Sri Lanka
State of Human Rights 2002

LAW & SOCIETY TRUST

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Contents

Contributors

Overview

Radhika Coomaraswamy
Soundarie David

17th Amendment to the Constitution of Sri Lanka

Rukshana Nanayakkara

The Judiciary in 2001

Shiranthi Jayatilaka

The impact of the Electricity Crisis on Socio-Economic Rights and Sustainable Development

Sonali R. Dayaratne

Judicial Protection of Human Rights

Sumudu Atapattu

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Foreword

This report seeks to describe the current status of human rights in Sri Lanka and to assess the extent to which Sri Lanka has fulfilled its obligation to protect the fundamental rights of its citizenry in conformity with its international obligations. Hence, the report represents an important watershed with regard to human rights in Sri Lanka. Constitutional guarantees, legislative enactments and the extent of the current implementation and enforcement of fundamental rights are examined and the impact of the restrictions they contain are discussed. The report covers the 17th amendment to the Constitution, Judiciary in 2001, the impact of the electricity crisis on socio-economic rights and sustainable development, judicial protection of human rights and the Public Service of Sri Lanka.

The report was co-ordinated by the Law & Society Trust. Specific chapters were assigned to individuals with special competence in the relevant areas. The drafts were subsequently reviewed for accuracy, objectivity and clarity of presentation. The report was then compiled in draft form and comprehensively edited to ensure that as far as practicable there would be uniformity of style and approach. It is inevitable, however, that there would be some overlap between chapters and that some topics would be dealt with more comprehensively than others. The report also contains a list of international human rights conventions to which Sri Lanka is a signatory and a list of instruments, which are yet to be ratified by Sri Lanka. A list of the fundamental rights cases decided by the Supreme Court in 2001, is also attached as a schedule to the report.

It is hoped that this report would continue to facilitate dialogue between civil society institutions and the government in ensuring more effective protection and promotion of human rights within Sri Lanka.

Sri Lanka's Constitution mandates that "the fundamental rights which are declared and recognized by the Constitution shall be respected, secured and advanced by all the organs of government." Sri Lanka is also a signatory to several international human rights conventions and must ensure that its domestic laws, policies and practices are in conformity with its international obligations. This report is a modest step in the continuing struggle to ensure that the State (and those non-state actors who are legitimately subject to scrutiny in this report) upholds its international and constitutional obligations to respect and safeguard human rights.

Law & Society Trust
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Abbreviations

ACTC	All Ceylon Tamil Congress
AG	Attorney General
ASP	Assistant Superintendent of Police
CAS	Ceylon Administrative Service
CAT	Convention Against Torture
CEA	Central Environmental Authority
CEB	Ceylon Electricity Board
CEDAW	Convention on Elimination of all Forms of Discrimination Against Women
CGFS	Commissioner General for Essential Services
CHA	Consortium of Humanitarian Agencies
CIJL	Centre for the Independence of Judges and Lawyers
CMEV	Centre for Monitoring Election Violence
COPE	Committee of Public Enterprise
CPA	Centre for Policy Alternatives
CPC	Ceylon Petroleum Corporation
EIA	Environmental Impact Assessment
ERs	Emergency Regulations
GDP	Gross Domestic Product
HRC	Human Rights Commission
IBA	International Bar Association

ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
IDPs	Internally Displaced Persons
IGP	Inspector General of Police
IHR	Institute of Human Rights
JSC	Judicial Service Commission
JVP	Janatha Vimukthi Peramuna
LECO	Lanka Electricity Company
LTTE	Liberation Tigers of Tamil Eelam
MOU	Memorandum of Understanding
MPs	Members of Parliament
NCPA	National Child Protection Authority
NGO	Non-Governmental Organisation
OPA	Organisation of Professional Associations
PA	People's Alliance
PPP	Protection of Public Property
PSC	Public Services Commission
PTA	Prevention of Terrorism Act
SASA	State Administrative Service Association
SC	Supreme Court
SLAS	Sri Lanka Administrative Services
SLMC	Sri Lanka Muslim Congress

TELO	Tamil Eelam Liberation Organisation
TQB	Textile Quota Board
TULF	Tamil United Liberation Front
UN	United Nations
UNHCR	United Nations High Commission of Refugees
UNICEF	United Nations Children's Fund
UNP	United National Party
WGEID	United Nations Working Group on Enforced and Involuntary Disappearances

I

Overview

Radhika Coomaraswamy[*]
Soundarie David[**]

1. Introduction

Renewed clashes between the Sri Lankan military forces and the Liberation Tigers of Tamil Eelam (LTTE), as well as prolonged political infighting in Colombo created an atmosphere wherein gross human rights abuses, including indiscriminate bombing and shelling, killings, disappearances, torture, and recruitment of child soldiers continued in various forms. This overshadowed other developments and generated serious abuses.

The war in the North continued to claim civilian lives and generated thousands of new internally displaced persons. Restrictions in the North and East prevented many displaced persons from reaching work

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[*] UN Special Rapporteur for Violence Against Women, Director, International Centre for Ethnic Studies, Colombo.

[**] Researcher, International Centre for Ethnic Studies, Colombo.

sites to earn a living, attending schools, or seeking urgent medical care. Arbitrary arrests of Tamils based almost solely on suspicion of LTTE connections continued in many parts of the country. Draconian security laws continued to facilitate arbitrary arrest, lengthy detention of suspects without trial and attendant abuses.[1] Widespread violence took place prior to as well as on the day of the December Parliamentary elections.[2]

The period from the days immediately before October 10th dissolution of Parliament to the close of nominations saw a number of changes in Sri Lanka's political spectrum. Various players manoeuvred for space, in the process creating new alliances, and coalitions that made the post election scenario rather complex. There was clearly a crisis in governance that seemed to have an impact on every aspect of life especially on the already ailing economy, which was barely just recovering from the aftermath of the July 24th attack on Colombo's Bandaranaike International Airport. There was also a rise in paramilitary and vigilante activities. The failure to bring to justice those responsible for human rights violations remained a major concern during the year.

2. The War

During the early part of the year, there was a ceasefire initiated by the LTTE, but on the 24th of April 2001, the LTTE headquarters in Vanni declared that it would not extend the unilaterally declared four months old ceasefire.[3] This was immediately followed by the Sri Lankan army

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1 Human Rights Watch World Report 2002, www.hrw.org/wr2k2/asia10.html, accessed on 20.06.2002.

2 Refer CMEV 2001 General Election Report.

3 'LTTE ends ceasefire', in the *Daily Mirror*, 24th April 2001.

launching Operation 'Agni Khiela' (fireball) with the intention of seeking to extend its control over the Jaffna peninsula. Civilians caught in the middle of the clashes experienced renewed hardships. Norway's efforts to bring the two sides to the negotiating table continued until June, when the process stalled. No formal peace talks took place during 2001.

Two suicide bombings took place this year. On the 30th of October, Prime Minister Ratnasiri Wickramanayake narrowly escaped a suicide bombing in Colombo. In this attack two civilians were killed and 13 others were injured. This attack came at a time when the country was preparing for Parliamentary elections. In November, three former members of a paramilitary group working with the Sri Lankan army intelligence unit were killed, and another wounded by a suicide bomber in Batticaloa; one civilian was also killed and eight injured in the attack.

The most daring attack last year was in July when the LTTE attacked Colombo's Bandaranaike International Airport. Two civilians, seven security personal and 14 LTTE members who took part in the attack were killed in the ensuing battle between the LTTE and the security forces. The attack on Sri Lanka's only international airport was both a political and financial blow.[4] It reduced the country's commercial fleet by half, drove up exporter's insurance premiums and damaged tourism.

2.1 Communal violence

Communal tension between Sinhalese and Muslim communities was experienced in early May last year, in Mawanella, where two people were killed and a large number of Muslim shops were destroyed. The

[4] *Supra* n 1.

Muslim community protested and alleged police inaction concerning the attack on a Muslim store clerk. In response a group of Sinhalese attacked the Muslim protestors. Conflict escalated, two Muslims were killed and scores of buildings and a few vehicles were destroyed. Several unruly incidents were reported in Colombo where police had to use tear gas and army units had to be called to disperse crowds and quell the violence that erupted.[5] It was observed that the police broke up the demonstration with force[6], and imposed a curfew in the city of Colombo. Many residents of Mawanella complained to the Human Rights Commission (HRC) stating that police inaction led to the massive mayhem there.[7] At year's end the government was said to be still investigating the Mawanella incident, and to date no affirmative action has been taken.

Muslim Congress Leader Rauf Hakeem took the government to task over its failure to take action on those responsible for the riots. In a report submitted to the President, Mr. Hakeem stated there was a general consensus among the public that the continued patronage given to criminal elements by leading politicians belonging to the government party was the primary cause for this tragedy.[8]

3. Election Violence

After further defections from her coalition, the President dissolved Parliament on the 10th of October, and called for elections to take place on the 5th of December. Violence continued to plague the political process in the lead up to Parliamentary elections scheduled for the 5th

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5 *Weekend Express*, 6th May 2001.

6 http://web.amnesty.org/web/ar2002.nsf/asa/sri+lanka, accessed on 20th June 2002.

7 *Daily Mirror*, 7th May 2001.

8 'Spotlight', *Sunday Leader*, 13th May 2001.

of December. A summary report at the end of the election campaign period of October 27th –December 2nd stated thus:

> *'The extent and seriousness of the violence experienced thus far have been clearly in excess of the General Election campaign of 2000, the Presidential Election of 1999 and the General Election of 1994. In 2000, CMEV recorded 2044 incidents during the 39 days of the campaign, whereas up to December 1, 2001 (37 days) the cumulative number of violations recorded is already 2205, and together with an estimated 110 incidents recorded on December 2, 2001 brings the total for the campaign to approximately 2315'* [9]

The 17th Amendment to the Constitution, which was passed in October 2001 gave the Commissioner of Elections additional powers and also provides that his overriding duty and responsibility was to ensure free and fair elections and to secure the enforcement of all laws relating to the election of Members of Parliament.[10] It was also made clear in the landmark judgment of the Supreme Court in the case, *Egodawala and others* v. *Dayananda Dissanayake and others*,[11] delivered on 3rd April 2001, which held unequivocally that the Commissioner of Elections, indeed, has the duty to annul a poll and order a re-poll in polling stations where the vote has not been free, equal and secret.[12]

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[9] CMEV Press release, 3rd December 2001.

[10] See also, Rukshana Nanayakara, "17th Amendment to the Constitution" in this volume.

[11] SC Application No 412/99, SC Minutes 3.4. 2001.

[12] For more details see, Sumudu Atapattu, "Judicial Protection of Human Rights" in this volume.

The Supreme Court declared that:

> *... A poll is a process of voting that enables a genuine choice between rival contenders: necessarily one that is free of any improper influence or pressure; equal, where all those entitled to vote (and no others) are allowed to express their choice as between parties and candidates who compete on level terms; and where the secrecy of the ballot is respected.... A mere semblance of a poll is not enough. The elaborate provisions of the Act, and especially Part III, compel the conclusion that Parliament had in mind a genuine poll, and not a mere charade. Such a poll must "continue": i.e. voting must take place not sporadically, but without interruption, from beginning to end.*

The Supreme Court referred to ballot stuffing, the chasing away of polling agents, violence, the threat of violence and intimidation that had the effect of deterring citizens from going to their respective polling stations and exercising their franchise, large scale impersonation and the seizure of poll cards as factors that could undermine a free, equal and secret poll, justifying annulment by the Commissioner of Elections and a decision by him to order a re-poll. With regard to the Commissioner of Elections powers it was stated in a report that:

> *'However, although the amendment was passed, the bodies envisaged under it were not set up. Encouragingly the Attorney General confirmed that the Commissioner of Elections could not only continue to exercise and perform the powers and functions vested in him immediately prior to the commencement of the Act but also that of the newly proposed Election Commission until that body was so constituted. Regrettably however the Election Commissioner's attempt to enforce*

provisions of the Act[13] *were thwarted during the election campaign.'*[14]

At the general election, the United National Party (UNP) contested under the banner of the United National Front. The Front included the Ceylon Workers' Congress (CWC), and the Upcountry People's Front. Some members of the Sri Lanka Muslim Congress (SLMC) contested as UNP candidates. The breakaway group from the Peoples Alliance (PA) led by Minister S.B. Dissanayake and Professor G.L. Peiris formed part of the UNF.[15]

Violence marred the December Parliamentary elections in which the United National Front, a coalition of parties led by the UNP, won a majority in Parliament for the next six years. The UNF won 96 seats and gained 13 bonus seats making a total of 109 seats in the 225 member Parliament.[16] The Centre for Monitoring Election Violence (CMEV) reported 4208 incidents, and 73 deaths[17], in the period between October 10th and December 5th. In a letter sent to the Commissioner of Elections, by the CMEV it was stated:

'According to reports we have received from our network of polls monitors as at 4 p.m. on December 5th, 2001, we are convinced that today's election has been severely marred by widespread incidents of violence, rigging and other electoral malpractices.

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[13] 17th Amendment to the Constitution.

[14] Final report of the European Unions Observation Mission to Sri Lanka, December 5th 2001, Parliamentary Elections.

[15] Ranatunge, D. C., *The Twelve Parliaments of Sri Lanka,* (Sarasavi Publishers, Colombo 2002), p 55.

[16] *Ibid.*

[17] CMEV 2001 General Election Interim Report, www.cpalanka.org/pdf/Interim_Report.pdf

> *In several areas, citizens have been denied access to polling stations and there has been a breakdown of the basic machinery of law and order. Furthermore, voters in the uncleared areas in the North and East have been denied access to the clustered polling centres by the armed forces. In several parts of the country, the Presidential Security Division (PSD) and the Police have actually contributed to the breakdown of law and order.'*[18]

Clearly no action was taken by the Government to ensure that people are free to exercise the franchise without fear, and according to their conscience – a right that is fundamental to any democratic process.

4. Rights of the Child

The most serious violation of children's rights in Sri Lanka is the continued recruitment of children by the LTTE as combatants. During a visit to Sri Lanka in 1998, the UN Secretary General's Special Representative on Children and Armed Conflict, Olara Otunnu, obtained assurances from both the government and the LTTE that gave hope for an improvement in the situation of child recruitment. However in the years that followed we see that the situation has deteriorated considerably. Despite these assurances, child conscription by the LTTE still continues. There have been reports that the LTTE had resorted to extortion and threats to families to comply.[19] UN agencies including the UNICEF have criticised the LTTE's continued recruitment of child soldiers. Some children are recruited even as young as 12.[20]

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[18] CMEV Press Release, 25th November 2001.

[19] 2001 Country Reports on Human Rights Practices, US Department of State, Sri Lanka, p 46.

[20] *Supra* n 1.

In February 2001 the UNICEF Deputy Director Andre Roberfroid met senior representatives of the LTTE in Northern Sri Lanka to express the UN's growing concerns. The LTTE agreed to implement measures proposed by the UN on previous occasions which included widely publicising the minimum age recruitment, not conducting any recruitment in or near schools, investigating all reported cases of children who have been recruited. The LTTE undertook to allow the UN to systematically monitor compliance with measures, including access to school attendance records by UNICEF and UNHCR to identify absent children. The LTTE also resorted to its earlier commitment to allow the UN to monitor systematically compliance with measures, including access to school attendance records by UNICEF and UNHCR to identify missing children.[21]

The Convention on the Rights of the Child (CRC) is the first legally binding international instrument to incorporate the full range of human rights – civil and political rights as well as economic, social and cultural rights in relation to children. Two optional protocols, on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography were adopted in 2000 to strengthen the provisions of the Convention in these areas.[22]

The UN Security Council Resolution on Children in Armed Conflict passed in 2001[23] reiterates its commitment in protecting children even in peace agreements as stated in sec. 8 (e) whereby member states are requested to:

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21 UNICEF Press release 24.01.2001, statement attributable to Carol Bellamy, Executive Director UNICEF.

22 Optional Protocol on the Sale of Children, Child Prostitution & Child Pornography, entered into force on 18.01.2002, and Sri Lanka became a signatory to it on 28.05.2002.

23 Resolution 1379, 2001.

> *Provide protection of children in peace agreements, including, where appropriate, provisions relating to the disarmament, demobilization, reintegration and rehabilitation of child soldiers and the reunification of families, and to consider, when possible, the views of children in those processes;*

In October 2001, Amnesty International appealed to the leadership of the LTTE urging to put an end to the ongoing recruitment of children stating:

> *"Whether the recruitment is forced or not, children have no role to play in war. The LTTE must live up to its own pledge not to use child soldiers, cease recruitment immediately and return the children to their families."*[24]

The second issue that was also a growing concern, highlighted by Mr. Roberfroid was the increasing number of children dropping out of school especially in the North and East. This was put down to two reasons. Namely, the acute shortage of trained teachers, and the need for children to help their parents supplement family income. Basic education is the right of every child under International Human Rights Law, and is also a deterrent to child recruitment. Sri Lankan law requires that children between the ages of 5-14 years attend school.[25] UNICEF was instrumental in trying to make a change - it called on the LTTE to adhere to all commitments concerning children and even went further by urging them to adhere to the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.[26] On becoming parties to the Protocol, States have

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[24] Amnesty International News Report 11.10.2001.

[25] Regulation to the Education Ordinance, Government Gazette, 25th November 1997.

[26] Sri Lanka is a signatory to the Optional Protocol, ratified on, 8th September 2000.

to deposit a binding declaration setting out their minimum voluntary age and the safeguards they have adopted in compliance with Article 3(3) of the Protocol. These declarations may be strengthened at any time but not weakened.[27] It also called upon the government to take steps to liberalise the current constraints on humanitarian access to resolve the acute shortage of teachers as mentioned above in the core areas worst affected by the conflict and to remove military presence from schools.[28] Regular employment of children also occurred in the informal sector and in family enterprises. Government inspections have been unable to eliminate these forms of child labour.

5. Torture and Arbitrary Detention

The Special Rapporteur on Torture in his report for the period of December 1999 – December 2000 acknowledged action taken by the government in relation to torture: the incorporation into domestic law of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Supreme Court awards of compensation and the decision to initiate police investigations into allegations of torture received from various sources, including United Nations bodies. The Special Rapporteur however, noted that:

> *'It remains evident that more prosecutions and convictions will be required in order to significantly affect the problem of impunity. In any event, personnel responsible for injury leading to compensation should be removed from office. Steps being taken to reinstate measures for monitoring places of detention will also need to be implemented vigorously to ensure the effective prevention of torture.'*[29]

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[27] Article 3.

[28] UNICEF Press release 24th January 2001.

[29] Report of the Special Rapporteur on Torture, Sir Nigel Rodney-eighth report to the commission (E/CN.4/2001/66).

Arbitrary detention and mistreatment of prisoners by police and security forces remained common during the year. The harshness of the provisions of the Prevention of Terrorism Act (PTA) and the harshness of the implementation measures adopted by the security forces had been the cause of growing concern. The PTA violates the accepted standards of the criminal procedure as well as other generally accepted international norms in relation to due process. Several provisions of the PTA have sustained criticism as it has been viewed as an obstacle to the promotion of Human Rights Standards. Under the Emergency Regulations and the PTA security forces may detain suspects for extended periods of time without court approval.[30]

The PTA permeated torture under the guise of interrogation and investigation. Security forces continued to torture and mistreat detainees and other prisoners, particularly during interrogation. Methods of torture included electric shock, beatings, suspension by the wrists, feet in contorted positions etc.[31] Detainees have reported broken bones and other serious injuries as a result of their mistreatment. An example would be that of Thivyan Krishnasamy, an outspoken student leader who was a critic of the actions of the Sri Lankan security forces in Jaffna. Human rights observers claimed that he was arrested because of his political activism, but the police stated that he had LTTE connections. He was arrested on the 2nd of July and when he was brought before the court in August he complained of being tortured.[32] He appeared in court again on the 18th of November at which time the hearing was delayed until early 2002.

Deaths in custody in 2001 included that of Kandiah Uthayakumar suspected of smuggling banned commodities to the northern town of

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[30] *Supra* n. 19, p 16.

[31] *Ibid.*, p 13.

[32] *Ibid.*, p 14.

Mannar, who died on the 28th of February after arrest by Navy personnel. His children, who witnessed the arrest, said he had been beaten and strangled by the arresting officer.[33] It has been indicated that some 18,000 people may have been arrested under the PTA. Many of the provisions under the PTA run in conflict with the ICCPR.[34]

It is stated under the Fundamental Rights provisions in the Constitution, that victims may apply to the Supreme Court as provided by article 126, in respect of the infringement or imminent infringement of fundamental rights by executive or administrative action.[35] However most cases take up to two years or more through courts, and NGOs – who represent torture victims, have complained that the Chief Justice appointed in September 1999 grants hearing in only the most egregious cases.[36]

On the 4th of July the country's emergency laws, which were in force for the greater part of the last 18 years were allowed to lapse. The President promulgated regulations under the PTA in a bid to meet the requirement of the current security situation in the country. As some hailed the lapse of emergency as a victory for democracy and the rights of the civilians, many questioned the effectiveness of the new regulations to uphold security.[37] To date impunity has remained a problem. The government has not identified those responsible and brought them to justice. The UN committee on torture sent a five

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[33] *Supra* n 1.

[34] See the chapters on "Integrity of the Person" in previous *Sri Lanka: State of Human Rights Reports* (Law & Society Trust, Colombo).

[35] Article 17: Constitution of the Democratic Socialist Republic of Sri Lanka.

[36] *Supra* n. 19, p. 14.

[37] *Sunday Times*, 8th July 2001.

person mission to Colombo in August 2000. At the year's end the mission had submitted a confidential report to President Kumaratunge but the report had not been released to the public.

Torture continues to be a pressing issue of concern. Therefore every effort should be made by the government in combating the root causes that pave the way for the use of torture. The continued use of the PTA which suspends important legal safeguards and provides for incommunicado detention in undisclosed places, raised several issues of human rights and questions as to whether in reality such legislation actually assists in combating insurgency. In view of this harsh piece of legislation, steps should be taken to repeal the Act altogether and principles of humanity be observed in the treatment of all those in detention.

Failing this, at least those provisions and forms of implementation which do bring Sri Lanka into conflict with her obligations under the International Law be recognised and significantly amended, so that they would be in line with Sri Lanka's commitments under the ICCPR. Special laws relating to arrest and detention such as those that exist under the PTA need as a basic minimum, both certain safeguards against abuse, and a special mechanism by which they can be monitored. The LTTE has also reportedly used torture on routine basis.

6. Women's Rights

Sexual assault, rape and spousal abuse continued to be serious and pervasive problems. Sexual violence against women by security forces in various parts of the country attracted new attention in 2001. Widespread protests were sparked by Tamil and Muslim political parties due to the premeditated gang rape on the 24th of June of a twenty-eight year old Tamil woman in Colombo by police and army

personnel at a security checkpoint. Following this incident due to the media storm that followed,[38] several other custodial rape cases received new scrutiny and at least one victim of grave sexual abuse was ordered to be released from custody.[39] During the first six months of the year police reported a total of 36 rape case investigations, five of which involved security personnel.[40] One such case involved the gang rape of two women arrested on March 19th in Mannar. The women claimed that they were tortured and repeatedly raped by naval and police personnel. Most of these incidents occurred in the context of the armed conflict between the security forces and the LTTE.

Following several reports of rape by security forces in Mannar, Batticoloa, Negombo and Jaffna, Amnesty International urged President Kumaratunge to take action to stop rape by security forces and bring perpetrators to justice.[41] However the pace of investigation has been very slow. It was been suggested that in some cases, pressure had been exerted by interested parties on medical officers to cover up evidence of custodial mistreatment. In the case of the March 19th gang rape (mentioned above) the initial report of the district medical officer concluded that there were no signs of mistreatment or even rape. After the complaints were made public, a second medical examination was ordered by the court, and it was only the second doctor who confirmed that the women had been tortured and raped.

There are several reasons as to why investigations are unsuccessful. Some of them are:

1) Threats by the perpetrators against the victim or witnesses.

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38 *The Island*, 2nd July 2001 and *Daily News*, 10th July 2001.

39 *Supra* n 1.

40 *Supra* n. 19, p. 37.

41 AI Index ASA 37/006/2001.

2) Political or other pressure brought to bear on the investigators.

3) The withdrawal of the complaint by the victim because of the stigma associated with rape.

All necessary measures should be taken to protect the victims and any security officers found to be responsible for rape, sexual abuse or other torture, or for encouraging or condoning these offences should be brought to justice.

6.1 Women in politics

A provision to reserve 25% of seats at local government level was included in the government's proposal for a new Constitution.[42] This was included on the initiative of the government and welcomed by women's groups in the country. But this provision was not present in the August 2000 Constitutional Reform Proposals tabled in Parliament.[43] In all 115 women contested the December 2001 elections and nine women MPs were elected to Parliament. However CMEV said the number of women elected was insufficient to represent women in Sri Lanka who constitute 51% of the total population.

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[42] October 1997 draft.

[43] 'Quotas for Women' By Chulani Kodikara; *Voice of Women*, April 2002.

7. Freedom of Speech

The Constitution provides for freedom of speech and expression, however, the government restricts those rights in practice, often using national security grounds permitted by law. Even though the government lifted the censorship on war reporting in June, private television stations continued to impose their own informal censorship on news broadcast in the country.

In previous years the government had stringent censorship regulations and on occasions security forces harassed journalists and shut down newspapers that were critical of the government.[44] One such example was the case of *The Sunday Leader.* It was a case where the Attorney General had filed indictment against the Editor of *The Sunday Leader,* with criminal defamation of President Chandrika Bandaranaike Kumaratunge by publishing an article titled "Height of Corruption" in *The Sunday Leader* newspaper in its issue of June 27th 1999. The case was still pending at the end of the year.

The Ministry of Defence censorship rules seemed certain to strain relations with the press. All news organizations were banned from carrying uncensored news about military operations. The Free Media Movement in Colombo called the action "a flagrant violation of the commitment made by this government in its election manifesto to defend media freedom." The Committee to Protect Journalists in New York similarly denounced the rules.[45]

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[44] See also, Pinto Jayawardena, K., "Freedom of Expression and Media Freedom," in *Sri Lanka: State of Human Rights 2001* (Law & Society Trust, Colombo 2001).

[45] Columbia Journalism Review July/Aug 1998, www.cpj.org/protests/00ltrs/SriLanka

Restrictions on war reporting were relaxed in May 2001.[46] The lifting of prior censorship on military issues was long overdue and most welcome. However restriction on access to areas under LTTE control still remained a serious impediment in 2001. In April 2001, a journalist writing for the London *Sunday Times* was shot and seriously injured when she defied a government ban on travel to LTTE controlled areas.

There have been credible claims of harassment and intimidation of private media personnel by the government. The International Bar Association (IBA) following a brief mission to Sri Lanka in August submitted recommendations to the Bar Association of Sri Lanka to do away with criminal defamation law and encourage freedom of speech. In a literate modern democracy there is no need for government control of the press, TV or radio and certainly not by way of state ownership. The capacity of any government and executive to manipulate the media to its own ends and particularly to stifle free debate is obvious and cannot be justified.[47] The IBA report noted that criminal defamation laws were contrary to the fundamental human rights set out in the constitution and were an affront to a free media. The report also condemned the harassment and interrogation of media personnel by the security forces as a means of restricting free speech.[48]

It is encouraging to note that measures had been taken to draft amendments to the Penal Code with regard to its criminal defamation laws. The Draft Bill to this effect was finalised by the Justice Ministry by the end of the year. Accordingly, several new clauses had been introduced to replace certain sections of the Penal Code and the Press

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[46] *Supra* n 1.

[47] IBA Report - a summary of the conclusions and recommendations of the IBA Human Rights Institute delegation following its mission to Sri Lanka between 28 August 2001 to 31 August 2001. www.envoynews.com/iba/e_article000057701.cfm#conclusion

[48] *Sunday Times*, 2nd December 2001.

Council laws. These include the repeal of the provisions relating to bringing the President into contempt and provisions relating to criminal defamation.

Clause 3 of the Bill repeals Chapter 19 of the principal enactment (i.e. the Penal Code) and the legal effect of the section as amended is to repeal the provisions relating to criminal defamation. Meanwhile, clause 4 has been introduced to repeal section 135 of the Criminal Procedure Code on the same issue.

8. Internally Displaced Persons (IDPs)

Internally displaced persons, who had been forced to leave their places of residence, and remain within Sri Lanka suffered a variety of Human Rights violations. These range from restrictions on their freedom of movement and expression, to little access to water, basic health care and education.

The Guiding Principles on Internal Displacement were developed by the UN to enhance protection and assistance to more than 20 million IDPs worldwide. While responsibility for the protection for IDPs rests first and foremost with national governments and local authorities, it is important for the international community to see how best it can contribute to enhancing the protection of IDPs in conflict and crisis situations.[49] The most worrying concern is the lack of governmental framework on displacement. State policy towards IDPs is vague and constantly changing. There is an evident lack of policy and legal framework. Toilet facilities are inadequate in most places. In the early part of 2001, most of the IDPs from Jaffna, Nallur, and Kopay had temporarily resettled in their places. This is attributable to the reason

[49] Foreword to the Guiding Principles by Under-Secretary-General for Humanitarian Affairs Mr Sergio Vieira de Mello.

that no shelling had taken place consequent to the declaration of the unilateral ceasefire by the LTTE.[50] Many displaced people kept coming to Vavuniya from the uncleared areas of Vanni. In January alone 3756 civilians and children had come into Vavuniya from uncleared areas.[51] IDPs constantly faced various problems of all forms. Most of them lived in so called 'Welfare Centres' where space and facility given to each family was totally inadequate and a security and health hazard. Some of the displaced were also accommodated in vacant and abandoned houses or with friends or relatives.

8.1 Sanitation and health

Between May and July 2001, Action Contre la Faim[52], undertook a survey of water and sanitation conditions in the Trincomalee Welfare Centres in Trincomalee District. Many guidelines were made available for evaluating standards, however for this survey, the water and sanitation conditions in each camp were evaluated using 'Key Indicators'. According to this survey, all welfare centres had adequate number of water points located sufficiently close to the shelters but the biological quality of water supplies consistently fell below the required recommended limit. Three quarters of the camps had an insufficient number of toilets that were usable.[53] People in the uncleared areas were living without adequate medical facilities. Facilities to run peripheral hospitals in the uncleared areas were available but doctors were reluctant to go there.[54]

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[50] CHA Newsletter, Monthly Situation Report-Jaffna Jan/Feb 2001.

[51] CHA Newsletter, Monthly Situation Report-Vanni Jan/Feb 2001.

[52] An international NGO working on humanitarian issues.

[53] "Assessing the level of service provision: The Case of Water and Sanitation conditions in Welfare Centres"- Ivor Kent, Country Programme Manager, Action Contre La Faim.

[54] CHA Newsletter, Monthly Situation Report-Batticoloa, March/April 2001.

8.2 Women and children

In welfare centres, children suffer most from malnutrition and bad health. Many displaced children did not attend school. IDP women are subject to sexual harassment, abuse, rape by security forces and paramilitary groups. Domestic violence was common in camps as was prostitution of women and children. The Guiding Principles place particular emphasis on the needs of vulnerable groups including children, expectant mothers, mothers with young children,[55] etc. However to date our laws have not incorporated any measures whereby vulnerable groups would be protected.

The problems encountered by IDPs are numerous and their conditions are not in adherence with international human rights norms. Family and community life has almost totally been destroyed. In some cases their identity as a people is at risk, this being the case of those evicted from the North. The opportunity for cultural identity hardly exists. The capacity and ability to work has been affected. Their ability to participate and influence the political process was totally been eliminated. There was also restriction of movement. Most of these restrictions seem senseless and counterproductive and do little to achieve the security objectives, but merely suffocate and humiliate the displaced. The embargo on so-called 'war related' items has further affected the welfare of that population. Medical equipment and medicine were also subject to embargos as well as delays and shortages.[56] It is obvious thus that several of their human rights civil, cultural, economic, political and social rights are infringed.

UNHCR and Refugees International both estimated that 800,000 Sri Lankans remained internally displaced at the end of 2001. Another

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[55] Guiding Principle No 3.

[56] CHA Newsletter, Situation Report, July/August 2001.

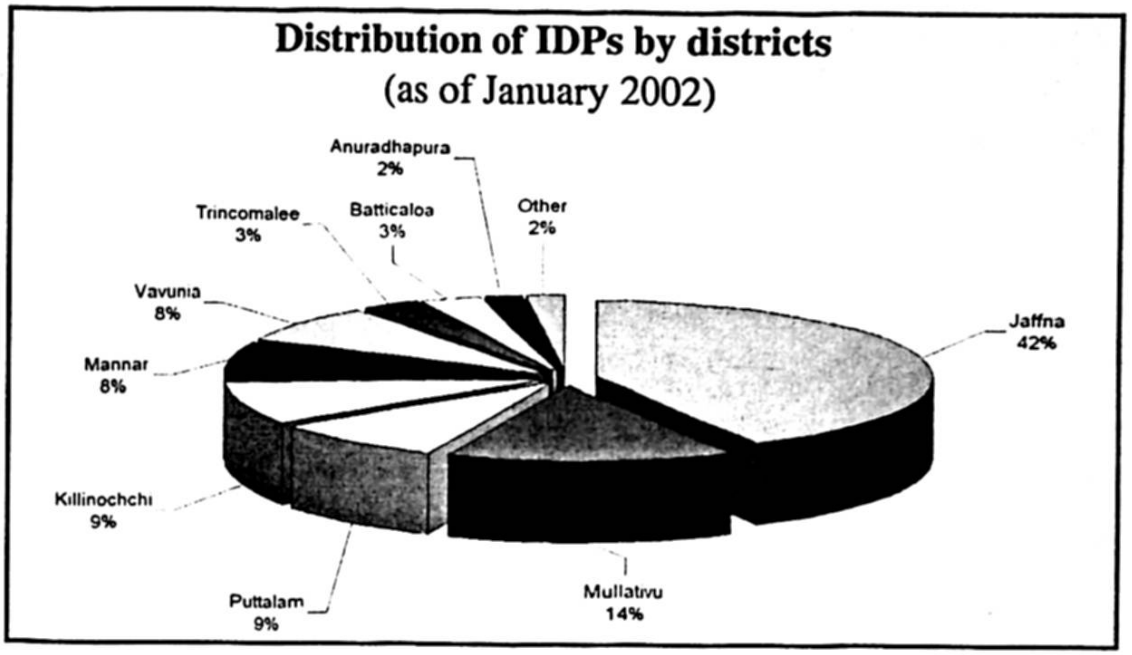
144,000 Sri Lankans were refugees in India. Most Sri Lankan refugees and displaced persons were Tamils, although thousands of Muslims and some Sinhalese were also displaced. Over 340,000 persons, principally in the Vanni region, remain displaced from the past several years of fighting. The Sri Lankan government reported that it was providing food assistance to nearly 705,000 internally displaced persons, including in areas controlled by the LTTE, but that it needed increased international aid to feed the remaining 100,000.

Of the displaced persons assisted by the government in 2001, some 528,000 were staying with family and friends, and the remaining 172,000 were living in welfare centers ranging from camps, where conditions vary considerably, to settlements with a full range of government social services and food aid.[57] A range of international, national, and local aid agencies continued to provide assistance to the displaced.

8.3 Distribution of IDPs by districts (January 2002)

The following graphics are based on figures provided by the Commissioner General for Essential Services (CGES) as of January 2002. They do not reflect the total number of displaced throughout the country since they only include those receiving food assistance from the government. As many as 100,000 IDPs may not be included either because they are living in uncleared areas or because they do not qualify for government assistance.

[57] *Supra* n. 19, p 31.



9. Human Rights Commission

The Human Rights Commission (HRC) was established by Act No. 21 of 1996 as a permanent national institution to investigate any infringement of fundamental rights declared and recognised by the Constitution, and to grant appropriate relief.[58] The HRC plans to establish a case by case registry to keep track of movement of detainees between different detention camps. Although the HRC officials regularly visited places of detention, the Commission needs to make more regular visits. In March 2001, the HRC selected three local NGOs to collaborate on the study of internally displaced.[59] Also this year, UNHCR signed a co-operation agreement with the National Human

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[58] Sathkunanathan, A., "The Human Rights Commission" in *Sri Lanka: State of Human Rights, 2000* (Law & Society Trust, Colombo 2000)

[59] CPA (Centre for Policy Alternatives), LST (Law & Society Trust) and CHA (Consortium of Humanitarian Agencies) undertook the responsibility of collaborating the study-'Internally Displaced Persons and the Human Rights Commission.'

Rights Commission in order to increase the capacity of the Commission to focus on the rights of IDPs and to help them resolve individual problems.[60]

10. Defending Human Rights

Local human rights organisations continued to advocate for an end to official impunity and custodial abuse, including violence against women. They were also actively involved in the international arena in the events leading up to the Durban World Conference Against Racism and in the global campaign against the use of child soldiers.

Rights activists joined academics and private citizens in Sri Lanka's growing peace movement in denouncing the government's ban on the LTTE and called on the LTTE and government to commence negotiations. Sri Lanka's flagging business community, early in September, with more than a dozen of top national business groups and advertising agencies initiated a 'Sri Lanka First' campaign advocating civil action to end the war.

11. International Human Rights Obligations

Sri Lanka ratified the Optional Protocol to the Convention on Elimination of all Forms of Discrimination Against Women (CEDAW) in 1981, which allows individual petitions to the CEDAW Committee, similar to the procedure under the first Optional Protocol to the ICCPR. While this is a positive sign, Sri Lanka is still overdue in submitting reports under the many treaties it is a party to. Treaty obligations make it compulsory that State parties submit periodic reports, reflecting the extent of compliance. The table below indicates the current status.

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[60] UNHCR Global Report Sri Lanka 2001.

Treaties	Date Due	Report	Status
CAT	01/02/99	Second Periodic	Not Submitted
ICCPR	10/09/96	Fourth Periodic	Not Submitted
ICCPR	10/09/01	Fifth Periodic	Not Submitted
CEDAW	04/11/98	Fifth Periodic	Not Submitted
ICESCR	30/06/00	Third Periodic	Not Submitted

Source: UNHCR website

It is important that Sri Lanka takes its international obligations seriously if one needs to put an end to the serious and flagrant abuses of human rights. There needs to be a system of accountability and the government needs to give priority to human rights issues. It also needs to revisit recommendations put forward by various expert bodies over the years including the United Nations Working Group on Enforced and Involuntary Disappearances (UNWGEID) and the Presidential Commissions on Disappearances. In particular the government should prioritise a review of the Prevention of Terrorism Act (PTA). The failure to bring to justice those responsible for human rights violations remained a major concern, and progress on previous cases have been minimal or non-existent in many of the high profile cases. Criminal extortion rings continued to be linked with political forces, and were blamed for increased communal tension in Central and Eastern Sri Lanka. The importance of complying with international standards of human rights should not be ignored and a mechanism for accountability for previous human rights violations should be set up. The year ended on an optimistic note with the general public looking forward to significant changes with the new government, hopeful that means of putting an end to the on going ethnic conflict would be found. It is anticipated that the following year would thus be free of the gross human rights violations observed this year.

II

17th Amendment to the Constitution of Sri Lanka

Rukshana Nanayakkara[*]

1. Introduction

The year 2001 marked the most significant development in recent constitutional history with the adoption of the much welcomed 17th Amendment to the 1978 Constitution of Sri Lanka. Further, the proclamation of a referendum by the President[1] to evaluate the public opinion on the introduction of a new Constitution, too, created much discussion on the subject, which contributed in part, to the cancellation of the referendum. It took nearly 11 years to introduce another amendment to the Sri Lankan Constitution; the 16th Amendment was adopted in 1988. As the governing party did not enjoy a 2/3 majority

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1 Referendum announced by the President by Government Gazette No.1192/16 on 10th July 2001.

in Parliament which is required to amend the Constitution,[2] no amendments to the Constitution were possible; most significantly, the attempt to introduce a new constitution in the year 2000 also failed due to this issue. Therefore, the 17th Amendment to the Constitution stands as a significant development in the recent constitutional history of Sri Lanka as a consensus from the main political parties[3] was achieved for its adoption. The adoption of the 17th Amendment and particularly the introduction of a Constitutional Council was welcomed by many civil society groups, which hoped that it would assist in the process of establishing a culture of good governance in the country.[4]

2. Background to the Amendment

The idea of an amendment was brought to the surface when the People's Alliance (PA) Government signed a Memorandum of Understanding (MOU) with the Janatha Vimukthi Peramuna (JVP) on 5th September

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[2] See Article 82(5) of Chapter XII of 1978 Constitution.

[3] The main political parties, which played an active role in the amendment, were the People's Alliance (which mainly consists of the Sri Lanka Freedom Party, the Communist Party of Sri Lanka and the Nawa Samasamaja Party), the United National Party and the Janatha Vimukthi Peramuna.

[4] The Concept of good governance has been clarified by the work of the Commission on Human Rights of the United Nations. In its resolution E/CN.4/RES/2000/64 in 2000, the Commission identified the key attributes of good governance as:

- Transparency
- Responsibility
- Accountability
- Participation
- Responsiveness (to the needs of the people) In his Millennium Report, *We the peoples*, the Secretary General of the United Nations, emphasized that better governance means greater participation, coupled with accountability. For the full report see http://www.un.org/millennium/sg/report/full.htm

. See also, Sonali R. Dayaratne, "The Impact of the Electricity Crisis on Socio-Economic Rights and Sustainable Development", in this volume.

2001 to regain its lost majority in Parliament. The government lost its majority in Parliament when the members of Sri Lanka Muslim Congress (SLMC) withdrew from the government coalition in June. The MOU entered into by the government and the JVP, which had ten seats in Parliament, had a number of agreements and conditions and was entered into for a period of one year. A number of constitutional changes were contained in the MOU, the most significant changes being the introduction of a Constitutional Council together with a number of other independent commissions;[5] the abolition of executive presidency within six months from the signing of the MOU and vesting executive power in Parliament; and the formulation and adoption of an electoral system which ensures reasonable representation of the will of all ethnic groups in Parliament.[6] The short-lived MOU[7] had time to realise only clause 5, which read as follows:

> *5. The People's Alliance agrees to have passed by Parliament the proposed 17th Amendment to the Constitution drafted by the full agreement of all the parties of the opposition included in the schedule to the Memorandum providing for the creation of the following institutions subject to essential amendments acceptable to both parties to the Memorandum of Understanding, on or before September 24th, 2001.*
>
> *a) Constitutional Council*
>
> *b) Independent Public Service Commission*
>
> *c) Independent Judicial Service Commission*
>
> *d) Independent Election Commission*

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5 Clause 5 of the MOU.

6 Clause 7 of the MOU.

7 The MOU was short lived as the Parliament was dissolved by the President as her government lost the majority in the house with the cross over of some members of the PA to the UNP.

e) Independent Police Commission

The Constitutional Council should be established before October 5, 2001.[8]

The independent commissions envisaged in the MOU are not a totally new concept in Sri Lankan constitutional history. The first independent commissions on public service and judicial service were introduced by the Soulbury Constitution in 1947, which was abolished in 1972 by the first Republican Constitution of Sri Lanka. Since then there has been a long process associated with the 17th Amendment with a continuity of development of ideas on the subject. The Youth Commission which was appointed to probe the causes of the problems during the period 1988-1989 by the late President R. Premadasa contained the idea of "*an independent commission of nomination*" as a pivotal feature in its report.[9] The idea of an independent commission originated from the views expressed to the Youth Commission that political polarisation throughout society had reached a dimension that was intolerably divisive.[10] The Youth Commission categorized politicisation under four headings:[11]

- Abuse of political power in the recruitment of personnel to the public service;

- Misapplication of political power in granting of public contracts and licences to supporters of the ruling party;

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[8] Clause 5 of the Memorandum of Understanding reached between D. M. Jayratne, Secretary of the PA on behalf of the PA on one part, and Tilvin Silva, Secretary of the JVP on behalf of the JVP, on 5th September 2001 at Colombo.

[9] "Sessional Paper No. I-1990", *Report of the Presidential Commission on Youth*, March, 1990, published by the Government on 2.3.1990.

[10] *Ibid.*, Chapter 1.

[11] *Ibid.*, p 1.

- Abuse of political power in the undermining of existing democratic institutions;

- Political interference in the day-to-day administration of government or government institutions.

The members of the Commission were, therefore, convinced of the necessity for a procedure of appointments that would be sufficiently objective and remote from arbitrariness and caprice to command the confidence of the public. The Youth Commission, therefore, proposed the establishment of a "Nomination Commission" to recommend to the President the names of persons for appointment to:

- Important commissions responsible for the recruitment, promotion, transfer and dismissal in certain vital areas;

- Important commissions responsible for policy making in selected areas of exceptional sensitivity and in spheres that transcend short term or partisan interests.[12]

This can be regarded as the genesis of the Constitutional Council that was subsequently included in the PA manifesto of 1994, which culminated in the draft constitutions being put forward by the PA government in October 1997[13] and 2000. The provisions contained in Chapter XIV of the draft constitution of 2000 envisaged a Constitutional Council, which is somewhat different from that envisaged under the 17th Amendment. However, any attempt to set up a Constitutional Council was aborted with the withdrawal of the draft constitution by the government in August 2000.

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[12] *Ibid.*, p 5.

[13] See Dattatreya, C.S., "The Proposal for a Constitutional Council," *The Draft Constitution of Sri Lanka, Critical Aspects*, (Panditaratne, D., and Ratnam, P. eds.) (Law & Society Trust, Colombo, 1998)

3. The Supreme Court Determination on the 17th Amendment

The Cabinet approved the white paper on the 17th Amendment to the Constitution on 19th September 2001. The following day it was placed before the Supreme Court by the President as an Urgent Bill of national importance for a determination on its constitutionality. It was examined before a bench of three judges comprising Chief Justice Sarath N. Silva PC, Justice P. Edussuriya and Justice Hector S. Yapa.

Five petitions were submitted to the Supreme Court mainly challenging an article in the Bill relating to the freedom of media. The Upali Newpapers Pvt. Ltd., the Leader Publications Pvt. Ltd., the Vijaya Publications Pvt. Ltd., Victor Ivan, Editor of the *Ravaya* and Varuna Karunatillake from the Free Media Movement were among the petitioners. All the petitions were based on the constitutional provisions relating to media freedom: they contended that the particular provision in the Bill was a subtle attempt to suppress the independence of the media.

The challenged Article 104 B 5(a) of the Bill read as follows:

> *The Commission [the Election Commission] shall have the power to issue from time to time, in respect of the holding of any election or the conduct of any referendum, such directions as the Commission may consider appropriate to any broadcasting or telecasting operator or any proprietor or publisher of a newspaper as the case may be, as the Commission may consider necessary to ensure a free and fair election.*

Paragraph 6 of the Article read as follows:

> *The provisions of sub paragraph (a) of paragraph (5) of Article 104 B shall not be applicable to an operator, proprietor or*

> *publisher as the case may be, who informs the Commission within seven days from the date of nomination of candidates at an election or from the date of the proclamation requiring a referendum to be held, that it is the policy of the broadcasting or telecasting station or newspaper which such operator, proprietor or publisher as the case may be, represents, to support any particular candidate or any particular named political party or independent group at any forthcoming election or to support or oppose a proposal put to the people at a referendum, as the case may be.*

Paragraph 7 of the Article read:

> *Upon receipt of the information referred to in paragraph (6) of this Article, it shall be the duty of the Commission to forthwith inform the public of the same, by giving adequate publicity to the information so furnished.*

The counsel for the petitioners argued that the Article, which called upon the proprietors and publishers of newspapers to disclose their political affiliation within seven days of the proclamation of a poll, was contrary to the fundamental rights chapter of the Constitution. They contended that these provisions were contrary to Articles 3,[14] 10[15] and 12(1)[16] of the Constitution.

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[14] In the Republic of Sri Lanka sovereignty is in the People and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise.

[15] Every person is entitled to freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of his choice.

[16] All persons are equal before the law and are entitled to the equal protection of the law.

Therefore, the contention here was that the provisions in the Bill referred to above provided for arbitrary, unlimited and unconstitutional powers to be vested in the Election Commission, which would result in it being empowered to control the freedom of the newspapers. The counsel, however, added that their clients were in no way objecting to the establishment of the proposed Constitutional Council or the other independent commissions envisaged under the 17th Amendment.

Taking these contentions into consideration the Chief Justice suggested to the Attorney General the deletion of the Article, which required independent media to disclose any political affiliations. The Attorney General agreed to a withdrawal of the provision during the course of the proceedings. Nevertheless, the Chief Justice highlighted that laying down guidelines on how the print and electronic media should function during a poll is democratic on the basis that it would help to ensure a free and fair election. He further pointed out that if the guidelines issued by the Elections Commissioner were considered pervasive they could be challenged in a court of law. In sending its determination on the amendment the Supreme Court made the observation that the amendment is not required to be approved at a referendum by the citizens of the country.[17] Therefore only a 2/3 majority in Parliament was required to pass the Bill. In conveying its determination to the Speaker, the Supreme Court further observed that there was no erosion of the powers of the executive presidency as the President retains the power to make appointments to the Constitutional Council.

Finally, the Bill was passed with a 2/3 majority bringing an end to one of the longest political deadlocks in post-independent Sri Lanka. The government accommodated a number of amendments proposed

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[17] See Chapter XII of the 1978 Constitution, which deals with the amendments to the Constitution. Article 83 under the same chapter lays down the articles, which have to be approved at a referendum in a case of an amendment or a repeal to them.

by various political parities before getting the final vote from the house. The UNP, the JVP and the PA voted for the Bill while the lone member of the Sihala Urumaya abstained from voting. It received 208 votes in favour. Fifteen members comprising the TULF, ACTC and TELO were absent at the time of voting. In issuing a press release the TULF stated that it could not take part in piecemeal constitutional reform, since it would further retard the just resolution of the Tamil national question.[18] The Sihala Urumaya opposed the allocation of a stipulated number of places in the Council for minority communities (three places out of five). This is allegedly why the Sihala Urumaya member, Champika Ranawaka, abstained from voting. Nevertheless, civil society groups praised the political consensus evident in the passage of the amendment.[19]

4. The Salient Features of the 17th Amendment and the Powers of the Commissions

4.1 The Constitutional Council

A perusal of the provisions on the powers of the Constitutional Council highlights the fact that it is an effort to transfer part of executive authority to a body consisting of nominees of all political parties represented in Parliament. According to Article 41A of the amendment the Constitutional Council comprises:

a. The Prime Minister

b. The Speaker

c. The Leader of the Opposition in Parliament

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[18] Press release issued by the Central Committee of the Tamil United Liberation Front (TUFL), 25th September 2001.

[19] For example, see the news release issued by the Organisation of Professional Associations (OPA), in *The Island*, 24th January 2002.

d. One person appointed by the President

e. Five persons appointed by the President, on the nomination of both the Prime Minister and Leader of the Opposition; and

f. One person nominated upon agreement by the majority of the Members of Parliament belonging to political parties or independent groups other than the respective political parties or independent groups to which Prime Minister and the Leader of the Opposition belong and appointed by the President.[20]

The nominees of categories (e) and (f) above hold office for a period of three years and are not eligible for re-appointment.[21] The nominee of the President too holds office for a period of three years but there is no provision which bars that person from being re-appointed. This affects the equal status of all members of the Council as the President's nominee has been given preference over the other members. The provision empowering the President to appoint one person to the Council has received much criticism. It is the practice in most countries that the Head of State has no absolute discretion in appointing persons to high constitutional posts. The mere argument that the head of the government is appointed by the people and, therefore, he or she has the authority to make absolute decisions is contrary to the concept of separation of powers as it can lead to an arbitrary interference in the other bodies of governance.[22]

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[20] See Article 41 A of the 17th Amendment to the Constitution.

[21] See Article 41 A (7) and (10).

[22] The President of the Untied States is appointed by the people. Nevertheless, the President must get the approval of the Congress in selecting and appointing persons to key posts in the federal government. The names sent by the US President for such appointments are subjected to a thorough examination by Congress and there are many instances where Congress had rejected the recommendations of the President.

According to the 17th Amendment it is the President who makes appointments to the Commissions on the recommendation of the Constitutional Council. Likewise, appointments to Constitutional high posts, are made on the approval of the Constitutional Council based on the recommendation of the President. Therefore, the presence of the President in the appointment procedure is inevitable. A further intervention by the President in appointing persons to the Council is an interference with the absolute independence of the Constitutional Council. Further, it may be difficult to get the Prime Minister and the Leader of Opposition to agree on a given set of names, as well as minority parties to agree on a name, given the confrontational nature of politics in Sri Lanka.

The persons to be appointed or nominated as the case may be, under (d), (e) and (f) categories, mentioned above, shall be persons of eminence and integrity who have distinguished themselves in public life and who are not members of any political party.[23] This is a vital provision in the amendment as it attempts to highlight the non-partisan character of the Council. However, the presence in the Council of the Prime Minister, the Leader of the Opposition, and the Speaker could raise fears that whoever the non-political persons forming the majority of the Council may wish to recommend, disputed recommendations may ultimately be resolved on the basis of political trade-offs.

It is significant to note that the amendment has stipulated a numerical quota in the Council for the minority communities in the country. Article 41A(3) states that three persons out of those who the Prime Minister and the Leader of Opposition appoint in consultation with other political parties and independent groups in Parliament, shall

[23] Article 41A (4).

belong to respective minority communities.[24] The rationale behind this provision is to represent minority interests in the Council.[25]

The provision on minority representation in the 17th Amendment is a deviation from the wording of the Bill that was placed before the Supreme Court. The earlier version required that membership of the Commissions shall reflect, as far as is practicable and prudent in the opinion of the Council, the different ethnic and other interest groups. This was converted to a specific ethnic quota as a result of the demand made by the minority parties in Parliament.

Minorities in recent constitutional parlance in Sri Lanka is generally understood to mean Tamil (including up country Tamils) and Muslim Communities. However, this raises the question as to whether an otherwise eminent person could be effectively disqualified from sitting on the Council because he or she belongs to one of the smaller minority communities that inhabit the country such as Burghers, Parsees, Chinese etc.

The Supreme Court in the case of *Ramupillai* v. *Festus Perera*[26], observed that:

> *Racial preferences or quotas for their own sake, are not permissible because in a free, republican democracy one citizen is as good as another, and is entitled to equal treatment, regardless of the group to which he belongs. Likewise, racial quotas cannot be imposed simply for the purpose of correcting an existing racial imbalance except perhaps where there is serious, chronic, pervasive under representation (or over*

[24] Muslim, Up Country Tamil and Jaffna Tamil.

[25] This is the article vehemently opposed by the member of the Sihala Urumaya.

[26] (1991) 1 Sri LR 11.

> *representation) sufficient to raise a presumption of past discrimination.*[27]

In this case the Supreme Court set aside an ethnic quota based promotion scheme within the Customs Department. Similarly, in the case of *Sherifdeen and two others v. The Secretary, Public Services Commission and seventeen others*[28] the Supreme Court declared that Public Administration Circular No 15/90 which stipulated the principle of ethnic quotas in relation to the recruitment to the public service was a violation of Articles 12(1) and 12(2)[29] of the Constitution.

Therefore, the specific ethnic quota recognised in the Amendment is a deviation from the interpretation of the equality clause adopted by the Supreme Court. The term ethnic minority itself can be imprecise. For instance, is "Muslim" a purely religious term, including Moors, Malays and even any Sinhalese or Tamils professing the Islamic faith, or does it have a racial element as well? Further, if up country or Estate Tamils demand separate representation, can Sinhalese also divide themselves into low country and up country Sinhalese?

There is no doubt that plurality should be encouraged in multi-ethnic societies such as Sri Lanka. Equally important is a sense of common national identity and national purpose. If ethnic representation was a crucial requirement in a small body as the Constitutional Council, which only consists of ten members, it would be a restriction to appoint the most eminent and suitable persons to the body taking into account national interest. Therefore, it is submitted that the wording of the Bill is a more acceptable formula: while encouraging ethnic diversity.

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[27] *Ibid.*, p 14.

[28] SC Application No 249/96, SC Minutes 19.11.1998.

[29] The equality clause of the Fundamental Rights Chapter.

it gives flexibility to cater to other types of plurality such as gender and area representation.

4.2 Powers of the Constitutional Council

The Constitutional Council can be described as an appointing authority, as the main function of the Council is to appoint personnel to the Commissions to be established under the 17th amendment as well as to the posts enumerated therein. Under Article 14(1) B of the Amendment no person shall be appointed by the President as the Chairman or a member of any of the Commissions specified there except on the recommendation of the Council. These Commissions are:

a. The Election Commission

b. The Public Service Commission

c. The National Police Commission

d. The Human Rights Commission of Sri Lanka.

e. The Permanent Commission to Investigate Allegations of Bribery or Corruption.

f. The Finance Commission

g. The Delimitation Commission

The Official Languages Commission and the University Grants Commission which were included in the Draft Constitution in 2000 have been excluded from the provisions of the 17th Amendment.

Article 41C (1) of the 17th amendment provides that no person shall be appointed by the President to any of the offices specified in the schedule to the Article except with the approval of the Council upon a recommendation made to the Council by the President. Therefore,

the approval of the Council is only limited to the names identified by the President. Nevertheless, no arbitrary power is vested with President as no appointment is possible without the approval of the Council.

The offices specified in the schedules are:[30]

a. The Chief Justice and the Judges of the Supreme Court.

b. The President and the Judges of the Court of Appeal.

c. The Members of the Judicial Service Commission other than the Chairman.[31]

d. The Attorney General.

e. The Auditor General.

f. The Inspector General of Police.

g. The Parliamentary Commissioner for Administration (Ombudsman).

h. The Secretary General of Parliament.

In appointing Judges to the Supreme Court and the President and Judges of the Court of Appeal, the Council may[32] obtain the views of the Chief Justice and the Attorney General.[33]

These provisions should be warmly welcomed and should increase public confidence in such institutions and offices, provided the appointees are capable persons and not merely the result of a selection process reduced to the lowest common denominator. Conspicuously

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30 Hereinafter referred to as constitutional high posts.

31 The Chief Justice is the chairman of the Judicial Service Commission.

32 The language signifies that this is not a mandatory requirement.

33 Article 41 C (4).

absent from the list of high-ranking personnel whose appointments require Council approval are the Commanders of the Army, the Navy and the Air Force whose appointments are expressly reserved to the sole discretion of the President.

The reason for the above appointments having to meet the approval of the Constitutional Council is that such institutions belong to the people and are designed to serve the national interest as opposed to the partisan interests of a party or individual who wields power at any given time. The armed forces also belong to the nation. In recent years when the armed conflict in the North and the East of the country had been allowed to escalate out of all rational proportions, there had been public criticism that military activities were tailored to suit the interests of the ruling party. There were a number of occasions on which neither the political nor the military leadership behind the war effort had been held accountable for a series of humiliating and costly disasters. Therefore, it is necessary that the acts of the high-ranking officials in the Armed forces be made accountable in the interest of the nation. While the issue of national security can be raised as a counter argument, it will not stand up to rational scrutiny as emphasized above. Therefore, it could be strongly argued that depoliticisation of the armed forces is not incompatible with national security and may, in fact, enhance it. However, such an opportunity has been lost.

4.4 The working procedure of the Council

According to Article 41 E (5) of the Amendment, the Council should endeavour to reach unanimous decisions.[34] No strict guidelines are, however, laid down in the Amendment to be followed by the Council. According to Article 41 E (1) the procedure with regard to meetings

[34] According to the same Article, in the absence of unanimity, a decision of the Council requires the affirmative vote of not less than five members of the Council.

of the Council and the transaction of business at such meetings are to be determined by the Council including the procedures to be followed with regard to the recommendation or approval of persons suitable for any appointment. Therefore, the members are given the discretion to adopt the procedure to be followed when conducting the deliberations of the Council. It must be emphasized that the Council should give effect to the principles of good governance, particularly those relating to transparency and accountability when laying down its procedure. An important aspect in this regard is making nominations for appointees to the Commissions and high posts. This has to be handled by the Constitutional Council not to compromise its fundamental tasks. In a situation where all the members of the Council are empowered to propose names, an unwieldy situation can arise; and on the other hand, if a specific member or members of the Council were identified to make nominations, the equality of the members of the Council would be lost.

Therefore, the task of the Council is in no way easy as the 17th Amendment contains broad guidelines on the eligibility of appointing persons. For example, Article 41B(3) states that the recommendations of the Council should reflect different ethnic groups in appointing the Chairman and members of the Commissions. Transparent criteria are necessary to give effect to these constitutional guidelines. In developing criteria the Council can invite different stakeholders to give their views. For example, it can invite the Minister in charge of the subject of Constitutional Affairs, the Attorney General and/or the Legal Draftsman to participate in its deliberations or could consult different Parliamentarians or even members of the public if the situation requires such an effort, although there is no express provision in the Amendment to this effect.

According to Article 41B(4) the removal of a chairperson or members of the Commissions in the absence of any Constitutional procedure

could be done by the President only with the prior approval of the Council. These Constitutional provisions make it incumbent upon the Council to establish a mechanism to assess the work of the Commission. Such an evaluation of the work of the Chairpersons and members would assist the Council in making recommendations in relation to acting appointments and taking decisions with regard to removal of members of the Commissions.

There is a Secretary to the Council[35] who shall be appointed by the Council and the Council is empowered to appoint officers to assist it as considered necessary for the discharge of the functions of the Council.[36]

It is imperative that the Council maintains confidentiality of its work while at the same time adopting transparent criteria in fulfilling its functions. If the discussions with regard to nominations filter out, it may affect the reputation and good standing of the persons concerned as well the impartial character of the Council. Deliberations with regard to appointments and promotions in the United Nations bodies are kept strictly confidential and the members of the appointing bodies have to make a declaration of confidentiality before entering into any such deliberations. A similar procedure has to be established by the Council to guarantee confidentiality and credibility. This may form part of the code of ethics that the members of the Council may consider adopting to ensure the dignity and credibility of the Council.[37]

The Constitutional Council is merely a body vested with powers to appoint persons. According to Article 41F of the basic law, the Council shall perform and discharge such other duties and functions as may

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[35] Article 41D (1).

[36] Article 41D (2).

[37] The writer is thankful to Mr. S. S. Wijeratne for his invaluable thoughts given in this regard at a discussion on the Constitutional Council at the BMICH on 29th April 2002, organised by the Law & Society Trust.

be imposed or assigned to the Council by the Constitution, or by any other law. But no such power has been laid down in the Amendment itself or any other existing law. Therefore, at present, the only function of the members of the Council is to make nominations to the Commissions and posts stipulated in the Amendment.

The second limb of jurisdiction of the Nomination Commission proposed by the Youth Commission, discussed above,[38] was to have been in relation to important commissions responsible for policy making in selected areas of exceptional sensitivity and in spheres that transcend short term or partisan interests.

This has not been realised by the 17th Amendment to the Constitution. Given that the Constitutional Council consists of eminent persons from multi disciplinary fields, their opinion can be obtained on matters relating to national importance such as education, power and energy planning, etc.[39]

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[38] *Supra* n 12.

[39] While the concept of Constitutional Council can be found in a few other countries, the powers of such Councils vary from country to country. The Constitutional Council of France - *Le Counseil Constitutional* - only deals with the constitutionality of laws presented in Parliament and the validity of referenda and elections. It is not an appointing authority as in Sri Lanka. A South Asian example can be found from the Constitution of Nepal in which Article 117 states that there shall be a Constitutional Council for making recommendations in accordance with the Constitution of the country. The Constitutional Council consists of the Prime Minister as the Chairman, the Chief Justice, the Speaker of the House of Representatives, the Chairman of the National Assembly and the Leader of the main opposition in the House of Representatives. A Constitutional Commission can be identified under Article IX of the Constitution of the Philippines which consists of three other bodies; the Civil Service Commission, the Commission of Elections and the Commission on Audit. It is unfortunate to note that no effort was taken in Sri Lanka to review the international experience on the subject before introducing the Amendment.

5. The Independent Commissions

5.1 The Election Commission

The Election Commission has been the focus of extensive discussions since the approval of the Amendment by Parliament; particularly the practical implementation of provisions relating to the Election Commission has been urged during the Parliamentary Elections in December.

Election-related violence and malpractice have unfortunately become an integral part of the Sri Lankan election process during the last two decades.[40] It has gone to the extent of comparing the number of violent activities between two elections to assess their free and fair nature. No law has expressly laid down that the Commissioner of Elections should act in an impartial manner in order to conduct a free and fair election. The law required the Commissioner to exercise, perform and discharge all such powers, duties or functions that may be conferred, imposed on or vested in him by the law.[41] There is no express provision relating to a free and fair election. The Supreme Court has endeavoured to fill this lacuna. Many of the elections at national and regional level came under the scrutiny of the Supreme Court in the years 1999 and 2000. In their effort to stress the necessity for a free and fair election, the Supreme Court utilized the provisions of Article 93 of the Constitution which requires that the voting at elections of the President of the Republic and of the Members of Parliament and at any referendum shall be free, equal and by secret ballot.

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[40] See "Right to Franchise: The Parliamentary Election of October 2000" by Kumudini Samuel, *Sri Lanka: State of Human Rights 2001* (Law & Society Trust, Colombo 2001) and *People's Choice and Presidential Election 1999, A Report on the Presidential Election of Sri Lanka*, (Law & Society Trust, Colombo 2000).

[41] Article 104 of the 1978 Constitution.

In the notable case of *Egodawela and Others* v. *Dissanayake and Others*,[42] which concerned certain incidents in the Kandy district during the Provincial Council elections in 1999, Justice Mark Fernando made the observation that the Commissioner of Elections had not been given the necessary support and staff to conduct a free and fair election. In delivering its judgment the Court acknowledged that the Commissioner did not have adequate resources at his disposal and that he had failed to insist upon the provision of adequate security – a term the Court used to cover personnel, weapons, communication equipment and vehicles. The insistence on such matters was, in the opinion of the Court, part and parcel of the Commissioner's statutory duty to ensure a free, equal and secret poll.

The 17th Amendment has given statutory force to the principles and observations made by the Supreme Court in the *Egodawela case*. Article 103(2) as now amended states that the object of the Election Commission shall be to conduct free and fair elections and referenda. It is the duty of the Elections Commission to enforce all laws relating to the holding of all types of elections from Presidential elections to Local Government elections;[43] it is the duty of all authorities of the State charged with the enforcement of such laws to co-operate with the Commission to ensure enforcement.[44] The Election Commission has the power to prohibit the use of any movable or immovable property belonging to the State or any public corporation during the period of elections for the purpose of either promoting or preventing the election of any candidate or any political party or independent group by any candidate, any political party or any independent group contesting at such elections.[45] The Commission can issue written orders

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[42] SC Application No. 412/99, SC Minutes 3.4.2001.

[43] Article 104B (1).

[44] Article 104B (2).

[45] Article 104B (4) (a).

to this effect and it is the duty of every person or officer in whose custody or under whose control such property is for the time being, to comply with and give effect to such direction.[46]

The Commission can also recommend the deployment of the Armed Forces for the prevention or control of any action or incident which may be prejudicial to the holding or conducting of a free and fair election.[47] The appointment of Returning Officers is also the task of the Commission while all other public officers on election duty are likewise under the charge of, and answerable to, the Commission. The Commission can delegate its powers to the Commissioner General of Elections, the new title for the present post of the Commissioner of Elections, and he/she can exercise, perform and discharge powers, duties or functions, subject to the direction and control of the Commission. Unlike the present Commissioner of Elections, the Commissioner General of Elections is not removable by the President without the concurrence of the Constitutional Council. The Commission is responsible and answerable to Parliament in accordance with the provisions of the Standing Orders of Parliament for the exercise, performance and discharge of its powers, duties and functions.[48]

It is clear from these provisions that the Commission is vested with wide powers to conduct free and fair elections. However, the provisions which empower the Commission to control public property during a period of an election establishes a vague position imposing a duty on every person or officer in whose custody or control such property lies to comply with and give effect to the orders of the Commission. No judicial enforcement procedure is envisaged in a case of failure to

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[46] *Ibid.*, (b).

[47] Article 104D.

[48] Article 104B (3).

comply. One of the last drafts of the Amendment empowered the Commission to institute legal proceedings in a case of non-compliance with its directions. It stated that where any particular offence is not punishable under the existing law, the Commission or the Attorney General can invoke the jurisdiction of the High Court. The draft contained rigorous penalties for a person found guilty of such an offence, up to a fine not exceeding Rs. 100,000/- or a sentence of seven years imprisonment or both. It was unfortunate that this provision was diluted in the final draft of the Amendment. The powers of the Commission would have been considerably strengthened if this provision had been retained.

This stands as a striking defect of the 17th Amendment and it is necessary to remedy it for the proper functioning of the Amendment. The Institute of Human Rights (IHR) in its final report under the Programme for the Protection of Public Property (PPP) has identified the inadequacy of powers of the Commissioner General of Elections as a serious defect of the Amendment.[49] The report outlines the use of public buildings, state vehicles and employing the services of a large number of public officers and corporation employees for the election campaign of the then ruling party during the General Election of December 2001. The report points out that Article 104B of the 17th Amendment does not give adequate powers to the Commissioner General of Elections to prevent such situations. For example, the Commissioner General has no powers to arrest the vehicles or to deal with any person who abuses a prohibitive order issued by the Commissioner General. Accordingly, the report proposes the amendment of Article 104B of the Constitution or the introduction of a Special Provisions Act whereby the Election Commission (or any other person authorized by the Commission) is empowered to take

[49] See the "Report of the Committee on the Abuse of Public Resources", published by Institute of Human Rights, released on 21st December 2001.

into custody, any public property if misused by candidates or political parties for election purposes.

According to Article 104B (5) (a) the Commission is empowered to issue guidelines to any radio, television or print media institution, as the Commission may consider necessary, to ensure a free and fair election. But the effect of this provision is that it is applicable only to the Sri Lanka Broadcasting Corporation and the Sri Lanka Rupavahini Corporation as only those two institutions are bound to comply with such guidelines. In the event of any contravention of the guidelines issued to these institutions, the Commission is vested with power of appointing a Competent Authority to manage their election-related broadcasting.

The rationale of these provisions is to provide an equal opportunity to all political parties during the period of an election. Only the government media has been made accountable as these institutions are run with public funds. The specific recognition of only two institutions excludes all other media institutions from the purview of this Article. The exclusion of some of the existing media institutions such as Lake House, Independent Television Network and Lakhanda (a Sinhala language radio station) is a clear deficiency in the Amendment as they are effectively run as government media institutions although in theory they are companies. This signifies that the impartial distribution of media facilities to all political parties and independent groups during a time of an election is not guaranteed under the Amendment.

According to Article 104C (1), the Commission may call upon the Inspector General of Police (IGP) to provide such number of facilities as it shall require for the conduct of the election, and the IGP is bound to comply with this request. Every police officer made available to the Commission under this Article shall be responsible to and acts

under the direction and control of the Commission during the period of an election. No prosecution or legal proceedings shall lie against a police officer for any lawful act done in good faith in pursuance of a direction of the Commission.[50]

This provision was the subject of controversy during the General Election in December. The IGP made an order to transfer 69 police officers after the date of notification of the general elections. The Commissioner of Elections requested the IGP to suspend all police transfers effected after the announcement of the date for Parliamentary Elections. The contention of the IGP was that the authority of the Commissioner of Elections was only limited to the deployment of police officers for his needs in order to hold a free and fair election; and that he could not interfere with the normal transfers made by the IGP.

A literal reading of the 17th Amendment may justify the position of the IGP. It should, however, be noted that a considerable amount of power has been vested in the Election Commission in deploying police officers during the period of an election and the Commission's request for the deployment of police officers can only be with regard to the police officers transferred by the IGP. Therefore the officers transferred by the IGP who would have been required by the Commissioner of Election to conduct a free and fair election. Further it can be that, those officers who had been transferred by the IGP would be responsible to act under the direction and control of the Commissioner during the period of election. The strength of this Article is that there is no restriction or limitation on the number of police officers or facilities that the Commissioner can request from the IGP. The IGP

[50] See Article 104C (1), (2), (3), (4) and (5).

has no power to refuse reasonable requests from the Commissioner of Elections.

The provisions relating to a free and fair elections were put to test during the General Election in December 2001. Although neither the Constitution Council nor the Elections Commission had been established by then, one provision in the 17th Amendment was highlighted to emphasize that the present Commissioner of Elections is vested with the powers of the proposed Elections Commission. Article 27 (2) of the Amendment states:

> *The person holding office as the Commissioner of Elections on the day immediately preceding the date of the commencement of this Act, shall continue to exercise and perform the powers and functions of the office of Commissioner of Elections as were vested in him immediately prior to the commencement of this Act, and of the Election Commission, until an Election Commission is constituted in term of Article 103, and shall, from and after the date on which the Election Commission is so constituted, cease to hold office as the Commissioner of Election.*

It was extremely unfortunate that these powers were not used effectively to hold a free and fair election during the General Elections. Most significantly, it highlighted some defects in the Amendment - especially the inability of the Commissioner to control election-related malpractices by resorting to the judiciary. Nevertheless, according to Article 103(2) of the Amendment the objective of the Commission is to hold free and fair elections. This provision should be utilised for a broader interpretation of the other sections of the Amendment in order

to serve the purpose of the Commission. A striking example can be found in the Indian experience.[51]

5.2 The Judicial Service Commission

According to Article 111D of the amendment there shall be a Judicial Service Commission consisting of the Chief Justice and two other judges of the Supreme Court appointed by the President on the recommendation of the Constitutional Council. The Chief Justice is the chairman of the Commission. The Commission is a powerful body vested with responsibilities of appointment, demotion, transfer and disciplinary control of members of the lower judiciary - magistrates and district judges.[52]

The controversy which arose with regard to the provisions relating to the Judicial Service Commission was the negation of the appointment of the two senior most judges of the Supreme Court to the Commission. There have been a few instances in the past where governments have appointed junior judges in the Supreme Court as members of the Judicial Service Commission. There may have been good reasons for this in some cases but it certainly generated the idea in the mind of

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[51] Clause (1) of Section 324 of the Indian Constitution entrusts the Indian Elections Commission, with the superintendence, direction and control of the electoral rolls for the conduct of elections. While no special powers with regard to police or the use of State resources are specified, there is nevertheless a stipulation that the government shall make available to the Indian Election Commission such staff as may be required by it for the discharge of its duties. In the case of *Mohinder Singh Gill v. Chief Elections Commissioner,* (AIR 1978 Supreme Court, 851) it was held by the Indian Supreme Court that clause (1) of section 324 is the reservoir of power for the Commission whenever enacted law is silent on any electoral aspect or makes insufficient provisions to deal with a particular situation. The courageous practice of the Indian Elections Commission assisted by the judiciary where the judiciary cleared all obstacles in the process for a free and fair elections is one of the best examples for Sri Lanka.

[52] See Article 111H.

the public that this was not a very reliable practice. Therefore, the Constitutional Council is vested with the responsibility of identifying the most eminent Judges of the Supreme Court in making appointments to the Judicial Service Commission.

5.3 The National Police Commission

The 17th Amendment envisages the establishment of a National Police Commission consisting of seven members.[53] The members are appointed by the President on the recommendation of the Constitutional Council and the Council is required to consult the Public Service Commission in making its recommendations.[54] The appointment, promotion, transfer, disciplinary control and dismissal of the police officers other than the Inspector General of Police, are vested in the Commission.[55] The Inspector General of Police has to be consulted by the Commission in the exercise of its powers of promotions, transfers, disciplinary control and dismissals.

There has been a long felt need to establish an institution to regulate the police service of the country due to anomalies and accusations of corruption in the service. The idea of forming a Police Commission was to streamline it with the concept of good governance especially as it is a service integrated into the justice system of the country. The police service of the country has lost public confidence and acceptance, and police officers are most often identified as supporters of political parties, particularly the party in power. Therefore, the formation of the Police Commission is to guarantee the rule of law in the country. Nevertheless, the service of the Commission is geographically limited, as it shall not, in the exercise of its powers, derogate from the powers

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53 See Chapter XVIIIA of the Amendment.

54 Article 155A.

55 Article 155G.

and functions assigned to the Provincial Police Service Commissions as and when such commissions are established under Chapter XVIIA of the Constitution.[56]

The members of the public can make complaints on a grievance regarding the police service once the Commission establishes the procedure to entertain and investigate such complaints. The Commission is vested with wide regulatory powers to determine all matters regarding police officers, including the formulation of schemes of recruitment and training and the improvement of the efficiency and independence of the police service, the nature and type of the arms, ammunition and other equipment necessary for the use of the National Division and Provincial Divisions, codes of conduct, and the standards to be followed in making promotions and transfers as the Commission may from time to time consider necessary.[57] The Commission can delegate its powers to a Committee or to the Inspector General of Police (IGP) or to any police officer subject to such conditions and procedures as may be prescribed by the Commission. Any police officer aggrieved by any order of such delegated authority can appeal to the Commission where the Commission has the power to alter, vary, and rescind such order.[58]

Any police officer aggrieved by an order of the Commission can appeal to the Administrative Appeals Tribunal proposed to be established under Article 59 of the Amendment.[59] The Commission is only answerable and responsible to Parliament.[60]

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[56] Article 155G (1) (b).

[57] Article 155G (2), (3).

[58] See Article 155H, 155J and 155K.

[59] Article 155L.

[60] Article 155N.

These wide powers signify that an attempt is being made to establish an independent police service where politicians play no role. The expected impact can only be achieved if independent officers are appointed to all levels from the IGP to the delegated authorities of the Commission. Fears have been expressed that establishing a Police Commission would lead to a Police State where adverse consequences would occur. But the status of a Police State has not been supported with a clear definition. Some have expressed the view that such a state can be as Rumania under Ceauscescu or Zimbabwe under Mugabe. Some have even cited Singapore under Lee Kuan Yew as a veiled police state. But it should be noted that the situations in these countries have been brought about by the regime in power and not by the police. Japan is the best example of a country where the police service is well known as a community friendly service despite massive corruption in Government.

Accountability of the Sri Lankan Police Commission lies with Parliament which is answerable to the people of the country. Therefore, the people can invoke the jurisdiction of the superior courts of the country in the event of an injustice to them.

5.4 The Public Service Commission

According to Article 54(1) of the Amendment a Public Service Commission is to be established which consists of nine members appointed by the President on the recommendation of the Constitutional Council. The Commission is vested with the power of appointment, promotion, transfer, disciplinary control and dismissal of public officers.[61] This is a clear deviation from the earlier Articles of the Constitution where the appointments, transfers, dismissals and disciplinary control of public officers were vested in the Cabinet of Ministers. Nevertheless, the appointment, promotion, transfer,

[61] Article 55 (1).

disciplinary control and dismissal of all Heads of Department are retained by the Cabinet of Ministers, who shall exercise such powers after ascertaining the views of the Commission.[62]

One of the significant developments of the new law is the establishment of an Administrative Appeals Tribunal which has the power to alter, vary or rescind any order or decision made by the Public Service Commission. According to earlier Article 55 of the Constitution no court or tribunal had the power or jurisdiction to inquire into, pronounce upon or in any manner call in question, any order or decision of the Cabinet of Ministers, a Minister, Public Service Commission or of a public officer. The only jurisdiction which could be invoked was the fundamental rights jurisdiction of the Supreme Court which was invoked on number of occasions against discriminatory actions. It is fortunate to note that the Supreme Court has consistently held that no arbitrary action is permitted against public servants who are entitled to the equal protection of the law.[63]

The Public Service Commission can delegate its powers to a Committee[64] or to a public officer[65] subject to such conditions and procedures as may be determined by the Commission. Upon delegation of any of its powers to a Committee or a public officer the Commission shall not, while such delegation is in force, exercise or perform its functions or duties in regard to the categories of public officers in respect of which such delegation is made.[66] A contradictory articulation can be identified in Article 158 of the Constitution where any body of persons or any authority is empowered under the provisions of the Constitution to delegate any power, duty or function to any other body

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62 Article 55(3).

63 See also, M. C. M. Iqbal, "The Public Service of Sri Lanka", in this volume.

64 Article 56.

65 Article 57.

66 Article 60.

of persons or body of authority, such person delegating such power, duty or function may, notwithstanding such delegation, exercise, perform or discharge such power, duty or function and may, at any time revoke such delegation. Therefore, two contradictory provisions can be identified in the Constitution, as Article 60 of the amendment does not stipulate that it is an exception to Article 158 of the Constitution. No attention was given by the Supreme Court to this contradiction in its determination on the Amendment.

The restoration of an independent Public Service Commission which operated under the Soulbury Constitution is, no doubt, a step in the right direction. The 1972 Constitution brought the Public Service Commission wholly under the Cabinet of Ministers in order to ensure, as it was then claimed, that governmental policy reflecting the needs of the people was implemented without bureaucratic impediment. The practice under both the 1972 and 1978 Constitutions made it evident that this purpose has not been served. Therefore, the formation of the Public Service Commission is a salutary step to ensure a more independent and efficient public service in the country.[67]

5.5 Other Commissions

No interpretation is provided in the Amendment to define the Human Rights Commission, the Permanent Commission to Investigate Allegations of Bribery or Corruption, the Finance Commission and the Delimitation Commission. This is a lacuna in the 17th Amendment where a reference should have been made to relevant laws and the provisions of the Constitution to define them.[68]

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[67] *Supra* n 63.

[68] The Human Rights Commission was formed under Act No. 21 of 1996; the Commission on Bribery and Corruption was formed under Act No. 19 of 1994; and Article 155R of the 13th Amendment to the Constitution and Article 95 of the Constitution provide the legal basis for the Finance Commission and the Delimitation Commission respectively.

6. The 17th Amendment and the North East Conflict

Fifteen Parliamentarians from the TULF, ACTC and TELO withdrew themselves from Parliament when the voting took place in Parliament for the 17th amendment. The reason for their disapproval of the Amendment was that it had no substantial provision to address the North East conflict of the country. Therefore, they were not in favour of the amendment stating that it would further retard the effective sharing of the powers of governance between the Centre and the Regions in the North and East.[69]

Some of the Tamil parties expressed reservations about the actual effectiveness of the commissions, especially the effectiveness of the Election and Police Commissions given the security environment of the war zone. They pointed out that no free and fair elections can be held without curbing the illegal armed forces operating in this region. With regard to the Police Commission they questioned whether it has the disciplinary control over personnel in the war zone to stop extra judicial killings, disappearances, torture and illegal detention. These are fundamental questions to be considered by respective Commissions and the Commissions should give every effort to remove any obstacles which stand in their way in achieving their goals.

While no effort was made by the 17th Amendment to address the ethnic conflict, the benefits of the 17th Amendment would be felt by the country as a whole. Nevertheless, as pointed out by the TULF, the necessity of solving the burning issue of the country cannot be overcome by any piecemeal legislation. Therefore, constitutional reform is urgently needed encompassing an arrangement for an effective sharing of power by granting substantial political autonomy to the North and East.

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[69] *Supra* n 18.

7. Conclusion

There is no doubt that the 17th Amendment is a step in the right direction. But it is unfortunate that the then government was compelled by other forces to move this legislation through Parliament especially as a device to retain their power in Parliament. It would have been much better for the Commissions to be enacted voluntarily and spontaneously through conviction rather than through a process of manipulation and pressure.

The hasty manner that the government and the JVP followed in the process of the enactment of the Amendment prevented active civil society participation in relation to the Amendment. The idea of independent commissions has been discussed on a number of occasions by civil society groups. The Organisation of Professional Associations (OPA) has reiterated the necessity of these commissions and conveyed its position on the matter to both Government and the opposition. But the failure of the government to present a clear draft of the amendment to the public even at the final stage prevented the adoption of the best constitutional amendment with input from all sectors of society. Further, the deliberation by the Supreme Court has kept it in an insignificant position, as it was not placed before a full bench of judges appointed for that purpose given the significance of the bill. Most unfortunately the amendment was debated in Parliament in one day and was passed without a final draft being tabled in Parliament.

Another glaring negative feature of the 17th Amendment is the lack of reference to any need for gender representation. Although minority representation has been emphasized, the drafters have totally negated the necessity for any gender representation in the Constitutional Council or any other Commissions envisaged in the Amendment. This reflects the ideological limitations of a Parliament where the representation of women MPs is at a very low level.

Most of the shortcomings in the 17th Amendment are demonstrative of a major shortcoming in the procedure for judicial review of legislation under the 1978 Constitution. The lack of judicial review of legislation prevents correcting the lacunae and shortcomings of the law through a judicial authority. Also, the very short period of time of 24 hours to challenge a bill, which is urgent in the national interest, is a further drawback as it prevents vigilant scrutiny of proposed legislation.

Nevertheless, the intensity of involvement of political parties in the process of adopting the amendment was a positive feature in the process. The amendments made to the draft by both the Government and the Opposition in a responsive manner were welcome which resulted in a noticeable majority after 11 years for the amendment in Parliament.

The 17th Amendment to the Constitution should be welcomed as a right step towards establishing a culture of good governance in the country. However, much will depend on the quality of persons appointed to the Council and the quality and level of knowledge and dedication of persons the Council recommends to all other posts under its preview. Therefore, only the future will assess the real impact of the 17th Amendment. Civil society groups should be vigilant to these appointments and even challenge them in courts if and when it is necessary to do so in the interest of the public.

III

The Judiciary in 2001

*Shiranthi Jayatilaka**

1. Introduction

This chapter seeks to discuss the important events in relation to the judiciary during the year 2001 as well as comment on the legal issues relevant to such events. Unlike in any other year there were several controversial issues, which arose with respect to the judiciary. The International Bar Association Report – discussed below - mentions six cases where judges were compelled to resign at the instance of the Judicial Service Commission or the Chief Justice without proper recourse to an inquiry or disciplinary hearing.[1] The challenge made by three petitioners to the appointment of Justice Sarath Silva to the office of the Chief Justice, the impeachment resolution against the

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1 "Sri Lanka: Failing to Protect the Rule of Law and the Independence of the Judiciary", *Report of the International Bar Association*, November 2001, pp 23-24.

Chief Justice and the controversy about an allegation of bribery against a Supreme Court Judge are other matters, which impaired the judiciary to a great extent. All these incidents were given wide publicity in the media and may have cast doubt in the minds of ordinary men as to the expectation of seeking justice before an independent and impartial judiciary.

The judiciary plays an important role in protecting the rights of people particularly where the violator of those rights is the State itself. Without an independent judiciary, rule of law cannot be upheld and other principles of good governance cannot be enforced. The role of the Supreme Court in granting relief to the victims of fundamental rights violations is discussed in the chapter on Judicial Protection of Human Rights.

2. Challenging the Appointment of the Chief Justice

The appointment of Justice Sarath Silva to the Office of Chief Justice was challenged in the Supreme Court by way of three fundamental rights applications.[2] The petitioners in all three applications cited the Chief Justice as the 1st respondent, and alleged that their fundamental rights under Articles 12(1) and 17 of the Constitution had been infringed by reason of the appointment of the 1st respondent as the Chief Justice.[3] A declaration was also sought in all three applications that the said appointment was unconstitutional, invalid, and null and void. The Court refused to grant leave to proceed in all three fundamental rights applications. The order of the Court[4] repeatedly

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2 Fundamental Rights Applications 898/99, 901/99 and 902/99.

3 In addition, the petitioner in application No. 901/99 being an Attorney-at-Law claimed a violation of Articles 14(1)(a) and 14(1)(g) of the Constitution.

4 (2001) 1 Sri LR 309.

referred to the fact that none of the petitioners had alleged that the 1st respondent was guilty of any executive or administrative act in accordance with Article 126 of the Constitution which had violated or was about to violate any of their fundamental rights. The only allegation made by all the petitioners was that it was the act of the President of appointing the 1st respondent as the Chief Justice, which had violated their fundamental rights.

2.1 Article 107(1) of the Constitution

Justice Wadugodapitiya dealt firstly with the question whether the appointment of the 1st respondent as Chief Justice by the President under Article 107(1) of the Constitution was lawful and constitutionally valid. He held that the answer was in the affirmative. It was argued on behalf of the petitioners that the decision in *Silva* v. *Bandaranayake*[5] was the authority for the proposition that the President must consult the Chief Justice when appointments are made in terms of Article 107(1). Rejecting this argument the Court said that the word "must" was not used by Justice Fernando; on the contrary, what was suggested in that judgment was that such co-operation was desirable.

Article 107(1) of the Constitution (before the 17th Amendment) contains no provision as to consultation but instead states that the President shall appoint judges of the appellate courts "by warrant under his hand." In the case of *Silva* v. *Bandaranayake* the issue arose whether the Chief Justice was consulted prior to the appointment of Dr. Bandaranayake to the Supreme Court. However, the issue was not decided since the then Chief Justice was not called upon to provide an affidavit clarifying the position. The judgment notes that a consideration of comity between the Executive and the Judiciary is necessary in the matter of judicial appointments. What is meant by

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[5] (1997) 1 Sri LR 92.

the term "comity" in this judgment is not clear. It was held in the present applications that the decision in *Silva* v. B*andarnayake* did not in any way seek to suggest that such co-operation and consultation was either a legal or constitutional requirement; neither did it indicate that such co-operation was in any way mandatory. Thus it was the view of the Court that the appointment of Chief Justice was constitutionally valid in terms of article 107(1) of the constitution.

2.2 Immunity of President from Suit

Having held that the appointment of Justice Sarath Silva to the Office of Chief Justice was constitutionally valid, Justice Wadugodapitiya next considered the argument that since the 1st respondent, the Chief Justice, was the 'beneficiary' of the impugned appointment, made by the President, the appointment could be questioned through the 1st respondent who was invoking the Presidents' act. It was argued that the burden was on the 1st respondent to establish the lawfulness of the President's act not withstanding the immunity under Article 35 of the Constitution, which was personal to the President. Rejecting this argument the Court held that the conduct of the 1st respondent in holding office as Chief Justice in consequence of his appointment by the President does not constitute executive or administrative action within the meaning of Articles 17 and 126 of the Constitution. Distinguishing the instant case from *Karunatilake* v. *Dayananda Dissanayake, the Commissioner of Elections*[6] the Court held that the 1st respondent could not be equated to a person who had invoked the act of the President and who had the burden of establishing that the President's acts were in accordance with the principles laid down in *Karunatilake's case.* Consequently, the petitioners had challenged an act of the President in respect of which the President enjoyed immunity under Article 35 of the Constitution.

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[6] (1999) 1 Sri LR 157.

2.3 The process of removing a Chief Justice from office

The Court also considered the fact whether the Chief Justice could be removed from office other than by a process of impeachment envisaged under Articles 107(2) and 107(3) of the Constitution. It was contended on behalf of the Attorney General that these two provisions constituted the only avenue available for the removal of a Chief Justice and any other process seeking to do so would be invalid. Upholding this contention the Court noted:

> *...The framers of the Constitution, in their endeavour to make the position of the Judges independent and assure their security of tenure, "invested them with the status of irremovability save on the limited grounds and manner specifically set out in its provisions," viz., paragraphs (2) and (3) of Article 107 of the Constitution.*

3. The Impeachment of the Chief Justice

For the second time in the history of Sri Lanka a Chief Justice faced a threat of impeachment, in the year 2001. The first time was in 1984, when Chief Justice Neville Samarakoon Q.C. had to face an inquiry before a Select Committee of Parliament for certain alleged acts of misbehaviour. The legislature, in 1984, chose to proceed with the investigation by resorting to the 'standing order procedure' as provided for in Article 107(3) of the Constitution rather than invoke the alternative of 'passing laws' to deal with such a situation provided for in the same Article. Such course of action gave rise to much criticism then; the second time around, too, the highest judicial officer in the country faced the prospect of being tried by a few Parliamentarians, not skilled to either make judicial decisions or judicial pronouncements or evaluate evidence before them.

3.1 The relevant Constitutional provisions

The Judges of the Supreme Court and the Court of Appeal can only be removed from office by an order of the President, made after an address of Parliament, supported by a majority of the total number of Members of Parliament, on the ground of proved misbehaviour or incapacity[7]. The resolution for the presentation of such an address has to be signed by not less than one-third of the total number of Members of Parliament. Judges of the High Court are removable by the President on the recommendation of the Judicial Service Commission.[8] The dismissal and disciplinary control of the Judges of the lower courts is a matter for the Judicial Service Commission.[9]

3.2 The procedure for investigation and proof of alleged misbehaviour or incapacity of the Judges of the Supreme Court and the Court of Appeal

The procedure for investigation and proof of the alleged misbehaviour or incapacity in terms of Article 107(2) of the Constitution is governed by Parliamentary Standing Orders.[10] The history behind the adoption of such procedure in 1984 is quite intriguing. The then Chief Justice, Neville Samarakoon, on 14th March 1984 at the annual awards ceremony of Sinnathurai Commercial Tutory made certain observations critical of the government in power.[11] A Select Committee

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7 Article 107(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka 1978.

8 *Ibid.*, Article 111(2).

9 *Ibid.*, Article 114(1).

10 Standing Order 78A of the Standing Orders of the Parliament of the Democratic Socialist Republic of Sri Lanka.

11 See Report of the Select Committee, Parliamentary Series No. 71 of 1984. These observations related to the riots in July 1983, the functioning of the Job Bank from which the Judicial Service Commission (JSC) had to make selection for court staff, the sending of letters of recommendation by some Members of Parliament in respect of incompetent typists to the JSC, the high cost of living and its consequences, and also remarks relating to the President's salary.

of Parliament was appointed thereafter under the chairmanship of the then Prime Minister Mr. R. Premadasa, (Hereinafter referred to as the "Premadasa Committee") to report to Parliament whether the Chief Justice had, in fact, made such statements and, if so, whether such statements:

- constituted improper conduct or conduct unbecoming of a Chief Justice;
- referred to matters of political nature involving political issues;
- affected the dispensation of impartial justice;
- afforded grounds of allegation of bias by parties to proceedings;
- tended to bring the entire Supreme Court and particularly the Office of the Chief Justice into disrepute.[12]

The political manoeuvring by the then government in power, attempting to remove a Chief Justice was quite remarkable. On 4th April 1984 – the day after the motion for the appointment of a Select Committee was moved before Parliament by Mr. R Premadasa – Standing Order 78 was amended by adding a Standing Order 78A which laid down the procedure for presenting an address to the President for the removal of superior court Judges.[13]

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[12] *Ibid.*, p 82.

[13] According to this amendment where notice of resolution for the removal of a judge is given to the Speaker, he shall entertain such resolution and place it on the Order Paper of Parliament. It further provides that, once such a resolution has been placed on the Order Paper, the Speaker shall appoint a Select Committee, consisting of not less than seven members to investigate and report to Parliament on the allegations of misbehaviour and incapacity set out in such resolution.

The Premadasa Committee made its report to Parliament on 9th August 1984 that certain statements contained in the speech could be considered as constituting improper conduct and conduct unbecoming of the holder of the Office of Chief Justice and recommended to the House that appropriate action be taken. The report further stated that the nature of the action to be taken is a matter for the House.[14] The next move by the Government was the handing over of a notice of resolution to the Speaker, on 6th September 1984, for the removal of the Chief Justice, under the newly passed Standing Orders. A Select Committee was appointed by the Speaker thereafter to investigate and report to Parliament on the charges referred to in the resolution.[15] However, before the Select Committee made its report to Parliament, Chief Justice Samarakoon retired on 22nd October 1984 after completing his term of office.

Important legal issues were discussed at the Select Committee inquiry, such as the concept of separation of powers, freedom of speech of Judges, and the constitutionality of the procedure adopted by Parliament on investigation of Judges under Article 107(2) of the Constitution. However, the Select Committee's final conclusion was that:

> *...The Hon. Chief Justice's speech, taking into account all the circumstances, constitutes a serious breach of convention and has thereby imperiled the independence of the judiciary and undermines the confidence of the public in the judiciary. However, every breach of convention does not necessarily amount to proved misbehaviour. The standard of proof required is very high. In all the circumstances of this case, while this committee cannot but condemn this speech, we cannot come to*

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[14] *Supra* n 11 at p 84.

[15] The charges contained in the resolution were identical to the allegations earlier considered by the "Premadasa Committee."

the conclusion that the Hon. Chief Justice is guilty of proved misbehaviour.[16]

4. Constitutionality of Standing Order 78(A)

4.1 Challenging Standing Order 78(A) before courts in the year 2001

The notice of resolution for the removal of Chief Justice Sarath Silva from the Office of the Chief Justice signed by 77 Members of Parliament was handed over to the Speaker, Mr. Anura Bandaranaike, on 6th June 2001. However, the Supreme Court, on the same day, issued a stay order on the Speaker, restraining him from appointing a Select Committee of Parliament, under Standing Order 78(A), until the hearing and final determination of three fundamental rights cases before it. Two of the applications were filed by Attorneys-at-Law alleging the violation of their right to equality [Article 12(1)], the freedom of expression [Article 14(1)(a)] and the freedom to engage in their professions [Article 14(1)(g)] under the fundamental rights chapter of the Constitution. The petitioners' basic argument was that Standing Order 78(A) was unconstitutional in that it does not provide for fair inquiry, and permitted arbitrary action on the part of the Select Committee.[17] The counsel for the petitioners argued, *inter alia*, that any investigation will be free and fair only if conducted judicially and further stated that such investigation by a Select Committee of Parliament would amount to a misappropriation of the judicial process

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[16] *Supra* n 11 at p.91.

[17] The Bench which granted leave to proceed and a stay order comprised Justices Priyantha Perera, H.S. Yapa and Shirani Bandaranayake.

by Parliament, and if inquired into, the accuser, the prosecutor and the Judge will be the same entity.[18]

4.2 Challenging 78(A) at the Select Committee Inquiry in 1984

Arguments on similar lines were advanced at the Select Committee inquiry in 1984. In fact, one of the preliminary objections raised by a member of the Select Committee[19] was that the Select Committee cannot determine "proved incapacity or misbehaviour" unless it had been legally proved and added that it would be a futile exercise for the committee to deliberate, without first having proved misbehaviour before it. It was also argued on behalf of Justice Samarakoon that judicial power could only be exercised by Parliament through courts except in respect of its own privileges according to Article 4(c) of the Constitution; therefore, Standing Order 78(A) insofar as it enables Parliament to exercise judicial power is *ultra vires* the Constitution. Nevertheless, the Committee was not amenable to these arguments. It was the view of the Select Committee that it was duty bound to carry out the mandate given to it by Parliament according to the terms of reference specified. It further said that in carrying out this task the Committee is fortified by the fact that the exercise of disciplinary power over the higher judiciary in a large number of countries, almost without exception, is a right, which has been exercised by Parliament. Furthermore, it was observed that under Standing Order 78(A) Parliament was exercising the powers vested in it under Article 107(3) of the Constitution.[20]

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[18] By motion dated 20th November 2001 the petitioners sought permission from Court to withdraw the applications. Permission was granted and the applications were dismissed *pro forma*.

[19] Mr. Sarath Muttettuwegama raised the preliminary objection and Messrs Anura Bandaranaike and Dinesh Gunewardena supported Mr. Muttettuwagama.

[20] *Supra* n 11 at p 89.

4.3 Speaker's ruling on Standing Order 78(A)

In a ruling delivered by the Speaker on 20th June 2001 it was noted that the Supreme Court had no jurisdiction to issue an interim order restraining the Speaker of Parliament, in respect of the steps he is empowered to take under Standing Order 78(A). It was pointed out that such an act is a proceeding of Parliament having the privilege of immunity and could not be impeached, questioned or interfered with by any court of law. It then followed that the Speaker had no legal obligation to comply with the orders given by the Supreme Court. It was also pointed out in the ruling that the Speaker does not perform executive or administrative action within the meaning of Articles 17 and 126 of the Constitution when appointing a Select Committee but acts as an officer of Parliament and, therefore, his actions are not amenable to the fundamental rights jurisdiction of the Supreme Court. Consequently, the Speaker proceeded to instruct the Secretary General of Parliament to place the impeachment resolution on the Order Paper of Parliament. The impeachment resolution is accepted to have terminated with the dissolution of Parliament in December 2001. In relation to prorogation of Parliament it is expressly laid down in Article 70(4) of the Constitution that all matters which have been duly brought before Parliament and which have not been disposed of at the time of the prorogation, may be proceeded with during the next session. However, the Constitution does not have a similar provision in relation to dissolution of Parliament.

5. Of Bias and Judges

5.1 The Legal Concept of Bias

The maxim *nemo judex in re sua causa* or "no man a judge in his own cause" is a principle of natural justice and is commonly referred to as the rule against bias. In short, what it means is that, decisions should

be made free from bias or partiality. In administrative law the rule against bias is applied in the operation of the rules of natural justice. Litigants seeking justice should do so with the confidence that an unbiased judge who is neutral to the case before him would adjudicate the matter. Neutrality of judges on matters coming before them is really an ideal to be achieved. A judge's mind is not a *tabularasa* and the public should not expect "divine justice" from them.

> *...To have the power of forgetting, for the time, self, friends, interests, relationships and to think only of right towards another, a stranger, an enemy, perhaps is to have that which men can share only with the angels, and with Him who is above men.*[21]

It has been held in several English cases that direct pecuniary interest, however small, will automatically disqualify a person from acting as a judge. When considering personal bias various circumstances may give rise to personal bias for or against one party in a dispute before a judge. The common instances of this type of bias are: a judge may be a friend or a relation of a party or have some business or professional relationship. If a litigant is aware of such a relationship then naturally a doubt is likely to be created as to whether a judge can act impartially on the dispute before him. The situation becomes more serious if the litigant becomes aware of such a relationship after the conclusion of the case. There have been several instances in Sri Lanka of which the writer is personally aware when judges of the Supreme Court and Court of Appeal have excused themselves from hearing cases on one or more of the grounds mentioned above.

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[21] Cited by Justice A.R.B Amerasinghe at an address to the District Judges of the Western Province on "Judicial Ethics", 1st June 1991. (Published in the Judges Journal of 1991)

In the year 2001 the principle of bias gained prominence in the Sri Lankan legal arena for two reasons both in connection with Chief Justice Sarath Silva. Firstly, certain charges in the impeachment resolution handed over to the Speaker – discussed below - referred to acts of bias by the Chief Justice. The second issue arose in relation to constituting Supreme Court Benches by the Chief Justice in the applications challenging his appointment to the office of Chief Justice.

5.2 Tests to determine bias by judicial officers

Under English law the test for bias by decision makers is determined by the application of the 'The real likelihood of bias test' or 'reasonable suspicion of bias test'. The former imposes a heavier burden on the person making the allegations because here the standard is whether the facts as assessed by the Court give rise to a real likelihood of bias. The second test is less stringent because it underlines the principle that justice must not only be done but must seen to be done.[22]

In recent times the case of Pinochet (No.2)[23] gained prominence as regards judges and bias. The application of the English Law principles regarding bias that lead to automatic disqualification was widened in this case. The House of Lords held, that although, the matter in issue

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[22] In *Metropolitan Properties Co. v. Lannon*, (1969) 1QB 577, Lord Denning approved the "reasonable suspicion of bias test". However, he interwove it with the "real likelihood of bias test' according to which, if a reasonable man would believe that there was a real likelihood of bias then a decision should be overturned. However in *R v. Gough* (1993) AC 646, the House of Lords reinstated the "real likelihood of bias test" in criminal cases, but stating it in terms of "real danger" therefore emphasizing 'possibility' rather than 'probability.'

[23] (1999) All E.R 577.

does not relate to money or economic advantage but concerned with promotion of a cause, still automatic disqualification will apply.[24]

5.3 The standard of bias applied in Sri Lankan courts

While the early case law indicates that our courts have adopted the "reasonable suspicion of bias test,"[25] in recent years there has been a shift to the test of "real likelihood of bias test": whether a reasonable man, in all the circumstances of the case, believes that there was a real likelihood of bias against him.[26]

This test was approved in the case of *Simon* v. *The Commissioner of National Housing*[27] in which the Supreme Court took the view that a decision is not liable to be quashed merely on the grounds of reasonable suspicion of the party aggrieved unless it is proved that there was a real likelihood of bias. The Court, after an examination of the English Law decisions, which have applied the 'reasonable suspicion of bias Test' and the 'real likelihood of bias test', approved the latter. However, the Court stressed that the reviewing court should make an objective determination, on the basis of the whole evidence before it, whether there was a real likelihood that the inferior tribunal would be biased.

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[24] According to the facts involved in the case it was the view of their Lordships that Lord Hoffman who was a member of the Appellate Committee which heard Pinochet's appeal cannot himself be treated as a being a party to the appeal. However automatic disqualification will apply on the basis of Lord Hoffman's interest in the matter i.e. Lord Hoffman's directorship in one of the subsidiary companies of Amnesty International (AI)– who was a party to the action in the case. Their Lordships held that although Lord Hoffman was not a direct member of AI, but only a director of one of its subsidiary companies still for all the company was promoting the same cause in the same organization as a party to the suit namely, AI.

[25] See *King* v. *Podisingho*, 16 NLR16.

[26] See *In Re Ratnagopal*, 70 NLR 409.

[27] 75 NLR 471.

5.4 The Impeachment resolution and the charges of bias

Several charges of bias were levelled against the Chief Justice in the impeachment resolution handed over to the Speaker on 6th June 2001.[28]

In this regard it is relevant to mention a certain incident, which had taken place when the present Chief Justice was the Attorney General. It was alleged that the Attorney General had expressed his view in connection with a certain allegation made against a former Deputy Solicitor General getting involved in the latter's brother in law's case which was pending in the Attorney General's Department. In this

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[28] See *Sunday Leader*, 10th June 2001, pp. 8-9:
In Supreme Court Fundamental Rights Application No. 441/97 filed by Lal Priyantha Liyanage in which Minister Richard Pathirana was one of the Respondents, leave to proceed was refused by a Bench presided over by Justice Sarath Nanda Silva who addressed the petitioner in words to the following effect: "Minister Richard Pathirana came to my house and cried. He told me he never did a thing like this. I know him. He is not a person who will do a thing like this."

In Supreme Court case No. 2/2000 (contempt)

(a) Minister S.B Dissanayake was issued a rule by the Supreme Court to show cause why he should not be punished for contempt of the Supreme Court. The rule was issued at the instance of certain judges of the Court itself.

(b) That in the same connection three Members of Parliament, namely, Dr. Rajitha Senaratne, Mr. P. Chandrasekeran and Mr. Cegu Isadeen, had petitioned the Supreme Court to inquire into and punish the said Minister Dissanayake for contempt of court. The said complaint bore No.1/2000 (contempt)

(c) The said Justice Sarath Nanda Silva presided at the hearing of the said rule although being a personal friend of Minister Dissanayake.

(d) When counsel appearing for the three MPs moved to be heard, the Chief Justice refused to permit him to make submissions. Instead, he ruled that the contempt case initiated by them should await the outcome in case No. 2/2000 and thereafter proceeded to merely warn and discharge Minister Dissanayake despite the seriousness of the contempt he had committed on the purported ground that the Minister had made a statement expressing regret contrary to the established procedures in such matters.

connection, the former Attorney General took the position that judges should hear cases irrespective of relationships involved but subject to one reservation that if the judge feels a decision is going to be made in favour of the relative or friend, then at that stage 'for public perception' the judge should decline to hear the case.[29] Sometimes, judges refuse to hear cases on the ground that they are associated with a body corporate, which is a party before court. Whether the 'appearance of bias' is being taken too far by such refusal is arguable. However, the Judicature Act states[30] that except with the consent of both parties no judge should exercise jurisdiction in relation to a case that he is a party to or is personally interested. How the term 'personally interested' is interpreted will determine when judges should decline to hear cases coming before them. This is exactly the question that arose in the second matter involving bias of the Chief Justice in the year 2001.

5.5 A matter of constituting Supreme Court benches

When the three fundamental rights applications[31] challenging the appointment of Justice Sarath Silva to the Office of Chief Justice were taken up by three judges of the Supreme Court, they were referred by the three Justices to the Chief Justice to nominate an "appropriate bench' in terms of Article 132(3)[32] of the Constitution. The petitioners

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[29] See *Sunday Times*, 6th April 1997.

[30] According, to section 49(1), of the Judicature Act. No.2 of 1978, "Except with the consent of both parties no Judge shall be competent and in no case shall any Judge be compellable, to exercise jurisdiction in any action, prosecution, proceeding or matter in which he is a party or personally interested."

[31] *Supra* n 2.

[32] Article 132(3) says that the Chief Justice may, of his own motion; or at the request of two or more Judges hearing any matter; or on the application of a party to any appeal, proceeding or matter if the question involved is, in the opinion of the Chief Justice, one of general and public importance, direct such matter be heard by a Bench comprising five or more Judges of the Supreme Court.

in the three applications later submitted to the Chief Justice a motion indicating that the appropriate bench should comprise the fullest possible number of judges of the Supreme Court, or in the event a bench comprising a lesser number was constituted, that nomination should be done strictly in order of seniority of the Supreme Court. However, the Chief Justice refused the motion of the petitioners but acting on the request of the three judges before whom the matter was listed for leave directed that the matters be heard by a bench of seven judges and the seven judges were thus nominated by the Chief Justice in ascending order of seniority. A new bench of five judges was constituted thereafter (due to the retirement of one of the judges) and all five were members of the original seven-member bench.

A preliminary objection was raised by the petitioners, to the constitution of the bench. In applications 901/99 and 902/99 the counsel appearing on behalf of the petitioners took up the objection that the Chief Justice had nominated the bench in a manner other than that to which his clients had consented to in the motion and, therefore, such nomination was contrary to the provisions of section 49 of the Judicature Act. No 2 of 1978. Justice Wadugodapitiya in overruling this objection held that it is section 49(3)[33] and not section 49(1)[34], which applied to judges of the Supreme Court and Court of Appeal, and, therefore, no question of giving of consent by parties would arise in this situation. Furthermore, it was stressed by Justice Wadugodapitiya that in any event the nomination or the constitution of a bench by the Chief Justice could in no way be said to be an exercise of jurisdiction in respect of that case. Referring to section

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[33] Where any judge who is a party or personally interested is a Judge of the Supreme Court or Court of Appeal, the matter in which he is a party or is interested or in which an appeal from his judgment shall be preferred shall be heard by some other Judge or Judges of the said Court.

[34] *Supra* n 30.

49(3) Justice Wadugodapitiya said that since the Chief Justice did not wish to hear and determine a matter in which he is a party or is at least, seeking or attempting to do so, section 49(3) was not violated.

A further objection was raised that the Chief Justice had not exercised the power conferred on him by Article 132(3)(ii) of the Constitution in the manner contemplated by law for the reason that the Chief Justice had acted in violation of the rule against bias when he made the order nominating and constituting the bench of five judges. It was the counsel's position that the doctrine of necessity required the Chief Justice to nominate a bench according to Article 132(3) of the Constitution but in doing so he must not violate the rule against bias. Had the Chief Justice appointed the bench as requested by the petitioners, then the petitioners could not make such an allegation. In relation to this objection, Justice Wadugodapitiya noted:

> *Thus the doctrine of necessity which in reality forms an exception to the principle of Natural Justice which embodies the rule against bias would, when invoked, allow and enable a functionary who is tainted with bias to perform without of course, flouting the rule against bias, the particular function in question exactly as he is authorized and empowered to, by the empowering statute. Therefore, applying the doctrine of necessity to the instant case, the Chief Justice although he is a party respondent to the petitioner's application, is nevertheless validly and lawfully authorized and empowered (despite this taint) to nominate judges to, and constitute a Bench in exact obedience to the provisions of law which empowers him so to do, viz: Article 132(3) of the Constitution. It would follow then, that his act of nominating and constituting the present Bench of five judges within the limits of his legal empowerment, is entirely valid in law and proper in every respect. In such a situation, the Chief Justice would not be acting in violation of the rule against bias...*

The counsel for the petitioners had conceded at the hearing that none of the judges in the Bench was in any way biased or had violated the rule against bias and had affirmed the fact that the Bench of five judges is itself impartial. Therefore, Justice Wadugodapitiya was of the view that any bias that the Chief Justice may be alleged to have can in no way be said to have trickled down to he Bench of five judges nominated by him, by virtue only of the fact of such nomination.

According to Justice Wadugodapitiya's reasoning since the Chief Justice himself was not part of the Bench that heard the application in which he was one of the respondents the rule against bias would not be applicable. The fact that the Chief Justice nominated the Bench, by itself, could not give rise to a suspicion of bias. Furthermore, it is clear from the judgment that the nomination and the constitution of Supreme Court Benches is an administrative function not involving the exercise of jurisdiction and, therefore, the rule against bias would not apply.

6. The International Bar Association Report

The International Bar Association (IBA) based in London made a fact finding mission to Sri Lanka between 28th – 31st August 2001. The ensuing report states that during this period the delegation held meetings with lawyers, the Bar Association of Sri Lanka, representatives of the media, judges including the Chief Justice himself, academics, professionals and politicians. The mission was organized by the Human Rights Institute of the IBA. According to its report[35] published in November 2001 one of the reasons for this assignment was:

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[35] *Supra* n 1.

> *In the light of recent cases seeking to disbar the Chief Justice from practicing as a lawyer and attempts by over one-third of Members of Parliament to have him impeached, to examine the guarantees for the independence of the judiciary, and practical respect these guarantees receive.*[36]

There is no doubt that the conclusions arrived by the IBA delegation on the independence of the judiciary in Sri Lanka are not very promising, more so due to the fact that within the period of five years this was the second adverse report published on the Independence of the Judiciary in Sri Lanka. The first one was a report of a mission by the Centre for the Independence of Judges and Lawyers (CIJL), based in Geneva, on the Judicial Independence of Sri Lanka.[37] The recommendations in the 1997 report read, *inter alia:*

i) That consideration be given to changing the constitutional method of judicial appointment

   a) by selecting the Judicial Service Commission by methods which will make it more independent.

   b) by requiring appointments to the higher courts to be made by the Commission , or by the President from a short list of names selected by the Commission

ii) that if the above proposal is not adopted, constitutional force should be given to the convention that the President must consult the Chief Justice before making appointments and that the two senior judges of the Supreme Court should, with the Chief Justice, make up the Judicial Service Commission.

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[36] *Ibid.*, p 9.

[37] *Judicial Independence in Sri Lanka,* Report of a Mission 14-23 September, Centre for the Independence of Judges and Lawyers, Geneva (1997).

iii) that the Secretary of the Commission be appointed by the Chief Justice and not by the President[38]

The recommendations in the IBA report 2001 were similar and referred, *inter alia,* to the appointment of judges through an independent assessment; the appointment, transfer, disciplinary action, dismissal or retirement of judges of whatever rank to be determined by a transparent and accountable system; and how appointments to the JSC should be done. These recommendations were made after the delegation came to certain conclusions in the light of recent happenings concerning the judiciary. Serious concerns were voiced by the delegation over the method of appointing judges, judges' complaints regarding the conduct of the JSC, the removal of judges without a fair hearing, and disciplinary action by Parliament over judges of the higher judiciary which the IBA delegation viewed as not the appropriate forum in which to have an independent debate about judicial misconduct or incapacity. The delegation was of the view that the perception of a lack of an independent judiciary was in danger of becoming widespread, which was extremely harmful for upholding the Rule of Law.

The IBA delegation also pointed out while judges and the courts were not exempt from public debate, politically motivated criticism of the judiciary and, in particular, the Supreme Court by politicians was considered as contrary to the interests of justice and to the independence of the judiciary. It was recommended that politicians including the President should not engage in gratuitous or unsupported allegations against the members of the judiciary.[39] Why such comments were deemed necessary by the delegation is discussed next.

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[38] *Ibid.*, p 47.

[39] *Supra* n 1 at p 40.

7. Allegations Against a Member of the Judiciary

It was reported in the media that on two separate occasions the President had alleged that, in the early part of 2000, an unnamed judge of the Supreme Court had accepted a bribe from an LTTE suspect in a fundamental rights application.[40] The alleged suspect was a party to a fundamental rights application. The judges of the Supreme Court wrote to the President in June 2000 denying the allegations of bribery and corruption and requesting the President to clear their names.[41] It was also pointed out in the letter that if there were any credible evidence against any of the judges the file said to contain the evidence would have been submitted to the relevant authorities for investigation and action according to procedure established by law. As there was no reply, the Supreme Court Judges wrote a second letter to the President referring to their earlier letter reiterating that in the absence of a reply controverting the first letter there seem to be no basis for the allegations against any of the judges of the Supreme Court. It was later reported in the media that the President had disclosed the name of the judge at a gathering, which had included some eminent members of the Bar.[42] Against this backdrop, a complaint was made to the Bribery Commissioner, in June 2001, by the then Assistant Leader of the UNP, Mr Gamini Atukorale, requesting the Commissioner to take action to identify the judge in question and establish whether or not the allegations made by the President against the judge were true or false. The fate of the complaint made by Mr Atukorale is unknown but the fact remains that the public's confidence in the judiciary was visibly shaken by this allegation of corruption attributed to a judge of the Supreme Court.

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[40] *Sunday Leader* , 9th April 2000.

[41] *Sunday Leader*, 24th June 2001.

[42] *Ibid.*

8. 17th Amendment to the Constitution

The 17th Amendment to the Constitution was passed in parliament with a two-thirds majority in October 2001. This topic is discussed at length in chapter two of this book and it is proposed to discuss here, some of the salient features in the 17th Amendment in relation to the judiciary. According to Article 41C(1) of the 17th Amendment the Chief Justice and the judges of the Supreme Court, the President and the judges of the Court of Appeal, the members of the Judicial Service Commission other than the Chairman and also the Attorney General are appointed by the President only after approval by the Constitutional Council upon a recommendation made to the Council by the President. The other relevant provision in the 17th Amendment is Article 111D which states that the Judicial Service Commission shall consist of the Chief Justice and two other judges of the Supreme Court appointed by the President, subject to the provisions of Article 41C. Especially during the last two decades on several instances the impression may have been created within the public that certain appointments to the judiciary had been politically motivated.[43] It is hoped that the present law will ensure the independence of the judiciary and keep the judiciary free from alleged political interference.

9. Conclusion

The judiciary plays a very important role in a democracy. The independence of the judiciary has come to mean much more than merely the non-interference with the judiciary by the other two branches of the State i.e. the Legislature and the Executive, and matters such as security of tenure, financial and institutional security. The International Congress

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[43] See paper presented by R.K.W Goonesekere on the'Judiciary' at the Law & Society Trust Conference on "*Fifty Years of Law, Justice and Governance in Sri Lanka.*"

of Jurists, which convened in New Delhi in 1959 to consider "The Rule of Law in a Changing World", recognised that:

> *The rule of law is a dynamic concept for the expansion and fulfilment of which Jurists are primarily responsible and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realized.*[44]

In recent times The Beijing Statement of Principles of the Independence of the Judiciary, 19th August 1995[45] has sought to lay down requirements for an "Independent Judiciary." This document lays down as the objectives and functions of the judiciary, *inter alia*, the application of the rule of law and the protection of human rights.[46] The activism of the judiciary in relation to the protection of fundamental rights in Sri Lanka in the year 2001 is discussed in chapter V of this book, while this chapter was an attempt to look at certain issues relating to the traditional notions of an 'Independent Judiciary.'

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[44] Barnett, Hilaire, *Constitutional and Administrative Law* (1995) p 115.

[45] Adopted by the 6th conference of Chief Justices of Asia and the Pacific, the Statement of Principles of the Independence of the Judiciary to be known as The Bejing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region .Sri Lanka was represented by Hon. Justice P.R.P Perera.

[46] *Ibid.*, Articles 10(a) and 10(b).

IV

The Impact of the Electricity Crisis on Socio-Economic Rights and Sustainable Development

Sonali R. Dayaratne[*]

1. Introduction

Sri Lanka has been experiencing periodic electricity shortages since 1994. However, these shortages have not emerged over night. Rather, an electricity crisis has been building up over the last one and a half decades. The Ceylon Electricity Board (hereinafter referred to as the 'CEB'), which was considered a natural monopoly of power made massive investments in hydropower generation in the 1980's. By the early 1990's, the need to diversify the energy base was well recognised as the use of hydroelectricity was limited by bad weather conditions

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which resulted in periodic electricity shortages. Although investment plans were designed, they were either delayed, substituted by other plans, or not implemented due to various interventions by, *inter alia*, environmentalists and religious bodies. Consequently, the country experienced one of the worst blackouts in 1996 when 8-hour power cuts along with restrictions on the use of electricity for non-essential purposes were imposed. Although some elements of the electricity crisis remained in the background, the authorities were able to avoid power cuts during the period 1996-2000 by restricting power usage, hiring generators and imposing tariff surcharges.[1] However, 2001 witnessed a significant reduction in hydropower electricity generation, once again primarily due to severe drought conditions. This resulted in continued blackouts for eight months in 2001. The resultant energy crisis had a significant effect on socio-economic activity in the country and raised issues of good governance with regard to electricity power sector institutions.

This chapter will attempt to evaluate the role played by the electricity crisis in the deterioration of the Sri Lankan economy in 2001, and its resultant effect on the socio-economic and developmental rights of her people. The chapter will examine the various steps taken by the relevant authorities in the light of Sri Lanka's obligations to achieve sustainable development[2] in terms of the Rio Declaration on Environment and Development (1992) (hereinafter referred to as the

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[1] *Central Bank of Sri Lanka Annual Report 2001*, Central Bank Printing Press, Colombo, Sri Lanka 2002, p 109. The Monetary Law Act requires the Monetary Board of the Central Bank of Sri Lanka to submit an Annual Report to the Minister of Finance on, *inter alia*, the state of the economy and a review of the policies and measures adopted by the Monetary Board each year.

[2] The concept of sustainable development crystallized during the United Nations Conference on Environment and Development (UNCED) or the Earth Summit held in Rio de Janeiro in June 1992. The Conference adopted the Rio Declaration on Environment and Development which enumerates the principles of sustainable development.

'Rio Declaration'). There will also be an assessment of the state of regulatory mechanisms in the electricity sector with regard to principles of governance,[3] and its implications on the energy crisis and sustainable development. The chapter will conclude with recommendations that have been made by various stakeholders and observations by the author.

Although the electricity crisis can be identified as a significant factor that disrupted socio-economic activity in the country in 2001, there were many other factors, which also had a negative impact on the socio-economic rights of the people. The Sri Lankan economy was also rocked by a series of other events that completely negated its eagerly awaited and much needed economic growth, and further demonstrated its continuing vulnerability.

As the Central Bank of Sri Lanka Annual Report 2001[4] (hereinafter referred to as the '*Central Bank Report*') observes, the terrorist attack in the United States of America on 11th September 2001 accelerated the deterioration of Sri Lanka's external trade activities which had already been affected by the slowdown in the global economy. In addition, the prolonged drought that prevailed from the beginning of the year 2000 reduced domestic agricultural output, increased domestic food prices and lowered hydropower electricity generation.[5] The reduction in hydropower electricity generation, in turn, resulted in extensive power cuts during the latter half of the year, which disrupted all economic activity in the country. To exacerbate the situation, the terrorist attack on the Bandaranaike International Airport in July

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[3] See discussion *infra* on principles of good governance. See also, Ambika Sathkunanathan, 'State Interference with Public Institutions; A case study of the Bribery Commission' in *Sri Lanka: State of Human Rights 2002* (Law & Society Trust, Colombo 2002)

[4] *Supra* n 1, p 1.

[5] *Ibid.*

drastically reduced tourist arrivals, weakened investor confidence, both here and abroad, and reduced external trade. The substantial reduction in external trade was the result of the imposition of a high war-risk insurance premium on ships and airlines following the terrorist attack on the airport. The political uncertainty that prevailed in the latter half of the year further dented investor confidence and resulted in the postponement of much needed structural reforms.[6]

The cumulative impact of these negative events on the economy was aggravated by existing structural weaknesses, delays in policy responses, inconsistencies in policy action and a reversal of policy strategies during the run-up to the Parliamentary General Elections in December.[7]

As a country's economic status directly affects the attainment of the socio-economic and developmental rights of her people, the aforesaid events in Sri Lanka factored very significantly in the erosion of the socio-economic rights of her people, particularly during the year under review.

Of the aforesaid factors, the energy crisis played a significantly potent role in the debilitation of the economy. Indeed, the importance of a steady supply of electricity cannot be understated. As has been pertinently observed:

> *The access to a reliable, clean and affordable source of energy is vital for the economic, social and human development of a country. The scope of economic activity in the industrial and service sectors, mobility, and access to information are increasingly dependent on modern technology that requires energy to drive them. Among the different sources of energy*

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6 *Ibid.*

7 *Ibid.*

> *available, electricity – being a clean source of energy that can be easily transmitted to far away places and converted to other forms of energy with little loss, – has become an essential pre-requisite for development.*[8]

This chapter will next examine the role played by the electricity crisis in the deterioration of the Sri Lankan economy, and its resultant effect on the socio-economic and developmental rights of her people.

2. Socio-Economic Rights and Sustainable Development

Sri Lanka ratified the International Covenant on Economic, Social and Cultural Rights of 1966 (hereinafter referred to as the 'ICESCR') over 20 years ago,[9] thereby undertaking to take steps, to the full extent of its available resources, to progressively achieve the full realization of the rights recognized by the Covenant.

Each State Party to the ICESCR is bound to take steps, especially economic and technical, to the full extent of its available resources, with a view to progressively achieving the full realization of the rights recognized in the Covenant by all appropriate means, including the adoption of legislative measures.[10] States Parties are specifically required to take appropriate steps to ensure the realization of the right of everyone to an adequate standard of living, and to the continuous improvement of living conditions.[11]

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[8] *Sri Lanka: State of the Economy 2001*, Institute of Policy Studies (Sri Lanka) at p 85.

[9] In 1980.

[10] Article 2(1).

[11] Article 11.

Sri Lanka is also a signatory to the Rio Declaration on Environment and Development, which enumerates the principles of sustainable development. The Declaration stipulates that the right to development must be fulfilled so as to equitably meet the developmental and environmental needs of present and future generations.[12] The Declaration thus requires States to recognize and work towards achieving the goal of 'sustainable development' where environmental protection constitutes an integral part of the developmental process and not be considered in isolation from it.[13] It is to be noted that even though the Rio Declaration, by its very nature, is not a binding international document, it has persuasive value and States should strive to achieve sustainable development.

Principle 10 of the Rio Declaration provides that environmental issues are best handled with the participation of all concerned citizens at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, and the opportunity to participate in the decision-making processes. Principle 10 further stipulates that States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.[14]

In keeping with its obligations, the Sri Lanka Government submitted its agenda on environmental and development activities for the 1990's at the Earth Summit[15] in 1992.[16] The National Report was prepared in

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[12] Principle 3.

[13] Principle 4.

[14] Principle 10.

[15] See *supra* n 2.

[16] Ratnasiri, J., "Sustainable development and the energy sector" in the *Daily News*, 29th November 2001, p 45.

1991 by a high-level team drawn from various ministries and other relevant organizations, and was coordinated by the Ministry of Environment. In its section on energy, the Report gave an undertaking that the following measures, *inter alia*, would be taken during the course of the decade in order to control adverse environmental consequences in the energy sector:

- all future hydro-electricity projects would be studied for their socio-economic and environmental impact;

- thermal generation would meet the national standards for emissions which needed to be realistic and achievable with reasonable additional costs;

- generation expansion planning, which was presently [i.e., in 1991] based on least-cost options, would include environmental costs and trade-offs; and

- a more vigorous drive towards energy conservation in industry and transport with concessionary financial packages, promotional drives and training.

In assessing how much has been achieved during the last 10 years since the preparation of the aforesaid National Report, it would seem that in almost all the tasks undertaken, the principles of sustainable development have not been adhered to.[17]

The United Nations Declaration on the Right to Development of 1986 (hereinafter referred to as the 'Declaration on Development') is also relevant here. It stipulates that the right to development is an inalienable human right by virtue of which every human person and

[17] *Ibid.*

all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realized.[18]

The Declaration also provides that States should undertake, at the national level, all necessary measures for the realization of the right to development.[19] It also requires that States should encourage popular participation in all spheres as an important factor in development, and in the full realization of all human rights.[20] Steps are also required to be taken to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislation and other measures at the national level.[21]

However, it is important to note that the Declaration on Development, as all declarations are, is non-binding. The Declaration has also attracted much debate and controversy at the international level. Although it was adopted in 1986, the Declaration does not reflect consensus at the international level, and the legal status of the right to development is rather uncertain. However, declarations and resolutions have persuasive effect, and some declarations like the Universal Declaration on Human Rights[22] and the Stockholm Declaration[23] have subsequently become part of customary international law.

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[18] Article 1(1).

[19] Article 8(1).

[20] Article 8(2).

[21] Article 10.

[22] Proclaimed by the United Nations General Assembly on 10th December 1948.

[23] Declaration of the United Nations Conference on the Human Environment, adopted at Stockholm on 16th June 1972.

2.1 Justiciability of socio-economic rights and sustainable development in Sri Lanka

The Fundamental Rights Chapter of the Sri Lankan Constitution[24] enshrines primarily civil and political rights[25] to the exclusion of socio-economic rights save for the right to equality (which is applicable to civil, political, social, economic and cultural rights),[26] trade union rights,[27] the right to engage in any lawful means of livelihood,[28] and cultural rights.[29] Thus, the question arises as to whether Sri Lankans have the right to enforce their socio-economic rights recognized by the ICESCR in a court of law, in the absence of enabling legislation.

The Declaration on Development recognizes that all human rights and fundamental freedoms are indivisible and interdependent; and that equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights.[30] Thus, States are required to take steps to eliminate obstacles to development resulting from a failure to observe civil and political rights, as well as economic, social and cultural rights.[31]

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[24] The Constitution of the Democratic Socialist Republic of Sri Lanka certified on 31st August 1978.

[25] Freedom of thought, conscience and religion (Article 10); freedom from torture (Article 11); freedom from arbitrary arrest, detention and punishment and prohibition of retroactive penal legislation (Article 13); and freedom of speech, assembly, association, movement, religion, etc. (Article 14).

[26] Article 12(1) and 12(2).

[27] Article 14(1)(d).

[28] Article 14(1)(g).

[29] Article 14(1)(f).

[30] Article 6(2).

[31] Article 6(3).

The Chapter on Directive Principles of State Policy and Fundamental Duties[32] in the Sri Lankan Constitution provides that the principles embodied there shall guide Parliament, the President and the Cabinet of Ministers in the enactment of laws, and the governance of the country.[33] Article 27(4) further stipulates that the State shall strengthen and broaden the democratic structure of government and the democratic rights of the people by decentralizing administration and affording all possible opportunities to the People to participate at every level in national life and in government.

Unlike the Fundamental Rights Chapter, however, Article 29 stipulates that the Directive Principles are not justiciable.[34] Notwithstanding, the Supreme Court in the case *In re the Thirteenth Amendment to the Constitution and the Provincial Councils Bill*[35] stressed the constitutional importance of the Directive Principles. The majority of the Court was of the view that although the Directive Principles are not enforceable, Bills may be scrutinized to see whether they represent steps taken in the direction of implementing the programme envisaged by the framers of the Constitution.[36] Chief Justice Sharvananda for the majority observed that although Directive Principles are not enforceable in a court of law, this shortcoming does not detract from their value as projecting the aims and aspirations of a democratic government. The Chief Justice was of the view that Directive Principles require to be implemented by legislation, and that the two impugned Bills represented steps in that direction.[37]

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[32] Chapter VI of the Constitution.

[33] Article 27(1).

[34] In other words that the said provisions do not confer or impose legal rights or obligations, and are not enforceable in any court or tribunal.

[35] [1987] 2 Sri LR 312.

[36] See Wickramaratne, J, *Fundamental Rights in Sri Lanka* (Navrang, Booksellers and Publishers, India: 1996) at p 30.

[37] *Ibid.*, p 326.

Similarly, in *Seneviratne and Another* v. *University Grants Commission and Another*,[38] Wanasundera, J. observed:

> *It is a settled principle of construction that when construing a legal document the whole of the document must be considered. Accordingly, all relevant provisions of the Constitution must be given effect to when a constitutional provision is under consideration and, when relevant, this must necessarily include the Directive Principles. It has been said that the Directive Principles are in the nature of an instrument of instructions which both the Legislature and the Executive must respect and follow. The expressive language in...[the relevant Indian cases] is intended to emphasise the fact that these provisions are part and parcel of the Constitution and that the courts must take due recognition of them and make proper allowance for their operation and function.*[39]

Thus, the intention of the University Grants Commission to implement the relevant Directive Principles in *Seneviratne's* case was accepted by the Supreme Court as a reasonable basis of classification.[40]

In the light of the aforesaid cases, it is arguable that socio-economic rights are enforceable in Sri Lanka to the extent they are recognized by the Directive Principles of State Policy, subject to the limitation of the availability of resources.

It also remains to be seen whether socio-economic rights will be enforced by the Supreme Court in terms of the equality provision[41] in

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[38] (1978-79-80) 1 Sri LR 182.

[39] *Ibid.*, p 216.

[40] *Supra* n 36, p 34.

[41] Article 12(1) of the Constitution stipulates that all persons are equal before the law and are entitled to equal protection of the law.

the Fundamental Rights Chapter, inasmuch as it can be argued that all Sri Lankans have an equal right to socio-economic rights which the State has undertaken to progressively realize (to the full extent of its available resources), in terms of its international obligations under the ICESCR.

The principle of sustainable development, on the other hand, has been recognized and enforced by the Sri Lankan courts on at least two occasions. Notable judgments are the Supreme Court decisions in *Vithanage Don Sunil Gunaratne* v. *The Homagama Pradeshiya Sabha and Others*[42] (probably the first judgment of this Court giving effect to the principle of sustainable development), and *Tikiri Banda Bulankulama and Others* v. *The Secretary, Ministry of Industrial Development and Others*[43] (hereinafter referred to as the '*Eppawela Phosphate Mining* case') respectively.

In the *Vithanage Don Sunil Gunaratne case*, Justice A. R. B. Amerasinghe made the important observation that "Publicity, transparency and fairness are essential if the goal of sustainable development is to be achieved."[44] This is a reference to some of the key elements of good governance which are inherent in the concept of sustainable development. In the *Eppawela Phosphate Mining* case, Justice Amerasinghe held that the proposed agreement between the government and a foreign company for the exploitation of the phosphate mine at Eppawela should be considered in the light of the

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[42] SC Application No. 210/97, SC Minutes of 03/04/1998. Also see de Silva, S R, "Investing in Sustainable Development: Judgments of the Supreme Court of Sri Lanka & International Court of Justice" in *Moot Point*, Legal Review 1999, Volume 3 (Centre for Policy Alternatives, Sri Lanka, December 1999), p 20.

[43] SC Application No. 884/99, SC Minutes of 02/06/2000. Also see Amaratunge, K., "Phosphate Mining at Eppawala: Some Salient Features of the Judgment" in *Moot Point*, Legal Review 2000, Volume 4 (Centre for Policy Alternatives, Sri Lanka, December 2000), p 3.

[44] *Supra* n 42, p 5.

principles of sustainable development enumerated in the Stockholm and Rio Declarations.[45] Justice Amerasinghe further pointed out that although these were non-binding documents, as a member of the UN, Sri Lanka could hardly ignore the principles embodied in them.

3. The Electricity Crisis

3.1 An overview

Sri Lanka faced an electricity crisis for the second time in five years with the commencement of power cuts in mid 2001. Many experts argued strongly that this was not due to unforeseen external factors such as high petroleum prices and low rainfall for a second consecutive year (low rainfall levels were consistent with systematic cycles and early forecasts of the Meteorological Department).[46] Instead, it was argued that the crisis was a management crisis at the national power utility - the CEB - that has manifested itself into a capacity crisis and a financial crisis.[47]

Hydropower has traditionally been the main source of electricity generation in Sri Lanka. It was first introduced on a large commercial scale in 1950 with the construction of the Laxapana power generation station in Maskeliya. During the period 1950-1974, four hydropower stations with a total installed capacity of 275 MW were built using two main tributaries of the Kelani River. Six major power plants with a combined capacity of 660 MW and capable of generating 2,032 GWh of electricity annually were constructed under the Accelerated

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[45] *Supra* n 43, p 21.

[46] *Supra* n 8, p 85.

[47] *Ibid.*

Mahaweli Development Project providing a significant boost to hydro-electricity generating capacity during the period1976-1990.[48]

However, additions to the national grid have been limited since 1990. In spite of the fact that total sales grew by 50% from 1990 to 1995, the Samanalawewa hydropower plant with a capacity of 120 MW was the only major power plant that was added to the national grid during this period.[49]

The immediate need to increase generation capacity to avoid short-term power shortages led to the construction of two thermal power plants in 1997 in Kelanitissa and Sapugaskande using auto-diesel with a capacity of 155 MW.[50] It has been observed that in the haste to construct these plants, factors such as generation costs and environmental considerations took a back seat.[51] Although the CEB originally advocated a coal power plant taking into consideration its historically low prices compared to petroleum, this was sidelined allegedly due to its gestation period of 4 to 6 years in contrast to less than a year for petroleum based power plants.[52] By 1999, notwithstanding the addition of several private small-scale mini hydropower plants and a wind power plant, the country was still relying primarily on high-cost thermal power plants using diesel to increase generation capacity.[53]

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[48] *Ibid.*, p 86.

[49] *Ibid.*, p 88.

[50] *Ibid.*

[51] *Ibid.*

[52] *Ibid.*

[53] *Ibid.*

The severe shortage of power supply in 2001 was due to the critical reduction in hydropower generation consequent to the drought; delays in repairing power plants; and the discontinuation of hired power plants. In addition, consumer need for electricity grew by approximately 7%, increasing the number of households with electricity to 65 per cent.[54] With the commissioning of the combined cycle power plant, the power generation capacity increased by 7% to 1,901 MW in 2001. Although this reduced hydro dependence to 61%, effective generating capacity remained well below its potential capacity due to low water levels in reservoirs. Thus, the expansion in power generation capacity was unable to meet the demand created by the increasing use of electricity in the economy.[55]

Moreover, the Central Bank reports that the CEB faced a twin crisis in 2001 – a power crisis and a liquidity crisis:

> *The cost of power generation rose rapidly due to high dependence on thermal power and hired power, but power tariffs were not raised adequately to cover the additional cost. The continuation of an average tariff (Rs.5.53 per unit) below the average cost (Rs.7.20 per unit) resulted in severe operational losses of about Rs.12 billion to the CEB, which had to be financed by bank borrowings. ... Meanwhile, the system losses remained high at around 21 per cent, further aggravating its financial crisis.*[56]

The CEB has estimated that the demand for electricity will grow at an average of 10 - 12% a year in the next 10 years. Hence, the demand for electricity will increase by approximately 650 GWh a year. To

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[54] *Supra* n 1, pp 13-14.

[55] *Ibid.*

[56] *Ibid.*, p 14.

sustain this growth, the present supply capacity will need to be increased by about 160 MW a year.[57]

Views have been expressed that most of the large-scale hydro potential of the country has already been exhausted, although the CEB has identified four economically viable, large-scale potential hydropower plants at Kukule, Upper Kotmale, Broadland and Uma Oya. Construction has already begun on two plants, viz., Kukule and Upper Kotmale but they will only solve the capacity problem in the short-term since together they add only a capacity of about 200 MW. Further, both these plants have been plagued by delay. Although there is the possibility of several small hydropower electricity plants being added, this will only increase the generation capacity marginally.[58]

The CEB's long-term power generation expansion plan in 1999 shows that more than half of the planned future expansion comes from the proposed coal power plants. However, as aforesaid, the work on these is yet to commence. Several other planned projects have also been delayed. In the short-term, the plan relies heavily on petroleum fuels, which is likely to increase inflationary pressure on electricity tariffs. It has been concluded that:

> *If the decision making process regarding future power generation plans are not streamlined so as to avoid unnecessary delays, the present problems of capacity shortages and high operational costs will continue to worsen.*[59]

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[57] *Supra* n 8, p 86.

[58] *Ibid.*, p 90.

[59] *Ibid.*, pp 92-93.

3.2 Issues of sustainable development and environmental lobbying

Although the Kukule project is now proceeding with a few years' delay, the Upper Kotmale Hydro-Power Project was held up during the major part of the last decade. It has been noted that, had the principles of sustainable development in the Rio Declaration, particularly Principle 10, been followed from the inception of the project, it would now have been nearing completion or have been already completed.[60] The Japanese consultants who were engaged to carry out the feasibility study completed the first phase, including the Environmental Impact Assessment (hereinafter referred to as the 'EIA') report in March 1994. They suggested four alternatives, of which one was selected, and the consultants were authorized to proceed with its final designs.[61] This option, while maximising energy generation, would have deprived water to several waterfalls including St. Claire's and Devon, which were major tourist attractions.

Only the EIA report of the final project was released to the public for purposes of feedback - after the expenditure of much time and money. The initial four alternatives suggested by the Japanese consultants were not made available to the public. Had the issues which were raised at the hearing of the final EIA, such as resettlement, the land area to be inundated and the impact on waterfalls, been publicized at the preliminary stage, their impact would have been known to the relevant authorities, scientific and environmental groups, and concerned members of the public; their comments could have been solicited at this stage. Once the option acceptable to the stakeholders and the proponent was decided upon, the project could have proceeded without causing any delay. It was the lack of this initial dialogue,

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[60] *Supra* n 16.

[61] *Ibid.*, See Upper Kotmale Hydro-Power Project EIA Report.

which was the real cause for the 5-year delay of the Upper Kotmale Hydro-Power Project, which cost the country dearly.[62]

There have also been allegations that the environmental lobby was responsible for blocking several power plant projects including the Trincomalee coal power plant (late 1980s), the new Upper Kotmale hydropower project (since 1995), the Norochcholai coal power project (since 1999), and a small power plant at Anuradhapura (in 2001).[63] It was reported that the latter three power plants had received the full approval of the Central Environmental Authority (CEA) and that the designs and financing have been ready for years.[64] The environmental lobby has responded by stating that the Upper Kotmale hydropower project was rejected thrice by a panel appointed by the CEA, as upon evaluation, it was found that its disadvantages far outweighed the benefits.[65] This has been countered with the argument that the credentials and affiliations of the panel which rejected the project are highly questionable.[66] The Upper Kotmale hydropower project was finally approved by means of an appeal made by the CEB to the Secretary to the Ministry of Environment.[67] The environmentalists contended that many people in Sri Lanka were concerned about this project because it threatened the existence of several waterfalls which they wanted preserved for the benefit of future generations, and threatened tourism which brought in a substantial amount of foreign

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62 *Ibid.*

63 Siyambalapitiya, T., "Three power plants blocked by environment NGO" in *The Island,* 1st September 2001.

64 *Ibid.*

65 Algama, R., "Electricity Crisis and the Environmental Foundation" in *The Island,* 6th September 2001.

66 Siyambalapitiya, T., "Ushering in intermittent darkness" in *The Island,* 21st September 2001.

67 *Supra* n 65.

exchange to the country.[68] They have also pointed out that it would be far better to remove the silt from the Lower Kotamale power project than to construct the new Upper Kotmale hydropower project as the Lower Kotmale power plant has lost about 40% of its capacity, and the Victoria power plant about 25% of its capacity.[69]

An important issue is the inordinate delay surrounding the construction of the proposed coal power plant. The first proposal for a coal power plant was forwarded in the late 1980s, and feasibility studies were concluded with an aid donor. However, construction of a coal power plant is yet to commence despite repeated propositions that the best option for the country is a coal power plant designed with the necessary security considerations.[70] Views have been expressed that the main reason for the delay is the continual opposition from misinformed environmentalists and other lobbyists. It has been observed that, "Political ambivalence stems from special interest lobbying, which now likely includes the recent beneficiaries of the highly profitable private provision of thermal power."[71]

There have been many newspaper reports and heated debate as to the actual cause for sidelining the coal power plants. In the late 1980's, an environmental non-governmental organization opposed the

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[68] *Ibid.*

[69] *Ibid.*

[70] Taking into account the current technology in this sphere, the CEB has identified coal power plants as the cheapest and most environmentally friendly power generation method. Coal prices have been on a downward trend and supplies are expected to be available for another couple of centuries in contrast to the uncertainties surrounding the supply of petroleum resources. It is noteworthy that coal power plants provide 40% of the world's electricity, and that they are used in developed countries such as the United States of America, United Kingdom, Germany, Australia, Japan and Canada.

[71] *Supra* n 8, p 92.

construction of a coal power plant at Trincomalee for environmental reasons, even after the preparation of an EIA for this project.[72] It was also alleged that the false propaganda of the environmental lobby concerning the construction of a coal power plant at Norochcholai since 1999 led to a public protest, with Christian clergy and Buddhist monks joining in. It then became a political issue culminating in politicians ordering the CEB to stop the project.[73]

The environmental lobby, on the other hand, has responded to these allegations by pointing out that the reasons for the electricity cuts include the 150 MW Fiat power plant and a 2 x 20 MW power plant at Kelanitissa being inoperative; the failure of the private fossil fuel power plants due to irregular tender procedure; corruption at the CEB which led to the interdiction of a few officers; and the Japanese OECF power plant, and the AES Kelanitissa project being delayed due to irregular tender procedures.[74] Environmentalists have also contended that the CEB will be the first public authority to be privatized in the next privatisation wave under the International Monetary Fund agreement and that it is being deliberately bankrupted since 1996 to justify privatisation.[75] The environmental lobby has also maintained that even though the unit price of hydro-electricity and coal power is cheaper than natural gas, coal will be more expensive than wind, solar and natural gas if one were to take into consideration the environmental cost of coal power.[76] It has also been contended that there is a lobby with a vested interest for the use of coal power within the CEB.[77] The

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[72] Withanage, H., "Reason for power cuts: Low rainfall or breakdown and delay of power plants" in *The Island*, 5th September 2001.

[73] *Supra* n 63.

[74] *Supra* n 72. Also see *supra* n 65.

[75] *Ibid.*

[76] *Ibid.*

[77] *Ibid.*

environmental lobby has submitted that while it is not against the use of coal as a source of energy, it opposed the construction of a coal power plant at Trincomalee for environmental reasons. It has also contended that whilst one of the environmental NGOs took the CEB to court regarding the approval process for the coal power plant at Norochcholai, it was the CEB which decided that it did not wish to proceed with the project.[78]

However, there are many compelling arguments, including those mentioned above, which have countered the defences raised by the environmental lobby. There have also been observations that the environmentalists' contention that liquefied natural gas is cheaper than coal for electricity generation remains unsubstantiated in terms of real figures.[79]

Concerns have been expressed that environmental activists should be more cautious in their future campaigns against the construction of power plants. It has been contended that blocking a major power plant would invariably result in an electricity crisis in four to five years. Estimates indicate that the next electricity crisis will be in 2004/5/6, and it has been alleged that this is due to the Norochcholai coal power project being stalled by legal action being filed by the Environmental Foundation against the approval process of the project.[80] The petitioner NGO has not opposed the Norochcholai coal power plant on environmental reasons but on the basis that the approval process for the project was flawed, in that three approvals were necessary for the project from the North Western Provincial Council, the CEA and the

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[78] *Supra* n 72. Also see Algama, R., "EFL replies 'Cost of NGO activities'" in *The Island*, 11th October 2001.

[79] *Supra* n 66.

[80] *Ibid.*

Coast Conservation Department, as the proposed power plant fell within the jurisdiction of all three institutions.[81]

Thus, primarily due to the environmental and religious lobby, plans to go ahead with the coal power plant have been shelved from time to time despite feasibility studies being done on three sites already, which have cost tax payers millions of rupees. It is true that the Rio Declaration provides that in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.[82] However, it is equally important to bear in mind that Principle 11 of the Declaration stipulates that environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular to the developing countries. The latter principle could be equally applicable within a country as opposed to between countries. Thus, the question arises as to whether the electricity crisis is an instance in which environmentalists have failed to understand the concept of sustainable development and whether they have acted irresponsibly in trying to give effect to its principles.

4. The Impact of the Electricity Crisis on Socio-Economic Rights

Estimates of the direct costs of the energy crisis are unavailable. However, the Gross Domestic Product (hereinafter referred to as 'GDP') recorded a negative growth rate of 1.4% in 2001, in contrast to an expected growth rate of 4.5% projected at the beginning of the

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[81] See Algama, R., *Supra* n. 78

[82] Principle 4.

year. This was the first annual negative growth recorded by Sri Lanka since it regained Independence in 1948. (Sri Lanka was not, however, an exception in this regard as many countries recorded negative growth rates in 2001.) Apart from the global recession,[83] the prolonged drought, which adversely affected agricultural output and hydropower generation, was the second major contractionary factor, directly accounting for a reduction in GDP by about 13 per cent.[84] The Central Bank reported that power cuts had their impact on economic activities, hindering investment, industrial production, internal and external trade, as well as the day-to-day life of the general public.[85] Thus, it can be concluded that prolonged power cuts in the latter half of the year adversely affected the socio-economic rights of the people and that many key areas such as industry, trade, investment, services, health, education and employment were also affected.

4.1 Industry

A study conducted by a committee appointed by the government to propose solutions for industrial sickness[86] identified the high cost of electricity and power interruption as one of the problems[87] for the sharp decline in growth. In the manufacturing sector, the factory industry sector which is the largest sub sector, recorded a decline of

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[83] Reported to have accounted for about two thirds of the loss in expected output - *Supra* n 1, p 2.

[84] *Ibid.*, pp 2-3.

[85] *Ibid.*, p 107.

[86] Industrial sickness has been defined by the Central bank as being the situation in which an industrial enterprise has accumulated losses exceeding its net worth thus having to depend on frequent infusion of external funds for its sustenance - *supra* n 1, p 80.

[87] Survey on Sick Industries (2001) - Report of the committee to make an assessment of industries which have been closed and industries which are vulnerable to economic adjustments and external shocks.

3.9% due to a sharp reduction in the output of export industries and considerable slowing down of industries catering to the domestic market. This is in marked contrast to the growth of factory industries output in the year 2000 (11%) and during the last ten years (9.5% per annum). The Central Bank Report states that manufacturing output, which increased continuously during the last two decades recording an average annual output growth rate of over 7%, declined for the first time in 2001.[88]

Among the industrial sub sectors, notable reductions were registered in apparel and textiles (8.5%), ceramic products (11.9%) and petroleum products (11.3%).[89] Although estimates are unavailable, this would invariably have had adverse effects on employment and wages, thereby affecting the living conditions of the people and violating their right to an adequate standard of living guaranteed under the ICESCR.

The Central Bank Report observes that power cuts directly affect industrial output, the quality of production and labour productivity. Regular power interruptions also damage machinery and equipment thereby deteriorating capital stock faster. However, the impact of the power cuts on large-scale industries was mitigated to a certain extent as most have their own generators, and the output of the export industries had been scaled down due to the slowdown in the global economy. In contrast, small and medium-scale industries and high electricity consuming industries were more affected.[90] The report notes that

> *The continuation of power cuts in 2002 would have an adverse effect on the country's economic recovery, preventing the gain of maximum benefits from the recovery in the world economy towards mid 2002.*[91]

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[88] *Supra* n 1, pp 13 and 77.

[89] *Ibid.*, p 13.

[90] *Ibid.*, p 109.

[91] *Ibid.*

4.2 Services

The Central Bank reported that the service sector, which accounts for about 53% of the GDP, also recorded a negative growth rate of 0.5% during the year. Tourism was the hardest hit – declining by 16 per cent.[92]

4.3 Employment

States Parties to the ICESCR recognize the right to work. This includes the right of everyone to have the opportunity to gain his living by work, which he freely chooses or accepts, and States are required to take appropriate steps to safeguard this right.[93] It further stipulates that such steps shall include policies and techniques to achieve steady economic, social and cultural development.

The slowdown in economic growth and investment resulted in generating fewer employment opportunities, thereby increasing the rate of unemployment. Some badly affected sectors, such as tourism-related services and garment exports, were forced to resort to temporary retrenchment.[94] It was reported that some garment factories had to be closed or were forced to work at half capacity due to the power cuts. This resulted in a reduction of production output. The garment industry was forced to reduce salaries and bonuses which had a direct impact on the financial status of the employees and their families.[95] It was reported at an Asian Development Bank workshop that prawn farm hatcheries had to be closed in consequence of the power cuts resulting in significant financial losses, unemployment and unpaid loans to lending institutions.[96]

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[92] *Ibid.*, p 15.

[93] Article 6(1).

[94] *Supra* n 1, p 18.

[95] Jinadasa, J., "Social impact of power crisis" in *Daily News*, 11th December 2001.

[96] *Ibid.*

The labour force at the end of the third quarter of 2001 was estimated at 6.7 million.[97] The labour force participation rate declined from 50.3% in 2000 to 48.3% in the third quarter of 2001 in keeping with the gradual decline over the last few years.

4.4 Health

The Central Bank Report states that budgetary constraints inhibited the expansion of the public sector health care services.[98] The Report observes that significant shortcomings in certain key infrastructure services in 2001 imposed a heavy burden on the economy, the power cuts in force for approximately half the year being one of them.[99]

In 2001, the total government expenditure on health services decreased to Rs.18,772 million or 1.3% of GDP from Rs.20,696 million and 1.6% respectively in 2000. Public expenditure on health care services, as a percentage of GDP, has remained around 1.5% in recent years.[100] According to the World Development Report 1999/2000, the average public sector expenditure on health as a percentage of GDP was 2.4% in middle-income countries.[101]

It was reported that about 15 persons died per month at the Colombo General Hospital alone, having been hospitalized due to accidents resulting in the lighting of kerosene oil lamps during power cuts.[102] The number of kerosene oil accident related deaths or injuries in other

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[97] Quarterly Labour Force Survey conducted by the Department of Census and Statistics.

[98] *Supra* n 1, p 99.

[99] *Ibid.*

[100] *Ibid.*, p 100.

[101] *Ibid.*

[102] *Supra* n 95.

areas of the country is unknown. The power crisis also had an indirect impact on the general day-to-day running of health services such as delays in laboratory diagnosis, postponement of surgery, etc.[103]

It was also reported that malnutrition escalated during the months in which the power cuts were enforced as people were laid off or worked only half of the usual time.[104]

4.5 Education

It was reported that school children lost valuable study time as a result of the power cuts - the urban areas being affected most. There were also reports that the General Certificate of Education Advanced Level Examination may have to be postponed as a result of the power cuts. The power cuts were also reported to have affected university education as laboratory practical sessions, research, the flow of information *via* electronic media, etc., were affected. Recreation and entertainment were also affected.[105]

This chapter will next assess the state of regulatory mechanisms in the electricity sector with regard to the principles of governance, and its implications on the energy crisis.

5. Governance and Regulation of the Electricity Sector

Governance has been referred to as the principles of good management. These principles have been identified as including sensible economic and social policies, democratic decision-making, adequate

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[103] *Ibid.*

[104] *Ibid.*

[105] *Ibid.*

governmental transparency, financial accountability, creation of a market-friendly environment for development, measures to combat corruption, as well as respect for the rule of law and human rights.[106] It has been observed that "Weak institutions of governance are also a defining characteristic of developing countries."[107]

Dr. Kamal Hossain observes that:

> *Inherent in the concept of sustainable development is the need for a political system which provides for effective citizen participation in decision-making and for good governance, i.e. institutions for policy-making, decision making and their implementation which are responsive to the objectives of sustainable development.*[108]
>
> *Good governance in the context of the goal of sustainable development would mean respecting the principles of the Rio Declaration in designing development projects and programmes. Thus narrow economic appraisals of the cost-benefit of development projects and programmes would clearly not be sufficient for this purpose. There must be an assessment of the environmental and social impact of projects and programmes, and their implications for the goals of sustainable development.*[109]

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[106] Ginther, K., Denters, E., and de Waart, P. J. I. M. (eds), *Sustainable Development and Good Governance* (Martinus Nijhoff Publishers, The Netherlands: 1995), p 1.

[107] Nye, J. S. Jr. and Donahue, J. D. (Editors), *Governance in a Globalizing World*, Visions of Governance for the 21st Century (Brookins Institution Press, Washington DC: 2000), p 188.

[108] *Supra* n 106 at p 20.

[109] *Ibid.*, p 21.

Thus, it would seem that the extent to which good governance principles are absorbed into the governmental process would manifestly affect the sustainable development of a country. For instance, shortsighted economic and social policies, arbitrary decision-making and corruption would be detrimental to a country's development and adversely affect the socio-economic rights of its people. In keeping with this realization, the right to good governance is emerging as a principle of international law.

The ICESCR provides that all peoples have the right to self-determination, by virtue of which they have the right to freely determine their political status and pursue their economic and social development.[110] States Parties to the Covenant have an obligation to promote the realization of the right to self-determination.[111]

The Declaration on the Right to Development provides that the human person is the central subject of development and should be the active participant and beneficiary of the right to development.[112] The Declaration also stipulates that all human beings have a responsibility for development, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community; they should, therefore, promote and protect an appropriate political, social and economic order for development.[113] The primary responsibility for the creation of national and international conditions favourable to the realization of the right to development is placed on States.[114]

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[110] Article 1(1).

[111] Article 1(3).

[112] Article 2(1).

[113] Article 2(2).

[114] Article 3(1).

A report by the United Nations Committee for Development Planning has identified, *inter alia*, the following attributes of good governance,[115]

- clear lines of accountability from political leaders to others along the bureaucracy;

- an open political system which encourages an active and vigilant civil society whose interests are represented within accountable government structures and which ensures that public offices are based on law and consent;

- a professionally competent, capable and honest public service which operates within an accountable, rule governed framework and in which the principles of merit and the public interest are paramount; and

- the capacity to undertake sound fiscal planning, expenditure and economic management, and a system of financial accountability and evaluation of public sector activities.

The concept of governance is thus concerned with the management of the developmental process in relation to both the public and private sectors. It has been submitted that governance encompasses the functioning and capability of the public sector, as well as the rules and institutions that create the framework for the conduct of both public and private business. This includes accountability for economic and financial performance, and regulatory frameworks relating to companies, corporations and partnerships.[116] Black's Law

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[115] Report of the United Nations Committee for Development Planning, *Poverty Alleviation and Sustainable Development: Goals in Conflict?* (1992), pp 62-3.

[116] The World Bank, *Managing Development: The Governance Dimension* (June 1991), p 1.

Dictionary[117] defines 'regulation' as the act or process of controlling by rule or restriction.[118] Thus, governance is, amongst other things, concerned with the effectiveness of regulatory institutions and processes charged with the task of achieving an equitable balance between the interests of all the players involved, i.e., the government, the private sector and the public. Good governance in regulatory institutions is important for the reason that it creates and enhances the legitimacy of the regulator which is a key element for its effectiveness.

As Dr. Hossain has pertinently observed:

> *There is [sic] need to develop legal frameworks which provide for greater transparency and accountability and indeed effective law-enforcing machinery, backed by such institutions as a free press and civic organizations which could mobilise public opinion to combat corruption. The strengthening of institutions of civic society are thus an important element in developing good governance which is necessary in order to promote sustainable development.*[119]

5.1 Statutory provisions relating to the regulation of the electricity sector

There was no effective regulation of the electricity sector as at the end of 2001. This was primarily due to the fact that there was no statutorily appointed regulator for the electricity sector unlike, for example, the telecommunications sector (although this in itself does not ensure effective regulation in the absence of governance elements

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[117] Garner, B. A, 7th Edition (West Group, St. Paul, Minn : 1999).

[118] *Ibid.*, p 1289.

[119] *Supra* n 106 at p 22.

in the regulatory process). Although the Electricity Act No. 19 of 1950, as amended, was enacted to regulate the generation, transmission, transformation, distribution, supply and the use of electrical energy, there is no provision for the establishment of a regulator for the electricity sector.

In addition, only the CEB has been statutorily vested with the duty to develop and maintain an efficient, coordinated and economical system of electricity supply for the whole of Sri Lanka in terms of the Ceylon Electricity Board Act No. 17 of 1969, as amended (hereinafter referred to as the 'CEB Act').[120] With the coming into operation of this Act, the Government Electrical Undertakings were transferred to the CEB.[121] The Act specifically prohibits the transmission of high voltage electrical energy in bulk from one place to another by any person or body other than the CEB, except with the written permission of the CEB given with the approval of the Minister.[122] This gives the CEB a monopoly over electricity generation, distribution and transmission. It must be noted, however, that the CEB directly sells electricity to about 80% of the 2.1 million electricity customers while Lanka Electricity Company (LECO), a state-owned distribution utility, purchases electricity from the CEB at medium voltage level and retails to customers in certain parts of the western coastal areas.[123]

On a reading of the CEB Act it becomes clear that there is an all-pervasive governmental/ ministerial control of the CEB, which has serious implications for its autonomy. The CEB consists of seven members of whom four are appointed by the Minister "...from persons

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[120] CEB Act Section 11.

[121] Section 18.

[122] Section 16.

[123] Siyambalapitiya, T., "Regulation in Sri Lanka's Electric Power Sector" in *Competition Policy and Utility Regulation, Sri Lankan Experience* (Law & Society Trust, Colombo, August 2002)

who appear to the Minister to have had experience and shown capacity in engineering, commerce, administration and accountancy."[124] Of the balance three members, one has to be appointed by the Minister in consultation with the Minister in charge of Local Government to represent local authorities and the other in consultation with the Minister in charge of Industries to represent the field of industries.[125] The seventh member should be an officer of the General Treasury nominated by the Minister in charge of Finance.[126]

The Board is vested with the power to appoint a 'competent and experienced person' as the General Manager of the Board (subject to the approval of the Minister).[127] Subject to the general direction of the Board on matters of policy, the General Manager is charged with, *inter alia*, the direction of the business of the Board and the execution of the powers, functions and duties of the Board.

The CEB Act also provides that prior to appointing a member of the Board, the Minister shall satisfy himself that such person has no financial or other interest likely to prejudice the discharge of functions as a member of the Board. Any person who is appointed to the Board is statutorily required to furnish the Minister with such information.[128] Here too, there is no provision for input from the public as to the prior disclosure of interests (via, for instance, a Parliamentary Select Committee), which is necessary to ensure transparency and the autonomy of the decision-making body.

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[124] Section 3(1)(a) of the CEB Act.

[125] Section 3(1)(b) and (c).

[126] Section 3(1)(d).

[127] Section 5(1).

[128] Section 3(3).

Nevertheless, the CEB Act makes it mandatory for a member of the Board who is in any way directly or indirectly interested in any contract made by the Board to disclose the nature of his interest. Such member is precluded from taking part in any deliberation or decision in respect of that contract.[129] Problems arise, however, as to the practicability and enforceability of these provisions.

There are also inherent problems in the scheme of the CEB Act in respect of the clarity of roles and objectives between the Minister and the Board. For instance, the Minister may, after consultation with the Board, give general or special directions to the Board regarding the performance of the duties and exercise of the powers in matters "which appear to him to affect the national interest." It is then mandatory for the Board give effect to such directions.[130] As to what constitutes 'national interest', the decision is left to the sole discretion of the Minister. The Minister also has the general power to make regulations for the purpose of carrying out the provisions of the Act;[131] this power, however, is subject to the approval of Parliament.[132]

The all-pervasive governmental/ministerial control of the CEB is also glaringly apparent in respect of the removal of a member of the Board from office. The CEB Act provides that where in the interest of the efficient performance of the functions or the discharge of the duties of the Board it is considered necessary to do so, any member of the Board may be removed by the Minister in consultation with the respective Ministers who were involved in their appointment.[133]

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[129] Section 3(4).

[130] Section 8(1).

[131] Section 56(1).

[132] Section 56(4).

[133] Section 3(7).

The statute does not require reasons to be given for such removal, although this aspect could be challenged by judicial review of administrative action.

It is also evident that there is minimal accountability and public input or participation in the CEB's decision-making process, which is left essentially to the Ministers concerned and to the CEB members appointed by them. The only exception to this is the provision for publicity to be given before tariffs are fixed by the Board, and the provision that a period of one month be fixed to enable pubic representations to be made in respect of such tariffs.[134] Thus, save for this provision, there is no provision in the CEB Act or the Electricity Act No. 19 of 1950 (as amended) for public hearings to be held on key issues that affect the energy sector. There is also no provision for reasons to be given by the Minister and/or Board for key decisions affecting the sector. However, when an EIA is done for a new project in the energy sector, the public can get involved in the process by virtue of the provisions in the Central Environmental Authority Act, No. 47 of 1980 (as amended by Act No 56 of 1988) which provides that such EIA documents are public documents and subject to public participation. The NEA also provides for public hearings to be held in some instances and such a hearing was held in relation to the Upper Kotmale Hydro Power Project.

5.2 Transparency and freedom of information

There is also a gross lack of transparency in the CEB's decision-making process. Sri Lanka's system of government is such that there is minimal disclosure of policy decisions that affect the public. The majority of Sri Lankans seems complacent about the lack of access to government-held information that have an impact on their lives. The State also seems to have, through the years, cultivated a culture of secrecy in

[134] Section 52(2).

respect of policy decisions. One of the reasons for this *status quo* is the fact that a fundamental right to information has not been expressly recognized by our Constitution or other legislation. Despite this, there have been a few attempts to seek government-held information through fundamental rights litigation.[135]

The Sri Lankan Supreme Court implied the right to information in the fundamental right to freedom of expression in *Visuvalingam* v. *Liyanage*.[136] In this case, the Supreme Court held that the full realisation of public discussion entails the recognition and advancement by all organs of government of the right of the person who is the recipient of information. However, the Supreme Court in a later case,[137] refused to accept a "right to information *simpliciter*," i.e., a right to receive information that is not related to a purpose relating to freedom of expression.[138] Notwithstanding, the Court declared that Article 10 of the Constitution which guarantees freedom of thought to every person, includes the right to information. It has been pointed out that by including the "right to information *simpliciter*" in Article 10, the right to information has been elevated to a right that cannot be limited or derogated from during public emergency under international law.[139] Furthermore, the Supreme Court in the *Media Authority Bill case*,[140] specifically referred to freedom of speech and expression as encompassing the right to receive information. Thus,

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[135] See Udagama, D., "The Right to Information in Sri Lanka" in *Sri Lanka: State of Human Rights 1999* (Law & Society Trust, Colombo, 1999) p 139.

[136] [1984] 2 Sri LR p 123. See *supra* n 86, pp 141-3.

[137] See *Wimal Fernando* v. *Sri Lanka Broadcasting Authority* [1996] 1 Sri LR p 157. See *supra* n 86, pp 143-7.

[138] *Supra* n 137, p 145.

[139] *Ibid.*, p 146.

[140] *Gamini Athukorale et al* v. *Attorney General*, Supreme Court SD No. 1/97 - 15/97. See *supra* n 86, pp 147-9.

the Sri Lankan judiciary has recognized the right to information through judicial activism. However, it has been pointed out that these judgments primarily address the right of recipients to receive information from third parties as opposed to government-held information.[141] In addition, certain statutes[142] limit access to government-held information either by prohibiting physical access to information or by censoring the publication of certain types of information.

The petitioners in the *Eppawela Phosphate Mining* case[143] argued that the confidentiality provisions of the proposed agreement and the substitution of arbitration for judicial review, in effect, excluded public participation. The petitioners contended, therefore, that the government's decision to pursue the project was arbitrary and unreasonable as there was obvious bias. The Supreme Court ordered that a comprehensive survey be conducted in relation to the proposed project, the results of which were to be published. It further called upon the parties to implement the EIA provisions in the NEA. Thus, the Supreme Court upheld the rights of the public to participate in decisions which had an impact on their lives, and arguably, acknowledged the right of the public to government-held information which affected them.[144]

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[141] See *supra* n 137, p 149.

[142] These statues include the Official Secrets Act, No. 32 of 1995; Sri Lanka Press Council Law, No. 5 of 1973; Profane Publications Act, No. 41 of 1958; Obscene Publications Ordinance, No. 4 of 1927; Public Performances Ordinance, No. 7 of 1912; Prevention of Terrorism Act, No. 48 of 1979; and emergency regulations promulgated under the Public Security Ordinance - *supra* n 102.

[143] *Supra* n 43.

[144] *Ibid.*, p 53.

There is also minimal statutory provision for transparency - there being stipulation only for copies of the CEB's report on the exercise and performance of its powers and duties and its policies and programmes during the year, the Auditor-General's report and statement of accounts and statistics of the Board to be made available for purchase by the public.[145]

The Central Bank Report pertinently concludes that:

> *Significant shortcomings in certain key infrastructure services in 2001 imposed a heavy burden on the economy. Power cuts were in force for about half of the year. ... Moreover, inadequate supply of infrastructure services, operational inefficiencies and issues relating to areas such as accountability, pricing and overstaffing continued to exist.*
>
> *In view of the fact that an efficient and adequately accessible infrastructure system is a prerequisite to rapid economic growth and enhanced social welfare, it is essential to pay special attention to developing infrastructure services. The pervasive involvement of the government in financing, managing, regulating and actual delivery of infrastructure services has created various inefficiencies in the system.*
>
> *Weak financial and operational responsibility of managers, delays in decision-making, politicisation, non-optimal pricing, over staffing and inappropriate technological choices are some of these inefficiencies. Some institutional reforms could generate added benefits from the substantial investments that have already been committed to infrastructure services.*[146]

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[145] CEB Act, section 51(4).

[146] *Supra* n 1 at p 99.

5.3 The governance implications in the electricity sector

Due to its dependence on weather conditions, the CEB made several proposals to diversify out of hydropower and into thermal power as far back as in the late 1980s. However, none of these proposals was implemented due to procedural delays, lobbying by various interest groups[147] and a lack of political commitment.[148]

As predicted by the CEB, when the rains failed in 1996 the country faced a severe energy crisis which led to electricity cuts for as long as 8 hours a day during the worst period. Although estimates of the direct costs of the power crisis are unavailable, GDP growth in 1996 decreased to 3.8% from an average growth rate of 5.5% in the two previous years.[149] Similarly, the prolonged drought in 2001, which adversely affected agricultural output and hydropower generation, was the second major contractionary factor, directly accounting for a reduction in GDP by about 13 per cent.[150]

It has been observed that:

> *The end- result in 2000 and 2001 has been excessive operation of CEB's own expensive thermal generating plants, extensive operation of more expensive standby generation at customer premises, and the expensive purchase of energy from private developers on short-term contracts.*[151]

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[147] Including environmental and religious groups.

[148] *Supra* n 8, p 88.

[149] *Ibid.*

[150] *Supra* n 1, pp 2-3.

[151] *Supra* n 8, p 88.

There have also been numerous reports of mismanagement, misuse of resources and corruption[152] which may have also contributed to the crisis faced by the CEB. The national power utility was forced to hire smaller mobile plants from private suppliers on short-term contracts at high cost. Emergency supplies secured through hurriedly negotiated contracts contributed to the high cost.[153] It has been reported that the CEB is currently facing a serious financial crisis. At the end of 2000, it had a revenue of Rs.26.3 billion and operating expenses of Rs.33 billion resulting in a loss of Rs.6.7 billion. The accumulated losses of the CEB are over Rs.12 billion, and this has been financed by bank overdrafts at the interest cost of Rs.1.7 billion per year.[154]

The main reasons for this situation according to the CEB are the huge increase in the use of thermal power (due to low rainfall) at a time of high world oil prices; delays in implementing two thermal power plants due to the government's procedural delays; and payment delays by governmental institutions. The situation was worsened by the CEB re-contracting with the Ceylon Petroleum Corporation (CPC) to pay for diesel at world prices in 2000, instead of at CPC administered prices as before.[155]

Allegations of corruption were also cast on the CEB in respect of the hiring of private generating plants at a very high cost.[156] It has been

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[152] See *Supra* n 65 and *Supra* n 72.

[153] *Supra* n 8, p 88.

[154] *Ibid.*, p 89.

[155] *Ibid.*

[156] Average cost of Rs.9.53/kWh in 2000 and estimated at Rs.12.40./kWh in January 2001.

contended that at the least, these deals reflect immature financial and negotiation powers on the part of the CEB. Contentious issues include the levying of high weekly rentals even when the plants were inoperative, the granting of tax exemptions, and the CEB incurring the transportation costs of the plants and absorbing risks of the fluctuation in petroleum prices by incurring the total cost of fuel. Investigations by the Committee on Public Enterprises (COPE) revealed that many of the private power plants were secondhand and inefficient, resulting in an excessively high consumption of fuel.[157]

Thus, not even the low cost of hydropower could sustain the cross-subsidisation of expensive thermal generation. In March 2001, the CEB imposed a 25% surcharge raising the average consumer price from Rs.4.75/KWh to Rs.5.70./KWh. However, it was reported that this still entailed a Rs.6.70/KWh loss per unit in respect of the electricity supplied by the private generating plants. This deficit is likely to be a large contributor to the loss of Rs.12 billion incurred by the CEB in 2001.[158]

It has also been submitted that the financial performance of the CEB has been below expectations not only due to the higher costs incurred during drought years. Inefficiencies in billing exacerbated by the delayed tender award of 400,000 electricity-consumption meters; theft; low returns from rural electrification schemes; and problems with restructuring and increasing tariff rates have also been attributed to its poor financial performance.[159]

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[157] *Supra* n 8, p 89.

[158] *Ibid.*

[159] *Ibid.*, pp 89-90.

The study conducted by the Committee to Propose Solutions for Industrial Sickness identified the following solutions, *inter alia*, as a means of resolving the high cost of electricity and power interruption:

- re-introducing power purchasing schemes.
- implementing the coal power project.
- eliminating the pilferage of electricity.
- reducing system loss from current level of over 20% to 15% within 2 years and to 12% within 5 to 7 years.
- popularising and encouraging the use of energy conservation equipment and non-oil based energy such as renewable energy, industrial waste, etc.
- changing the restriction of the maximum capacity on hydro-power generation by the private sector from 10 MW to 25 MW whilst giving due consideration to environmental issues.[160]

5.4 The role of consumers in the energy sector

The Declaration on the Right to Development provides that States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.[161]

The governance elements of participation and accountability are achievable through consumer and public involvement in the regulatory

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[160] *Supra* n 1, p 81.

[161] Declaration and Development Article 2(3).

process. Consumer protection has received little attention in Sri Lanka. Inadequate and ineffective consumer protection laws have contributed in no small measure to the current *status quo*.[162] Sri Lankan legislation on consumer protection falls far short of comparative regional and international laws.

As of 2001, there are no statutory provisions for the recognition of consumer societies/groups as stakeholders in the energy sector. As such, consumer societies/groups would have to establish themselves in terms of the general laws applicable to associations and societies. The lack of expertise, resources and institutional facilities also hinder the creation and organization of consumer groups that can effectively participate in the regulation of the energy sector. While steps were taken to draft a law on consumer protection, this remained a draft at the end of the year.

Dr. Tilak Siyambalapitiya pertinently observes that:

> *Both the electric utilities, CEB and LECO, remain as state-owned monopolies. Their decision-making process in internal administrative matters as well as those directly affecting customers is heavily influenced by various other state institutions and individuals. Monopolies are characterised by their poor customer relations and lack of care or dedication to satisfy customer desire for a reliable and low-cost supply of electricity and electrical services. Electric utilities in Sri Lanka are no different.*[163]

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[162] See Kelegama, S. and Casie Chetty, Y., *Consumer Protection Act and Fair Trading in Sri Lanka* (Law & Society Trust, Colombo August 1993)

[163] *Supra* n 123 at p 103.

It has been further observed that the poor regulation of certain aspects and over-regulation of other functions, coupled with a rigid ownership structure of the two electricity utilities, has had detrimental consequences on consumers.[164] The recurring capacity crises in electricity supply necessitated blackouts in 1979, 1983, 1987, 1992, and 1996. Between 2001 and 2002, the system suffered continual blackouts for eight months. There have also been reports of poor customer care and handling of complaints.[165]

A lawyer filed a public interest writ application complaining about the CEB's failure to provide consumers with a continuous supply of electricity, citing the CEB as the respondent.[166] The petition requested the Court to issue the writ to compel the CEB to comply with the provisions of the CEB Act by generating an uninterrupted supply of electricity. The petitioner has submitted that the CEB should install an alternate source of energy to counter the drought periods when the quantum of hydro-electricity decreases. The petitioner has also blamed environmentalists who have allegedly promoted the installation of diesel-fed generators in a bid to promote the interests of their foreign contacts who financed their respective non-governmental organizations.[167]

This is one-off instance where a consumer has invoked the jurisdiction of the courts to compel the electricity authorities to perform their duty. It is of no surprise that the petitioner in this case is a lawyer, as the vast majority of layman have little access to the judicial system to resolve their consumer grievances for various reasons, including,

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[164] *Ibid.*

[165] *Ibid.*

[166] Weerarathne, C. "Court issues notice on CEB for failure to supply continuous power" in *The Island*, 23rd October 2001.

[167] *Ibid.*

financial constraints, a lack of knowledge concerning their rights, the laws delays and complex procedures to invoke the jurisdiction of the courts.

6. Conclusions and Recommendations

The Institute of Policy Studies has concluded that:

> *Having previously faced crises in 1983, 1987, 1992 and 1996, the country finds itself once again with power cuts in 2001. The repeating pattern, associated with rainfall patterns...suggests a severe management failure at the national power utility. Delays in project implementation and an excessively costly response to a capacity constraint have precipitated a financial crisis at the CEB.*[168]

It has been suggested that reforming the electricity sector requires an authoritative proficient institution to be given the full power to evaluate proposed power generation plans and oversee their implementation. Decision-makers must be trained experts as power generation plans are highly technical, having regard to the technical, financial, social and environmental requirements of the country. It has been pointed out that de-politicization of the CEB would also improve its financial position and stimulate long-term investment by putting a stop to compulsory lending to the government in profitable years, and reducing payment delays by a fiscally constrained government. It has also been contended that institutional autonomy and expertise are a pre-requisite to these reforms.[169]

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[168] *Supra* n 8, p 96.

[169] *Ibid.*, p 97.

The De-Regulation Committee established in January 2001 by the government, in terms of the Industrial Promotion Act No. 46 of 1990, to study and promote deregulation with a view to improving the country's competitive position to attract investment, made the following recommendations with regard to energy:

- establishment of a regulatory framework to oversee investment and competition;
- removal of cross subsidies, price controls and budget transfers;
- removal of restrictions on entry into electricity generation and distribution;
- dismantling of restrictions on private sector activity in the petroleum sector;
- the immediate commencement of proposed coal-fired power plants and preparation of environmental impact studies for three more locations.[170]

The Committee also recommended that the Government establish an ongoing programme of regulatory review involving independent and transparent tests of all regulation to ensure that it is in the public interest.[171]

Another worrying issue is whether the energy crisis could reoccur. The Central Bank Report observes:

> *Energy experts have pointed out that the worst is yet to come and anther power crisis would occur in 2004/2005. The existing installed capacity will be expanded by 200 MW by end 2002*

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[170] *Supra* n 1, p 51.

[171] *Ibid.*, p 50.

> *while the Kukule Ganga (80 MW) is the only major project to be added during 2002 - 2004. [The] CEB had earlier expected the first stage of the 300 MW coal fired power plant in Puttalam to be operational in 2004. As this power project [did not] progress beyond the drawing board, the CEB Plan (2000) emphasized that a 150 MW combined cycle power plant should be operational no later than January 2004. However, no action has been taken on this yet. If no action is taken to build the proposed coal power plant now, and initiate steps immediately for more new large scale low-cost power projects, the crisis will continue for several years.*[172]

The Central Bank Report rightly points out that resolving the electricity crisis is a complex issue. The power sector authorities would need to address the current capacity and financial crises immediately, while simultaneously taking appropriate measures to avert a long-term crisis. The Report states that authorities would need to adopt, *inter alia*, the following measures in order to solve the present problems:

- facilitate and allow the private sector to invest in power generation and distribution, especially for the benefit of industrial zones;

- internalise the losses of the CEB and implement the required tariff increase early in order to overcome the current financial crisis; and

- expedite tender procedures and strictly adhere to a timetable in order to minimise delays in repairs and maintenance of the power plants.[173]

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[172] *Ibid.*, p 110.

[173] *Ibid.*

The Report also observes that the following ***immediate*** measures, would need to be taken by the electricity sector authorities to avert future power crises:

- investors should be guaranteed a realiable and adequate power supply at competitive prices in order to maintain competitiveness;
- the Upper Kotmale Hydroelectricity project should be implemented immediately as the project is six years behind schedule;
- an independent advisory committee comprising professionals in the energy field, stakeholders from the private sector, economists, government officials, etc., should be set up to assess long-term needs, design policies and strategies and make recommendations for the electricity sector;
- the accountability of the electricity authorities should be improved;
- the network loss reduction programme should be accelerated;
- an effective demand-management policy to enhance the efficiency of energy usage should be implemented; and
- an appropriate independent regulatory authority must be established as future expansion in capacity, transmission and distribution of power has to depend mainly on the private sector.[174]

[174] *Ibid.*, pp 110-111

Thus, there seems to be a recurring set of recommendations being made by different stakeholders in the country. Foremost amongst these is the urgent need for the government to establish an autonomous and apolitical regulatory framework for the electricity sector bearing in mind the importance of investment and competitiveness. Thus, legal reform is of vital importance if the country is to have a realistic chance of rising out of the existing quagmire of financial loss, inefficiency, corruption, and delayed decision-making. It is imperative that a permanent autonomous regulatory body is established within a statutory framework that incorporates the key elements of good governance. This would invariably create the foundation for the legitimacy of a regulatory institution which is indispensable for its effectiveness. The Central Bank Report pertinently observes:

> *In order to establish accountability of the power authorities, institutions should be freed from political interferences and other interventions and, in particular, technical issues of the electrical sector (selecting proper energy mix, selecting location, deciding tariff) should be permitted to be handled by professionals rather than politicians or environmentalists. Past experience indicates that the cost of these interventions are unbearable.*[175]

There is also the need for all stakeholders (including the government, private sector, consumers, economists, environmentalists and the public at large) to balance the various social, economic and environmental factors pertaining to the electricity sector. As difficult and unrealistic as this may sound, dispute resolution mechanisms could be introduced via subordinate legislation to facilitate the speedy and effective resolution of a variety of disputes that inevitably arise in such a complex sphere. The ultimate goal of all stakeholders should

[175] *Ibid.*, p 111.

be the attainment of socio-economic rights within a framework of sustainable development.

In addition, programmes aimed at public education, particularly in relation to consumer protection should be undertaken by the government and particularly by civil society organizations. An effort should be made to provide a forum for the public to participate in the decision making process and the public should be educated to do so in a responsible manner. Reforming outdated laws in a holistic manner should be undertaken with the participation of civil society and principles of good governance should be upheld in all aspects of governance.

V

Judicial Protection of Human Rights

Sumudu Atapattu*

1. Introduction

The Supreme Court[1] which is vested with the exclusive right to adjudicate the violation of fundamental rights[2] continued, during the year 2001, its vital role in protecting the fundamental rights of the citizenry. This year too several important judgments were handed down by the Court and one case in particular was unprecedented as the petitioners challenged the validity of the appointment of the present Chief Justice in a fundamental rights petition. Although, normally, this chapter does not discuss unsuccessful leave to proceed petitions, given the nature of these petitions, three in all, attention will be paid to the Court's discussion of the issue.

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1 Hereinafter, "the Court."

2 Under Article 126(1) of the 1978 Constitution the Supreme Court has the ***sole and exclusive jurisdiction*** to hear and determine any question relating to the infringement or imminent infringement of fundamental rights or language rights protected under the Constitution.

An alarming feature of the petitions during the year under review was the apparent increase in the petitions under Article 11 relating to torture and inhuman and degrading treatment and punishment. While no statistics are available to confirm this view, 22 of the petitions which resulted in judgments during the year, eight related to petitions under Article 11, of which at least 75% were successful. As was discussed in previous chapters, torture of those taken into custody under the Prevention of Terrorism Act (PTA) or the Emergency Regulations (ERs) was a common practice. Since emergency rule lapsed in June along with ERs promulgated under it, arrests are no longer possible under ERs. Torture is also a prevalent feature of the criminal justice system as the cases discussed below reveal. The increase in petitions alleging torture at the hands of the police is a cause for concern.

This chapter seeks to discuss the seminal fundamental rights judgments of the Court during the year under review. As pointed out above, it will depart from customary practice of only discussing decided cases by discussing the preliminary objections and the leave to proceed applications challenging the validity of the appointment of the Chief Justice as they raise important questions of law.

2. Cases under Articles 11,[3] 13(1)[4] and 13(2)[5]

Cases under these three articles are taken together for convenience although it must be pointed out that all the cases under this heading do not deal with all three articles.

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[3] This Article deals with the right to be free from torture, degrading and inhuman treatment or punishment.

[4] This Article deals with freedom from arbitrary arrest and detention.

[5] This Article deals with the right of a detained person to be produced before a judge according to procedure established by law and the right to be informed of reasons for arrest.

As pointed out in the introduction, it is a cause for concern that there seems to be a resurgence of petitions under Article 11 as compared with the number of cases under this Article in the previous years. In several cases, the methods of torture resorted to were horrendous, with the injuries suffered by the petitioners clearly amounting to grievous hurt. It is all the more serious as these methods seem "a routine part" of the criminal investigation system.

Several of the petitions under these articles related to torture at the hands of the police. In *N.K.L. Vidanage* v. *Udaya Seneviratne, Inspector of Police, Meeliyagoda and two others,*[6] the petitioner, the Assistant Manager of an industrial concern, alleged that the respondents had scolded her in vile and degrading language, forced her to sit on a bench in the police station for several hours until midnight while being manacled to the door and was also dealt a few blows on the cheek by the 1st respondent. She was produced before a Magistrate only three days after arrest. In a harsh judgment Justice Edussuriya lashed out at the police for their indecent and degrading investigative methods:

> *It is high time that 1st Respondent realised that Police investigations should be done intelligently and not with fisticuffs. It has often been repeated that Police investigations are for men with brains rather than brawn.*

The Court also admonished the 1st respondent for altering his entry in the police records and furnishing false affidavits to Court in an attempt to mislead the Court. Ordering that the 1st respondent should personally pay to the petitioner a sum of Rs 20,000 as compensation and costs, Edussuriya, J further noted: "It must also be mentioned that it is highly disturbing to know that people of this country are at the mercy of such errant police officers who disregard the law with impunity."

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[6] SC Application No 148/99, SC Minutes 26.9. 2001.

The case of *N. Sivakumar* v. *Officer in Charge, Special Task Force Camp, Chettipalayam and five others,*[7] also dealt with torture, this time at the hands of the Special Task Force (STF). In this case the petitioner who was detained under the PTA, alleged that he had been tortured, *inter alia*, in the following manner: beaten with wooden rods; kicked on the chest and abdomen; a shopping bag containing petrol and chillie powder placed on his head; being immersed in water until he suffocated; being immersed in a sewage tank; burnt with cigarette butts and his penis and scrotum being pulled and squeezed. Medical evidence corroborated these injuries. Finding a violation of the petitioner's fundamental rights under Article 11, Justice Bandaranayake ordered Rs 30,000 be paid as compensation and costs by the State and directed a copy of the judgment be sent to the Attorney General and the Inspector General of Police for necessary investigations and action to be taken against those who were found guilty of torture. She also quoted with approval the judgment of Athukorale J in *Amal Sudath Silva* v. *Kodituwakku, Inspector of Police and others*:[8]

The petitioner may be a hard-core criminal whose tribe deserves no sympathy. But if constitutional guarantees are to have any meaning or value in our democratic set- up, it is essential that he be not denied the protection guaranteed by our Constitution.

Needless to say this case involved a horrendous case of torture which should have attracted a much more severe penalty.[9] Given the nature

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[7] SC Application No 363/2000, SC Minutes 1.10. 2001

[8] (1987) 2 Sri LR 119 at p 127.

[9] See also the case of *U.W.A. Neil Ajantha, U.W.A. Kusumsiri and U.W.A. Samantha Priya* v. *Inspector of Police Koralalage, Police Station, Wattala and five others* (SC applications Nos 966/97, 967/97, 968/97, SC Minutes 1.10.2001) in which a sum of Rs 5000 was paid to each of the petitioners for the violations of Articles 11 and 13(2).

of the injuries suffered by the petitioner, not to mention the probable psychological trauma, which would no doubt haunt him for the rest of his life, a paltry sum of Rs 30,000 as compensation seems to go against the principle of proportionality[10] which requires a reasonable proportionality between the injury suffered and the amount of compensation awarded.[11]

By contrast, in *P.K. Liyanarachchi* v. *Officer in Charge, Remand Prison, Embilipitiya and six others,*[12] the petitioner was awarded a sum of Rs 100,000 as compensation and costs, on the ground that the injuries suffered by the petitioner are consistent only with a very serious assault. This sum is indeed unprecedented, as torture cases seem to have attracted very paltry sums as compensation, despite the grave nature of the offence in question as compared to compensation awarded under Article 12.[13]

In another case, too, a sum of Rs 100,000 was ordered to be paid for the violation of the fundamental rights guaranteed under Articles 11,

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[10] The principle of proportionality is a general principle of law, particularly of international law, which requires a reasonable proportionality between the original act and the response to it. Thus, for example, the right of self-defence under international law is subject to the principle of proportionality. The Court itself endorsed this principle in the case of *Nethasinghe, D. A.,* v. *Ratnasiri Wickramanayake, Minister of Public Administration, Home Affairs and Plantation Industries and four others* (SC Application No 770/99, SC Minutes 13.7. 2001), discussed below, when it pointed out that: "Moreover, a penalty which is completely disproportionate to the offence is also unreasonable, perverse and capricious, and comes within the purview of the protection in Article 12(1)."

[11] See in this regard the discussion under relief.

[12] SC Application No 971/99, SC Minutes 19.1.2001.

[13] See also, Deepika Udagama, "Fundamental Rights Jurisprudence' in Elizabeth Nissan (ed), *Sri Lanka: State of Human Rights 2001* (Law & Society Trust, Colombo, 2001) p 147.

13(1) and 13(2). In the case of *M.H. Sithi Mariliya* v. *R. Mallawa Kumara, OIC Minor Offences Branch, Police Station, Nittambuwa and seven others*[14] Justice Fernando held that at the time of the arrest of the petitioner excessive force was used; the petitioner was treated in a humiliating manner; she was subjected to serious assault thereafter; and was needlessly detained overnight. In addition, her fundamental rights under Articles 13(1) and (2) were also violated.

Pushpa Priyantha Dias v. *Ekanayake, Police Station, Polpithigama and three others*[15] involved the torture of a school teacher. He was taken to the police station on the ground that he must be a 'tiger' because he had been born in Batticoloa. Medical evidence revealed 23 injuries on the body of the petitioner and the Court had no hesitation in finding a violation of Articles 11 and 13(1). According to the submissions of the petitioner the respondents had threatened that they will not allow the petitioner to continue his job and that they would introduce a parcel of cannabis into his possession and send the petitioner to jail. Whenever he professed his innocence, the 1st respondent had informed that "he will use this opportunity to show the petitioner the capabilities of police officers." The highhanded manner in which the police officers had acted in this case with scant regard for the law that they are supposed to enforce, is indeed a cause for concern.

3. Cases under Article 12

The marked increase in fundamental rights petitions under Article 12(1) noted in the previous chapters on the subject cannot be observed this year. It would seem that most of such petitions are eliminated at

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[14] SC (Spl) Application No 293/99, SC Minutes 21.9. 2001.

[15] SC Application No 860/99, SC Minutes 27.3.2001.

the leave to proceed stage. Several important judgments were delivered in relation to Article 12(1) on equality and equal protection of the law. None of the petitions, however, seemed to allege a violation of Article 12(2) - i.e. discrimination on grounds such as race, sex, political opinion etc. It is also interesting to note that some of the judges refer to international covenants in order to support their judgments.

In *A.H. Wickramatunga and three others* v. *H.R. de Silva, Chief Valuer, Department of valuation and 14 others*[16] Justice Fernando had to deal with the issue of promotions - the petitioners alleged that the promotion of the 12th to the 15th respondents was unfair and arbitrary and resulted in the violation of their fundamental rights under Article 12(1). Holding for the petitioners and quashing the promotion of the said respondents, Fernando J took the opportunity to refer to international human rights law. He said:

> *Article 7 of the International Covenant on Economic, Social & Cultural Rights recognises the right to an "equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence."*

The case of *Mario Gomez* v. *University of Colombo and two others*[17] challenged the language policy of the respondent university which required all probationary lecturers to pass a proficiency test in one of the national languages. As the petitioner failed to pass this test within the stipulated period of time, his services as a lecturer at the Faculty of Law were terminated. The Court was of the view that, since the petitioner had been aware that he was required to pass the language proficiency test at the time of his appointment as a probationary lecturer

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[16] SC Application No 551/98 (FR), SC Minutes 31.8. 2001.

[17] SC Application No 833/99, SC Minutes 25.5. 2001.

way back in 1990, he could not come before the Court once his services had been terminated to challenge the provisions in his letter of appointment. If he had wished to, he should have done so when he received his letter of appointment. As such, this petition alleging that the termination of his services was a violation of his fundamental rights was time barred as this petition required a decision into the issue of Clause 8 of the letter of appointment relating to the language proficiency test. Here the Court seems to have applied the principle of estoppel to the facts of the case: if you do not protest within a reasonable period of time about a particular issue, you are debarred (or estopped) from complaining about it later.

In *Sirimal Gunaratna* v. *People's Bank and eleven others*[18] the petitioner alleged that the 1st respondent bank had violated his fundamental rights under Articles 12(1) and 14 by interdicting him without pay while another officer who was similarly served with a charge sheet was not. Leave to proceed was granted in respect of the alleged violation of Article 12(1). The petitioner alleged that, while he and the other officer were similarly circumstanced, the petitioner was treated unequally. The Court, however, did not find evidence of unequal protection and Justice Bandaranayake delivering the judgment of the Court, quoted from Jain Kagzi:

> *The equals should not be placed unequally; and at the same time unequals should not be treated as equals in matters of promotion, retirement benefits etc. The equal opportunity requires that men placed similarly should be treated similarly. The subjection of unequals to the same rules for appointment through promotion and the payment of gratuity and pension should not be 'per se' discriminitive. Equal opportunity is for equals, that is to say, those who are similarly circumstanced in life.*[19]

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[18] SC Application No 514/99, SC Minutes 25.7. 2001.

[19] *The Constitution of India*, 5th Edition, p 238.

Justice Bandaranayake further stressed that while Article 12(1) of the Constitution guarantees equal protection of the law, it does not imply that each act of different treatment amounts to an infringement: "a classification or a differentiation based on reasonable grounds would be lawful and valid." In this regard, she quoted from the US case of *Arkansas Gas Co* v. *Railroad Commission*:[20]

> *Inequality per se does not violate equal protection, for every selection of persons for regulation pronounces inequality in some degree. The inequality to offend the principle of equality must be actually and palpably unreasonable and arbitrary.*

Thus, the Court endorsed the principle of reasonable classification which does not amount to a violation of Article 12(1) on equality.

Sandatanna Garments (Pvt) Ltd., v. *The Textile Quota Board and four others*[21] involved the alleged violation of Articles 12(1) and 14(1)(g), the latter relating to the freedom to engage in any profession or business, by the action of the 1st respondent who by drastically reducing the petitioner's 1999 export quota, put the petitioner out of business.

Justice Fernando dealt with the issue in relation to several aspects. First, he held that there was a breach of the principles of natural justice as the petitioner was not given an opportunity to be heard before a decision affecting him was taken. Secondly, by failing to take the circumstances of the case of the petitioner into account, the 1st respondent failed to exercise its discretion in a proper manner. Thirdly, even assuming that the quota cut was necessary in certain instances, the quota cut that was actually imposed on the petitioner was seriously excessive, even in terms of the Textile Quota Board's (TQB) own

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[20] 261 US 379 at p 384.

[21] SC (FR) Application No 869/99, SC Minutes 11.12. 2001.

scheme and formula. Fourthly, the imposition of a quota cut on the petitioner was plainly discriminatory and finally, it was unreasonable to penalise exchanges of quotas between exporters, particularly in view of the practice of the TQB.

Justice Fernando declaring that the petitioner's fundamental right under Article 12(1) had been violated stated that such infringement caused grave prejudice to the petitioner as the quota cut was so severe that the petitioner was unable to continue his business. A record sum of Rs 5,000,000 was awarded as compensation to the petitioner, probably the highest amount of compensation ever to be granted in a fundamental rights petition in Sri Lanka. This amount was arrived at by taking the average profits that the petitioner would have earned if not for the action of the 1st respondent.

With regard to the alleged violation of Article 14(1)(g), Justice Fernando was of the view that it is a fundamental right enjoyed by citizens and not by other persons:

> *Citizens have the right to engage in any lawful business in association with others. Such "association" may take many forms: a limited liability company, a partnership, a society, etc. Accordingly, any of the shareholders of the Petitioner, if they were citizens, may have complained that the infringement affected their fundamental right under Article 14(1)(g). However, I do not think the Petitioner company itself is entitled to complain, particularly as there is no averment that all - or even a majority of - its shareholders are citizens* (emphasis in original).

The case of *D.A. Nethasinghe* v. *Ratnasiri Wickramanayake, Minister of Public Administration, Home Affairs and Plantation Industries and four others*[22] involved several important issues: whether a Minister

[22] SC Application No 770/99, SC Minutes 13.7. 2001.

had the power to remove a member of a statutory board; should he have a legally sound reason for his act?; whether his act is reviewable?; and whether he must comply with the *audi alteram partem* rule?

The petitioner, a scientist of international repute, alleged that the summary removal of him as the Acting Chairman and a member of the 2nd respondent Board - the Coconut Board - without assigning any reasons whatsoever, resulted in a violation of his fundamental rights under Article 12(1).

Examining the relevant provisions of the statute - the Coconut Development Act of 1971 - which empowered the Minister to remove a member of the Board from office without assigning any reason, Justice Fernando, referred to one of his earlier decisions:

> *The subjection of Article 55(1) to the equality provisions of Article 12 mandates fairness and excludes arbitrariness. Powers of appointment and dismissal are conferred by the Constitution on various authorities in the public interest, and not for private benefit, and their exercise must be governed by reason and not caprice; they cannot be regarded as absolute, unfettered, or arbitrary, unless the enabling provisions compel such a construction ...*[23]

Justice Fernando also held that reasons must be provided for the decision to remove the petitioner from office; that the Minister's decision is reviewable in these proceedings; and that one of the protections which the law provides and which is implicit in Article 12(1) is the right to a hearing. Since no opportunity was provided to the petitioner to state his case, his removal from office was flawed for not complying with the *audi alteram partem* rule. Moreover, a penalty

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[23] *Bandara* v. *Premachandra* (1994) 1 Sri LR 301.

which is completely disproportionate to the offence is also unreasonable, perverse and capricious, and comes within the purview of the protection in Article 12(1). In this regard, Justice Fernando was of the view that the summary punishment of removal from the post of Acting Chairman and a board member without even giving him an opportunity to provide an explanation "was not only unjust, but unreasonably harsh." Since the term of office of the petitioner had by now lapsed, the Court ordered compensation and costs in the sum of Rs 100,000 to be paid to him by the State.

It is thus clear that the principle of equality enshrined in Article 12(1) extends to the penalties or punishment meted out under a decision taken by the Executive and if the test of proportionality cannot be satisfied, such penalties will also run the risk of being struck down as arbitrary or unreasonable.

4. Cases under Article 14

A few cases challenged the violation of fundamental rights under Article 14 and they seem to be confined to Articles 14(1)(a) and (g) - freedom of speech and expression and the freedom to engage in any profession or business.

J.A. Egodawela and three others v. *Dayananda Dissanayake, Commissioner of Elections and fifteen others*[24] involved the important issue of right to vote. The petitioners, registered voters of the Kandy district, alleged that the various unlawful incidents which took place on the day of the election at 25 named polling stations - such as premature closing of a polling station, ballot stuffing, driving away polling agents and intimidation of others - resulted in the violation of the petitioners' fundamental rights under Articles 12(1) and 14(1)(a).

[24] SC Application No 412/99, SC Minutes 3.4. 2001.

In this case, yet another pathbreaking judgment of Justice Fernando, the right to vote which was recognised by the Court in a previous case as being encompassed in the freedom of expression clause,[25] was taken a step further. In doing so, Justice Fernando drew from international human rights law on the issue.

Having been satisfied that such election malpractice did actually take place, Justice Fernando proceeded to consider the impact of those incidents and noted that "such incidents inevitably have an effect far beyond the actual number of ballots or polling agents involved. Their effect on other electors needs to be analysed."

In order to ascertain the issue of annulment and repoll, Justice Fernando considered several issues:

(a) Was there a proper poll?

Referring to Part III of the Provincial Councils Elections Act No. 2 of 1988 (as amended), Justice Fernando was of the view that many of the provisions therein manifest a legislative intention that the poll must be free, equal and secret. He defined a "poll" as:

> *[a] process of voting that enables a genuine choice between rival contenders: necessarily, one that is free of any improper influence or pressure; equal, where all those entitled to vote (and no others) are allowed to express their choice as between parties and candidates who compete on level terms; and where the secrecy of the ballot is respected (emphasis in original)*

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[25] *Karunatillake and another* v. *Dayananda Dissanayake, the Elections Commissioner and others*. For a discussion of this case, see Sumudu Atapattu, "Judicial Protection of Human Rights" in Elizabeth Nissan (ed) *Sri Lanka: State of Human Rights 2000* (Law & Society Trust, Colombo, 2000), p 79.

In addition, he noted that such a poll must continue i.e voting must take place without interruption, from beginning to end.

(b) Annulment of poll

While the law does not require an automatic annulment of the poll for each and every violation, and the word "may" confirms that the 1st respondent has a discretion there, whenever it appears that such violations have interfered with a free, equal and secret ballot, such discretion must be exercised. It was held that the 1st respondent should have annulled the poll at all 23 polling stations where such widespread violations had taken place.

(c) Repoll

Where the Commissioner of Elections has annulled the poll at a polling station, the law requires him to hold a repoll, if he is of the view that the result of the election in such administrative district will be affected by the failure to count the votes polled. It was held that the 1st respondent could not reasonably have concluded that the irregularities disclosed at those polling stations would not have affected the election results. Thus, a repoll should have been ordered by the 1st respondent.

Justice Fernando was of the view that it was the failure by the 1st respondent to insist upon the provision of adequate security that resulted in the cause of those infringements:

> *The 1st respondent, as one limb of the Executive, can hardly claim that infringements caused by culpable inaction on the part of another limb of the Executive should remain unremedied on the ground of inconvenience.*

(d) Nature of the right claimed by the petitioners

The petitioners, as registered voters in the Kandy district, had a legal right to vote at the election and that voting was a form of expression guaranteed by Article 14(1)(a) as was held in *Karunatillake* v. *Dissanayake*. While Provincial Council elections were not expressly mentioned in Articles 4(e) and 93 of the Constitution, Justice Fernando pointed out that the requirement that elections be free, equal and by secret ballot:

> *[is] fundamental to any election in any nation which respects the sovereignty of the People, representative democracy and the Rule of Law. I therefore hold that the right to a free, equal and secret ballot is an integral part of the citizen's freedom of expression, when he exercises that freedom through his right - whether constitutional or statutory makes no difference - to vote.*

He further noted that the duty imposed by Article 4(d) on all organs of government to respect, advance and secure fundamental rights applies to the Commissioner of Elections as well. He must thus ensure that elections are conducted in such a manner as to safeguard the fundamental rights of every registered voter.

Having said this, the Court had to deal with the issue whether the petitioners' fundamental rights were infringed as alleged although they personally did not experience even the slightest inconvenience with regard to the exercise of their right to vote. In order to ascertain whether irregularities complained of constituted in law an infringement of the petitioners' fundamental rights under Articles 12(1) and 14(1)(a), Justice Fernando sought to ascertain the true nature of a citizen's right to vote.

Justice Fernando's starting point was Article 25 of the ICCPR which embodies the right of every citizen to take part in the conduct of public affairs through freely chosen representatives; to vote at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, and guaranteeing the free expression of the will of the electors. Pointing out that Sri Lanka is a party to the ICCPR as well as its sister Covenant, Justice Fernando reminded us that Article 27(15) requires the State to respect international law and treaty obligations:

> *It would be idle to argue that our election laws pertaining to Provincial Council elections are not founded on guarantees to every citizen of the right to "take part" in public affairs, through representatives* ***freely chosen by him****, at a* ***genuine*** *election, by universal and* ***equal suffrage****, held by* ***secret ballot****, ensuring the* ***free expression*** *of the will of the electorate..... In interpreting the relevant provisions of an enactment regulating any election a Court must, unless there is compelling language, favour a construction which is consistent with the international obligations of the State, <u>especially</u> those imposed by the International Bill of Human Rights. I hold that those guarantees are an essential part of the freedom of expression recognized by Article 14(1)(a)* (emphasis in original).

Further exploring the contours of the right to vote Justice Fernando stated that the right of a citizen to vote at a free, equal and secret poll extends to the right to a genuine election guaranteeing the free expression of the will of the entire electorate to which he belongs. To that extent, this right is a collective one, like many of the rights enshrined in Article 14 of the Constitution.

He further pointed out that the true value of a citizen's right to vote can never be ascertained in isolation: "To ignore that would set the

bell tolling for democracy." It was held that the failure of the 1st respondent to ensure a genuine, free, equal and secret poll and his failure thereafter to annul the poll and to order a repoll infringed the right of the petitioners to the freedom of expression under Article 14(1)(a) and to equality and equal protection under Article 12(1).

Furthermore, Justice Fernando laid down certain safeguards which must be present in order to ensure a genuine democratic election by universal and equal suffrage:

- a proper and timely registration procedures;
- ensuring that during the pre-election period all candidates are allowed to campaign on equal terms, with election laws being uniformly enforced, without any misuse of state media, resources and facilities;
- prevention of electoral wrongdoing and the prompt investigation and prosecution election offences.

One other issue is worthy of mention here. It was argued on behalf of the respondents that the exclusive remedy for an election dispute is an election petition under Part VII of the Act and that such disputes cannot be adjudicated under Article 126 of the Constitution. In other words, it was argued that with regard to election matters, the Supreme Court had no jurisdiction under Article 126. Rejecting this argument, Justice Fernando stated that a fundamental rights application and an election petition are of a completely different character, both in respect of the disputes and the remedies involved. He pointed out that while any citizen can file a fundamental rights application, seeking redress for a violation of his constitutionally guaranteed rights by the executive, an election petition can be filed only by a candidate and the violation is not confined to executive misconduct.

There is no doubt that this judgment took the jurisprudence laid down in *Karunatillake* v. *Dissanayake* several steps further and examined the parameters of the right to vote and the preconditions necessary for a free and fair election. It is also important from the point of international law: Justice Fernando relied on the ICCPR to examine the content of the right to vote and very clearly stated that our laws must be interpreted to harmonise with our international obligations, particularly where the International Bill of Rights was concerned. This indeed is a victory for international law and endorses the pathbreaking judgment of Justice Amerasinghe in the *Eppawala case*, examined in the 2001 issue of the *Sri Lanka: State of Human Rights Report*.[26]

Another important judgment involved the alleged violation of Articles 14(1)(a) and (g) and Article 12(1) and was centred around the award winning film *Purahanda Kaluwara* ("Death on a Full Moon Day"). This case also had the occasion to deal with Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 2000 promulgated on 3.5.2000. The film *Purahanda Kaluwara* had won several international awards, including the prize for the best film. The film was submitted to the Public Performances Board - the members of which are appointed by the Minister of Defence - and the Board issued a certificate to the effect that the film was suitable for unrestricted public exhibition. This certificate was never revoked.

The 1st respondent - the Minister of Media - averred that exhibiting the film would be a violation of Emergency Regulation 14 of the above ERs; it would adversely affect the war effort, the morale of the security forces and the prevailing recruitment drive. He thus issued a "directive" to the 3rd respondent - the chairman of the National Film Corporation - that the release of the film should be deferred until the security

[26] See *supra* n 13.

situation improves. By this time, the Cabinet had decided to place the country on a "war footing."

When approval for the release of the film was sought from the Competent Authority (the 4th respondent), the latter informed that the theme of the film as well as several scenes could not be approved under the above ERs. Subsequent to the decision of the Court in the *Leader Publications* v. *Rubasinghe*,[27] in which it was decided that the ERs did not make provisions for the appointment of a Competent Authority, the petitioner informed the 3rd respondent that the 4th respondent's above decision was invalid. After a discussion with the petitioner and the 3rd respondent, the 5th respondent - the Assistant General Manager (exhibition) of the National Film Corporation - informed the petitioner that his film would be released for exhibition on 21st August 2000 and asked him to obtain the necessary copies. The petitioner obtained a loan of Rs 1.5 million from the 2nd respondent in order to get 15 copies of his film from India.

Justice Fernando, delivering the judgment of the Court, noted that *prima facie*, the indefinite suspension of the release of the petitioner's film was an infringement of his freedom of speech and expression guaranteed under Article 14(1)(a). The restrictions that the Constitution permits to be imposed on this right are mentioned in Article 15(7) and such restrictions must be in the interests of national security. In *Sunila Abeysekera* v. *Rubasinghe*,[28] similar provisions contained in the Emergency (Prohibition on Publication and Transmission of Sensitive Military Information) Regulation No. 1 of 1998 were considered by Justice Amerasinghe where it was pointed out that restrictions to Article 14(1)(a) must be construed narrowly.

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[27] SC 362/2000, SC Minutes 30.6.2000.

[28] (2000) 1 Sri LR 314.

Justice Fernando looked at several issues in this case:

- Was ER 14(2) a permissible restriction on freedom of speech?
- Even if ER 14(2) was a permissible restriction, was ER 14(2) inapplicable to producers of films; or was the exhibition of the film prohibited by reason of either its contents or the opinion of the Competent Authority?
- Was the directive given by the 1st respondent and/or the decision of the 3rd respondent dated 21.7.2000, lawful under section 6 of the National Film Corporation Act?
- Was this directive and decision in breach of the *audi alteram partem* rule?

The respondents alleged that the film contained material which would affect the morale of the security forces. Since ERs can only be made in the interests of national security, the preservation of public order etc., the question arises whether ER 14(2)(a) prohibits all statements which affect the morale of servicemen, regardless of their effect on national security or whether it should be restrictively interpreted to include only statements prejudicial to national security? Justice Fernando pointed out that every statement about the conduct of the security forces which might affect their morale does not necessarily prejudice national security. Furthermore, ER 14(2)(b) lays down an uncertain and subjective standard: thus the materials purported to be prohibited are those which *in the opinion of the Competent Authority* would be prejudicial to national security.

Indicating that ER 14(2) is over-broad and uncertain, Justice Fernando, however, noted that since emergency itself had by now lapsed, and since the case can be disposed of on other grounds, it is unnecessary

to decide whether ER 14(2) was a permissible restriction on the freedom of speech and expression.

With regard to the applicability of ER 14(2), Justice Fernando noted that it is applicable only to two categories of persons: editors and publishers of newspapers, and persons operating broadcasting or television stations. Producers of films, distributors of films and cinema owners are not covered. Responding to the argument made by counsel for the respondents that ER 14(3) and (4) had the effect of expanding the category of persons to whom the regulation is applicable, Justice Fernando replied that those provisions only expand the category of acts which such persons are prohibited from doing.

Furthermore, section 6 of the National Film Corporation Act empowers the Minister to give directions in relation to the general policy of the Government in respect of the film industry. The Court held that, therefore, the 1st respondent was not entitled to give directions in relation to Government policy on national security. It was also articulated by the Court that, even if section 6 empowered the 1st respondent to give that "directive", it would have been a restriction on the petitioner's freedom of speech and expression. Such restrictions can only be imposed by law, not under law. In addition, the 3rd respondent made no attempt to exercise an independent judgment, but simply rubber-stamped the 1st respondent's decision and his decision is contaminated by the same flaws.

The petitioner had taken all steps necessary to have his film released for exhibition, secured advertising material and incurred considerable expense and with full knowledge of the ERs, the 2nd respondent had fixed the date of release for 21st August 2000. The Court held that the petitioner's legitimate expectations had matured into a legal right and the taking away of that right without any notice or hearing was a violation of the petitioner's fundamental right to equal protection of the law.

The decision of the Court

The Court thus held that ER 14(2) was not applicable to the petitioner or to the 2nd respondent; 1st - 3rd respondents had no authority to suspend the release of the film; 1st - 3rd respondents acted in breach of the *audi alteram partem* rule in suspending the release of the film. Furthermore, the 1st respondent had exceeded his powers under section 6, attempted to usurp the powers vested in the Public Performances Board and was primarily responsible for this litigation; therefore, he must personally bear the costs of litigation.

In determining the relief, the Court said it must consider the context of the infringement. Since the 2nd respondent had a monopoly over the release of films, the refusal to release the film seriously affected the petitioner's livelihood. In this regard endorsing the principle of restitution in relation to redress the Court said:

> *This Court must therefore endeavour to restore the Petitioner, as far as possible, to the position in which he would have been if his film had been released as scheduled.*

Relief to the petitioner included: a declaration that his fundamental rights under Articles 12(1), 14(1)(a) and 14(1)(g) have been violated; a direction to the 2nd respondent to release the petitioner's film for exhibition not later than 15.9. 2001; in the event of delay, payment of compensation of Rs 100,000 per month; 2nd respondent cannot claim any interest on the loan of Rs 1.5 million; repayment of the loan will commence one year after the release of the film; compensation of Rs 500,000 to be paid by the 2nd respondent and the 1st respondent to personally pay petitioner costs in the sum of Rs 50,000 not later than 15.9.2001.

It is hoped that this decision would send a warning to Ministers as well as other public bodies that when taking decisions they must abide

by the law and respect principles of natural justice: the penalty for the failure to do so can be very high.

5. Executive/Administrative Action

The issue of executive or administrative action arose for interpretation in the case of *P.V.D. Leo Samson* v. *Sri Lankan Airlines Ltd. and five others.*[29] In order to interpret this, Justice Ismail looked at the trend in India and several Indian cases were referred to: the case of *Sukhdev Singh* v. *Bhagatram*[30] in which the doctrine of agency and state instrumentality was adopted and the case of *Ajay Hasia* v. *Khalid Mujib*[31] in which Justice Bhagwati laid down the factors which should be taken into account in deciding whether a corporation was an agency or instrumentality of the government: whether the entire share capital is being held by the government; whether financial assistance is being provided by the State to the extent that it meets almost the entire expenditure of the undertaking; whether the corporation enjoys a state conferred monopoly status; and whether there is deep and pervasive government control of the corporation.

While it was held in 1987 in *Rajaratne* v. *Air Lanka*[32] that action of Air Lanka fell within executive or administrative action, Justice Ismail noted that the position had changed due to the take over of 26% of shares of Air Lanka by Emirates. As a result of this, it was held, the government had lost control over the Board of Directors. Applying the test of government agency or instrumentality, the Court held that the government had lost the deep and pervasive control it had hitherto

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[29] SC (FR) Application No 791/98 & 797/98, SC Minutes 11.1.2001.

[30] AIR (1975) SC 1331.

[31] AIR (1981) SC 487.

[32] (1987) 2 Sri LR 128 at 146

exercised over the company and, therefore, action taken by the 1st respondent cannot be considered as executive or administrative action. The applications were, therefore, dismissed.

This case must be contrasted with the case of *D.R.A. Sri Kumar Jayakody* v. *Sri Lanka Insurance and Robinson Hotel Co. Ltd. and eleven others*[33] in which the same issue arose. Justice Fernando noted that the 2nd respondent - Robinson Club Bentota Ltd. - was owned 80% by the State through Sri Lanka Insurance Corporation, which was likewise controlled by the State. The chain of ownership and control may extend indefinitely, however long the chain is, if ultimately it is the State which has effective ownership and control and every link in that chain are State agencies. It was, therefore, held that the 2nd respondent is a State agency although it was performing purely commercial functions.

With regard to the issue whether the appointment, disciplinary control etc., of employees of State and State agencies amount to executive or administrative action, the Court looked at Article 55(5) of the Constitution.[34] It was pointed out that the ouster jurisdiction clause in that article was expressly made subject to the fundamental rights jurisdiction of the Court:

> *I must stress that Article 55(5) preserves the jurisdiction of this Court in respect of <u>all</u> public officers - regardless of the nature of their functions. It cannot be said in relation to a public officer that his <u>functions</u> relate to commercial or business activities, and that therefore his <u>appointment</u> (or his transfer, dismissal or disciplinary control) is not "executive or administrative action"* (emphasis in original).

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[33] SC Application No 769/98, SC Minutes 13.7. 2001.

[34] See the case of *Nethsinghe* v. *Ratnasiri Wickremanayake*, discussed above, for a similar conclusion.

It was further noted by Justice Fernando that if the State decides to carry on a function, business or economic activity either directly or indirectly (through a corporation or agency), the persons employed by such entities would enjoy the protection of their fundamental rights. To hold otherwise would be to "cheat such employees of their fundamental rights." Justice Fernando referred to the judgment of Justice Ismail in the case of *Samson* v. *Sri Lankan Airlines*, discussed above.

Applying the above principle relating to indirect action, Justice Fernando held that although the suspension of the petitioner was carried out by the 2nd respondent by acting through a private agent, it does not cease to be executive or administrative, as it was still, in law, the act of the 2nd respondent: "the liabilities which direct action would attract, could not be evaded by resorting to indirect action."

Justice Fernando, contrasting the decision in *Samson's case*, raised the issue of indirect action and noted that if the company itself (i.e. Sri Lankan Airlines Ltd) had dismissed the petitioner, it would undoubtedly have been executive or administrative action. He asked whether it made any difference if the company had acted through its agent.

The principle of indirect action would, no doubt, bring many cases within the purview of the fundamental rights jurisdiction of the Court, as the Robinson case above illustrated. It is, however, a cause for concern that different judges of the Court come to different conclusions, although they seem to apply the same principles.

6. Petitions against the Chief Justice

Three petitions were filed in the Court, one by a lawyer cum journalist who argued his own case, alleging that the appointment by the President of the Chief Justice was unconstitutional and invalid, and

amounted to a violation of their fundamental rights, particularly those enshrined in Articles 12, 14(1)(a) and (g) and 17.[35] The cases were *Victor Ivan* v. *Hon. Sarath N. Silva and two others*,[36] *Rajpal Abeynayake* v. *Hon. Sarath N. Silva and two others*,[37] and *W.B.A. Jayasekera* v. *Hon. Sarath N. Silva and another*.[38] All three cases were taken together for disposal as all three involved the same issues.

6.1 Hearing into preliminary objections

A five-judge bench was constituted to hear into the preliminary objections. The main objection was the constitution of the bench by the Chief Justice (CJ). It was argued on behalf of the petitioners in 910/99 and 902/99 that the CJ had constituted the bench in a manner other than to which the petitioners had consented to and this was contrary to section 49 of the Judicature Act of 1978.

Delivering the judgment of the Court Justice Wadugodapitiya noted that this objection was misconceived. Section 49(1) of the Judicature Act provided that

> ***Except with the consent of both parties thereto**, no Judge shall be competent, and in no case shall any Judge be compellable, to **exercise jurisdiction** in any action, prosecution, proceeding or matter in which he is a party or personally interested. (emphasis in original)*

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[35] Article 17 lays down the remedy for the violation of a fundamental right, namely that the aggrieved party can petition the Supreme Court under Article 126 of the Constitution.

[36] SC Application No 898/99 (FR), SC Minutes 28.2. 2001.

[37] SC Application No 901/99 (FR), SC Minutes 28.2. 2001.

[38] SC Application No 902/99 (FR), SC Minutes 28.2. 2001.

Justice Wadugodapitiya stressed that the above provision related to the issue of exercising jurisdiction in relation to a case to which he is a party and it follows that if the CJ does not wish to hear and determine this application, section 49 has no application to him. He has, in fact, deliberately excluded himself from the Bench constituted to hear this application.

The preliminary objection raised by Mr Ranjit Abeysuriya PC for the petitioner in Application No 898/99 was that the constitution of the present Bench by the CJ was biased because he himself was a respondent in this case and was a breach of the rule against bias.

Justice Wadugodapitiya noted that the CJ constituted the Bench – a mere administrative procedure – strictly in terms of the power conferred on him by Article 132(3)(ii) of the Constitution at the request of the Bench of three judges of the Court acting under the self same provision. Referring to the motions filed by the petitioners in Court stating how the Bench should be constituted, Justice Wadugodapitiya stated that it was completely out of place and improper for the petitioners to suggest the number of judges who should hear their case and in what order of seniority:

> *It would indeed become a most unsavoury precedent if it were to be accepted that a party litigant, in whatever context, could give direction to the Chief Justice as to how the Chief Justice should constitute a Bench: and it would become intolerable if a party litigant, whatever the circumstances of his case may be, were to be allowed to demand, and be granted such demand, that his case be heard by a Bench consisting of a number of Judges he desires, in the order of seniority he prefers.*

Thus, the preliminary objections raised on behalf of the petitioners were overruled.

6.2 Hearing into leave to proceed

All three applications were again considered together. All three petitioners alleged that as a result of the appointment of the 1st respondent as the CJ, their fundamental rights under Articles 12(1) and 17 had been violated. In addition, the petitioner in the second application (901/99), being an attorney-at-law, alleged that his fundamental rights under Articles 14(1)(a) and (g) were also violated. None of the petitioners, however, alleged that the 1st respondent was guilty of any executive or administrative action which resulted in their fundamental rights being violated. Furthermore, a declaration was sought by the petitioners to the effect that the CJ's appointment was unconstitutional, invalid and null and void.

In this respect, the Attorney General raised three preliminary objections:

- The appointment of the CJ cannot be questioned in these proceedings;
- There are deficiencies in the pleadings; and
- In any event, there has been no violation of the petitioners' fundamental rights.

6.3 Questioning the appointment of the CJ in fundamental rights proceedings

With regard to this issue, the Court raised three related issues, namely the appointment of the CJ by the President under Article 107(1) of the Constitution; the immunity of the President under Article 35(1) of the Constitution; and the irremovability of the 1st respondent except by impeachment under Articles 107(2) and (3) of the Constitution.

Justice Wadugodapitiya noted that Article 107(1) is clear and unambiguous and a plain reading of it does not call for the observance of any guidelines:

> *This surely must receive its natural, logical and only interpretation, viz., that plain words and plain language must be given their plain meaning and that these provisions of the Constitution must be construed accordingly. .... We certainly cannot read into Article 107(1) guidelines which the Petitioners think ought to be there, but are not.*

The Court pointed out that in the circumstances, the appointment of the 1st respondent as the CJ by the President was *intra vires* the Constitution and, therefore, was lawful and constitutionally valid.

With regard to the immunity of the President, the Attorney-General contended that Article 35(1) confers absolute immunity on the President for both private and official acts while the President holds such office. This does not mean that the President is above the law and the Constitution clearly lays down how a President can be removed from office. Citing *Joseph Perera* v. *Attorney General*[39] and *Karunatillake* v. *Dissanayake*,[40] the Court noted that while the President's immunity remains inviolable, her acts under certain circumstances may not be. Thus, where an officer who has violated somebody's fundamental rights seeks to justify his own act by relying on the act of the President, the parent act of the President may be subject to judicial review.

The only act that is challenged in these proceedings is the President's act of appointing the 1st respondent as the CJ. In this regard, holding that the President enjoyed immunity in respect of the appointment of 1st respondent as CJ, Justice Wadugodapitiya stated:

> *I am constrained to say that, in fact, what the Petitioners are asking this court to do, is in effect to amend, by judicial action,*

[39] (1992) 1 Sri LR 199.

[40] (1999) 1 Sri LR 157.

> *Article 35 of the Constitution, by ruling that the immunity enjoyed by the President is not immunity at all. This, of course, it (sic) is not within the power of this Court to do. In the guise of judicial decisions and rulings, Judges cannot and will not seek to usurp the functions of the Legislature, especially where the Constitution itself is concerned.*

With regard to the issue of removing the CJ from office, Justice Wadugodapitiya held that Article 107(2) and (3) provide the only way in which a CJ could be removed from office and the Supreme Court is powerless in that respect with regard to proceedings under Article 126 and has no jurisdiction to grant the declaration prayed for by the petitioners.

The 2nd objection raised by the Attorney General - that there are deficiencies in the pleadings - relate mainly to evidentiary issues and, therefore, does not require a discussion here.

The 3rd objection was that there was no violation of fundamental rights of any of the petitioners. In this regard, the Court noted that, according to all three petitioners, the only violation is the appointment itself and the only violator is the President. The Court also noted that none of the petitioners has *locus standi* as none of them is affected by the act of the President as contemplated by Article 126(2). Finally, the Court noted:

> *Therefore, however much the Petitioners may desire it, this Court, cannot go beyond its clear duty of proper and lawful construction of the provisions of the Constitution, to stretch the elasticity of its language beyond permissible limits under the guise of judicial interpretation, in order to accede to the request of the Petitioners to add yet another method of removal from office of a Judge of the Supreme Court or Court of Appeal,*

> *including the Chief Justice ..... If any individual can challenge the President's appointment of the Chief Justice or any Judge of the Superior Courts by way of any application for alleged violations of fundamental rights, then Article 35 will have no meaning. One cannot invoke the limited fundamental rights jurisdiction to achieve a purpose not contemplated therein.*

The Court also pointed out that the Constitution is the paramount law of the land, and the Court has a sacred duty to uphold the Constitution. Upholding the preliminary objections raised by the Attorney General the Court refused to grant leave to proceed to the petitioners.

7. Relief

Article 126(4) of the Constitution empowers the Court to "grant such relief or make such directions as it may deem ***just and equitable*** in the circumstance..." (emphasis added). Thus, the relief granted by the Court should, in its opinion, be just and equitable. While most of the awards of compensation would meet this criterion, some of the cases referred to above raise doubts whether this criterion had been taken into consideration by the Court.

Several forms of remedies are usually granted by the Court: a declaration of illegality; a declaration coupled with compensation and costs; and in certain cases, a declaration and costs but no compensation. A good example of the latter is *Senaratne* v. *Punya de Silva*[41] in which Justice Amerasinghe considered that a declaration by the Court that the petitioner's fundamental rights had been violated by the respondent constituted, by itself, just satisfaction. It was further noted that an award of compensation was not necessary to rehabilitate the petitioner

[41] (1995) 1 Sri LR 273.

and that the amount of compensation requested by the petitioner (Rs 5 million) should not be taken as an indication of a *solatium* that would soothe the petitioner's wounded feelings.[42] Thus, an award of compensation could include an amount of money for the actual physical suffering as well as a *solatium* for mental suffering.[43]

The most common form of relief granted, as in previous years, was compensation and a declaration that fundamental rights have been violated. This year, the principle of restitution was endorsed as a yardstick to measure relief - the need to restore the petitioner to the position he would have been if not for the act of the respondent/s. In addition, several directives have been made by the Court, either to the Attorney General or the IGP to ensure that disciplinary proceedings are conducted against errant officers; or that a film be released for exhibition before a particular date, or that compensation be paid before a particular date etc.

As noted above, a cause for concern is the discrepancy in the amounts of compensation awarded for violations under Article 11 and for violations under Article 12(1). In some cases, it is not clear on what

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[42] In *Saman* v. *Leeladasa and Another* (SC Application No 4/88; SC Minutes 6/7.10.1988), Justice Amerasinghe noted: *In a case such as this, where the First Respondent was guilty of outrageous behaviour, it is not a punitive element that must enter into the enhancement of compensation payable, but the need to assuage the Petitioner's hurt feelings by a recognition of the enormity of the wrong complained of. What is sought to be done by increasing the amount of the award is to give the Petitioner the consolation of knowing that this Court acknowledges the seriousness of the harm done and that it has tried to establish some reasonable relation between the wrong done and the solatium applied.*

[43] See in this regard the excellent analysis by Justice A.R.B. Amerasinghe in "Relief and Remedies for the Infringement of the Rights of Personal Security and Physical Liberty in Sri Lanka," *Developing Human Rights Jurisprudence*, Interights, Vol 8 (2001) p 85; and Justice A.R.B. Amerasinghe in *Our Fundamenatl Rights of Personal Security and Physical Liberty* (Ratmalana, Sri Lanka : Sarvodaya, 1995), at pp 58-59.

grounds the Court had arrived at the amount of compensation. While it is not an easy task to compute compensation for pain and suffering,[44] as noted above, Article 126(4) requires the remedy to be just and equitable. While an in-depth analysis of the role of the Court under Article 126(4) cannot be undertaken at this juncture, particularly with regard to the nature of relief and whether it should be punitive in nature,[45] suffice it to note that the amount of compensation awarded should be reasonably proportionate to the loss/damage suffered by the petitioner (whether physical and/or mental). If this vital element of proportionality is missing, the relief ordered by the Court may not meet the "just and equitable test" as laid down in Article 126(4) of the Constitution.[46]

Similarly, the issue whether the infliction of personal liability on respondents and an award of compensation by them personally amount to punitive damages or at least to deterrence, requires a separate study. However, in many cases the Court has held errant public officers personally liable as a means of deterring future transgressions,[47] which, as pointed out by Justice Amerasinghe in *Abasin Banda* v. *Gunaratne*,[48] did not seem to have had the desired effect:

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[44] See in this regard the discussion on the award of compensation by way of a *solatium*, by Justice Amerasinghe in his article in *supra* n 43, p 105.

[45] See discussion, *ibid.*

[46] *Ibid.*

[47] With regard to the issues of deterrence, see Justice Amerasinghe's judgment in *Saman* v. *Leeladasa and another*, *supra* n 42, where he says that "I am unable to agree that deterrence is a relevant element in the assessment of compensation in a Fundamental Rights action." It is important to note here that Justice Amerasinghe refers to deterrence in terms of inflicting punishment on the State and not so much in relation to deterring public officials in committing future transgressions.

[48] *Supra* n 43 at p 100.

> *Judicial condemnation and the imposition of sanctions by way of requiring transgressors to personally contribute toward compensation assessed by the Court as being just and equitable in the hope that other persons may be deterred from violating Article 11 of the Constitution has meant very little. The Court's sense of frustration has been openly expressed...*

8. Conclusion

The year under review contained several interesting judgments including the unprecedented challenge to the appointment of the CJ under a fundamental rights application, for which leave to proceed was refused. The quotation from this case in which the Court stresses that it cannot stretch the language of the Constitution to encompass something that is not there, if taken out of context, can be taken as a direct blow to judicial activism. Indeed, looking at the experience of India, it is precisely what the Indian Supreme Court did in their pathbreaking judgments in relation to environmental protection and human rights. Thus, one should be careful about applying this to other issues such as interpreting the fundamental rights chapter. Admittedly, the circumstances in which this judgment was made are unprecedented.

Another notable feature of fundamental rights cases is that seminal judgments are always delivered by one or two judges of the Court. The ingenuity displayed in some judgments is by no means general to all judges of the Court. As the above discussion clearly showed, only one or two judges of the Court seem to be interested in developing the jurisprudence in relation to fundamental rights.

Despite several harsh judgments over the years, torture is by no means a thing of the past, as this year's cases have revealed. If at all, it seems entrenched in the criminal justice system and the law enforcers seem

to pay scant regard for the law. This indeed is alarming and the methods of torture employed seem to be getting worse by the year; it is inconceivable that one human being could inflict such harm on another human being. It is hoped that errant officers are duly punished, their promotions cancelled and indictments filed against them under the Torture Act.

Inasmuch as it is important to provide a remedy for a violation of fundamental rights, it is equally, if not more, important to prevent such violations from taking place. In this regard education and awareness raising play an important role. Civil society groups must make use of the substantial jurisprudence of the Court to carry out awareness raising programmes among the general public as well as government officials in an effort to minimise violations of fundamental rights.

VI

The Public Service of Sri Lanka

M.C. M. Iqbal[*]

1. Introduction

This chapter deals with the state of the public service during the year 2001 and examines the reasons that gave rise to the present pathetic state that signifies the public service of Sri Lanka. It also discusses historic developments in order to put the discussion in context as this is the first time that the public service is discussed in a State of Human Rights Report. The measures that need to be taken to restore it to a position from where it could become the key arm of the State in ensuring good governance, are also discussed. In a democratic state good governance is the product of an efficient and effective administrative set up. Good governance seeks to ensure that there is accountability, transparency, respect for rule of law and protection of human rights in a democratic society. It also pre-supposes the absence of any form of discrimination as discrimination prompts a breakdown in the rule of law and makes way for violations of human rights. It

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invariably follows that where there is an absence of good governance, a need to put in place mechanisms to protect the rights of people arises. Since the public service is an important arm of the State that seeks to ensure there is good governance, it follows that when the public service fails to perform, good governance becomes affected. Consequently, the rights of the people become jeopardized at the hands of the public service. As a result, the public service becomes relevant for a discussion on human rights and has been included in this report for the first time.

Decisions of public officers in state institutions can have bearings on the fundamental rights of people and such decisions can, in turn, be subject to the fundamental rights jurisdiction of the Supreme Court. As is evident from the chapters on Judicial Protection of Human Rights over the years, most of the fundamental rights cases have related to administrative decisions which have been challenged under Article 12(1) of the Constitution which deals with the equality before the law and the equal protection of the law.

2. The Historical Evolution, the Structure of the Service and its Politicization

The public service in Sri Lanka has a long history. It dates back to the times of ancient kings.[1] During the time of British rule significant reforms were carried out to the existing structure in 1833 pursuant to the recommendations of the Colebrooke Commissioners and in 1928 to those of the Donoughmore Commissioners. When Ceylon became independent in 1948 the public service was brought under the Public Service Commission established on the recommendation of the

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[1] F.A. Hayley, *A Treatise on the Laws and Customs of the Sinhalese* (1923) pp. 41, 43, 51.

Soulbury Commissioners.[2] Each Ministry had a Permanent Secretary who was responsible for helping the Minister to achieve the objectives of the Ministry and for the administration of the departments under the Ministry. Some Ministers wanted their pet projects to be given priority, disregarding the opinion of the Permanent Secretary on the feasibility of such projects. Some Permanent Secretaries acquiesced with such requests while others did not. This eventually led to friction between Ministers and their Permanent Secretaries. Uncooperative officials were gradually edged out by more amenable officials. This is a reflection of the appetite of politicians to gain control over bureaucratic decisions. By Independence, this control was well underway as manifested in the appointment of Mr. Hema Basnayake, the then Attorney General, as the Chief Justice, the Prime Minister picking the electorates that should go to the polls on the first day of the General Elections of 1952, the appointment of a civilian as Inspector General of Police in 1956, and the appointment of Mr. Ananda Tissa de Alwis as Permanent Secretary in 1969. This trend of interference grew with cancerous rapidity spreading from Government to Ministers, to Members of Parliament to Provincial Councilors and a whole group of political hangers-on. Eventually changes made by the 1978 Constitution made the Cabinet responsible for the appointments of Heads of Departments and Secretaries to Ministries. This paved the way for the legitimization of political interference.

The British had designed the public service to facilitate the collection of revenue from the resources in the country. With the gaining of independence in 1948 the focus of the public service had to become development oriented. Public officers were apportioned to various ministries to assist in developing the country and providing services such as postal, rail transport, health care, irrigation etc., to the people. The Secretary to the Ministry was its administrative head. He also

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[2] The Ceylon (Constitution) Order-in-Council, 1947 as amended, Section 58.

had to advise the Minister on policy planning. These Secretaries have Additional Secretaries, Deputy Secretaries, Assistant Secretaries and Heads of Departments who constitute the principal executive officers of the Ministry. They are also known as staff officers or gazetted officers. Most of the staff grade officers belong to the Sri Lanka Administrative Service (SLAS), or its parallel grades, such as the Sri Lanka Accountants' Service, Sri Lanka Educational Administrative Service, etc. The SLAS is the successor of the Ceylon Administrative Service (CAS) which succeeded the Ceylon Civil Service in 1963.

The *kachcheri* system of the colonial days continues to date with appropriate modifications. Government Agents who were earlier appointed on a provincial basis are now appointed on a district basis and are also known as District Secretaries. They are the principal administrative heads of the various districts with Additional Government Agents and Assistant Government Agents (also known as Divisional Secretaries), to assist them at the divisional level. These officers have a retinue of clerical and other allied grades to help them in serving the public.

With the adoption of the 13th Amendment to the Constitution in 1987[3] and the subsequent passing of the Provincial Councils Act,[4] the Public Service in Sri Lanka became bifurcated into the Public Service of the Central Government and the Provincial Public Service. While the Cabinet continued to exercise its control over the public service of the Central Government, the Governors of the Provinces exercised authority over the provincial public service through the Provincial Public Service Commissions [5], which the Governors are authorized

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[3] 13th Amendment to the Constitution, Article 154A.

[4] Section 32(1) of Act No.42 of 1987.

[5] *Ibid.*, sections 32 & 33.

to appoint.[6] While decentralization of the public service was a dire need, it led to the public officers in the provincial administration too falling into the clutches of the politicians of the provinces.

With the enactment of the 13th Amendment, Divisional Secretaries had to perform functions in a dual capacity: they had to serve the central government in respect of the subjects that have not been devolved to the provincial administration as well as attend to the devolved subjects under the authority of the Chief Secretaries of the Provinces and the Provincial Ministers. Although Divisional Secretaries are not under the purview of the Provincial Public Service Commission they are answerable to the Chief Secretary of the Province, in respect devolved subjects. This places the Divisional Secretary in a very dubious position, especially when the party in power in the province is different from the party in power at the centre. The same is true with regard to the *Grama Niladharis* (earlier known as *Grama Sevakas*)[7] - the grassroots level administrators - who also have to serve dual masters, the central and the provincial governments.

3. The State of the Service in 2001

The Constitutions that were adopted in 1972 and 1978 whittled down most of the powers and functions the Public Service Commission had under the Soulbury Constitution and vested them in the Cabinet. This dealt a deathblow to the independence of the Public Service Commission and the public service itself. The political masters eventually began to consider the public officers as their subordinates who had merely to do their bidding without question. When the first political appointment was made to a high position in the civil

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[6] *Ibid.*

[7] He was known as the village headman during the colonial days.

administration in 1956, "it set in motion the disintegration of an independent, upright and incorruptible public service to be replaced by a sorry scheme of things in which top officials were seen scurrying after politicians for top jobs."[8] Some of them found it more expedient and profitable to be their stooges. A few even stooped to the level of justifying pet projects of the politicians, knowing very well that such projects were not feasible and were doomed to fail. The nationalization of the road transport service, which brought in the Ceylon Transport Board, is an example. This move failed to bring in the expected benefits and the subsequent governments had to allow private buses to supplement services of the Ceylon Transport Board.

Speaking at the debate in the Committee Stage of the budget in 1998, Professor Viswa Warnapala, the then Deputy Minister of Education and Higher Education referred to problems in the public service as follows:

> *At Independence, Sri Lanka inherited a highly centralized administrative structure, which was in fact a colonial legacy, and this system of public administration required radical changes in keeping with the aspirations of an independent state.*
>
> *The same old archaic methods and procedures were allowed to continue and modern methods and concepts were not injected into the system. This has resulted in bureaucratic lethargy, inefficiency, and a total failure in routine matters.*[9]

Secretaries to Ministries have a special place under the Constitution.[10] Since their appointment and removal is at the sole discretion of the

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[8] Editorial, *Sunday Times*, 17th February 2002.

[9] Parliamentary Debates (Hansard) Vol121 No. 3 23rd November 1998.

[10] Article 52 of Constitution of 1978.

President, they are generally compelled to be loyal to the party in power. Since the Secretary holds the highest position in the public service, he cannot aspire for any further promotions other than hope to be appointed to a statutory board or given a diplomatic posting after his retirement. The latter could become a reality only if he continues to be in the good books of the party in power and the Minister concerned. If he does not, he runs the risk not just of losing his position and being dumped into the 'pool'[11] but also foregoing his chance of securing a 'higher' position after his retirement. That is perhaps one of the reasons why so many public officers became 'yes men' of politicians during 2001 and the years preceding it. The release of official vehicles and other government resources to Ministers and Members of Parliament (MPs) during the general elections in December 2001 [12] was a typical example of the type of conduct resorted to by public officers.[13]

All public officers,[14] as they are now called, hold office at the pleasure of the State[15] and are subject to the provisions of the Constitution,

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[11] The pool is a place to which administrative service officers who have fallen foul with the government in power are dumped into and paid for doing nothing as no work is usually assigned to them. This means that such persons are a real burden on the tax payer!

[12] Report of the Committee on the Abuse of Public Resources., Institute of Human Rights, 21.12.2001, p 8.

[13] Other instances of abuse appear elsewhere in this article.

[14] Defined in Article 170 of the Constitution as:- *a person who holds any paid office under the Republic, other than a judicial officer but does not include - (a) the President; (b) the Speaker; (c) a Minister; (d) a Member of the Judicial Service Commission; (e) a Member of the Public Service Commission; (f) a Deputy Minister; (g) a Member of Parliament; (h) the Secretary General of Parliament; (i) a Member of the President's staff; (j) a Member of the staff of the Secretary-General of Parliament.*

[15] Article 55 (1) of the Constitution.

which confer the powers of appointment, transfer, dismissal and disciplinary control of public officers on the Cabinet of Minister.[16] The Constitution, however, provides for the delegation of these powers to the Public Service Commission (PSC) appointed under the provisions of Article 56(1) of the Constitution. The PSC has, in turn, delegated many of its powers to Secretaries of Ministries and Heads of Departments.[17] Secretaries of Ministries are appointed by the Cabinet from amongst the senior public officers. Of late, the choice has often fallen on not so much on the person most capable for the post but on the person most likely to be a 'yes sir' type or a favourite of the Minister concerned. However, until December 2001, the Secretary to the President had been the key decider. Although such appointments have not yet been challenged in a court of law, the State Administrative Service Association, (SASA)[18] had indicated its displeasure at such appointments. SASA had indicated its displeasure at a meeting it had with the Minister of Public Administration, sometime ago, when they met him at the Ministry. Despite this, there have been occasions when secretaries were chosen even from among persons who had never been in the public service. There have been occasions on which retired public officers have been appointed as Secretaries to Ministries.[19] Such appointees based on proven track record and not on patronage have made good secretaries. The situation became worse with the politicisation of these appointments where there was little evidence that capability, suitability, experience, qualifications and competence were taken into consideration. More often than not, officers who were not up to the mark were appointed

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[16] *Ibid.*

[17] Article 58(1) provides for such delegation.

[18] It is a trade union of the Sri Lanka Administrative Service.

[19] The Cabinet's appointment of the last Commissioner of Elections as the Secretary to the Ministry of Defence during the previous regime is an example.

as Secretaries. The result was that over the years, many senior officials have become ill equipped to hold these posts.[20]

The traditional view is that a state employee enjoys security of service while his counterpart in the private sector does not. But when considering the legal safeguards available to the private sector employees, we see that they are protected against arbitrary termination of employment as they could obtain relief through labour tribunals. The public servant does not enjoy such safeguards.[21] Though public officers enjoy the legal right to continue in service till the age of 60 years those who fell foul had to face transfers to uncongenial stations and degrading positions that made them find it difficult to continue in service. Relief through the fundamental rights jurisdiction of the Supreme Court is both expensive and is of not much use to many because of the time limitation and the cumbersome procedures involved. The Human Rights Commission and the Ombudsman do not have adequate powers to provide speedy and effective relief in such instances.

Article 55(5) of the Constitution is inimical and detrimental to the interests of public officers. It reads as follows -

> *Subject to the jurisdiction conferred on the Supreme Court*[22] *no court or Tribunal shall have power or jurisdiction to inquire into, pronounce upon or in any manner call in question any order of the decision of the Cabinet or Ministers or Minister, the Public Service Commission, a Committee of the Public*

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[20] Somasunderam, M., *The Third Wave – Governance and Public Administration in Sri Lanka* (ICES, Colombo 1997) p 37.

[21] Gankanda, D. P., "How Secure is the Public Service", *Daily News*, 16th February 1996.

[22] Article 126 of the Constitution, para 1.

> *Service Commission, or of a public officer in regard to any matter concerning the appointment, transfer, dismissal or disciplinary control of a public officer.*

Nevertheless, the Supreme Court has consistently held that it has jurisdiction over transfer, disciplinary control, dismissal etc., as the cases under Article 12(1) have shown. The Court has also held consistently that reasons must be given for decisions even by Ministers and rules of natural justice must be followed.[23] Compliance with these requirements of the rules of natural justice is more the exception than the rule. It is not many public officers who could afford to resort to the judiciary to seek redress.

4. Efforts to Reform the Public Service

In 1969 the Ministry of Public Administration was established on the recommendation of a UN team of officials appointed by the Ministry of Finance with the concurrence of the then Prime Minister.[24] It was hoped that the deterioration of the public service could be arrested with the establishment of this Ministry which now consists of three divisions - the Combined Services Division, the Administrative Reforms Division, and the Establishments Division.

A perusal of the website of the Ministry of Public Administration [25] shows that the mission of this Ministry is to ensure an efficient and effective public service and a regional administrative system responsive to the aspirations of the people and the national priorities

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[23] Please see cases discussed in section on *Judicial Review and the Public Service.*

[24] Nadarajah, S., "Evolution of Administrative Reforms", in Somasundaram, M., *Supra* n 20, p 251

[25] http://www.gov.lk/public/index.htm visited in April, 2002.

identified by the Government. The website lists the following as the objectives of the Ministry -

- Enhance the efficiency and effectiveness of the public service management and the regional administrative system.
- Provide state services to the satisfaction of the public.
- Empower the public service to achieve development objectives set out by the Government.

5. The Effects of Reform

Despite these efforts to get the public service back to its pristine position there was no remarkable improvement in relation to its efficiency, effectiveness or integrity. The deterioration of the service continued and reached a peak in the year 2000 when President Chandrika Kumaratunga stepped in, in an effort to revamp the service.

In August 2000 the President appointed a Public Services Management Development Authority to ascertain the problems surrounding the public service and to make recommendations for its improvement. It was headed by a senior public officer with an equally senior officer as his deputy and a retinue of research officers. The chairman of the Authority had to regularly report to the President of the progress made by the Authority.

During 2001 the Authority conducted a few surveys into the working of selected departments such as the Registrar General's Office, the Office of the Registrar of Persons and a few Divisional Secretaries' Offices. Some of the officials of the Authority revealed that

recommendations have been made to the Ministry of Public Administration for necessary action.[26] According to these officers, the main problems of the public service are: the lack of accountability; the inadequacy of the knowledge of the subject the public officers are called upon to handle; the absence of effective supervision; lack of adequate motivation; and, above all, political interference.

The Authority was not established by an Act of Parliament. It could not make any effective changes on its own to justify its creation. Perhaps due to this reason, the staff of this authority has been absorbed into the Administrative Reforms Division of the Ministry of Public Administration.

Upon a recommendation of the Abeyratne Committee[27] a programme to train newly recruited clerical servants and officers of parallel services had been initiated.[28] During the year 2001, 700 such officers had been trained at the Sri Lanka Institute of Development Administration (SLIDA).

Despite these attempts to reform the public service, the same modes of bureaucratic controls and bureaucratic organisations continued resulting in the public service becoming authoritarian and distant from the public.

One of the government departments that is crippled as a result of manpower shortages and lack of resources is the postal department.[29] It is also reported that the General Post Office building was taken

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[26] The author obtained this information from some officials of the Authority.

[27] Appointed by President Premadasa in the early 1990s to recommend ways of improving the public service.

[28] Hansard Vol. 135 No.14 Column 2348.

[29] Nilika de Silva and Tania Fernando, "Mail Going Down the Drain", *Sunday Times*, 3rd February 2002.

over for the President's Security Staff and the postal department was shifted to an inappropriate building further away, leading to congestion and poor working conditions which affected the output of the department.[30]

6. Instances of Abuse of and by the Public Service

There were innumerable instances of abuse of and by the public service during the year 2001. A few of them are cited below.

(a) Abuse of government property

According to the Final Report of the Study of the Institute of Human Rights on the Abuse of Public Resources prior to the Parliamentary Elections of December 2001:

> *All public servants are governed by the Financial Regulations and any violations thereof result in serious disciplinary action taken against the public servants concerned. Equally the disciplinary codes of all public corporations and the provisions of the Finance Act guide all public corporations to protect public resources. However the abuse of public property takes place completely ignoring these rules and regulations. In addition to causing losses the discipline in the public sector completely collapsed in the face of these violations by those in authority.*[31]

The most misused of the public resources during 2001 were vehicles belonging to state institutions most which were elections related. It has been reported to the Institute of Human Rights Programme for the Protection of Public Property that 433 vehicles belonging to state

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[30] *Ibid.*

[31] *Ibid.*, para 6.3 at p 15.

institutions had been used by the People's Alliance for election work[32] despite assurances by the President at public meetings that it will not be done. According to another report over 1000 state owned vehicles were used by politicians of the PA Government are yet to be returned to the respective government institutions. The newly appointed Minister of Parliamentary Affairs who was quoted in the newspapers as having made this disclosure also said that a Government Parliamentary Group had appointed a committee to probe these irregularities.[33]

Each one of these vehicles would have been in charge of a public officer who would have been responsible for its custody and maintenance. Technically, the Head of the Department to which these vehicles belonged is responsible for them. They have been either directly or indirectly a party to the misuse of these vehicles.

The same situation arose in relation to government residences. It was reported in the media that several such residences had been made available to politicians to be used as their election secretariats. One such building was the Ackland House now known as 'Visumpaya' which is reported to have been used as the residential election office of Mr. Arjuna Ranatunga, now a Member of Parliament for the Colombo District.

(b) Abuse of power or official position

The Director of Information, Mr. Ariya Rubasinghe, is alleged to have sent 72,000 election propaganda pamphlets by air to Jaffna for distribution among the security forces personnel.[34] This again is

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[32] *Supra* n 12, p 8.

[33] Editorial of the *Daily News* 20th February 2002.

[34] *Ibid.*, p 18.

another instance of the misuse of one's position to use state air transport to distribute ruling party's election propaganda material.

The media reported another instance of abuse of the public service, this time in the Ministry of Foreign Affairs at an interview for selection of personnel for the Foreign Service in year 2001.[35] The report adds "The Public Service Commission has ordered fresh interviews after receiving a number of petitions against the interview held by the previous administration" alleging irregularities.[36]

In another instance concerning the Police Department, 46 Assistant Superintendents of Police (ASPs) filed action in the Supreme Court alleging that their fundamental rights had been violated by a decision of the former administration to promote 34 ASPs to the positions of Superintendents of Police.[37]

The high-handed manner in which politicians wielded power is one of the main reasons that compelled public officers to indulge in or not take action against those who indulged in the abuse of authority or the misuse of resources of the State. Many Ministers and Deputy

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[35] *Daily News*, 21st February 2002.

[36] *Ibid.*

[37] Editor's Note: The Supreme Court held in February 2002 that fresh interviews must be held by the Police Department. The court ordered the first four of the 52 respondents viz - The Inspector General of Police, the Secretary to the Ministry of Defence, the former Secretary to the Ministry of Cultural Affairs, former Secretary to the Ministry of Posts and Telecommunication, and the Additional Secretary to the Ministry of Foreign Affairs – who were all members of the interview board, to pay personally a part of the compensation. The Court also debarred them from sitting in future interview boards constituted for this purpose and the Attorney General was directed to consider whether the 1st and the 4th respondents could be charged for having performed a corrupt practice within the meaning of the provisions of the Bribery Act or any other law.

Ministers arbitrarily used their political power for their own gain including the misuse of State resources such as vehicles.

7. Accountability of Public Officers

Accountability is defined as the obligation of a person to offer satisfactory explanation to those who have a right to demand a satisfactory explanation.[38] Justice Rehman of India defined accountability as "an obligation to reveal, explain and justify one's action. It is concomitant on responsibility. Without responsibility of some sort there cannot be accountability of any sort."[39] If one looks at the extent to which abuse of authority by public officers took place during 2001, it would be patently clear that they had acted without any sense of accountability.

This opinion is further confirmed by the following comment in one of the leading newspapers:

> *The situation got out of hand in the last months of the last regime. What the press stated has now been confirmed and documented by the new government. However, criticisms of the last government's lack of accountability would not do much good, if the new government does not take meaningful steps to ensure that they themselves adhere to the principles of accountability. Those who come to office do not usually follow what they said when they were in the opposition. This in fact is the reason for the continuous erosion in accountability over the years.*[40]

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[38] *Administrative Accountability* by Justice Rehman (1987) Mimico unpublished, Islamabad, quoted by Somasunderam, *supra* n 20, p 375.

[39] *Ibid.*

[40] Special Report by *Sunday Times* Economic Analysis, 24th February 2002, p 10.

Public Officers have specific functions to perform in relation to their duties. To facilitate the performance of these functions, the state entrusts every officer with resources, which they are required to hold in trust for the benefit of the public. It is the solemn duty of every public servant to use these resources diligently and for the purpose for which they were intended. If such resources had been abused, the public officer who was in charge of the resources is accountable. During the year 2001 there were several instances of public officers expending funds allocated to their ministries or departments, for purposes for which they were not intended. However, they were not held accountable for this abuse.

With regard to employment issues in the public service during 2001, Kishali Pinto Jayawardena articulated as follows:

> *And though the extent to which accountability collapsed in public employment during the past several years is yet to be gauged in its true solemnity, we are now beginning to have revealing glimpses of this deterioration.*[41]

Now that a change of government has taken place it would be worth finding out the degree to which public officers acted without the fear of being held accountable by initiating a probe into such activities. Such a step could be useful in acting as a deterrent to instances of this nature in the future and inhibit the culture of impunity that appears to have pervaded the public service, as in many other areas, in the performance of their duties.

The basic principle of public accountability is that the peoples' representatives in Parliament must control the allocation and use of funds for the benefit of the public. One of the subtle ways in which

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[41] *Sunday Times*, 24th February 2002.

the government had eroded public accountability in a constitutional manner is by not including actual expected expenditures in the budget, but by passing additional amounts through supplementary votes. The fact is that such supplementary votes are often rushed through Parliament, without a full dress debate as during budget debates. Often such supplementary estimates had been for large sums, rendering the scrutiny during budget debates meaningless.

8. Judicial Review and the Public Service

In any democracy, besides the public officers, the citizens of the country should have the right and ability to question and challenge actions of administrative authorities. That would ensure that the state and the administrative authorities act judiciously and remain accountable for their actions. It has been said that "where ever there is power, there are excesses in the exercise of the power. Judicial review is one of the ways of controlling these excesses of power."[42]

Several judgments were delivered by the Supreme Court recently in relation to cases which had been filed by victims of administrative actions alleging, the violation of the principles of natural justice, the abuse of discretionary power and issuing of arbitrary orders.

In the case of *Jayawardena* v. *Dharani Wijayatilleke, Secretary Ministry of Justice and others*[43] in respect of the services of a former co-operative inspector who later became an Inquirer into Sudden Deaths, Fernando J. stated as follows -

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[42] Mario Gomez, *Emerging Trends in Public Law* (1998) p 2..

[43] SC Minutes 27.7.1995 reported in SLR 2001 Part V 132 at 139 – per Fernando J.

> *... the Government Agent, Gampaha had been induced to call the petitioner for an interview, despite ineligibility, because of political pressure exerted on the Government Agent by a powerful Member of Parliament of the Government.*
>
> *Respect for the rule of law requires minimum standards of openness, fairness and accountability in administration, and this means - in relation to appointments to and removal from, offices involving power, functions and duties which are public in nature - that the process of making a decision should not be shrouded in secrecy.*[44]

In the case of *Nandadasa* v. *M.S. Jayasinghe, Secretary, Ministry of Justice, Constitutional Affairs, et al* [45] Fernando J., stated as follows:

> *It is common knowledge that various forms of bribery and corruption are rampant. Accordingly, everyone, and certainly officers of the Ministry of Justice, must endeavour to eradicate bribery and corruption, by every means - prevention, investigation, prosecution and punishment.*

There have been a few cases in Sri Lanka where the courts have held that the administrators should provide or at least have valid reasons for the decisions they take. The Supreme Court has affirmed that natural justice requires that reasons be provided.[46] The Court has held that even if the individual is not entitled to reasons, the Court is entitled to demand reasons when the issue comes up during litigation.

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[44] *Ibid.*, 134.

[45] 1 Sri LR 2001 at 25 - Part I.

[46] *Karunadasa* v. *Unique Gemstones*, S.C. Minutes of 5.12.1996 – quoted in Mario Gomez, supra n 42 p 185.

> In another case Justice H.W. Senanayake stated as follows:[47] *In my view public confidence in decision making process is enhanced by the knowledge that supportable reasons have to be given by those who exercise administrative power.*

In yet another case[48] the learned Judge stated as follows:

> *The actions of the public officers should be 'transparent' and they cannot make blank orders. The giving of reasons is one of the fundamentals of good administration.*

During the year 2001, as the case law shows, the public service of Sri Lanka in general and some of the Heads of Departments acted in violation of the principles enunciated in the decisions in the cases cited above. As the chapter on Judicial Protection of Human Rights has consistently shown over the years, how despite court rulings laying down these important principles, violations by public officials have continued, as the sheer number of cases filed under Article 12(1) over the past few years has clearly shown.

9. The 17th Amendment to the Constitution

One important step taken during 2001 was the passing of the 17th Amendment to the Constitution by Parliament. It proposed to establish, *inter alia* an independent Public Services Commission[49] (hereinafter "the Commission"). Public opinion and pressure exerted by concerned

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[47] *Kalawana Multi-purpose Co-operative Society Ltd.* v. *Co-operative Employees Commission*, C.A.Minutes of 15.8.93 – Cited by Mario Gomez *Supra* n 42 at p 189.

[48] *Unique Gemstones* v. *Karunadasa* (1995) 2 Sri LR 357 (C.A).

[49] Article 41B of the 17th Amendment to the Constitution. See also Rukshana Nanayakkara, in Chapter II in this volume.

institutions and political parties during 2001 resulted in the 17th Amendment to the Constitution being passed during the last stages of the PA government. As to whether this measure would lead to a better public service would depend partly on the stature of those who will be appointed to this Commission and how independent they will be. It is hoped that all the communities would be adequately represented in this Commission by persons with integrity and determination to restore the lost image of the public service.

However, closer scrutiny of the provisions relating to the public service in the 17th Amendment shows several anomalies. Article 55(1) of the Constitution now reads as follows: "The appointment, promotion, transfer, disciplinary control and dismissal of public officers shall be vested in the Commission."

While on the face of this provision it would appear that the expectation of an independent Public Service Commission has become a reality, Article 55(3) still retains the powers of the Cabinet of Ministers. Article 55(3) reads as follows:

> *Notwithstanding the provisions of paragraph 1 of this Article, the appointment, promotion, transfer, disciplinary control and dismissal of all Heads of Departments shall vest in the Cabinet of Ministers, who shall exercise such powers after ascertaining the views of the Commission.*

This provision does give the impression that what was given with the right hand had been taken away with the left. What is the use of having an independent Public Service Commission if it cannot exercise control over Heads of Departments and protect them from political manoeuvers? In other words, despite the provisions of Article 55(1), it would seem that the public service would continue to be the pawns of politicians. If the words "with the concurrence of the Commission"

had been used in Article 55(3) instead, this provision would have been of some significance.

The Provincial Councils Act No.42 of 1987 took away a large slice of the public service from the hands of the central government and placed it in the hands of provincial politicians. Article 55(2) of the 17th Amendment has re-iterated it. Although this is in keeping with the devolution of powers under the 13th Amendment to the Constitution it could have made provision for an independent Provincial Public Service Commission rather than place the provincial public service in the hands of a Provincial Public Service Commission which is an arm of the Provincial Governor who invariably is a partisan individual, being the representative of the President in the Province.

However, the true implications of the 17th Amendment are yet to be seen and time will tell us whether we were successful in achieving an independent public service commission. If the political will is there to do so, then discrepancies in the law would not be a problem. Civil society institutions also have a role to play in this regard and should get actively involved in the reform of the public service and bring malpractices to the attention of the those in authority and particularly, the judiciary when necessary.

10. Conclusion

If the public service in Sri Lanka is to serve the purpose for which it was created, a more sincere and greater effort has to be made to rescue it from its present state. As was pointed out earlier, one of the principal reasons for the state of the public service is incessant political interference. Besides this, the lack of proper training, dedication, attitudinal orientation, absence of adequate motivation and, last but not least, inadequate remuneration, are contributory factors.

Another measure that has been suggested to improve the public service is to link up the officers' prospects in the service to their performance in the various posts they held in the service. A flawless performance evaluation system has to be evolved by the proposed Public Service Commission. Recommendations from politicians should have no weight at all either for promotions or transfers. Instances of misconduct should be dealt with swiftly and effectively by initiating prompt disciplinary proceedings. Politicians should be debarred from interfering in disciplinary proceedings.

A record of the skills and noteworthy performances of members of the public service, be it as administrators, disaster managers, engineers, medical personnel, surveyors, accountants, or even clerks and other grades of employees, must be taken note of. The recognition of merit in the performance of one's duties could motivate persons to excel in their respective fields.

Together with these changes, it is also necessary that the salaries of public officers be made more attractive. They should be adequately protected from the effects of inflation. Often the lower rung of the public service is prone to indulge in corrupt practices to make ends meet whilst those at the top indulge in it as an easy means of self-aggrandizement. The wage structure needs to be made attractive enough to draw in high quality personnel.

The possibility of extending the age of retirement to enable the services of capable public officers to be availed of by the State should be considered. This needs special consideration in view of the increase in the ageing population in Sri Lanka.

As part of the reform of the public service, voluntary retirement schemes, pension reform and treatment of government and private employees on equal footing are on the offing. Public sector reform

through institutional strengthening and good governance is one of the terms of the agreement between Sri Lanka and the International Monetary Fund.[50]

The duplication of government institutions in the center and at the provinces consequent to the 13th Amendment to the Constitution, must be avoided. Therefore, there is an urgent need to rationalize and close down many such institutions. What the 13th Amendment sought to do was to devolve and not to duplicate. The proliferation of ministers has also led to a series of negative outcomes such as splintering of sectoral responsibilities and development concerns, not to mention the huge drain on resources.

Sri Lanka is burdened with one of the largest public services in Asia. Therefore, the proposed reforms are of critical importance. The last attempt at such reform following the Report of the Administrative Reform Committee headed by Shelton Wanasinghe recommended a 'lean public service with a fat salary.' The miscalculated, infamous Public Administration Circular No.44 of 1990 resulted in a large number of capable and competent public officers retiring from the public sector. It was mostly the experienced and the more capable who left hoping to join the private sector. This led to a further deterioration of the public service. It is, therefore, hoped that in the next attempt to rid the service of redundant staff, a properly devised voluntary retirement scheme would be implemented followed by a better wage structure and the provision of necessary resources to motivate those remaining in service to perform better.

Nonetheless, whatever steps one may take to improve the public service, good governance would become a reality only if we have

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[50] IMF Sri Lanka Country Report No.1/71, Internet Edition, May 2001, quoted in *Pravada* Vol.7 No. 4 p 11, by Sarvananthan, M.

good governors as well as a vibrant civil society. Whether the general elections of December 2001 has brought forth good governors is yet to be seen.

Schedule I

UN Conventions on Human Rights and International Conventions on Terrorism Signed, Ratified or Acceded to by Sri Lanka as at 31st December 2001*

- Convention on the Prevention and Punishment of the Crime of Genocide.
  Acceded on 12th October 1950.

- International Covenant on Economic, Social and Cultural Rights.
  Acceded on 11th June 1980.

- International Covenant on Civil and Political Rights.
  Acceded on 11th June 1980.

- Convention on the Elimination of All Forms of Discrimination against Women.
  Ratified on 5th October 1981.

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* The consent of a State to be bound by a treaty is expressed by the signature of its representative when the treaty provides that signature shall have that effect. In many instances, the parties may agree either in the text of the agreement or in the negotiations accompanying the formulation of the text, that signature alone is not sufficient; a further act is required to signify consent to be bound which is called ratification. Treaties in which this approach is adopted usually intend that the signature will merely authenticate the text of the agreement. The purpose of ratification is to provide the government of the states concerned with a further opportunity to examine whether they wish to be bound by a treaty or not. For those States which did not participate in the original negotiation and were not signatories to the treaty but nonetheless wish to become parties to the treaty, can do so by acceding to the treaty. Once a State has become a party to the treaty, it enjoys all the rights and responsibil ities under the treaty irrespective of whether it became a party by signature and ratification or accession.

- International Convention on the Elimination of All Forms of Racial Discrimination.
  Acceded on 18th February 1982.

- International Covenant on the Suppression and Punishment of the Crime of Apartheid.
  Acceded on 18th February 1982.

- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.
  Acceded on 27th February 1991.

- Convention on the Rights of the Child.
  Ratified on 12th July 1991.

- Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.
  Acceded on 3rd January 1994.

- International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.
  Acceded on 11th March 1996.

- Optional Protocol 1 to the International Covenant on Civil and Political Rights.
  Acceded on 3rd October 1997.

- International Convention for the Suppression of Terrorist Bombings.
  Ratified on 23rd March 1999.

- Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.
  Ratified on 6th September 2000.

- International Convention against the Taking of Hostages.
  Acceded on 6th September 2000.

- Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation.
  Acceded on 6th September 2000.

- International Convention for the Suppression of Financing of Terrorism.
  Ratified on 6th September 2000.

- United Nations Convention against Transnational Organised Crime.
  Signed on 15th December 2000

- Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children - supplementing the United Nations Convention against Transnational Organised Crime.
  Signed on 15th December 2000.

- Protocol against the Smuggling of Migrants by Land, Sea and Air - supplementing the United Nations Convention against Transnational Organised Crime.
  Signed on 15th December 2000.

- Optional Protocol to the Convention on the Rights of the Child on the sale of Children, Child Prostitution, and Pornography.
  Signed on 8th May 2002

Ratification of ILO Conventions by Sri Lanka

Con. No.	Name of the Convention	Date of Ratification	Present Status
C4	Night Work (Women) Convention 1919	08.10.1951	Denounced
C5	Minimum Age (Industry) Convention 1919	27.09.1950	Denounced
C6	Night Work of Young Persons (Industry) Convention 1919	26.10.1950	Denounced
C7	Minimum Age (Sea) Convention 1920	02.09.1950	Denounced
C8	Unemployment Indemnity (Shipwreck) Convention 1920	25.04.1951	
C10	Minimum Age (Agriculture) Convention 1921	29.11.1991	Denounced
C11	Right of Association (Agriculture) Convention 1921	25.08.1952	
C15	Minimum Age (Trimmers and Stockers) Convention 1921	25.04.1951	Denounced
C16	Medical Examination of Young Persons (Sea) Convention 1921	25.04.1950	
C18	Workmen's Compensation (Occupational Diseases) Convention 1925	17.05.1952	
C26	Minimum Wage Fixing Machinery Convention 1928	09.06.1961	
C29	Forced Labour Convention 1930	05.04.1950	

C41	Night Work (Women) Convention (Revised) 1934	02.09.1950	Denounced
C45	Underground Work (Women) Convention 1935	20.12.1950	
C58	Minimum Age (Sea) Convention (Revised) 1936	18.05.1959	
C63	Convention concerning Statistics of Wages and Hours of Work 1938	25.08.1952	
C80	Final Articles Revision Convention 1946	10.09.1950	
C81	Labour Inspection Convention 1947	03.04.1950	
C87	Freedom of Association and Protection of the Right to Organise Convention 1948	15.11.1995	
C89	Night Work (Women) Convention (Revised) 1948	31.03.1966	Denounced
C90	Night Work of Young Persons (Industry) Convention (Revised) 1948	18.05.1959	
C95	Protection of Wages Convention 1949	27.10.1983	
C96	Pre-charging Employment Agencies Convention (Revised) 1949	30.04.1958	
C98	Right to Organise and Collective Bargaining Convention 1949	13.12.1972	

C99	Minimum Wage Fixing Machinery (Agriculture) Convention 1951	05.04.1954
C100	Equal Remuneration Convention 1951	01.04.1993
C103	Maternity Protection Convention (revised) 1952	01.04.1993
C106	Weekly Rest (Commerce and Offices) Convention 1957	27.10.1983
C108	Seafarers Identity Documents Convention 1958	24.11.1995
C110	Conditions of Employment of Plantation workers Convention 1958	24.04.1995
C111	Discrimination (Employment and Occupation) Convention 1958	27.11.1998
C115	Radiation Protection Convention 1960	18.06.1986
C116	Final Articles Revision Convention 1961	26.04.1974
C131	Minimum Wage Fixing Convention 1970	17.03.1975
C135	Workers Representatives Convention 1971	16.11.1976
C138	Minimum Age for Admission to Employment 1973	11.02.2000

C144	Tripartite Consultations to Promote the Implementation of ILO Convention 1976	17.03.1994
C160	Labour Statistics Convention 1985	01.04.1993

Humanitarian Law Conventions Ratified by Sri Lanka

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field 1949
Ratified on 28th February 1959.

Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea 1949
Ratified on 28th February 1959.

Geneva Convention Relating to the Treatment of Prisoners of War 1949
Ratified on 28th February 1959.

Geneva Convention Relating to the Protection of Civilian Persons in Time of War 1949
Ratified on 28th February 1959.

Schedule II

Some Human Rights Instruments not Ratified by Sri Lanka

- Optional Protocol II to the International Covenant on Civil and Political Rights.
- Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity 1968.
- ILO Convention (No. 105) concerning the Abolition of Forced Labour.
- Declaration regarding Article 21 of the above (relating to the entertainment of complaints by one State Party against another).
- Declaration regarding Article 22 of the above (relating to the entertainment of complaints by individuals).
- ILO Convention (No. 102) concerning Minimum Standards of Social Security.
- ILO Convention (No. 143) concerning Migrants in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers.
- ILO Convention (No. 122) concerning Employment Policy.

- ILO Convention (No. 141) concerning Organisations of Rural Workers and Their Role in Economic and Social Development.

- ILO convention (No. 151) Concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service.

- Convention Relating to the Status of Refugees 1951

- Protocol to the 1951 Refugees Convention 1967

- Protocol Additional to the Geneva Convention of 12th August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)

- Protocol Additional to the Geneva Convention of 12th August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)

Schedule III

Fundamental Rights Cases decided in 2001

Article 11

Nesarasa Sivakumar v. *Officer in charge, Special Task Force Camp, Chettipalayam and Others,* S.C. Application No. 363/2000, S.C. Minutes 01/10/2001.

Priyal Kumara Liyanarachchi v. *O.I.C. Remand Prison, Embilipitiya and Others,* S.C. Application No. 971/99, S.C. Minutes 19/01/2001.

Article 11, 12(1), 13

Chaminda Caldera and Others v. *O.I.C., Police Station, Seeduwa and Others,* S.C. Application No. 62-63/99, S.C. Minutes 06/02/2001.

Article 11, 13(1)

Pushpa Priyantha Dias Abeysekera Jayawardene v. *Ekanayake and Others,* S.C. Application No. 860/99, S.C. Minutes 27/03/2001.

Article 11, 13(1) & 13(2)

Mohamed Haniffa Sithi Mariliya v. *O.I.C. Police Station, Nittambuwa and Others,* S.C. Application No. 293/99, S.C. Minutes 21/09/2001.

M.M. Sarath v. *O.I.C. Police Station, Pugoda and Others,* S.C. Application No. 586/2000, S.C. Minutes 18/05/2001.

Ubeysinghe Weerabaddana Arachchige Neil Ajantha and Others v. *Inspector of Police Station, Wattala and Others*, S.C. Application No. 967-968/97, S.C. Minutes 01/10/2001.

Article 12, 13 & 14

Dr. Mario Gomez v. *University of Colombo and Others*, S.C. Application No. 833/99, S.C. Minutes 25/05/2001.

Article 12(1)

Don. Ravi Aloysius Sri Kumara Jayakody v. *Sri Lanka Insurance and Robinson Hotel Co. Ltd and Others*, S.C. Application 769/98, S.C. Minutes 13/07/2001

Leo Samson v. *Sri Lankan Airlines Limited and Others*, S.C. Application No. 791/98, S.C. Minutes 11/01/2001.

Wickramatunga and Others v. *H.R. de Silva and Others*, S.C. Application No. 551/98, S.C. Minutes 31/08/2001

Kanagasabai Rajapuvaneeswaran and Others v. *Bank of Ceylon and Others*, S.C. Application No. 869/99, S.C. Minutes 11/12/2001.

Sandatanna Garments (Pvt) Ltd v. *The Textile Quota Board and Others*, S.C. Application No. 298/99, S.C. Minutes 11/12/2001.

Ratnayake Mudiyanselage Ranjith Chula Bandara v. *Urban Development Authority and Others*, S.C. Application No. 698/2000, S.C. Minutes 28/11/2001.

Sunil Lakshman Sirisena v. *The Bank of Ceylon and Others*, S.C. Application No. 981/97, S.C. Minutes 11/06/2001.

Y.T. Thushanga v. *University of Colombo and Others*, S.C. Application No. 804/99, S.C. Minutes 11/05/2001.

Herath v. *Air Commodore and Others*, S.C. Application No. 760/99, S.C. Minutes 24/05/2001.

Article 12(1), 13(1), 13(2)

Madhani Shahib Tajudeen v. *P. Jayawickrama and Others*, S.C. Application No. 216/2000, S.C. Minutes 22/11/2001

Article 12(1) & 14(1) (a)

Egodawele and Others v. *Dayananda Dissanayake and Others*, S.C. Application No. 412/99, S.C. Minutes 03/04/2001

Article 12(1), 14(1) (a), 14(1) (g)

Udaya Prasanna Withanage v. *Sarath Amunugama and Others*, S.C. Application No. 516/2000, S.C. Minutes 02/08/2001.

Victor Ivan v. *Hon. Sarath N. Silva and Others*, S.C. Application No. 898-901/99, S.C. Minutes 28/02/2001.

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Emil Franklin Kronemberg v. *Senior Superintendent of Police, Colombo Fraud Investigation Bureau and Others*, S.C. Application No. 58/99, S.C. Minutes 11/06/2001.

Nayana Kumudinie Lasanthi Vidanage v. *Udaya Seneviratne (Inspector of Police) and Others*, S.C. Application 148/99, S.C. Minutes 26/09/2001.

TABLE OF CASES

A.H. Wickrematunge and three others v. *H. R. de Silva, Chief Valuer, Department of Valuation and 14 others* S.C Application 551/98, S.C. Minutes 31.8.01

Abasin Banda v. *Gunaratne* (1995) 1 Sri LR 244

Ajay Hasia v. *Khalid Miyib* A.I.R 1981 S.C 487

Amal Sudath Silva v. *Kodituwakku, Inspector of Police and others* (1987) 2 Sri L.R. 119

Arkansas Gas Co v. *Railboard Commssion* 261 U.S 379 at 384

Bandara v. *Premachandra* (1994) 1 Sri L.R. 301

D.A. Nethasinghe v. *Ratnasiri Wickremanayake, Minister of Public Administration, Home Affairs and Plantation Industries and four others* S.C Application 770/99, S.C. Minutes 13.7.01

D.R.A. Sri Kumar Jayakody v. *Sri Lanka Insurance and Robinson Hotel Co Ltd. and eleven others* S.C. Application 769/98, S.C Minutes 13.7.01

Dr. Rajitha Senaratne, Mr. P. Chandrasekeran & Mr Cegu Isadeen v. *Minister Dissanayake* No 1/2000

Egodawela and Others v. *Dissanayake and others* S.C Application 412/99, S.C. Minutes 3rd April 2001

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In re The Thirteenth Amendment to the Constitution and the Provincial Councils Bill (1987) 2 Sri. L.R. 312

Jayawardene v. *Dharani Wijayatilleke, Secretary Ministry of Justice and others* (2000) 1 Sri L.R. 132

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Karunadasa v. *Unique Gemstones* (1997) 1 Sri L.R. 256

Karunatillaka v. *Dayananda Dissanayake,The Election Commissioner and others* (1999) 1 Sri L.R. 157

King v. *Podisingho* 16 N.L.R. 16

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P.K. Liyanarachchi v. *Officer in Charge, Remand Prison, Embilipitiya and Six others* S.C. Application No. 971/99 S.C. Minutes 19.1.01

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Ramupillai v. *Festus Perera* (1991) 1 Sri L. R. 11

Victor Ivan v. *Hon. Sarath N. Silva and two others* S.C. Application 898/99, S.C. Minutes 28.2.01

Visuvalingam v. *Liyanage* (1984) 2 Sri L.R. 123

Vithanage Don Sunil Gunaratne v. *The Homagama Pradeshiya Sabha and others* S.C. Application 210/97, S.C. Minutes 3rd April 1998

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Index

SRI LANKA:
STATE OF HUMAN RIGHTS
2002

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The report considers the 17th Amendment to the Constitution; the judiciary in 2001; the impact of the electricity crisis on socio-economic rights and sustainable development; judicial protection of human rights; and the public service in Sri Lanka. The report, therefore, represents an important watershed with regard to human rights in Sri Lanka.

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