



## LAW & SOCIETY TRUST

### Fortnightly Review

No 3 Kynsey Terrace, Colombo 8  
Fax 686843 Tel 691228/684845

June 1997, Volume VII, Issue No 116

In this issue we publish an article by Bart Rwezaura on sex discrimination in Africa entitled "Recent Experiences in the Use of Constitutions to Fight Sex Discrimination in Selected African Jurisdictions." The writer surveys the developments that have taken place in the Sub-Saharan region of Africa during this decade in relation to sex discrimination and discusses the constitutional guarantees that have been invoked by women applicants seeking redress against gender discrimination.

We also publish the text of the Human Rights Commission Act of Sri Lanka No 21 of 1996 passed by Parliament in August 1996. The text of the Bill and the lobby document prepared by the Trust were published in a previous issue of the *Fortnightly Review*.

## GENDER DISCRIMINATION IN AFRICA

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RECENT EXPERIENCES IN THE  
USE OF CONSTITUTIONS TO  
FIGHT SEX DISCRIMINATION  
IN SELECTED AFRICAN  
JURISDICTIONS

*Bart Rwezaura*

HUMAN RIGHTS COMMISSION  
OF SRI LANKA  
ACT NO. 21 OF 1996  
(Certified in August 1996)

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PHYSICS DEPARTMENT

# Recent Experiences in the Use of Constitutions to Fight Sex Discrimination in Selected African Jurisdictions\*

*Bart Rwezaura\*\**

## 1. Introduction

During this decade, and indeed, more than any other time in the past, many African countries in the Sub-Saharan region have seen an increasing number of women applicants who are seeking redress against gender discrimination by invoking constitutional guarantees. Most of them have been successful in their applications. Although this development in itself justifies the study of how constitutional principles are developed and applied to protect women's rights in the region, there is another reason why this development is significant. It can now be claimed that gender issues are becoming part of the dominant judicial discourse which in some ways, assures the political visibility of women's issues. On the other hand, however, such a surge of litigation by women also raises other questions concerning its underlying causes. One pertinent question is why has such litigation occurred during the 1990s rather than before? What are the possible factors that have produced these cases? An inquiry along these lines will contribute to an understanding of the ways in which these initiatives can be effectively harnessed to fight sex discrimination as we move into the 21st Century.

This paper considers the experience in the use of constitutional safeguards to fight gender-based discrimination in selected African jurisdictions. It begins by examining the concept of constitutionalism and the extent to which it is understood and practised in Sub-Saharan Africa. The second section considers the legal disputes themselves and the extent to which they have contributed to constitutional theory. In the third section the effect of the new political liberalisation and democratisation in the sub-Saharan region on judicial behaviour is considered and the possible impact of international human interpretation and application of national constitutions. In conclusion it is noted that, while constitutional guarantees are an important tool in the struggle for gender equality, it is essential to take a broader view of this question by adopting a range of inter-related strategies that have a mutually reinforcing effect.

## 2. Constitutionalism in Sub-Saharan Africa: Past and Present

The word 'constitutionalism' stands for certain key elements in liberal democratic theory, the most important being the notion of limited government and the protection of individual liberties. As argued by Professor Yash Ghai, constitutionalism or rule of law:

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\* Presented at the Conference on "Trends in Contemporary Constitutional Law," held at University of Hong Kong on 13-14 December 1996. Edited for publication.

\*\* Faculty of Law, University of Hong Kong. The Trust would like to thank the writer for giving permission to publish his paper in our Review.

*is premised on the belief that the primary functions of constitutions is to limit the scope of governmental power and to prescribe the method for its exercise, thereby preserving the autonomy of civil society.*<sup>1</sup>

Underlying such a framework is the theory of 'social contract' that emphasises the contractual nature of state power and the proper exercise of such power (i.e. accountability), as the foundation of political legitimacy. In sum, constitutionalism does not refer simply to the idea of acting in accordance with the dictates of any constitution, whether written or unwritten. Rather, it refers to acting in accordance with a particular kind of constitution that achieves the contractual ideal of limited government and accountability.<sup>2</sup> Such a constitution, as argued by Professor Ghai, "validates certain fundamental values and, subject to their overriding supremacy, establishes a framework for the formation of government and the conduct of administration."<sup>3</sup>

It is also necessary to consider, briefly, the recent history of sub-Saharan Africa to see the extent to which this notion of constitutionalism has been recognised and practised. The starting point must be the post-colonial period when most states in the sub-Saharan region acquired self-governing status. In this connection most analysts agree that limited government and protection of individual liberties were not the principles that consistently guided the exercise of political power in most of sub-Saharan Africa. On the contrary, the post-colonial era saw the emergence, in most states, of an authoritarian executive-led type of governments with more or less rubber-stamp legislatures and largely compliant judiciaries.

Thus, commenting on what he called the 'African perversion of constitutionalism,' Welshman Ncube has noted that although virtually all African states that gained self-rule did so under constitutions that were imbued with notions of limited government, respect for individual liberties, and accountability, yet soon after, these constitutions were either amended, modified or altogether repealed to pave the way for authoritarian and autocratic regimes.<sup>4</sup> And where no such amendments were made, so that these constitutions continued to provide on paper for individual liberties and limited government, there was always a way of getting around the

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<sup>1</sup> Yash Ghai, "Constitutions and Governance in Africa: A Prolegomenon" in S. Adelman and A. Paliwala, (eds), *Law and Crisis in the Third World* (Centre for Modern Africa Studies, University of Warwick, Hans Zell Publishers, London) (1993) at p 53.

<sup>2</sup> See also Gerhard Casper "Constitutionalism" in Leonard W Levy et al (eds) *The Encyclopaedia of the American Constitution*, New York, QP at 474. This contractual notion of state/citizen relation was endorsed also by Hon Justice Musumali in *Sara Longwe* when he noted that "a constitution is a product of a surrender by the citizenry of the individual rights to their rulers (Governments) in order for those rulers to distribute and supervise the enjoyment of those rights in an atmosphere of peaceful co-existence by all". *Sara H Longwe v. Intercontinental Hotels Ltd* [1993] 4 LRC 221 (High Court of Zambia)

<sup>3</sup> *Supra* n 1 at p 54.

<sup>4</sup> See W Ncube, "Constitutionalism and Human Rights: Challenges of Democracy" in P. Nherere and M. d'Engel bronner-Kolff (eds), *The Institutionalisation of Human Rights in Southern Africa* (Nordic Human Rights Publications, Copenhagen, 1993) pp 1-22 at p 4.

constitution which, in turn, led to a wide gap between the letter of the law and actual practice. During the same period multi-party systems of government were abolished in favour of single political party regimes, while in other states opposition parties were effectively marginalised and their leaders either banished or detained. According to Tony Thomas, by 1989, of all the 47 sub-Saharan countries, only four had a multi-party political system.<sup>5</sup>

For reasons too numerous to detail here, the period of authoritarianism by civilian rulers soon gave way to recurrent waves of military takeovers that engulfed practically the whole of the African continent. Thus, between 1963 and 1970 no less than 19 countries had experienced military *coup d'etat*, with some countries undergoing such political trauma more than once.<sup>6</sup> A recent survey provides a long list of countries that have experienced violent change of government more than three times between 1963 and 1996. These include, Benin (5), Burkina Faso (4) Burundi (4), Central African Republic (3) Chad (4), Congo (3), Comoros (3) Ethiopia (4), Gabon (3), Ghana (5), Nigeria (6), Sudan (5) and Uganda (5).<sup>7</sup> The loss of innocent lives and human suffering that were caused by such political upheavals and the economic mismanagement and collapse that accompanied this process, are all too well known to detail here.<sup>8</sup>

At least one obvious conclusion can be drawn from the foregoing overview: during the three decades following the end of colonial rule, the exercise of political power by most African politicians and military dictators, did not abide by the concept of constitutionalism as this term has been defined above.

The implications of all this for gender equality, and human rights generally, is that considering the heavy-handed and very frequent attack on traditional civil liberties and the relative marginalisation of the judiciary, few citizens ever imagined that courts were appropriate institutions for standing between them and the all powerful executive branch or for redressing other human rights violations. Indeed, in some instances courts were simply debarred from hearing cases involving detention without trial.<sup>9</sup> And in those few cases that individuals had the courage to question their detention by applying for remedies such as *habeas corpus* or judicial review, the results were always mixed and unpredictable.

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<sup>5</sup> See Tony Thomas of the *Economist*, 'Africa for the Africans' *A Survey of Sub-Saharan Africa*, (September, 1996) at p 5.

<sup>6</sup> See B.O Nwabueze, *Constitutionalism in the Emergent States* (C Hurst & Co. London, 1973) p 219.

<sup>7</sup> *Supra* n 5. The figure in the bracket indicates the number of violent change of government in the respective countries.

<sup>8</sup> For a recent study, see Peter Gibbon, et al *Authoritarianism, Democracy and Adjustment: The Politics of Economics Reform in Africa*, The Scandinavian Institute of African Studies Seminar Proceedings No. 26 (Uppsala 1992).

<sup>9</sup> See for example Tanzania Preventive Detention Act 1962.

Thus, in summing up the attitude and practices of Tanzanian judges towards individual liberty during this period, a prominent High Court judge has noted that, although in Tanzania the liberty of the subject is generally regarded as sacrosanct, "executive behaviour, aided by an authoritarian political structure and enabling repressive laws," have all tended to frustrate the attainment of this ideal and certain judges have found it difficult to resist the pressure to validate the decisions of the executive even in cases where a violation of the enabling statute has been clearly demonstrated.<sup>10</sup>

Considering that civil liberties were in most parts of sub-Saharan Africa either accorded a low priority or were openly attacked, it is only to be expected that issues of gender equality would take a back seat. And those few that found their way into the courts are likely to have been dealt with as private law disputes having no constitutional significance whatsoever. Gender equality, however, as part of the rights of man, is now a constitutional issue and courts are beginning to take it very seriously indeed.

### 3. Discrimination as a Constitutional Issue Today

Although the disputes reported here emanate from different countries, raise somewhat different legal issues and have been decided by applying specific constitutional provisions of the relevant state, they have certain common features that unite them. They are united, for example, by the fact that all the cases have been instituted by women alleging discrimination on the basis of gender. More importantly perhaps, senior judges in the region have found these decisions very persuasive and have adopted them in their reasoning to decide similar cases before them. The effect is that the region is slowly generating a body of case law that might prove crucial for women in the years to come.

#### 3.1 An Overview of the Issues Litigated

In February 1990, the High Court of Tanzania struck down a patrilineal rule of customary law governing succession to land on the ground that it violated the equality provisions enshrined in the 1977 Constitution. The offending rule provided that a woman, unlike her kinsmen, had no right to inherit clan land. But where there is no male survivor, a woman could still use such land during her lifetime but she could not pass it on to her children or alienate it by sale. And on the death of a female heir the land was supposed to revert to the clan.<sup>11</sup> The following year, in June 1991, the High Court of Botswana held that section 4 of the Botswana Citizenship Act was in conflict with the Botswana Constitution in that it discriminated against female citizens in the way it conferred nationality rights on children.<sup>12</sup> Under the 1984 Citizenship Act, a person born in Botswana would be a citizen if, at the time of birth, his or her father was

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<sup>10</sup> See K.S.K Lugakingira, 'Personal Liberty and Judicial Attitude: The Tanzanian Case' *Eastern Africa Law Review* (1990) 17 (1) 107-133 at 128.

<sup>11</sup> See *Ephrahim v Pastory and Another* [1990] LRC (Const) 757.

<sup>12</sup> See *AG of Botswana v Unity Dow* [1991] LRC (Const) 574.

a citizen, or in the case of a child born out of wedlock, his or her mother was a citizen. The effect of this law was to deny citizenship rights to legitimate children whose mother is a citizen but whose father is a foreign national. The court also held that by denying citizenship rights to such a child, the Act also circumscribed the mother's freedom of movement because she would be compelled to live with her child in a foreign land.<sup>13</sup> During the same year (i.e. in October 1991) the High Court of Namibia held that although the cautionary rule in sexual offences was seemingly gender neutral, it nonetheless discriminated against women who were in the overwhelmingly majority of cases the complainants. Such a rule was potentially in conflict with the equality provisions contained in the Namibia Constitution.<sup>14</sup>

In November 1992, the High Court of Zambia held that Intercontinental Hotels Ltd, by refusing admission to women patrons unless accompanied by men, had contravened the equality provisions in the Zambian Constitution which safeguards freedoms of association and movement.<sup>15</sup> Again, in June 1994, the Zimbabwe Supreme Court held that by denying a resident permit to a non-citizen husband married to a Zimbabwe citizen, the immigration authorities had directly contravened the wife's freedom of movement enshrined in the Zimbabwe Constitution.<sup>16</sup> For, if the temporary residence permit of the husband was not renewed, the wife would be compelled to leave Zimbabwe in order to be with her husband and children. Finally, in 1995, the Botswana Court of Appeal held that a local college regulation, providing that on becoming pregnant a female student was required to withdraw from studies for one year, was discriminatory and therefore, unconstitutional.<sup>17</sup> The court held that one year of suspension from studies was too long compared to the three months of maternity leave currently enjoyed by civil service employees. This regulation, however, did not apply to married women students at the college who were treated as a special case whenever they became pregnant.

The above survey indicates that issues of gender equality are no longer at the fringes of the legal process but have become integrated into the mainstream constitutional discourse of the region.

### 3.2 The Purposive Interpretation

Most superior courts in the region agree that constitutional provisions should be construed generously and read as a whole in order to achieve the objects of the framers of the constitution. Since the function of the constitution is to establish a framework for the exercise of power by the state and since its terms are necessarily broad and general, and intended to apply to the varying social and economic conditions and times, it must not be given a narrow, artificial, rigid

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<sup>13</sup> Per Amissah JP, at 660.

<sup>14</sup> See *S v D and Another* 1992 (1) SA 513, also noted in (1993) 37 JAL 97.

<sup>15</sup> See *Sarah Longwe*, supra n 2.

<sup>16</sup> See *Ratigan v Chief Immigration Officer* [1994] 1 LRC 343.

<sup>17</sup> *Student Representative Council of Molepole College of Education v Attorney General of Botswana*. Civil Appeal No 13 of 1994, Misc No 396 of 1993. Noted by E K Quansah [1995] JAL 97-102.

or pedantic interpretation.<sup>18</sup> In the words of Aguda JA., the overriding principle in construing a constitution, "must be an adherence to the general picture presented by the Constitution into which each individual provision must fit in order to maintain in essential details the picture which the framers could have painted had they been faced with circumstances of today."<sup>19</sup>

Amissah JP, (in the same case) after referring to the dictum of Lord Wright in *James v Commonwealth of Australia*,<sup>20</sup> reminded the court that there were previous pronouncements of the same court such as that of *Attorney General v Moagi*<sup>21</sup> where Kentridge JA had said that:

*... a constitution such as [that] of Botswana, embodying fundamental rights, should as far as its language permits be given a broad construction. Constitutional rights conferred without express limitation should not be cut down by reading implicit restrictions into them, so as to bring them into line with the common law.*

Such an approach to interpretation has been warmly endorsed by the Chief Justice of Zimbabwe, Honourable Justice Gubbay, who noted in *Rattigan* that courts should not allow a Constitution to be 'a lifeless museum piece' but must continue to breathe life into it from time to time when an opportunity to do so arises. Echoing similar sentiments, Justice Mwalusanya of the High Court of Tanzania noted in *Ephrahim* that the purposive approach to statutory interpretation had been fully endorsed by the Tanzania Court of Appeal in previous decisions and, as Lord Denning had said in *James Buchanan*,<sup>22</sup> "the literal method was now completely out of date and had been replaced by 'the purposive' approach which seeks to "promote the general legislative purpose."<sup>23</sup>

In sum, the purposive approach is now an established principle of constitutional interpretation in the region and superior courts are unwilling to give an artificial and restrictive interpretation to provisions relating to fundamental liberties unless such interpretation is mandated by the clear words of the Constitution.

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<sup>18</sup> Following closely the dicta of Sir Udo Udoma of the Supreme Court of Nigeria in *Rafu Rabiu v State* (1981) 2 NCLR 293 at 326 and that of the Chief Justice of Zimbabwe in *Rattigan and Others v Chief Immigration Office and Others* [1994] 1 LRC 343 at 347.

<sup>19</sup> Again, in the opinion of Hon Justice Aguda, "the primary duty of the judges is to make the Constitution grow and develop in order to meet the just demands and aspirations of an ever developing society which is part of a wider and larger human society governed by some acceptable concepts of human dignity". See *Unity Dow v Attorney General* [1992] LRC (Const) 623 at 668.

<sup>20</sup> (1936) AC 578 at 614.

<sup>21</sup> (1981) BLR 1 at 32.

<sup>22</sup> Lord Denning J in *James Buchanan & Co v Babco Forwarding and Shipping (UK) Ltd.*, (1977) QB 208 and *Northman v Barnett Council* [1978] 1 WLR 220.

<sup>23</sup> See *Ephrahim*, supra n 11 at 766.



### 3.3 The Meaning of Freedom of Movement

Honourable Justice Gubbay, the Chief Justice of Zimbabwe, observed in *Rattigan*,<sup>24</sup> that the "short and undisputed facts of this joint application conceal a problem of considerable constitutional significance and [of] no little difficulty."

The single most important issue in *Rattigan* concerned whether a female citizen of Zimbabwe, married to a foreign national, was entitled to the right to reside permanently with her husband in Zimbabwe. As it turned out, the solution to this question depended upon the meaning and scope to be attached to the applicants' right to 'freedom of movement.' It was argued on behalf of the three women applicants that the decision to deny residence permit to their husbands circumscribed their freedom of movement in that they would be compelled to leave Zimbabwe with their husbands in order to maintain their marital relationship.<sup>25</sup> In response to the applicants' submission, the Chief Immigration Officer argued that the applicants' freedom of movement was not restricted by his refusal to permit the husbands to reside in Zimbabwe because the wives were free to move in and out of Zimbabwe as they wished.<sup>26</sup>

In its ruling, the Supreme Court proposed to maintain its previous practice of reading constitutional provisions as a whole and giving them a generous and purposive interpretation "serves the interests of the Constitution and best carries out its objects and promotes its purpose."<sup>27</sup> And where derogation from these freedoms is made, the Court held that, "as far as the language permits, these should be narrowly or strictly construed."<sup>28</sup> Having laid down the *modus operandi*, the court considered whether or not the applicants' freedom of movement had been curtailed.

After examining the decisions of other Commonwealth jurisdictions, the European Court of Human Rights, and the European Commission of Human Rights, Chief Justice Gubbay fully endorsed the view that marriage was the most fundamental institution known to mankind and thus, it was entitled to the protection of the law. Relying on the Botswana Supreme Court decision in *Unity Dow*, the judge noted further that the bond of marriage between husband and

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<sup>24</sup> See supra n 18 above at 343.

<sup>25</sup> Section 22(1) of the Zimbabwe Constitution provides that "no person shall be deprived of his freedom of movement." This includes: (i) the right to move freely throughout Zimbabwe; (ii) the right to reside in any part of Zimbabwe; (iii) the right to enter and leave Zimbabwe; and (iv) immunity from expulsion from Zimbabwe.

<sup>26</sup> The argument of the Chief Immigration Officer was summed up by the Court as follows: "But so far as establishing the matrimonial home in Zimbabwe is concerned they must decide either to exercise their constitutional right to reside in Zimbabwe without their husbands or accompany them to countries of their citizenship and live together there. This may cause inconvenience but no more. Their right of freedom of movement in any of its aspects has not been removed from them or indeed infringed." (p 349).

<sup>27</sup> See supra n 18 above at p 347.

<sup>28</sup> Such a welcome approach to interpretation has now become widely accepted in the superior courts of the region. The long list of authorities cited by Gubbay CJ does support the popularity of this approach.

wife was as strong as that between parent and child and that the constitutional protection for the privacy of the home under Section 11 of the Zimbabwe Constitution would be infringed by prohibiting a husband from residing in Zimbabwe. In sum, the Court reached the conclusion that

*to prohibit the husbands from residing in Zimbabwe and so disable them from living with their wives in the country of which those wives are citizens, was... in effect to undermine and to devalue the protection of freedom of movement accorded to each of the wives as a member of the family unit.*<sup>29</sup>

### 3.4 The Right of Residence Includes the Right to Work

Shortly after the decision in *Rattigan*, another Zimbabwean married to a foreign national applied that her husband should be permitted to reside and work in Zimbabwe. The husband had applied to the immigration department for a resident permit but was advised to leave Zimbabwe immediately while his application was being processed. Such an event would have created a problem for the wife who was expecting their baby and who would be unable to remain employed towards the end of her term of pregnancy and for some time after the baby was born. She was not sure as to how her husband's residence application would be determined. She also desired her husband to be permitted to work in Zimbabwe so that he could support the family.

Applying the principle in *Rattigan* the Court held that the word 'reside' should be given a generous and purposive interpretation to include the right of a foreign husband to work in the country where he resides. The Court reasoned that, unless the wife was economically independent which, in any case, was not a necessary criteria of citizenship, her unqualified right to reside in Zimbabwe would be curtailed if her husband was not permitted to work. Under these circumstances, she would be compelled to accompany the husband to a country where he could make a living.<sup>30</sup> As the Court emphasised:

*to deny the foreign spouse of a Zimbabwe citizen the right to work would diminish the guaranteed right of the citizen wife who, through such causes as old age, poverty, illiteracy, redundancy, physical or mental disability is unable sufficiently to provide for her alien husband and children in Zimbabwe. And so in order to secure and maintain the marital relationship she is left no option but to depart with her husband to a country*

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<sup>29</sup> *Salem v Chief Immigration Officer and Anor* [1994] 1 LRC 354 at 352.

<sup>30</sup> Per Gubbay CJ at 357. [The Court put the same point differently by noting that to deny the foreign spouse of a Zimbabwe citizen the right to work would "diminish the guaranteed right of the citizen wife who, through such causes as old age, poverty, illiteracy, redundancy, physical or mental disability is unable sufficiently to provide for her alien husband and children in Zimbabwe. And so in order to secure and maintain the marital relationship she is left no option but to depart with her husband to a country where he is in a position to assume the role and responsibility of a breadwinner" (p 357).]

*where he is in a position to assume the role and responsibility of a breadwinner.*<sup>31</sup>

There are two notable features of this case which reflect the attitude of some of the government officials in the region. The first is the sexist and gender intensive nature of government regulations concerning immigration and employment. The second is the semi-contemptuous attitude of members of the executive towards the courts. The first of these features appears in *Rattigan* where the Chief Immigration Officer, in his opposing affidavit, stated that:

*the principal applicant for a family residence permit should always be the husband unless the wife is a highly qualified professional, e.g. medical practitioner, offering a scarce skill in her own right, in which case the husband may be treated a dependant...*

The obvious implication here is that female citizens who are not highly qualified are not entitled to apply for a resident permit for their dependant husbands who might lack the qualifying 'scarce skill.' Considering the low level of professional attainment by women in Africa, however, (which is really not their fault) it would amount to punishing the victim instead of the offender.

The second feature mentioned above is found in *Salem* where the Chief Immigration Officer and the Attorney-General failed to file an opposing affidavit and refused to appear in court even when they were notified in good time of the proceedings and were served with all the relevant papers. It is also clear that, had the Immigration Officials been respectful of the Supreme Court's decision in *Rattigan*, the *Salem* application could have been avoided and valuable time and money could have been saved. It appears that before the application in *Salem* was filed in Court, the applicant's lawyers reminded the Immigration Officer of the Supreme Court's decision in *Rattigan* and that it was binding on them. In reply, the Officer retorted that:

*I wish to advise that the Supreme Court judgement does not state that foreign husbands shall not be required to apply for permits; neither does it say the granting of such permits should be automatic. What we are talking about in this case is purely an immigration requirement which has nothing to do with the Supreme Court judgement. We wish to advise once again that your client must leave the country and await the outcome of his application outside the country, and his departure must be confirmed...*

The Court considered such an arrogant attitude by a public official as a disdainful disregard of a judgment of the court and therefore "deserving of censure." Chief Justice Gubbay, also noted that in order to ensure that "such rights are given effect to, [the court would] issue directives to the Chief Immigration Officer, rather than adopt the preferred expedient of merely declaring their existence under the Constitution." Although it is not certain whether that official was disciplined, the point is that some of the officials still harbour the 'old' attitudes when the judiciary was highly marginalised and when law and legal procedures were used as an

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<sup>31</sup> See supra n 29 at p 357.

instrument of oppression or if found to be inconvenient were simply ignored by public officials.<sup>32</sup>

Space does not permit a detailed analysis of all the constitutional issues raised in these decisions. It is clear from the above discussion that these decisions have placed gender discrimination on the agenda of the highest courts in our region. They have also contributed to new constitutional theory on which other judges in the region are now relying. Although the impact of these decisions will depend largely upon how the political system of the region will develop, their potential is nonetheless quite considerable.

#### **4. The Dawn of an Age of Constitutionalism?**

In this section it is proposed to examine the effect of the new political liberalisation and democratisation in the sub-Saharan region on judicial behaviour and the possible impact of international human rights norms on judicial attitudes.

##### **4.1 The building of a democratic habit**

Following the disintegration of the Soviet bloc and the emergence of a new political order in most parts of Eastern Europe, the world has also seen many interesting political developments in sub-Saharan Africa. One country after another abandoned the one-party system. From 1991 when the Republic of Benin became the first country in the region to vote out a ruling party and its President, there have been several multi-party elections in a number African States.<sup>33</sup> In order to achieve a stamp of international approval, especially from the donor nations of the West, the World Bank and the IMF, expert observers and the international media have been invited to oversee these elections and to inform the world that Africa is about to emerge from the depths of authoritarianism and the rule of man.

Although the underlying factors that have produced the current changes in African political systems are too complex to discuss here, it remains true that in some countries these changes have provided the ideal environment for a new start in building a form of constitutionalism. The ground on which the rule of law is being built is still very shaky and slippery. Elections in some countries are still being rigged, falsified and political opponents harassed. However, there must be a starting point somewhere. Once the principle of changing political leaders by ballot rather than bullet is widely accepted, it will see the beginning of a process of building a democratic habit in our region. As Tony Thomas has noted, "the holding of elections is an advance. They may not be as free or as fair as elections in today's western democracies, but

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<sup>32</sup> Yash Ghai has described the behaviour of African state officials during the post-independence period as having turned the law into "a commodity that only the state may mobilise and manipulate;" that "Governments regard it as dangerous to allow dominated groups any purchase on the law except as part of a careful stage management;" and that "limitations on the powers of the Government become inconceivable, as on the whole do attempts to enforce human rights..." supra n 1 at p 72.

<sup>33</sup> They include, Angola, Botswana, Cameroon, Cote d'Ivoire, Gabon, Kenya, Malawi, Mozambique, Senegal, Sierra Leone, Tanzania, Uganda, and Zambia, see *Economist* (September 1996) at p 5.

they make the point that African leaders are accountable to the public they rule."<sup>34</sup>

Under these circumstances, it needs no stressing that the national judiciary in the region stands in a very unique position of a midwife to the precious democratic baby. Courts can provide the much needed forum for settling political disputes such as election petitions and complaints about political harassment and the like. They can insist on technical as well as substantive compliance with legislation governing the transition to democracy. They can enhance the legitimacy of the law and the legal process by assuming the role of an umpire in this sophisticated political game. In sum, they can make constitutionalism a reality for the ordinary man and woman.

In some ways this is already happening in certain countries. The way superior courts have analysed the constitutional issues brought before them by women indicates that judges realise the gravity of their mission. Such a point was stressed in 1994 by the High Court of Tanzania in *Rev Christopher Mtikila*, when granting *locus standi* to a human rights campaigner cum political activist.<sup>35</sup> The latter was challenging certain enacted statutes on the ground that they violated the Constitution. The State opposed this application, *inter alia*, on the ground that the applicant had no *locus standi*. After carefully reviewing the concept of standing in public and private law, the court allowed the application noting that this was a fit case for public interest litigation. Hon Justice Lugakingira then considered the general poverty within the community, the high illiteracy rate of the population, the lack of ability to mobilise the law, and the prevalent "culture of apathy and silence [which was] a product of institutionalised mono-party politics that... sapped up [people's] initiative and guts." He then concluded that:

*[g]iven all these and other circumstances, if there should spring up a public-spirited individual and seek the Court's intervention against legislation or actions that pervert the Constitution, the Court, as guardian and trustee of the Constitution and what it stands for, is under an obligation to rise up to the occasion and grant him standing.*

This message could not have been put any clearer. Courts in the region are aware of their crucial responsibility. They have adopted a commendable and new style of interpreting national Constitutions. They are getting very comfortable with constitutional precedent from older and younger Commonwealth jurisdictions and are beginning to draw from international human rights norms to perform this task.

#### **4.2 The application of international human rights norms**

The general principle of law in most common law jurisdictions is that ratification of an international treaty by a state does not, *ipso facto*, transform that instrument into a piece of domestic law. Hence, courts cannot directly enforce treaties unless their provisions are locally

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<sup>34</sup> *Supra* n 5 at p 6.

<sup>35</sup> See *Rev Christopher Mtikila v The Attorney-General*, High Court Civil Case No. 5 of 1993, *per* Lugakingira J (24.10.94) (not yet reported).

enacted or otherwise incorporated into the domestic law. Although such a principle remains largely unchallenged, it has been qualified in particular respects. For example, in 1988, at Bangalore, India, a colloquium of senior Commonwealth judges, convened to discuss the question of domestic application of human rights norms, reached a number of conclusions that have come to be known as the Bangalore Principles. One of these principles is that where a treaty has been ratified but not yet incorporated into domestic law, it would still be taken into consideration by a court for purposes of deciding cases where the domestic law, whether constitutional, statute or common law, is ambiguous, uncertain or incomplete.<sup>36</sup>

Another principle is that in performing their judicial roles, judges must interpret statutes in such a way as to avoid the violation of international law. This principle is based on the presumption that legislatures do not intend to enact laws that violate the state's treaty obligations.<sup>37</sup> The Bangalore Principles were fully endorsed in 1989, at a judicial colloquium of senior African Commonwealth judges held at Harare, Zimbabwe. The endorsement is known as the Harare Declaration of Human Rights.<sup>38</sup> It is encouraging to note that in the years following the Bangalore and Harare colloquia (the latter having been attended by many senior judges in the African region) a number of judges in the sub-Saharan African region have demonstrated their willingness to draw on international human rights norms in interpreting local legislation including their national constitutions. Thus, referring to the legal effect under domestic law of Zambia's ratification of various international human rights instruments, Honourable Justice Musumali said in *Sara Langwe* that:

*ratification of such [instruments] by a nation state without reservations is a clear testimony of the willingness by the State to be bound by the provisions of such [a treaty]. Since there is that willingness, if an issue comes before this court which would not be covered by local legislation but would be covered by such international [instrument], I would take judicial notice of that Treaty or Convention in my resolution of the dispute.*<sup>39</sup>

In *Dow*,<sup>40</sup> the Supreme Court of Botswana also declared that although international treaties were not binding within Botswana unless enacted by Parliament, courts ought not to interpret legislation in a manner that conflicted with Botswana's international obligations. After referring to Botswana's ratification of several international human rights treaties including the African Charter on Human and People's Rights, which, *inter alia*, prohibits all forms of discrimination,

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<sup>36</sup> Bangalore Principles No. 4.

<sup>37</sup> See also Maxwell Cohen and Anne F Bashefsky, 'The Canadian Charter of Rights and Freedoms and Public International Law' *Canadian Bar Review* (1983) Vol 61, p 265 at 298.

<sup>38</sup> See *Developing Human Rights Jurisprudence, A Second Judicial Colloquium on The Domestic Application of International Human Rights Norms*, vol 2. Held at Harare, 19-22nd April 1989, Commonwealth Secretariat.

<sup>39</sup> *Sara Longwe v International Hotels* [1993] LRC (Const) 221.

<sup>40</sup> *The Attorney-General of Botswana v Unity Dow* [1992] LRC (Const) 623 (CA). See also E K Quansah "Unity Dow v Attorney-General of Botswana: One More Relic of a Woman's Servitude Removed?"

Amissah, JP observed that, even if:

*it is accepted that those treaties and conventions do not confer enforceable rights on individuals within the state until Parliament has legislated its provisions into the law of the land, in so far as such relevant international treaties and conventions may be referred to as an aid to construction of enactments, including the Constitution, I find myself at a loss to understand the complaint made against their use in that manner in the interpretation of what no doubt are some difficult provisions of the Constitution.*<sup>41</sup>

In a separate concurring judgment, Aguda JA made reference to the Bangalore judicial colloquium, citing with approval, the arguments of Honourable Justice Michael Kirby, the then President of the Court of Appeal, Supreme Court of New South Wales, and that of Honourable Justice Muhamad Heleem, the Chief Justice of Pakistan. Both judges argued, at Bangalore, that when interpreting written constitutions the provisions of which are usually expressed in general terms, judges have a wide choice in the exercise of which they should normally seek to ensure compliance with the international obligations of the state in which they operate.<sup>42</sup>

Tanzanian judges have also adopted a similar stand concerning the effect on domestic law of unincorporated international treaties. In 1990, the High Court of Tanzania, relying on the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and People's Rights, all of which were ratified by Tanzania, declared *ultra vires* the Constitution, a customary law rule of the Bahaya people of Tanzania that was discriminatory to women on matters of inheritance.<sup>43</sup> Honourable Justice Mwalusanya considered such a rule to be discriminatory and contrary to Article 13(4) of the Tanzania Bill of Rights.<sup>44</sup> Perhaps in anticipation of a possible objection based on the ground that the terms 'sex' is not specifically included in Article 13(5), the judge noted that:

*the Universal Declaration of Human Rights (1949), which is part of our Constitution by virtue of Article 9 (1)(f), prohibits discrimination based on sex as per Article 7. Moreover, Tanzania has ratified the Convention on the Elimination of All Forms of Discrimination against Women.... and the African Charter on Human and People's Rights which in Article 18(3) prohibits discrimination on account of sex... and the International Covenant on Civil and Political Rights which in Article 26 prohibits discrimination based on sex.*<sup>45</sup>

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<sup>41</sup> *Dow v AG* p 656.

<sup>42</sup> *Ibid* at p 671.

<sup>43</sup> The relevant rule provided that women could only inherit clan land for use during their life time but, unlike male heirs, they were not permitted to alienate such property.

<sup>44</sup> See *supra* n 11 at p 763.

<sup>45</sup> *Ibid* at p 763.

Perhaps to round up this survey and to underline the same point, I need only add that the Supreme Courts of Namibia,<sup>46</sup> Nigeria,<sup>47</sup> and Zimbabwe,<sup>48</sup> have all handed down significant decisions that clearly signal their willingness to draw on international human rights norms to interpret domestic law including their national constitutions.<sup>49</sup> All this clearly suggest that the process of building a new culture of constitutionalism is already taking place, albeit unevenly, in the sub-Saharan region of Africa. Even if this is too optimistic a view, there is a way in which the new political liberalisation in Africa is being complemented by a range of international endeavours to produce what is described above as the dawn of an age of constitutionalism in our region.

## 5. Conclusion

I began this paper by noting that there has been a surge in the 1990s of constitutional litigation in which women are seeking redress against discrimination. The courts have generally been quite responsive to these demands. In performing this task, courts have not only generated new legal concepts but have also accorded a certain visibility to gender issues by moving the debate from the fringes of society into the mainstream of judicial discourse. On the question why all this is happening during this decade, the paper has argued that since attaining self rule, sub-Saharan Africa has never enjoyed any meaningful form of constitutionalism. Instead it has been engulfed by an evil cloud of political authoritarianism, economic depravity and civil strife. Whatever may be the real causes of all these problems, the conditions were such that women could not come forward to demand their rights in courts of law, if anywhere.

However, in the years following the end of the cold-war and the disintegration of the Soviet block, a number of forces have worked together to compel African leaders to liberalise their economies and political systems. This has provided an ideal opportunity not only to women but to all citizens who now feel are able to demand their fundamental rights. Courts also have recognised the gravity of their mission in acting as umpires between various competing interests in the community. They have taken up the challenge very seriously. In conclusion, while all these events are to be celebrated by all liberal minded people, women activists will need to

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<sup>46</sup> *Supra* n 14.

<sup>47</sup> *Abibatu Folami & Ors v Flora Cole & Ors*, All Nig LR 1990, 310-20.

<sup>48</sup> *Ncube and Others v The State* (unreported) SC Zimbabwe 14 December 1987; *Rattigan v Chief Immigration Officer of Zimbabwe* [1994] 1 LRC 343, 1995(2) SA 182 (Supreme Court of Zimbabwe); *Salem v Chief Immigration Officer of Zimbabwe* [1994] 1 LRC 354.

<sup>49</sup> This is not to ignore instances of lost opportunities such as in the Kenya case of *Virginia Wambui Otieno v Joash Ougo & Omolo Siranga*; Court of Appeal, Nairobi Civil App No. 31 of 1987 where the Supreme Court of Kenya failed to consider the compatibility of Luo Customary law with international human rights standards. Cited in E Cotran, *Casebook on Kenya Customary Law*, Professional Books and Nairobi University Press (1987) at 331-345. For a more recent critique of the Kenya situation, see Mumbi Mathangani, "Women's Rights in Kenya: A Review of Government Policy" *Harvard Human Rights Journal* Vol 8 (1995) pp 179-199. See also Marsha Freeman, "Measuring Equality: A Comparative Perspective on Women's Legal Capacity and Constitutional Rights in Five Commonwealth Countries" *Berkeley Women's Law Journal* Vol 5 (1989-90) pp 110-138 especially pp 121-125.



recognise that, whereas constitutional guarantees are an important tool in the struggle for gender equality, it is important to consider ways in which court-room victories can be incorporated into a broader framework for social action so that these constitutional guarantees can be translated into reality for every woman in the region.

Forthcoming

### **SRI LANKA: STATE OF HUMAN RIGHTS 1996**

For the first time, the report will cover

- \* environmental rights;
- \* devolution proposals;
- \* nationality & citizenship laws;
- \* the office of the Ombudsman,

in addition to the topics generally covered (freedom of expression, emergency regulations, children's rights, women's rights, internally displaced and integrity of the person).

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**PARLIAMENT OF THE DEMOCRATIC SOCIALIST REPUBLIC  
OF SRI LANKA**

**HUMAN RIGHTS COMMISSION OF SRI LANKA  
ACT, NO. 21 OF 1996**

(Certified on 21st August, 1996)

L.D. - O 12/94

AN ACT TO PROVIDE FOR THE ESTABLISHMENT OF THE 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. 21 of 1996 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 and the Leader of the Opposition.

- (3) In making recommendations, under subsection (2), the Constitutional Council and the Prime Minister shall have regard to the necessity of the minorities being represented of the Commission.
  - (4) One of the members so appointed shall be nominated by the **President to be the Chairman of the Commission.**
  - (5) Every member of the Commission shall hold office for a period of **three years.**
  - (6) 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. (1) A member of the Commission may be removed from office -
- (a) by the President, if he -
    - (i) is adjudged an insolvent by a court of competent jurisdiction;
    - (ii) engages in any paid employment outside the duties of his office, which in the opinion of the President, formed on the recommendation of the Prime Minister in consultation with the Speaker and the Leader of the Opposition, conflicts with his duties as a member of the Commission;
    - (iii) is unfit to continue in office by reason of infirmity of mind or body;
    - (iv) is declared to be of unsound mind by a court of competent jurisdiction;
    - (v) is convicted of an offence involving moral turpitude; or

(vi) absence himself from three consecutive meetings without obtaining leave of the Commission; or

(b) by an order of the President made after an address of Parliament, supported by a majority of the total number of members of Parliament (including those not present) has been presented to the President for such removal on the ground of proved misbehaviour or incapacity:

Provided however that no resolution for the presentation of such an address shall be entertained by the Speaker or placed on the Order Paper of Parliament, unless notice of such resolution is signed by not less than one-third of the total number of members of Parliament and sets out full particulars of the alleged misbehavior or incapacity.

(2) The procedure for the presentation and passing on an address of Parliament for the removal of [a] Judge of the Supreme Court or the Court of Appeal, shall apply in all respects to the presentation and passing of an address of Parliament for the removal of a member of the Commission.

5. Any member who vacates his office, otherwise 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 subsection (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 inquire into, and investigate, complaints regarding 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 conciliation and mediation 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, human 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) appoint such number of sub-committees at Provincial level, as it considers necessary to exercise such powers of the Commission as may be delegated to them, by the Commission, under this Act;

- (c) intervene in any proceedings relating to the infringement or imminent infringement of fundamental rights, pending before any court, with the permission of such court;
- (d) 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;
- (e) 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;
- (f) undertake research into, and promote awareness of, human rights, by conducting programmes, seminars and workshops and to disseminate and distribute the results of such research;
- (g) award in its absolute discretion to an aggrieved person or a person acting on behalf of an aggrieved person, such sum of money as is sufficient to meet the expenses that may have been reasonably incurred by him in making a complaint to the Commission under Section 14.
- (h) 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 sub-section (1), within the period, if any, specified in such reference.
- 13. (1) Where a complaint is made by an aggrieved party in terms of section 14, to the Commission, within one month of the alleged infringement or imminent infringement of a fundamental right by executive or administrative action, the period within which the inquiry into such complaint is pending before the Commission, shall not be taken into account in computing the period of one month within which an application may be made to the Supreme Court by such person in terms of Article 126(2) of the Constitution.

- (2) Where the Supreme Court makes a reference in terms of section 12(1) to the Commission for inquiry or report, the period commencing for inquiry or report, the period commencing from the date of such reference and ending on the date of the report of the Commission, shall not be taken into account in computing the period of two months referred to in Article 126(5) of the Constitution.
14. The Commission may, on its own motion or on a complaint made to it by an aggrieved person or group of persons or a person acting on behalf of an aggrieved person or a group of persons, investigate an allegation of the infringement or imminent infringement of a fundamental right of such person or group of person caused -
- (a) by executive or administrative action; or
  - (b) as a result of an act which constitutes an offence under the Prevention of Terrorism Act No. 48 of 1979, committed by any person.
15. (1) Where an investigation conducted by the Commission under section 14 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 14, 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 section 14 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 14, 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 section 14 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 14, the Commission may where it appears to the Commission that it is not appropriate to refer such matter for conciliation or mediation, or 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 object or 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 paragraph (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 considered or reflected;
  - (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 action which such authority or 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 such report to be placed before Parliament.

16. (1) Where the Commission refers a matter for conciliation or mediation under section 15 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. Sittings of the conciliators or mediators may be held in camera.
  - (4) In the event of the conciliation 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 arrived at.
  - (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 directions (including directions as to the payment of compensation) as may be necessary to give effect to such settlement.
17. Where in the course of an inquiry or investigation conducted by the Commission a question arises as to the scope or 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.
18. (1) The Commission shall, for the purposes of an inquiry or investigations 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;
  - (e) to admit or exclude the public from such inquiry or investigation or any part thereof.
19. (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 proceeding 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 23 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.

20. (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 named 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.
21. (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 with 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**

22. (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.
23. The members of the Commission and the officers and 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.

24. The Commission may delegate to any officer appointed to assist the Commission any of its powers, and the person to whom such powers are so delegated may exercise those powers subject to the direction of the Commission.
25. (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.
26. (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 purpose 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 publications 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.
27. The Commission shall be deemed to be a scheduled institution within the meaning of the Bribery Act, and the provisions of that Act shall be construed accordingly.

#### **PART IV**

#### **GENERAL**

28. (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 of detention, as the case may be, to forthwith and in any case, not later than forty-eight hours from the time of such arrest or detention, 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 conditions of detention of the persons detained therein.
- (3) Any person on whom a duty is imposed by subsection (1), and who wilfully omits to inform the Commission as required by subsection (1), or 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 one year or to a fine not exceeding five thousand rupees, or to both such fine and imprisonment.

29. (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.
30. The Commission shall submit an annual report to Parliament of all its activities during the year to which the report relates. Such report shall contain a list of all matters referred to it, and the action taken respect of them along with the recommendations of the Commission in respect of each matter. The Commission may, whenever it considers it necessary to do so, submit periodic or special reports to Parliament in respect of any particular matter or matters referred to it, and the action taken in respect thereof.
31. (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) Without prejudice to the generality of the powers conferred by subsection (1), the Minister may make regulations prescribing the procedure to be followed in the conduct of investigations under this Act.
- (3) Every regulation 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 regulation.
- (4) 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.
- (5) Notification of the date of which any regulation is so deemed to be rescinded shall be published in the *Gazette*.

32. In the event of inconsistency between the Sinhala and Tamil texts of this Act, the Sinhala text shall prevail.
33. 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 the Companies Act No. 17 of 1982, with funds or capital wholly or partly provided by the Government, by way of grant, loan or otherwise.



## NEWS FROM THE TRUST

### **Handing over of Sri Lanka: State of Human Rights 1996/97**

The Trust handed over *Sri Lanka: State of Human Rights 1996/97* to the Speaker, Mr K.B. Ratnayake, on the 30th. The Report deals with integrity of the person, emergency rule, freedom of expression and media freedom, nationality and citizenship laws, children's rights, violence against women, environmental rights, internally displaced persons and the human rights implications of the devolution proposals.

In addition, the report carries a chapter on the effectiveness of human rights institutions which discusses the role of the Supreme Court and the Office of the Ombudsman.

The publication will be available for sale shortly.

### **Visitors to the Trust**

The Deputy High Commissioner of New Zealand visited the Trust in June. Among the issues that were discussed were the current activities of the Trust, the status of the State of Human Rights Report, the newly established Human Rights Commission and the general situation in the country.

### **NGO Consultation on Freedom of Association, Assembly and Expression**

The Trust organised a consultation of NGOs on Freedom of Association, Assembly and Expression. The main objective was to discuss the Country Report prepared for the Trust by Professor Vijaya Samaraweera. Several prominent NGOs were represented who made many important suggestions which were subsequently incorporated into the document. The report will be presented at a consultation of NGOs to be held in Indonesia later this month which is being organised by NOVIB.

*If undelivered please return to:*

**Law & Society Trust  
No.3, Kynsey Terrace  
Colombo 8  
Sri Lanka**

*Printed and published at Law & Society Trust, No.3, Kynsey Terrace, Colombo 8, Sri Lanka*