.

31 It held that to require a deposit of Kina 1000 for candidacy for parliamentary elections violates the right to stand for elections given the economic conditions of the country and was contrary to the Constitution's manifest emphasis on free and equal participation by citizens, *SCR No. 2: Re Organic Law* [1982] PNGLR 214.

32 *In re Havieta v. Wingti and ors. (No. 3)* (1994), unreported.

33 *In re Joseph Auna* [1980] PNGLR 500 and *Karo v Ombudsman Commission*, (1995), unreported.

34 *Avia Aihi v The State* [1981] PNGLR 81.

35 *Premdas v Papua New Guinea* [1979] PNGLR 329; *Perryman v Minister of Foreign Affairs and Trade* [1982] PNGLR 339.

36 (*Re Rooney (No.2)* [1979] PNGLR 448).

Other independent authorities, particularly the Ombudsman Commission and the Public Solicitor, have also contributed greatly to ensure justice, prevent the abuse of power and facilitate access to courts. They have suffered from the lack of resources, and in the case of the Commission, from a weak and faulty Leadership Code. Nevertheless these independent institutions, along with the judiciary, are the redeeming features of PNG's constitutional system. They have prevented the decline of the executive and parliament into total irresponsibility and unaccountability. They have attempted to enforce constitutional standards of public morality. They have supported the protection of human rights. However, before we lawyers get carried away in an orgy of self-congratulation, it is as well to remind ourselves that even these institutions do not come out with glory from their role in the atrocities that accompanied what is now called the "Bougainville Crisis." They did little to ensure that the perpetrators of the atrocities were brought to account. Most of the serious violations of human rights take place within the law enforcement system itself--the police and custodial services, as well as by the army as on Bougainville. And if I can say so without offending my many learned friends, the legal profession, as in so many other countries, has cultivated its own self-interests in making money at the expense of its public duties and responsibilities.

Conclusion

I will first provide a brief balance sheet and then attempt an explanation of some salient features in that balance sheet. On the credit side, the Constitution has survived and with it the political and legal system that it established. The Constitution provides the framework for national politics. Papua New Guinea is an open society, where most rights are protected. No one can accuse the various governments since independence of being tyrannical, and no dictator has emerged to undermine the constitutional order. Elections have been held regularly, and have been conducted competitively and fairly. Changes of governments have followed peacefully. The press is free. Despite the aims of the notorious "anti-terrorist" legislation of 1993 (The Internal Security Act), there is no preventive detention. And to a significant degree, the Rule of Law has been maintained.

On the debit side, almost none of the national goals has been achieved. There is no gender equality; on the contrary, women are highly exploited, in the economy and in the household; and are victims of great violence. The founding fathers would be ashamed that there is not a single woman in Parliament today, and relatively few in senior positions in government or the private sector--at the 20th anniversary of independence. There is still very limited public participation in the affairs of state; provincial governments have been no better than central institutions. Public accountability, particularly through the political process, has fared little better. I understand that corruption is now of endemic proportions--an achievement one might say purely of independence since it is my impression that was little of it before.

National sovereignty has been somewhat battered, and national unity is fragile. A solution to the Bougainville crisis continues to elude the government, and the changes in provincial government have added to the strains on national unity. Self-reliance is no longer fashionable. The dependence on external funding and other forms of assistance has increased, particularly now with the country's financial crisis--and inspite of the country's rich natural resources. There is little progress towards, indeed regression from, the goals of equity and equality, both as regards regions and as regards individuals and groups. Public policy concerns do not embrace the alleviation of poverty or the equalisation of opportunities. One result is a horrendous breakdown in law and order.

The Constitution requires government and citizens to have control of the bulk of economic enterprises and production and to provide a strict control of foreign investment (Section 3). Instead, privatisation, dictated by foreign institutions, is in vogue. Successive governments have pursued big projects, primarily in minerals, and have surrendered the economy to foreign corporations. And in their wake has come the degradation of the environment and the destruction of communities. In this pursuit of mega-projects, "Papua New Guinea ways" are dying a sure and painful death.

And now to explanations--or more accurately, hypotheses. At first sight one has to explain an apparent paradox--the Constitution works but its primary goals are subverted. I have already mentioned that the Constitution did not change the material conditions that might have facilitated the achievement of national goals. The CPC left that largely to the political process. I have given enough indications that it is the political process which has largely subverted most national goals. The idealism of the CPC did not necessarily represent the aspirations of the elite. As Peter Fitzpatrick has said:

> *Dominant internal class elements were interested in some purchase on the existing system that sustains them. They were not interested in radically changing it.*[37]

And indeed the ideological provisions were effectively ousted by a competing (though less overt) ideology in the Constitution--centrality of the state apparatus and the market economy--reinforced by the continuation of political, economic and military links with the former metropolitan power.

As I have indicated, the whole parliamentary system is now lubricated by cash. Candidates, unable to count on party organisation or loyalty of supporters to win elections, rely on monetary or other material incentives to win votes. Additionally, reciprocity and ethnic ties have become the basis of politics. Politics are an investment; a clan will contribute significant sums, often exceeding K 500,000, to the campaign of its candidate. in the expectation of subsequent rewards. The obligations to members of the community are woven into state politics, so that state roles, any more than state resources, cannot be separated from communal exchanges. Electoral Development Fund and the sectoral grants have institutionalised these forms of dispensation. Governments cannot maintain their cohesion through common purpose, but must rely on patronage and trade offs. Some of the cash to maintain this system may come from private resources, but the bulk of it comes from the state. In the absence of significant indigenous entrepreneurial economic activity, the plunder of the state takes the form of the abuse of public political office. Nowhere that I know of is there such a lure of ministerial office as in the South Pacific. Few qualifications are necessary for such public office. The politics of survival narrows the politicians' vision and concentrates the mind on the personal appropriation of public resources. Clearly public accountability is an anathema to such pursuits. Because of ties of kinship and the clientelist base of politics, state plunder does not frequently lead to accumulation that might provide in time the springboard for economic independence, and class formation--and some separation of the state from daily depredations of politicians.

Thus the political system adheres less to democratic values or parliamentary procedures, than to traditional notions of leadership and kinship. Most parliamentarians are content with support of kin and the clan. Morality that is relevant to the success of a candidate is clannish rather

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[37] Fitzpatrick, Peter (1980), *Law and State in Papua New Guinea* (London: Academic Press).

mobilisation of discontent has been muted. This factor combined with the elite consensus on the constitutional framework enable judges to discharge their tasks with impartiality. But the discontent is no longer entirely muted--as is evident from periodic crisis in Bougainville, the first region to become the victim of state development strategy. Other mineral projects have already begun to create discontent. Various provincial politicians are upset at the dismantling of the system under which they achieved some purchase on political power. Public opinion is becoming anxious at the exploitation of natural resources from which they seem to secure no benefits. The reaction of the government so far to these does not augur well for the future of the Rule of Law. Is the Internal Security Act, with the most massive invasions of rights and freedoms, directed under discretionary executive powers, the portend of the future?

I have tried to the best of my ability to see post-independence developments through the perspectives of the Constitution. But I have to confess there is limited mileage in this strategy. The Constitution does not control the unfolding of social forces, although it may nudge them in one direction or another. Nor does the Constitution encompass the whole range of forces that determine the country's development--some of the most potent of them are not captured by it, like large corporations or external governments that have such a major influence. The hurly-burly of parliamentary and executive politics may be marginal to the processes of change. The operation of the Constitution is more reflective of these autonomous changes than determinative of them. We thus run against the limitations of constitutions. At best a constitution can set up institutions and give them resources and competencies, but can seldom infuse them with particular values. It is especially hard to determine the dynamics of politics or the conduct of parties. It is somewhat easier to prescribe legal roles (although not dictate outcomes), since they come with a long tradition of procedures, values embodied in numerous cases binding on courts, and rigorous professional training (but that tradition also handicaps the profession and courts from developing a custom-based indigenous jurisprudence). However, the Constitution can rarely operate against the tide of social and economic change.

Was the CPC therefore wrong to produce a constitution that was ambitious beyond the capacity of society; to inscribe public values that were so divorced from traditional perceptions of the role and behaviour of leaders; of seeking self-reliance and independence of foreign influences that seemed even then utopian? I do not think that the CPC can be blamed for wishing to chart a visionary future for the country and to provide as best an institutional structure for it as was within its knowledge and judgement. Perhaps it could have been more critical of the westminster system, one of the least participatory systems of governments, and it may have had other errors of judgement. It might have gone further in structural change, but it is just as well as to remember that not only are there limitations on constitutions, but there are also limitations on constitution-makers. Despite the free hand that the CPC apparently had, it operated under several constraints, commonly understood, and radical action for some of its radical visions was effectively precluded. Paradoxically, that is why the CPC could have been given a free hand. For now it is enough to say that the CPC produced an excellent constitution and provided a vision which still inspires, is a benchmark, and beckons a future generation of leaders.

Amendments to the Penal Code
Abortion Laws

A discussion was held at the LST premises on the recent amendments to the Penal Code with particular reference to the new abortion laws which was attended by many prominent lawyers, doctors and women's activists. Ms Nimalka Fernando of Sri Lanka Desk of APWLD, in introducing the amendments, pointed out that there was hardly any discussion on this topic before the preparation of the amendments and no concerned groups were consulted. The only part of the amendments that gained prominence and provoked public debate was the section on the new rape laws.[1]

Ms Fernando, pointing out that this is a very controversial issue, stated that it is not only a women's rights issue, it is also a social and economic issue. While being happy that amendments to the Penal Code are being brought about to give effect to women's rights, she questioned how the law facilitates abortion.

1.1 Definition of abortion

As regards the definition of abortion, she stated that it is explained as termination of pregnancy, but the history of the pregnancy is not taken account of. She explained three possible instances where pregnancy can take place:

(a) whether it took place within wedlock;
(b) whether it took place out of wedlock;
(c) whether it resulted from violence against women, for example, rape.

Here one needs to consider all three scenarios and the reasons for unwanted pregnancies. Sometimes married women do not want to have another child due to economic reasons. Although Sri Lankan history indicates large families, the situation has changed mainly due to family planning, and Sri Lankans now opt for small families.

In the Sri Lankan context, the issue of pregnancy and abortion carries a social stigma because when a woman gets pregnant out of wedlock, issues of who the father is and legitimacy of the child become problems. Violence against women and marital rape deserves particular attention and in determining the legal strategy in relation to abortion, all these factors have to be taken into consideration.

The new law envisages abortion in two instances: pregnancy as a result of violence against women and health of the child which necessitates termination.

Dr Hemamal Jaywardena outlining the position of medical practitioners stated that doctors are hesitant to carry out abortions because they can be charged for homicide if death occurs. He

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[1] See the commentary on the discussion held at the LST on the new rape law, Fortnightly Review, Vol V, Issue No 93, p 48.

also noted that the provision that the medical practitioner should have postgraduate qualifications in obstetrics should be deleted as the existing number of doctors with such qualifications cannot possibly cope up with the demand for abortions and in any event, any qualified doctor could carry out a simple abortion provided it is done within the first semester of pregnancy.

Ms Fernando questioned whether abortion would be widely available and whether women have a right to say no to pregnancy. She also stated that the progressive nature of the law is lacking in the new amendments because they are very technical and legal. In addition, she criticised the amendments for not having embraced women's rights and the human rights dimension.

1.2 Gender-sensitisation of the legal system

One participant highlighted the nature of the legal system which will implement the law and pointed out that since it is so patriarchally oriented, there is no gender sensitivity within the legal system; when a woman resorts to the system, she would be dominated by these male oriented ideals and perspectives.

Ms Radhika Coomaraswamy highlighted the importance of the support system that is available for women and pointed out that merely bringing legal reform is not sufficient unless it is holistic and is supported by other mechanisms.

When legal reform is brought in, there must be a public debate on the subject, as we need to educate the public on these aspects. Further, the experience of women must be looked into when introducing reforms and particular mention was made of the situation of women in the Free Trade Zone.

The need was also felt to strengthen sex education in the country and the importance of taking protective measures; it was also pointed out that violence against women cannot be remedied solely through legal reform.

In answer to the question as to why women would opt for an abortion, it was generally considered to be a question of economic and social considerations and the social stigma attached to certain pregnancies.

Ms Coomaraswamy briefed the participants on the outcome of the Beijing Conference and of the biggest debate that took place there: the right of women to say no to unwanted pregnancies irrespective of whether they occurred within or outside wedlock. She welcomed the inclusion of the health of the unborn baby in the amendments as a ground for abortion and stated that "it is a big step forward."

It was also questioned whether we need to gender sentisize the medical profession. The participants also felt it necessary to carry out a survey on the ratio between abortions carried out in urban and rural areas including whether these abortions are carried out by qualified personnel or not. If a very traditional state like India could allow abortion on demand, the participants questioned as to why Sri Lanka cannot follow suit. It was pointed out that there was a similar debate on the use of contraceptives.

Dr Jayawardena stated that foetal research shows that life does not begin at conception, thus, there is no scientific basis for the debate on abortion. Pointing out that abortion is a health issue, Dr Nissanka Wijeyaratne stated that it is better to have safe abortions, rather than unsafe abortions.

Ms Coomaraswamy, speaking of American Case law on the subject stated that all cases reflect the right of women to her own body and that they give effect to the term, "reproductive health of women." She noted that if we can accept the concept that women can control pregnancies, it would be a recognition of the right of the women to her own health. She stated that there should be a two-pronged attack: one, from the women's right perspective and the other, from the social implications point of view.

1.3 De-criminalizing of abortion

The participants generally felt that if the right to abortion is presented as a health, social and economic issue, rather than as a women's rights issue, there might be better acceptance of the notion of abortion. If abortion is legalised, it would also minimise the number of deaths caused as a result of unsafe abortions. It was also felt that the Penal Code is not the place to embody laws on abortion which is a health issue and it was pointed out that local authorities could provide this service.

In conclusion, although the participants welcomed the new amendments on abortion, the general consensus was that the law does not go far enough and that it does not provide for abortion on demand as many countries now do. Furthermore, it was felt that counselling, sex education, strengthening the support system, etc., play an important role in providing a better deal for women, which cannot be achieved solely through legal reform.[2]

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[2] Editor's note: When the Bill was presented in Parliament, it was decided to de-criminalize abortion by taking the provisions on abortion out of the Penal Code and include them in a statute on public health.

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