Sri Lanka: State of Human Rights 2005

Law & Society Trust

SRI LANKA:
STATE OF HUMAN RIGHTS 2005

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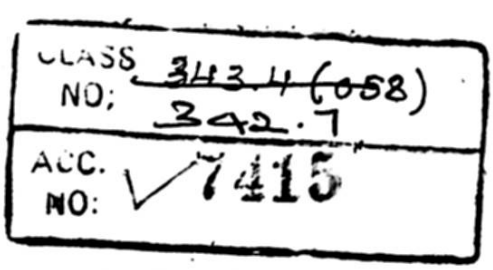

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Abbreviations

AG	Attorney-General
AHRC	Asian Human Rights Commission
AI	Amnesty International
ASP	Assistant Superintendent of Police
AV	Accredited Visitor
BSP	Protocol on Bio-safety
CA	Competent Authority
CA Minutes	Court of Appeal Minutes
CAT Act	Convention Against Torture Act
CC	Constitutional Council
CDA	Cosmetics and Drugs Authority
CEA	Central Environmental Authority
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CENWOR	Centre for Women's Research
CMC	Colombo Municipal Council
CMEV	Centre for Monitoring Election Violence
CPA	Centre for Policy Alternatives
CRC	Convention on the Rights of the Child
CRM	Civil Rights Movement
EPDP	Eelam People's Democratic Party
FFP	food, feed and processed products
FPP	'first past the post'
GM	genetically modified
GMOs	enetically modified organisms
GURTS	Genetic Use Restriction Technologies
ICCPR	International Covenant on Civil and Political Rights

ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Commission of Jurists
IGP	Inspector General of Police
ILO	International Labour Organisation
INGOs	International Non-Governmental Organisations
JHU	Jathika Hela Urumaya
JJPA	Juvenile Justice Procedure Act
JSC	Judicial Service Commission
JVP	Janatha Vimukthi Peramuna
LMOs	Living modified organisms
LO	Leader of the Opposition
LTTE	Liberation Tigers of Tamil Eelam
MOU	Memorandum of Understanding
MP	Member of Parliament
NCPA	National Child Protection Authority
NESHOR	NorthEast Secretariat on Human Rights
NGOs	Non-Governmental Organisations
NIC	National Identity Card
NLR	New Law Reports
NPC	National Police Commission
OIC	Officer in Charge
OMCT	World Organisation on Torture
P/CA	President / Court of Appeal
PA	People's Alliance
PGIM	Post Graduate Institute of Medicine
PR	Proportional Representation
PSC	Public Service Commission
PTA	Prevention of Terrorism Act

RDA	Road Development Authority
SC Minutes	Supreme Court Minutes
SCF	Save the Children Fund
SLBC	Sri Lanka Broadcasting Corporation
SLFP	Sri Lanka Freedom Party
SLMC	Sri Lanka Muslim Congress
SLMM	Sri Lanka Monitoring Mission
SLR	Sri Lanka Law Reports
SLRC	Sri Lanka Rupavahini Corporation
SPC	State Pharmaceutical Corporation
SPS	Agreement on the Application of Sanitary and Phytosanitary Measures Agreement
STF	Special Task Force
STV	Single transferable vote
TBT	Agreement on Technical Barriers to Trade Agreement
TNA	Tamil National Alliance
TPMU	Torture Prevention and Monitoring Unit
TRIPS	Agreement on Trade Related Aspects of Intellectual Property Rights
TRO	Tamil Rehabilitation Organization
UDHR	Universal Declaration of Human Rights
UGC	University Grants Commission
UNDP	United Nations Development Programme
UNHRC	United Nations Human Rights Committee
UNICEF	United Nations Children's Fund
UNP	United National Party
UPFA	United People's Freedom Alliance
WTO	World Trade Organization

Foreword

This report seeks to set out the current status of human rights in Sri Lanka and to assess the extent to which Sri Lanka has fulfilled its duty, in conformity with the country's international obligations, to protect the fundamental rights of its citizenry. Thus, the report stands as an important milestone in highlighting both developments and setbacks in the status of human rights in Sri Lanka. Constitutional guarantees and other legal standards and obligations, both domestic and international, as well as the implementation and enforcement of those standards are appraised from a largely human rights perspective and the impact of inherent restrictions highlighted. The report also seeks to make recommendations aimed at bettering human rights standards and approaches in Sri Lanka.

Sri Lanka: State of Human Rights 2005 contains the following chapters;

- Judicial protection of Human Rights
- Integrity of the person
- The 17th Amendment to the Constitution: A review of some Institutions under it
- The National Human Rights Commission and the National Police Commission
- The Right to Religion
- The Right to Vote
- The Right to Health as a Socio-Economic Right in Sri Lanka: its scope and limits
- Analysis of the Prevention of Domestic Violence Bill and the Women's Rights Bill
- Rights of the Child
- Recent Developments in Biotechnology and Bio-safety in Sri Lanka.

The report was co-ordinated by the Law & Society Trust and is the result of a long process of research, reviewing and editing. Individuals with specialised knowledge in the relevant areas were assigned chapters. The chapters were reviewed for accuracy, objectivity and clarity of presentation. The compiled report was then carefully edited to ensure uniformity of style and approach, as far as practicable. Given that the issues covered within the report are approachable from a

variety of viewpoints, overlaps between chapters is inevitable, with some issues being covered more comprehensively than others.

The report also includes a list of international human rights conventions to which Sri Lanka is a signatory and a list of those which Sri Lanka is yet to ratify. Also included is a list of judgments, involving alleged infringements of fundamental rights, delivered by the Supreme Court in the year under review.

This report remains an integral part of ongoing attempts to ensure that the State, and those non-state actors referred to in the report, actively upholds its constitutional and international obligations and responsibilities to respect, safeguard and strengthen human rights in Sri Lanka. It is further hoped that this report would serve to facilitate dialogue both between and within civil society organisations and the State in order to afford effective protection and promotion of human rights within the country.

Law & Society Trust
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I

OVERVIEW

Elizabeth Nissan*

1. Introduction

This year's volume contains eight chapters reviewing a range of human rights issues in Sri Lanka during 2004. Although the cessation of hostilities between the Government of Sri Lanka and the Liberation Tigers of Tamil Eelam (LTTE) remained in force through 2004, no progress was made towards resuming peace talks between the two sides during the year and the human rights situation in the north east remained highly volatile. This was particularly evident in the run-up to the parliamentary elections on 2nd April, and in the months following the split from the LTTE of the eastern faction under the leadership of Colonel Karuna. By the end of November, following LTTE leader Velupillai Prabhakaran's 'Heroes' Day' speech threatening a return to hostilities if peace talks did not resume on the LTTE's terms, there was considerable concern that a return to armed conflict might be

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imminent. However, no such action had been taken by 26 December, when the Indian Ocean tsunami hit Sri Lanka's coastline with devastating results, reportedly killing over 30,000 people and rendering over 400,000 more homeless. Communities located on the southern and eastern coasts were hardest hit. At the end of the year, it was starting to become clear that the response to the tsunami was itself likely to generate a range of new human rights concerns. However, as such issues were only just starting to emerge at the end of 2004 and would be more clearly articulated in the following months, they cannot be included in this volume.

2. Parliamentary Elections and the Right to Vote

The parliamentary elections of 2 April resulted in a coalition headed by President Kumaratunga's United People's Freedom Alliance coming to power following a campaign which was deemed to have been fair for the most part, with the notable exception of the north east. In the north east, the elections were marred by violence, intimidation and murders, particularly of candidates and supporters of parties opposed to the LTTE-backed Tamil National Alliance (TNA). In the event, the TNA won the great majority of seats in the north east. In the chapter in this volume on "The Right to Vote," Asanga Welikala makes the following important comment on the conduct of the election in the north east: "*Noteworthy here is that most of the intimidation and attacks were against candidates and parties opposed to the LTTE-backed TNA. The LTTE enjoys tangible political power in the North and East, even outside the Districts of Killinochchi and Mullaitivu. Given the LTTE's stated desire for an institutionally expressed role in the governance of the North-East, and its de facto power as an almost omnipotent non-State political actor in the region, it is cause for serious apprehension that the legitimacy of the election and the conditions for a free and fair campaign were to be in question only in areas under its influence.*"

Another area of concern during the election campaign, which would have had an impact on the conduct of the election in the south and is also discussed by Welikala, was the manner in which the state media institutions behaved during the election campaign, revealing "the real nexus between the state media institutions and the political party that controls them." When the Election Commissioner attempted to enforce guidelines on fair and balanced reporting to try to stem the

blatant bias in the state media towards the ruling party, the Sri Lanka Rupavahini Corporation took the extraordinary step of attempting – unsuccessfully, as it turned out – to impugn his actions through a fundamental rights application to the Supreme Court.

Welikala devotes much of the discussion in "The Right to Vote" to reviewing the constitutional and statutory legal provisions for elections in Sri Lanka, the manner in which they are implemented and the status of the current debate on electoral reform. He notes that the April 2004 elections were the first to be held under the provisions of the 17th Amendment to the Constitution, introduced in 2001, which abolished the office of Commissioner of Elections and instead provides for the creation of an independent Election Commission to oversee the conduct of free and fair elections. Following the President's refusal to appoint a Chairman of the Election Commission on the basis of the Constitutional Council's recommendation, the Election Commission was not in fact appointed. Instead, its powers were exercised by a single Commissioner of Elections. The President's refusal to act on the recommendation of the Constitutional Council was probably itself unconstitutional, and militated against the very spirit of the 17th Amendment: "*If the President as the leader of a political party and elected chief executive continued to retain a discretion in appointments to the new body, then the entire scheme of Article 41B is negated. In violation of the letter and the spirit of the Seventeenth Amendment, however, the Election Commission remains unconstituted to this day.*"

As Welikala states, "In deeply divided societies like Sri Lanka, characterised by ethno-political tensions, democracy, and how it works, are inherently problematic issues." The first-past-the-post system which was in force from 1931 to 1978 entrenched majoritarian rule, while proportional representation (introduced under the 1978 constitution) should enhance pluralism and inclusivity. Yet proportional representation as practised in Sri Lanka also has its weaknesses, as discussed in Welikala's review. In conclusion, Welikala advocates reform based on the German model of democracy, whereby voters have two votes – one for a constituency representative and one for a political party – which "*provides for the best aspects of FPP and PR to be blended in a system that also takes into consideration matters like the appropriate role of political party leaderships in the electoral process, the need for stability, and fair representation of most, if not all, stake-holders in society.*"

3. The 17th Amendment to the Constitution and the Institutions arising from it

It was seen above that considerable controversy surrounded the failure to appoint an Election Commission in 2004, following the President's disagreement with the recommendation of the Constitutional Council. The Constitutional Council had been created in 2002 under the provisions of the 17th Amendment. As explained by M C M Iqbal in his chapter on this subject, "One of the prime objectives in creating the Constitutional Council was to free the Commissions created by the 17th Amendment from political interference." Thus, it became the role of the Constitutional Council to recommend appointments to independent commissions such as the Public Service Commission, the Judicial Service Commission, the Election Commission, the Police Commission, the Bribery Commission and the Human Rights Commission. The President no longer has any power to make such appointments independently, but can only appoint persons recommended by the Constitutional Council. This most significant attempt to reduce the possibility for political interference and corruption in the administration of the country, however, itself contains serious flaws, as discussed by Iqbal in this chapter. With regard to the very membership of the Council, Iqbal summarises his concerns as follows: "*The Constitutional Council is one of the most important bodies created by the Constitution to ensure justice and fair play in the governance of the country, yet its members have no binding interest in the institution. At a critical moment such as when the Parliament stands dissolved, the Speaker, the Prime Minister and the Leader of the Opposition could not justifiably be expected to perform their functions in the CC diligently and judiciously when they would need to be busy electioneering to ensure their re-election. It can also be argued that when Parliament is dissolved, there is no Speaker and no Leader of the Opposition, and that the Prime Minister exists only as the caretaker Prime Minister. Hence, they cannot legitimately continue to be members of the Constitutional Council at such a time. What is more, article 41E of the 17th Amendment states that it is the Speaker who is authorised to convene meetings of the Constitutional Council and he cannot legitimately summon a meeting while he is no longer Speaker, as Parliament would have ceased to exist at such time.*" The haste to push this piece of legislation through, which is also discussed by Iqbal, has clearly left its mark.

We have already seen that the President refused in the case of the Election Commission to appoint the person recommended by the Council as Chairman. Delays stemming from other problems with the recommendation procedure also affected the Bribery Commission, which remained with unfilled vacancies for some two years, during which period of time it was not able to function. Iqbal reviews the provisions for and the work of the Bribery Commission, the Public Service Commission and the Administrative Appeals Commission in detail. He sees the institutions created under the 17th Amendment as "undoubtedly a significant step towards establishing a culture of good governance in the country," despite the flaws in their constitution and the practical obstacles they face in putting their remits into practice. He urges those charged with the responsibility of the work of these institutions to "live up to the expectations placed on them" and also calls for changes to be made to the Constitutional provisions establishing these institutions to enable them to become fully independent and effective.

The work of another institution created under the 17th Amendment – the National Police Commission (NPC) – is discussed separately by Basil Fernando. Fernando describes the NPC as "one of the most potentially powerful institutions created by the 17th Amendment." Its task is no less than to eliminate the politicisation of the police force which in the past has led to the police being used by members of the party in power as a tool for their own ends.

Fernando reviews the powers and functioning of the NPC and reaches the conclusion that while its "constitutional mandate ... is enormous," its resources are "miniscule." Fernando argues that, "of all national institutions created in recent times, perhaps the one that bears the most vital mandate is the National Police Commission, because without a radical reform of the police, brought from within, the issues of social stability and the increase of crime and corruption in Sri Lanka cannot be controlled." For the NPC to be able to fulfil its mandate, however, it will need to develop an imaginative and innovative strategic plan which Fernando hopes will provide the basis for material support from multilateral and bilateral agencies.

4. National Human Rights Commission

Fernando also reviews the work during 2004 of the National Human Rights Commission. During the year under review, the new Commissioners, who had been appointed in mid-2003, put forward a three year strategic plan to guide its work. Priority areas included developing programmes for the prevention of torture through a "zero-tolerance policy" and developing the Commission's capacity to undertake fact-finding missions to investigate systematic human rights violations on a wide range of important issues. While the plan was ambitious in conception, in Fernando's analysis it was disappointing in practice, as the Commission was not able to undertake much of the proposed work during the year. Many of the problems of implementation are seen to derive from resourcing issues. Commission staff are poorly qualified, lack professional inquiry and mediation skills, and have not been encouraged to foster a human rights culture in the workplace in the past (indeed, some have reportedly worked against the very mandate of the Commission); the Commissioners are not employed full-time and so cannot exercise adequate supervision; the Commission's education programmes have been ineffective. There are, however, also external factors that impede the work of the Commission, as Fernando notes. For example, officers of the Commission attempting to make unannounced visits to places of detention came under attack at Paiyagala and Jaffna Police Stations, and the Inspector General of Police has denied the Commission the right to make unannounced visits, requiring that notice be given and thereby undermining the very purpose of such visits. In conclusion, Fernando urges the Commission to resolve the difficult issue of the quality of its staff. He also cites as a model for the future the swift, proactive response of the Commission to the shooting dead of torture victim Gerald Perera before he was due to give evidence in the High Court in November 2004.

Further aspects of the Commission's work are also discussed in the chapters on 'Integrity of the Person' and 'Rights of the Child'.

5. Integrity of the Person

Just as the National Human Rights Commission made the prevention of torture a priority issue, so too does Amila Jayamaha see as a

major concern the high levels of torture in police custody that continue to be reported, sometimes leading to death, together with the often linked issue of arbitrary arrest and detention. As well as describing a range of such cases, Jayamaha also examines the casework of the Torture Prevention and Monitoring Unit (TPMU) established by the HRC as part of its torture-prevention strategy.

A particularly worrying trend in reports of extra-judicial killings by the police is also described. The shooting of Gerald Perera before he was due to give evidence against the police, mentioned above, is discussed more fully in this chapter alongside a number of other suspicious killings by the police during a crack-down against criminality. A number of criminal suspects were shot dead by police during the year The police claimed that their victims had been shot while "resisting arrest" or "attempting to escape". In numerous cases, however, police described similar circumstances as the context for the killing, leading to suspicions that the police had decided to wage their campaign against crime illegally. Indeed, the police versions of these killings kindling memories for the Civil Rights Movement of the manner in which the leaders of the JVP insurgency had been killed in 1989. Clearly any trend towards extra-legal methods of crime control must be decisively curbed through thorough and impartial investigation leading to the prosecution of any person responsible for extrajudicial execution.

The chapter on "Integrity of the Person" also discusses the continuing high levels of abuses reported in the north east, in areas under the control or influence of the LTTE. The vast majority of ceasefire violations involving integrity of the person, investigated by the Sri Lanka Monitoring Mission, were committed by the LTTE. Of particular concern in this regard were killings, torture and abductions committed by the LTTE, and their continuing recruitment of child soldiers. As Jayamaha says, "*continued recruitment of children on the part of the LTTE is a violation of the Ceasefire Agreement and also reneges on numerous commitments made by the LTTE to end their recruitment and use of child soldiers. This is evidenced by the disparity between the number of recorded recruitments and the number of child combatants released by the LTTE. Between January 2002 and 01 November 2004, UNICEF documented a total of 4,600 cases of under-age recruitment. During the same period, the LTTE was reported to have released only 1,208 children from its forces.*"

An interesting international development relating to integrity rights was the outcome of an individual submission made to the Human Rights Committee by Nallaratnam Singarasa concerning his arrest, detention, torture, trial and conviction under the Prevention of Terrorism Act. Singarasa had been arrested in July 1993 and convicted in September 1995. In October 1995 he was sentenced to 50 years' rigorous imprisonment, based on an alleged "confession", a sentence which was reduced to 35 years in July 1999. In short, the Committee found that Singarasa had been denied a fair trial and that the State was obliged to provide him with "an effective and appropriate remedy, including release or retrial and compensation." In addition, the Committee required the State "to avoid similar violations in the future and ... ensure that the impugned sections of the PTA are made compatible with the provisions of the Covenant."

Human rights activists have long argued for the repeal or reform of the Prevention of Terrorism Act in keeping with Sri Lanka's international human rights obligations. The Sri Lankan government, however, chose to ignore the Committee's findings. Despite the Committee's insistence that its findings be enforced within 90 days, no steps had been taken to reform or repeal the PTA by the end of 2004 and Singarasa himself remained imprisoned.

6. Judicial Protection of Human Rights

Torture persists unabated in Sri Lanka despite numerous directions by the Supreme Court for effective preventative action to be taken by the National Police Commission, the Police Department and other relevant bodies. In some cases sizeable awards have been made as compensation – although victims certainly do not always receive what is due – and the use of public funds to meet the State's liability has raised some controversy. In her chapter on "Judicial Protection of Human Rights", Kishali Pinto Jayawardena shifts the emphasis firmly away from this issue: "It is high time ... that the discussions moved away from the question as to the quantum of compensation that ought to be awarded by the Court in these cases (an absurd question in any event) to more significant issues of impunity..." In numerous cases, individual officers have been identified as being responsible for torture and the Court has directed that disciplinary action should be taken by the authorities, but impunity is nevertheless allowed to prevail. Jayawardena asks, "*Why is it that even where police officers (junior*

as well as senior) have been identified as personally responsible, we have seen no internal departmental action taken against them or successful prosecution in courts of law? The deterrent effect of such action or prosecution would be incalculable. These directions of the Supreme Court have been rendered nugatory and of no avail in the most profound sense of the term."

Important judicial issues also arise when a victim of torture dies in police custody. Can the victim's relatives have *locus standi* in a fundamental rights case on behalf of the deceased? Jayawardena discusses the important judicial developments on this question so far in Sri Lanka, whereby a person's heirs have been recognised as having an entitlement to bring a case to the Court when a death has occurred as a result of torture. At present, this is based on the recognition that violation of the rights of the victim must have a remedy, access to which in effect devolves to their relatives. Jayawardena, however, draws on the reasoning of the UN Human Rights Committee to demonstrate how this line of judicial reasoning could be further expanded: "*This would involve an extended interpretation of Article 11 read together with Article 126(2) as including a direct violation not only of the rights of the victim but also the rights of his family members not to be subjected to torture or to cruel, inhuman or degrading treatment as a result of the treatment meted out to the victim.*"

Turning to judicial issues arising from cases concerning freedom of expression, the case of a television news editor and his crew who were denied entry to the President's House to film the swearing in of then Prime Minister Ranil Wickremasinghe led to a determination on the limits of Presidential immunity. The Court found that the refusal constituted "naked discrimination," and went on to hold that a subordinate cannot use the defence of a Presidential directive to justify an illegal and unconstitutional act.

The Supreme Court's defence of constitutionally guaranteed rights is further discussed with regard to the right to equality in an important case regarding land acquisition for the Southern Expressway. Here the "public trust" doctrine was strongly expressed in the Court's decision. As explained by Jayawardena, this means "*that powers vested in public authorities are not absolute or unfettered but are held in trust for the public, to be exercised for the purposes for which they*

have been conferred, and that their exercise is subject to judicial review by reference to those purposes."

Jayawardena expands the coverage of her chapter to include not only discussion of the Supreme Court's decisions in fundamental rights cases, but also its deliberations on the constitutionality of a Bill prohibiting religious conversions and another which sought to make Buddhism the official religion of the Republic. She also discusses the growth of writ applications to the Court of Appeal under Article 140 of the Constitution alleging denial of a legal right, presenting details of case material to show that "[w]hile the inter-linking of fundamental rights protection and the invocation of writ remedies became stronger, these developments were buttressed by judicial observations in regard to the manner in which the constitutional enshrining of fundamental rights has impacted positively on the writ jurisdiction of the appellate courts."

A final welcome addition to the chapter is inclusion of the decisions of the UN Human Rights Committee in response to individual communications under the Optional Protocol of the ICCPR. In 2004, the HRC found that *Ravaya* editor Victor Ivan's right to freedom of expression had indeed been violated by the bringing of three defamation charges against him in 1996 and 1997. That these charges were then left pending for several years had a "chilling effect" on his freedom of expression. The second decision of the HRC in the Singarasa case was already discussed above in the context of integrity rights, resulting in the HRC's stipulation that the government must amend or repeal the Prevention of Terrorism Act if it is to fulfil its international obligations. Jayawardena points out that these decisions of the HRC buttress those made by the Sri Lankan Supreme Court, and lauds the Court for drawing on the ICCPR in reaching its own determinations.

7. Rights of the Child

In the chapter on children's rights, Manori Gunatilleke provides an update on events during 2004 pertaining to child rights covering the following main issues: the continuing recruitment by the LTTE of children into the armed cadres; legislative developments relating to children's rights; new measures undertaken by the police and the Ministry of Justice to monitor and prevent child abuse as well as to

expedite the backlog of criminal cases in which child abuse is alleged; and the work of the National Child Protection Authority.

Child abuse continues at an alarming rate in Sri Lanka, as the statistics cited by Gunatilleke show: "Police Women & Children's Bureau statistics reveal 2,242 cases of grave offences against children and 1,026 minor offences against children for the year 2004," which represents a significant increase from the 1,579 cases reported in the previous year. One response during 2004 was for the Attorney General's Department to initiate a special unit to expedite the backlog of an estimated 1,500 child abuse cases that had built up at the time the unit was established. These cases include charges of statutory rape, grave sexual abuse, cruelty to children and sexual harassment.

Another major issue is the continuing recruitment by the LTTE – sometimes by forcible means – of child soldiers during 2004. According to Gunatilleke, over 1,015 children were recruited by the LTTE and 650 were formally released during 2004.

8. The Right to Religion

The cases referred to above, involving the Supreme Court determining the constitutionality of two Bills on religion, arose in a context of heightened concern within some religious communities about the activities of evangelical Christian churches in Sri Lanka, and the rapid rise in number of such churches in recent years. In his chapter on "The Right to Religion," R K W Goonesekere discusses the background to the issue and the manner in which decisions of the Supreme Court have restricted the fundamental right to freedom of religion in its determinations on these matters. In refusing the constitutionality of various Incorporation Bills presented before parliament on behalf of evangelical churches, the Court ruled in one case that economic activity by such a group was not strictly religious, and suggested that a "fetter of allurement" might taint people's freedom to choose their own religion. Similarly, two years later the Court ruled that the process of "uplifting" socio-economic conditions for altruistic reasons might distort the freedom to observe a religion of one's choice. In 2003, the objection to an Incorporation Bill was based on the argument that propagating Christianity by providing material benefits would threaten the future existence of Buddhism. In response, the Court reasoned that the right to manifest a religion did not include spreading a religion, a

determination which Goonesekere argues "has wrongly cut down the scope of religious freedom in Articles 9 and 10 to the rights in Article 14(1)(e)."

With the continuing growth of the evangelical churches, pressure grew in some quarters for an anti-conversion law to be passed. In the event, it was a Buddhist monk who introduced a Private Member's Bill entitled "Prohibition of Forcible Conversion of Religion" to create a new offence. The constitutionality of the Bill was challenged by 21 petitioners and supported by exactly the same number of intervenient petitioners. Goonesekere's discussion examines the reasoning of the Court with respect to various clauses of the Bill, and concludes that in the end "[t]here were no winners or losers. Both sides were given something by the Determination, which has put stumbling blocks in the way of an anti-conversion law." Discussing various difficulties of interpretation arising from the determination, Goonesekere argues that "*[w]here the Determination fails is in not giving a clear interpretation of the scope of religious freedom. The right to religious belief and the right to adopt a religion may be unconditional but there still remains the question whether and what limits could be placed on the right to spread a religion.*" This matter, as yet, remains unresolved.

9. Women's Rights

The chapter on "Women's Rights" concentrates on discussing two Bills aimed at strengthening the legal framework for women's rights in Sri Lanka: the Prevention of Domestic Violence Bill and The Women's Rights Bill. The author, Ambika Satkunanathan, reviews the national and international legal frameworks relating to domestic violence before critically examining the provisions of the Bill and finding it lacking. In particular, the Bill focuses exclusively on the issue of protection orders and fails to take a holistic approach to the issue of domestic violence, failing even to convey the message that domestic violence is a serious crime. In Satukunanthan's analysis, "the Prevention of Domestic Violence Bill appears to be an instance of the government drafting legislation to merely fulfil international obligations without regard for the effect of the law or the socio-economic realities facing women." Satkunanathan's review of The Women's Rights Bill is considerably more positive. This Bill seeks to convert the National Committee on Women into a Commission on Women with enhanced powers. Satkunanathan reviews the provisions relating to the Commission's

objectives, membership, powers and financing and concludes that the Bill is "an example of a genuine effort to protect and promote the rights of women." She cautions, however, that women's status is not solely dependent on law reform, and urges the government to adopt an approach which takes into account "historical, socio-economic and cultural realities and seeks to eliminate systemic and institutional inequality."

10. The Right to Health

This chapter reviews Sri Lanka's constitutional and statutory provisions relating to the right to health, as well as judgements of the Supreme Court relating to this right, and also asks whether the country has an adequate institutional and administrative framework to fulfil it statutory obligations. The author, J de Almeida Guneratne, finds that "the Supreme Court has impliedly recognised a Constitutional right to health" in Sri Lanka and that this right is justiciable. Nevertheless, through comparing the Sri Lankan situation with that in Argentina, India, South Africa and Venezuela, Guneratne is led to conclude that "*objective express constitutional provisions must be incorporated in the Constitution, perhaps with additional entrenched provisions providing that the health budget cannot be cut with further provision to increase the health share of the budget should such demands arise. Only then would there be a framework to make real the right to health with all its concomitant connotations. The other avenues in relation to the right that exist at present are only lesser options.*"

11. Biotechnology, bio-safety and socio-economic rights

As Avanthi Weerasinghe writes in her chapter on biotechnology, "Biotechnology has immense potential to provide solutions to the growing demand for food and health required by the increasing world population." On the other hand, there are also risks to human health and the environment involved in biotechnology – and in particular, in recent developments in the production of genetically modified (GM) organisms and crops. Further, ethical issues also arise in the context of the patenting regime embodied in the World Trade Organisation's Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). In an attempt to address these concerns, the Cartagena Protocol on Bio-safety was adopted in 2000, and was ratified by Sri Lanka in 2004. Sri Lanka is thus now "obliged to develop its own

national regulatory framework for the safe transfer, handling, use and release of genetically modified organisms (GMOs) and products resulting from modern biotechnology."

Weerasinghe provides a detailed review of developments relating to these important issues, providing an overview of the international agreements relating to bio-safety before discussing Sri Lanka's own response in establishing a National Sub-Committee on Legal Issues under the National Bio-safety Framework to look into the legal aspects of biotechnology and related issues. The Sub-Committee made a range of detailed proposals during 2004 concerning the legislation required to regulate biotechnology but by the end of the year no new laws had yet been passed. Weerasinghe discusses these proposals in the context of the sometimes conflicting international norms which apply in this field, particularly where regulation by one state party could be interpreted as being overly trade-restrictive by another. She proposes that such conflict could be avoided by adopting an approach "which serves the interest of the public at large."

II

JUDICIAL PROTECTION OF HUMAN RIGHTS

Kishali Pinto Jayawardena*

1. Introduction

The surest and most delicately balanced measuring of the adherence of a particular legal system to the rule of law posit as much an analysis of the decisions of its courts as it does, an examination of its laws.

This is so for a simple reason; the best and most conscientious of judges can work miracles with an obdurate law or legal provision while respecting thereto the basic purpose of the judicial function. Contrarily, an amoral or politicised judge can render silent even the most enlightened law or constitutional provision. This observation is particularly relevant when considering judi cial decisions during 2004, especially in regard to gross violations of civil and political rights that had serious repercussions on the healthy functioning of the country's democratic institutions.

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This chapter analyses judgements of the Supreme Court as well as Determinations of the Court in respect of bills of particular importance submitted for its review during the year in question. In addition, it engages in the examination of decisions of the Court of Appeal exercising its writ jurisdiction under Article 140 of the Constitution due to the monumentally significant impact that some of these decisions have had on rights of citizens. In so doing, it differentiates itself from previous chapters on this topic in this publication, which (subject to one exception) have substantially confined themselves to analysis of the fundamental rights decisions of the Supreme Court.[1]

This chapter also includes analysis of relevant decisions of the United Nations Human Rights Committee in response to individual communications submitted to the Committee by applicants subject to Sri Lanka's jurisdiction in terms of the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR). Given the relatively novel nature of these communications and their important impact on the obligations that the country must perform in the context of obligations incurred by the accession to and/or ratification of international treaties, this segment of the analysis is indispensable to this chapter.

2. Judicial Response of the Supreme Court in the context of Civil and Political Rights

2.1 Judicial Reasoning pertaining to the Right to Freedom from Torture and Cruel, Inhuman and Degrading Treatment (Article 11)

Wagaachige Dayaratne v IGP and Others[2]

When should a Sri Lankan dare to be a Good Samaritan? Or, in the alternative, should this be avoided at all costs, given the perils that

1 See in this regard, "Judicial Protection of Human Rights" in *Sri Lanka: State of Human Rights 2004* (Colombo: Law & Society Trust, 2004), 113-158, which first comments upon rights relevant decisions of the Court of Appeal as well as fundamental rights decisions of the Supreme Court.

2 SC(FR) Application No. 337/2003, SC Minutes 17.05.2004, judgement of Justice CV Wigneswaran with Justices Yapa and JAN de Silva agreeing. This is an expansion of an analysis by this same writer in "Focus on Rights," *the Sunday Times* , 30 May 2004.

such an intervention may involve? These are questions that have become very pertinent to us, living as we do in a society where observance of the ordinary rules of civilised behaviour has become more the exception rather than the rule.

This case illustrates the dilemma that a fifty five year old senior lawyer was placed in as a result of deciding to intervene upon seeing his neighbour's son being taken away by police officers, allegedly upon involvement in a fatal accident. Following the boy upon the entreaties of his mother, he had seen the former being dragged out of the car and kicked by an officer while on the way to the police station. When he pleaded that the boy should not be assaulted but taken to the police station, he was abused in obscene language and assaulted by other police officers coming on to the scene. When he tried to escape, he had stopped when he heard someone shouting 'shoot him.' He was then further assaulted, dragged to the police jeep and taken to the police station and detained there until his release.

The issue before the judges was not the fact of the assault and detention of the lawyer, which was admitted by the Inspector General of Police but the identification of the specific police officers who were responsible for the same. These latter officers were not the police officers who had initially taken the boy away.

In the absence of specific identification of the culpable police officers, the State was made culpable for the violation of rights of the petitioner to freedom against torture and degrading treatment, equality under the law and freedom from arbitrary arrest and detention. Responsibility arose therein for payment of the compensation amount of Rs. 500,000.

> The responsibility for the acts collectively performed by the police officers who gathered at the scene of the incident, thereafter forcibly arrested and took the petitioner to the police station at Bambalapitiya and then detained him, must fairly and squarely be placed on the State. The State is responsible for the actions of its officers.[3]

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[3] Ibid., at page 24 of the judgement.

Piquantly, the violation of the right to equal treatment is found in the fact that the police had failed to give equal treatment of the law to the lawyer (acting as a Good Samaritan and kindly neighbour) presumably because a police officer had been knocked down in the accident involving his neighbour's son and the enraged police officers had not responded well to the request of the petitioner to show restraint in their actions.

Re Responsibility Imposed Upon the State and Resultant Debate re Payments of Compensation

Imposing liability on the State, where the identity of the particular police officers responsible for the rights violation is in doubt, is, of course, an old and well-established principle.[4] The police force is an organ of the State. The State is liable to pay compensation to the victim.

The judicial stand in holding the State responsible for the payment of considerable sums of compensation in such cases has given rise to public discussion as to the merits and demerits of taxpayers in this country being called upon to bear the financial burden of such awards. This is a concern which obviously preoccupied the mind of Court in the *Dayaratne* case when it took cognisance of the fact that, ordering the State to pay compensation for violation of rights by individual police officers will drain public funds while "guilty officers get away with impunity."[5]

In some instances, the Court has withdrawn from the granting of high awards as seen in *Erandaka and Another v Halwela, OIC, Police Station, Hakmana*[6] where the petitioners were assaulted while in prison

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4 *Amal Sudath Silva v Kodithuwakku, Inspector of Police and Others*, (1987) 2 SLR 119, per Atukorale J.

5 See note 2 above, at page 24 of the judgement. The Court refers to the reluctance of the petitioner to attribute culpability to individual police officers 'for reasons best known to him.'

6 (2004) 1 SLR 268. Also, *Adhikary and Adhikary v Amarasinghe and Others*, SC(FR) Application No. 251/2002, SC Minutes 14.02.2003, another recent case again involving a police assault on a lawyer where the Court ordered Rs. 20,000/- as compensation and Rs. 5,000/- as costs to be paid by the State.

as evidenced by the medical records. The State was held liable for payment of compensation in the sum of Rs. 25,000 each to the two petitioners, in the absence of the identification of the particular prison officers responsible for the assault.

On the other hand, where specific police officers are identified as responsible for rights violations that are particularly severe in nature, these officers have been ordered to personally pay the compensation. In *Silva v Iddamalgoda*,[7] an alleged army deserter arrested by the police, died whilst in remand custody. The Court gave relief to his widow on the basis that she and her minor child were entitled to the compensation that the deceased would have received, but for his death. A sum of Rs. 700,000 was directed to be payable by the State and Rs. 50,000 each by the two errant police officers personally.

In *Wewelage Rani Fernando*,[8] where death was due to assault by prison officials rather than by the police, the State was directed to pay a sum of Rs. 925,000 while each of the three prison officials were directed to pay Rs. 25,000, amounting to one million in equal shares. In awarding this considerable sum as compensation and costs, the Court took into account the fact that the deceased was a father of three minor children. The treatment meted out to him while he was at the Negombo prison, which "painted a gruesome picture where a hapless prisoner was brutally tortured and left alone, tied to an iron door, to draw his least breath," was also a contributory factor.

If one evaluates these cases, it is evident that the issue here is most emphatically not the high awards of compensation that the conscience of the Court is moved to award, considering the most barbaric forms of behaviour that law enforcement officers and/or officers of the state engage in, at times. Take, for instance, the case of Gerald Perera, an

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7 Judgement of Justice Mark Fernando, (2003) 2 SLR 63. See discussion regarding this case in "Judicial Protection of Human Rights" in *Sri Lanka: State of Human Rights 2004* (Colombo: Law & Society Trust, 2004), and discussion of recent judicial developments following this decision in this chapter below.

8 SC(FR) Application No. 700/2002, SC Minutes 26.07.2004, judgement of (Dr.) Justice Shiranee Bandaranayake with Justices JAN de Silva and Nihal Jayasinghe agreeing.

ordinary worker who arrested on the mistaken belief that he was "Gerad," a known criminal, and then assaulted to the extent that he suffered acute renal failure. Here too, the Court granted the sum of Rs. 800,000 as compensation and costs for the violation of the petitioner's rights under Articles 11, 13(1) and 13(2), payable both by the police officers found to be responsible for the violations and the State.[9] Additionally, the Court granted the petitioner's claim to reimbursement by the State of his medical expenses, including treatment obtained at a private hospital due to the gross torture that he suffered, despite the contention of the respondents that the charges were exorbitant and treatment could have been obtained at a state hospital.

At that time, the question raised was whether, in any event, any amount of money was sufficient for his continuing health problems let alone his psychological traumas. However, this query was rendered tragically academic when on 21 November 2004, Gerald Perera was shot in broad daylight and died thereafter in hospital, days before he was due to give evidence in a High Court trial instituted by the Attorney - General's Department under the Torture Act. Investigations have now identified the perpetrators as including some of the very same police officers who were found responsible for the torture. Ironically, at the time of his death, a major portion of the medical re-imbursements had yet not been paid to him.

In all these cases, what emerges are the poignant stories of victims and their families who undergo the perils of litigation in situations where often, even the most massive sums of compensation cannot redress the pain that they have suffered. It is high time therefore that the discussions moved away from the question as to the quantum of compensation that ought to be awarded by the Court in these cases (an absurd question in any event) to more significant issues of impunity as the analysis below would indicate.

One notable instance where a large amount of compensation was awarded by Court during the period under review in the absence of a finding of death or, for that matter, of physical assault, was the case of

[9] *Sanjeewa v Suraweera*, (2003) 1 SLR 317, judgement of Justice Mark Fernando with Justices Edussuriya and Wigneswaran agreeing.

Shahul Hameed Mohammed Nilam and Others v K Udugampola and Others[10] which is discussed at a later point in this chapter. The State was directed to pay each petitioner a sum of Rs. 750,000 with the 1st respondent Superintendent of Police ordered to personally pay each petitioner whose rights were found to have been violated, a sum of Rs. 50,000. The petitioners were officers of the military intelligence Directorate.

Vicarious Liability of Persons in Authority

In *Silva v Iddamalgoda*, the 1st respondent OIC's responsibility and liability was not restricted to participation, authorisation, complicity and/or knowledge of the acts of torture and cruelty meted out to the petitioner. He was held liable due to his not ensuring that the petitioner was being treated as the law required; in other words, by virtue of his culpable inaction including failure to monitor the activities of his subordinates that would have prevented further ill-treatment of the petitioner and investigation of any misconduct.

Yet again, the 3rd, 4th and 5th respondents in the *Wewelage Rani Fernando* case, respectively the OIC, Negombo Prison, the chief jailor and the Superintendent of Prisons, Negombo Prison, were found liable (even though there was no evidence of their direct implication in the assault on the deceased) on the judicial finding that there had been dereliction of their duties.

It is apparent that each case turns on its facts in respect of the imposing of liability for culpable inaction as evidenced by the fact that in *Erandaka v Halwela, OIC, Police Station, Hakmana* referred to above, the Court did not hold responsible the senior prison officers cited in the case as respondents, despite medical evidence indicating torture of the petitioners while in prison. Instead, the Court opted to impose liability purely on the State.

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[10] SC(FR) Applications Nos. 68/2002, 73/2002, 74/2002, 75/2002, 76/2002, SC Minutes 29.01.2004, judgement of (Dr.) Justice Shiranee Bandaranayake with Chief Justice Sarath Nanda Silva and Justice P Edussuriya agreeing.

In another decision delivered during the year under review[11] regarding a complaint brought before Court that a reserve police constable behaved in an unruly and unlawful manner and attacked the petitioner while the latter was visiting the Mahapola Exhibition and Trade Fair in the area, the judges reprimanded the OIC of the Gokarella police station for not preventing the attack while being present at the trade fair at the time that the incident took place. In addition, the OIC was found personally liable as a result of his omission to promptly record the statement of the petitioner regarding his assault and to embark on an investigation in respect of the same.

Direction of Court re action to be taken by the National Police Commission and the Police Department

> The number of credible complaints of torture and cruel, inhuman and degrading treatment whilst in police custody shows no decline. The duty imposed by Article 4(d) [of the Constitution] to respect, secure and advance fundamental rights, including freedom from torture, extends to all organs of government, and the Head of the Police can claim no exemption. At least, he may make arrangements for surprise visits by specially appointed Police officers, and/or officers and representatives of the [National] Human Rights Commission, and/or local community leaders who would be authorized to interview and to report on the treatment and conditions of detention of persons in custody.
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> A prolonged failure to give effective directions designed to prevent violations of Article 11, and to ensure the proper investigation of those which nevertheless take place followed

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[11] *AM Vijitha Alagiawannawe v LPG Lalith Prema, Reserve Police Constable and Others* SC(FR) Application No. 433/2003, SC Minutes 30.11.2004, judgement of Chief Justice Sarath Nanda Silva with Justices HS Yapa and Raja Fernando agreeing. For a comprehensive articulation of the context within which vicarious liability may be imposed, see *Banda v Gajanayake* (2002) 1 SLR 365 and *Deshapriya v Weerakoon*, SC Application No. 42/2002, SC Minutes 08.08.2003.

> by disciplinary or criminal proceedings, may well justify the inference of acquiescence and condonation if not also of approval and authorization.[12]

In *Silva v Iddamalgoda* as well as in *Dayaratne's* case, the Supreme Court called upon the National Police Commission and the Police Department to take stringent steps to subject erring individual officers to appropriate disciplinary action. Towards this end, the Registrar of the Supreme Court was directed to send copies of this judgement to the Inspector General of Police as well as the National Police Commission.

These two are among the legion cases in which such directions have been issued during the past two decades. Why is it that even where police officers (junior as well as senior) have been identified as personally responsible, we have seen no internal departmental action taken against them or successful prosecution in courts of law? The deterrent effect of such action or prosecution would be incalculable. These directions of the Supreme Court have been rendered nugatory and of no avail in the most profound sense of the term.

Senior police officers cite lacunae in the Establishments Code as reason for the inability to take disciplinary action against police officers found guilty of fundamental rights violations and have engaged in debate with civil society as to how this obstacle could be overcome.[13] However, neither the office of the Inspector General of Police nor the National Police Commission appear to be spearheading any substantive initiative towards correction of this legal lacunae and the enforcement of the appropriate disciplinary sanctions against erring police officers.

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[12] See note 9 above, per observation of Justice Mark Fernando.

[13] See the *Law & Society Trust Review*, 15 Joint Issue nos. 208 & 209 (February-March 2004). Similar directions have been issued by Court to other department heads whose officers have also been found to have violated rights of persons in their custody as for example, directions issued in the *Wewelage Rani Fernando* case to the Commissioner General of Prisons, see note 8 above. There appears to be no discernible compliance with these orders as well.

Wewalage Rani Fernando (wife of deceased Lama Hewage Lal) and Others v OIC, Minor Offences, Seeduwa Police Station, Seeduwa and eight Others[14]

This case exemplifies a common pattern exhibited in a number of complaints filed before the Court alleging an Article 11 (freedom from torture and cruel, inhuman or degrading treatment) violation wherein an individual is arrested by the police purportedly for petty theft and thereafter dies in the custody of state officials.

The death occurred at a time when the deceased was not in the custody of the police but in remand prison. The Court was called upon to determine whether the conduct of the prison officials had been such as to cause his death. In coming to its finding that the deceased's death had occurred due to a prolonged and brutal assault at the hands of prison officials, and ordering thereto a sum of Rs. 925,000 payable by the State and Rs. 25,000 each payable by the prison officials responsible for the assault, the following principles were judicially emphasized.

Was there a violation of the right to life entitling the heirs and/or dependants of the deceased to come before Court?

A preliminary objection was raised by the respondents that the petitioners had no *locus standi* to proceed with the application, as they did not allege any violation of their fundamental rights but only the fundamental rights of the deceased. Dismissing this objection, the Court cited seminal precedent[15] affirming that though there is no express provision in the Constitution of Sri Lanka that recognises the right to life, Article 13(4) by necessary implication recognizes that a person has a right to life, which he can be deprived of only under a

[14] See note 8 above.

[15] Vide decision of the Court in granting leave to proceed in *Silva v Iddamalgoda* (2003) 1 SLR 14, per (Dr.) Justice Shiranee Bandaranayake J. as well as the final decision of the Court in that same case, see note 7 above, where the Court (per Justice Mark Fernando) explicitly recognised that, to "unlawfully deprive a person of life, without his consent or against his will, would certainly be inhuman treatment, for life is an essential pre-condition for being human."

court order. Article 13(4) provides that "no person shall be punished with death or imprisonment except by an order of a competent Court."

When Article 13(4) of the Constitution creates a right to life, there cannot be a situation where such right is without a remedy. Article 126(2) of the Constitution gives a person who alleges that a fundamental right 'relating to such person' has been infringed, the right by himself or an attorney-at-law to apply to court. By reading Article 13(4) of the Constitution together with Article 126(2), the lawful heirs and/or dependants would be able to bring an action in a situation where death had occurred as a result of a violation of Article 11.

Considering the judicial advances made in recognising an implicit right to life as underlying particular constitutional provisions in *Silva v Iddamalgoda* as well as the *Wewelage Rani Fernando* case, a further judicial expansion may be appropriate in a situation where a similarly grievous rights violation is found. This would involve an extended interpretation of Article 11 read together with Article 126(2) as including a direct violation not only of the rights of the victim but also the rights of his family members not to be subjected to torture or to cruel, inhuman or degrading treatment as a result of the treatment meted out to the victim. This approach would necessarily vary from the upholding of a violation of the rights of the victim and the accrual or devolving of such rights to his lawful heirs and/or dependants, which latter thinking was exemplified in the two cases analysed above.

The violation of the rights of family members arising out of the violation of the victim has been acknowledged, for example, in the jurisprudence of the United Nations Human Rights Committee (UNHRC) in the exercise of its jurisdiction in regard to individual complaints submitted against States in terms of the Optional Protocol to the ICCPR.

In its relatively early years, the UNHRC recognised that, in the specific context of disappearances, the family of the disappeared were also victims of all the violations suffered by the disappeared, including ICCPR Articles 9 (the right to liberty and security of person), and 10 (1) (the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person).[16]

More recently, deciding against Sri Lanka in a complaint filed by a father from Trincomalee, whose son disappeared in army custody in 1990, the UNHRC held that,

> (the Committee) recognizes the degree of suffering involved in being held indefinitely without any contact with the outside world and observes that, in the present case, the author appears to have accidentally seen his son some 15 months after the initial detention. He must, accordingly, be considered a victim of a violation of article 7 (the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment).
>
> Moreover, noting the anguish and stress caused to the author's family by the disappearance of his son and by the continuing uncertainty concerning his fate and whereabouts, the Committee considers that the author and his wife are also victims of violation of article 7 of the Covenant. The Committee is therefore of the opinion that the facts before it reveal a violation of article 7 of the Covenant both with regard to the author's son and with regard to the author's family.[17]

While it must be conceded that this reasoning of the UNHRC has been advanced in regard to involuntary disappearances, it is difficult to discern any logical reason as to why similar reasoning cannot be evidenced in cases of grievous torture where the victim dies in consequence and his family members file an application in the Supreme Court.

This is so particularly in view of the now articulated reasoning of the Court that the right to life underlies Article 11 and Article 13(4) and

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[16] *Quinteros v. Uruguay*, Case No. 107/1981, Views adopted on 21 July 1983.

[17] *Jegetheeswaran Sarma v Sri Lanka*, Case No. 950/2000, Views adopted on 31 July 2003. For discusion of other UNHRC decisions relevant to Sri Lanka, see section 6 of this chapter below.

that the word "person' in Article 126(2) must be interpreted broadly as to include the 'lawful heirs and/or dependants of such person.'[18]

Extending of the constitutional rights of personal liberty to hard core criminals

The initial reason given by the police for the arrest of the deceased in the *Wewelage Rani Fernando* case was that he had stolen two bunches of bananas. It was pointed out by the Court that this allegation of theft should not have detracted from the duty to afford to the deceased, the protection of his constitutional rights of personal liberty. Previous decisions were adverted to as indicative of the general principle that,

> the petitioner may be a hard-core criminal whose tribe deserve 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.[19]

The imperative nature of the duty of care imposed on prison officials

There is a further vital facet to this discussion: namely, the question of proper treatment of remand prisoners as necessarily distinguishable from convicted prisoners. Though the Sri Lankan Constitution does not expressly provide for the rights of detained persons, this is an implicit right that, in any event, is specifically articulated in Article 10 of the ICCPR,

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[18] Relevantly in this regard, *Silva v Iddamalgoda* and the *Wewelage Rani Fernando* case, see notes 14 and 15 above, recognised the linkage between Article 126(2) and Article 17 of the Constitution which entitles each person to make an application under Article 126 in respect of the infringement of a right.

[19] Vide *Amal Sudath Silva v Kodituwakku* (1987) 2 SLR 119. Also, *Senthilnayagam v Seneviratne* (1981) 2 SLR 187, *Dissanayake v Superintendant, Mahara Prisons* (1991) 2 SLR 247, *Premalal de Silva v Inspector Rodrigo* (1991) 2 SLR 307, *Pellawattage (AAL) for Piyasena v OIC, Wadduwa*, SC Application No. 433/93, SC Minutes 31.08.1994. In *Silva v Iddamalgoda*, see note 7 above, a specific argument that an alleged bad record of the petitioner should be held against him was summarily dismissed by Court pointing not only to the presumption of innocence but also that by the respondent's actions in depriving the petitioner of life, he lost the opportunity to redeem the alleged bad record.

prisoners should be kept separated and subjected to separate treatment as appropriate to their status. International jurisprudence in relation to these principles has been unequivocal in upholding their substance.

In the instant decision, the Court did not specifically refer to ICCPR Article 10, in the context of the differential treatment to be accorded to remand prisoners following necessarily from the principle that one is presumed innocent until proven guilty. However, in buttressing its condemnation of the brutal treatment of the deceased, it laudably referred not only to the applicable domestic law contained in the Prisons Ordinance but also to relevant views of the UNHRC together with provisions of international treaties and declarations concerned with the rights of prisoners.[20]

Especially pertinent was the judicial declaration by (Dr.) Justice Shiranee Bandaranayake that,

> Assault on a prisoner by prison officers who are officials of the State must be considered to be an especially grave form of ill-treatment. This indicates that the officers concerned have exploited the vulnerability of the victim.[21]

Shahul Hameed Mohammed Nilam and Others v K Udugampola and Others[22]

A particularly controversial standoff between military covert operations officers and police officials involving a raid conducted by the latter on what was referred to be a safe house of the army gave rise to the parties coming before the Supreme Court in this application. Effectively, it was a classic example of a 'home and home match' that occupied

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[20] *Thomas v Jamaica* Communication No. 266/1989, Views of UNHRC,2 November 1993. Also, General Assembly Resolution 43/174 of 9 December 1988 and the Standard Minimum Rules for the treatment of prisoners adopted by the United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, 1955 and approved by the Economic and Social Council by its resolutions 663 C(XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

[21] See note 8 above, at page 14 of the judgement.

[22] See note 10 above. The case was highly sensitive politically as it put in issue the actions of key ministers of the United National Front government at that time as implicitly condoning the raid.

the news pages of Sri Lankan newspapers at that time. The decision itself illustrates a marked judicial liberality in its approach to granting relief to the petitioners.

The five petitioners, all members of the long-range reconnaissance patrol of the Directorate of Military Intelligence, alleged that the raid of their safe house in a Colombo suburb by a Superintendent of Police from Kandy and their consequent arrest and detention was despite their explanation that they were performing lawful duties. They alleged violations of Articles 11, 12(1), 13(1) and 13(2).

Denying the alleged violations, the respondent Superintendent of Police contended that the raid had followed information received by him that the petitioners were living in a residential area and keeping a large quantity of dangerous weapons in the house. In any event, he concluded that the police in the area of an army safe house are generally informed of its presence, which had not happened in the present case and he had merely carried out his duty to investigate reports of suspicious activities.

Unlawful arrest and detention

In its analysis of the facts, the Court came to the finding that the version of the 1st respondent police officer was not credible and that, at the time of the arrest of the petitioners, the 1st respondent had no valid basis for the arrest. Neither had the petitioners been informed about the reasons for the arrest, which was a mandatory requirement stipulated by law. Accordingly, a violation of Article 13(1) was evidenced.

Violation of Article 13(2) relating to unlawful detention was also found. Detention of the petitioners had been first under Section 7(1) of the Prevention of Terrorism Act (PTA), (Temporary Provisions) No 48 of 1979 (as amended), which allows a person arrested under that section to be kept in custody only for a period not exceeding seventy two hours. Further detention has to be in terms of Section 9 of the PTA on detention orders issued by the Ministry of Defence. Otherwise, the detainees have to be produced before a magistrate. In the present

case, no detention orders issued by the Ministry were produced. Neither had the petitioners been brought before a judicial officer.

Pain of mind of a sufficiently aggravated degree will involve a violation of Article 11

However, it is in respect of its findings in relation to the violation of Article 11 that prohibits torture or cruel or degrading treatment or humiliation, that this judgement may be noted. This is one of the relatively rare instances where there is judicial finding of a violation of Article 11 despite no physical assaults resulting in either temporary or permanent physical impairment. The degrading treatment complained of by the petitioners was grounded in the nature of the incarceration that they had to suffer – they had been put in an ill-ventilated and cramped cell amidst an 'unbearable stench that emanated from the vomit of intoxicated prisoners' – as well as the manner in which they had been transported from one police station to another.

In finding a violation of Article 11, it was conceded that, pain of mind, provided that it is of a sufficiently aggravated degree, would suffice to prove a rights violation. Both domestic and regional precedent articulating this principle was cited.[23]

Express judicial sympathy for what was termed to be 'the greatest risk' that the petitioners and their families faced as a result of the raid

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[23] Particularly *Kumarasena v Sub-Inspector Sriyantha and Others*, SC Application 257/93, SC Minutes 23.05.1994, where the Court held that although there was no assault causing physical disability, the suffering occasioned was held to be of an aggravated kind and attained the level of severity required for a violation of Article 11. Most notably, *Fernando v Silva*, SC Application 7/89, SC Minutes 03.05.1991, where the Court held that imprisonment of a person without medication and food and without basic amenities for the performance of normal bodily functions was a violation of Article 11. Jurisprudence of the European Court of Human Rights (EUCT) was also considered, specifically *Tyrer v UK* (1978) 2 EHHR 1, *the Greek case* 127 B (1969) Com. Rep. 70, *Campbell and Cosans v UK* (Case law of the EUCT, 1,170).

was specially manifest. It was recalled in this respect that the petitioners were members of a special team conducting terrorist operations of the utmost secrecy. Their pleas that any publicity given to them would endanger their lives as a result of the actions of the respondents had apparently fallen on deaf ears. This was a factor in the determining of high compensation for the violations.[24]

The judgement is useful for its laying down of the burden of proof that applies in allegations of Article 11 where the Court professed itself alive to the need not to impose undue burdens on a petitioner seeking justice.[25]

Discriminatory treatment in respect of arrest and detention

The conclusion arrived at by the Court that a violation of Article 12 had also occurred as a result of the treatment meted out to the petitioners after they were arrested, raises an interesting question in the meantime. Primarily, would a violation of the right to equality automatically follow in all cases where unlawful arrest and detention is evidenced as well as when torture or cruel and degrading treatment or humiliation is found, given that such a finding naturally presumes differential treatment meted out to the victims? The sustainability of the linking up of the two rights provisions in this regard remains to be better explored in an appropriate case later.

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[24] See note 10 above, at page 40 of the judgement. Vide a cumulative amount of Rs. 800,000/= per each petitioner in the sum of Rs. 750,000 payable by the State and a sum of Rs. 50,000/= payable personally by the 1st respondent Superintendent of Police.

[25] Cases referred to include *Velmurugu v the Attorney-General* (1980) 1 FRD 180, *Abeywickrema v Dayaratne*, SC Application 125/88, SC Minutes 12.07.1989, *Channa Pieris and Others v the Attorney-General* (1994) 1 SLR 1 .

2.2 Judicial Reasoning pertaining to the Right to Freedoms of Expression, Assembly and Association (Articles 14 (1)(a), (b) and (c))

MND Perera v Balabatabendi and Others[26]

This application arose out of a situation that occurred in early December 2001 when the news editor of one of the many television stations in Colombo and his crew were refused entry into the President's House in order to televise the swearing in of then Prime Minister Ranil Wickremesinghe. The refusal was based on a direction by President Kumaratunga that particular private media personnel who were perceived as being antagonistic to her Presidency should not be allowed into the President's House to broadcast or report the swearing in of the Premier, who came from a coalition headed by the United National Party (UNP), the main political party opposed to the Peoples Alliance headed by President Kumaratunga.

The majority view (by Justice Wigneswaran with a concurring opinion by Justice Shiranee Tillekewardene) held that this refusal constituted "naked discrimination" for extraneous political or personal considerations, which cannot be condoned from persons "however highly placed." Violation of the rights of the barred media personnel to equality before the law and freedom of speech and expression was found.

For the State, it was contended that unlike in the case of the President and the members of the higher judiciary who are constitutionally required to take or make oath/affirmation before a certain official, the Prime Minister is not under a similar constitutional duty. Accordingly, the occasion of his oath or affirmation does not become a public function and even if the public may have been allowed in, if such swearing in had taken place in a public place, in this instance, it had taken place in the President's House, which was not a public place and to which the media had no right of entry. Members of the media were invited only as a courtesy and if exclusion took place, this did not confer a right on any media person to argue that his rights had been violated.

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[26] SC(FR) Application No. 27/2002, SC Minutes 19.10.2004, judgement of Justice CV Wigneswaran with Justice Shiranee Tillekewardene agreeing and Justice N Dissanayake dissenting. This account expands upon judicial reasoning in this case first discussed by the writer in "Focus on Rights," *the Sunday Times*, 24 October 2004.

Unequivocally rejecting this argument, the majority judgement stated that the question as to whether this was a public function or not has to be ascertained from all the circumstances of the case. In this instance, the President had decided to appoint as her Prime Minister the leader of a different political party who had received the majority of votes at the poll. In terms of Article 33 of the Constitution, she was mandated constitutionally to make and execute under the Public Seal, the Act of Appointment of the Prime Minister, which she decided to do in the President's House.

Having decided that an official function is to take place in an official residence, was it available for the President to deny that the occasion was a public function and arbitrarily preclude some media persons from coverage? The position may have been different if the prohibition related equally to all the media and was for considerations of security, which again, would have been subject to judicial review. Here, however, there was no such defence raised. On the contrary, the directive of the President, though based on no objective criteria, was put forward as the sole reason for the impugned action.[27]

Ruling on limits of presidential immunity

Significantly, the majority view held that the mere directive of the President is not sufficient to justify unconstitutional action by minions. Following on previous case law,[28] it was ruled that a Presidential

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[27] Concurring in this view, Justice Tillekewardene observed that personal preferences have to be subjugated in all public and official decision making. This must be so, indeed, not only of the substantive decision itself but also with regard to the entire process of decision making. Justice Dissanayake, in his dissent, took the view that public property and public place cannot be equated to each other and that while all property owned by the state is public property, not all are public places. The official residence of the Head of State is not a public place and therefore, there is no right of access.

[28] The Court referred to (as he was then) Justice Sharvananda's observations in *Visuvalingam and others v Liyanage and Others (No.1)*, a full bench consisting of nine judges, (1983) 1 SLR 203 at 204 as well as *Wijesuriya v the State* 77 NLR 25 at 56. See also in this connection, *Karunatilleke v Dissanayake* (1999) 1 SLR 157 and *Senasinghe v Karunatilleke,* SC Application No. 431/2001, SC Minutes 17.03.2003.

directive cannot be a defence to subordinate action if it is manifestly and obviously illegal. Thus, Justice Wigneswaran reasoned that,

> a leader of a sovereign country is not expected to be parochial nor vindictive nor spiteful whatever the provocations of his subjects may be, real or imaginary. Leaders are no doubt, human beings. But they are humans clothed with power and privileges granted by their compatriots out of their love and respect. This power is not to be used to harass such compatriots.

Ushettige Nihal Perera and Others v IGP and Others[29]

The petitioners, all People's Alliance members of the Ja-Ela Pradeshiya Sabha, alleged that their fundamental rights in terms of the rights to equality and non-discrimination, rights of free expression, peaceful assembly and freedom of association had been infringed by the members of the main opposition party, the United National Party (UNP), acting in concert with the police through their actions in preventing them from attending the 57th monthly meeting of the Sabha scheduled to be held on 21.12.2001 and thereafter re-scheduled for 31.12.2001, 11.01.2001 and 22.01.2001. During the attempts by the petitioners to attend the re-scheduled meeting on 22.01.2001, the 3rd petitioner had been assaulted.

The respondent members of the Pradeshiya Sabha contended in opposition that the assault and the prevention of the petitioners from attending the meeting took place due to the discriminatory and unfair

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[29] SC (FR) No. 93/2002, SC Minutes 28.01.2004 per judgement of Justice TB Weerasuriya with Justices Fernando and Wigneswaran agreeing. See also during this same period, judgement of the Supreme Court in *BA Tillekeratne v M Edwin Alwis, Chairman, Pradeshiya Sabhawa, Divulapitiya and Others*, SC(Spl) Application No. 122/2002, SC Minutes 16.02.2004, judgement of Chief Justice Sarath Nanda Silva with Justices Ameer Ismail and HS Yapa agreeing, where the freedom to engage in a lawful occupation (Article 14(1)(g)) was held violated by the collective action of the chairman of the Divulapitiya Pradeshiya Sabha and the police in forcibly preventing a three-wheeler owner from hiring his three wheeler and removing his revenue licence and insurance certificate.

practices adopted by the People's Alliance Pradeshiya Sabha members, including the petitioners, in respect of award of tenders for the lease of meat stalls.

The respondent's counter-claim was not accepted by the Court on the evaluation of the evidence. This included the finding that no complaint had been made to the police regarding the alleged unjust award of tenders, together with the fact that tender boards of the pradeshiya sabhas comprised both People's Alliance and United National Party members and that none of the members had raised any complaint regarding this issue.

The judicial finding regarding the harassment of the petitioners was that, rather than any dispute arising from the award of tenders, the harassment had come about as a result of the victory of the UNP at the 2001 General Elections. The Court held the respondent police officers cited in the petition culpable for the inability of the petitioners to attend the sabha meetings inasmuch as they failed to provide the necessary protection for the People's Alliance members in that regard. However, as no link was established between the opposition pradeshiya sabha members and the police in the said culpable inaction, the former was not held liable.

3. Judicial Response of the Supreme Court in the context of the Right to Equality

3.1 Land Acquisition

Heather Therese Mundy v Central Environmental Authority and Others[30]

Property owners whose lands in Akmeemana and Bandaragama were sought to be acquired by the government for the purposes of

[30] *Heather Mundy v Central Environmental Authority and Others,* SC Appeal No. 58/03, SC Minutes 20.01.2004, judgement of Justice Mark Fernando with Justices Ismail and Wigneswaran agreeing, at page 13. For further judicial discussion of the general parameters of the Public Trust doctrine, see *Perera v Pathirana,* SC Application No. 453/97, SC Minutes 30.01.2003, *Senasinghe v Karunatilleke* (2003) 1 SLR 172 and *Thavaneethan v Dissanayake* (2003) 1 SLR 75.

constructing the Southern Expressway appealed to the Supreme Court from a dismissal of their writ petition by the Court of Appeal. They preferred an appeal on the basis that the Court of Appeal misdirected itself and/or erred in law in not finding that the decision of the Road Development Authority to change the final route of the Expressway without noticing the affected property owners was contrary to the National Environmental Act (NEA) No. 47 of 1980, as amended by Acts No. 56 of 1988 and 53 of 2000 and its regulations.

The Expressway had first been scheduled to run on the Original Trace, which had been environmentally studied, and then changed to a Combined Trace, which was also environmentally studied and assessed as mandated by law. Its further deviation to the Final Trace, which had not undergone a thorough mandated impact assessment either in terms of its environmental consequences or human resettlement issues, was sought to be challenged by the appellants.

The State contended that the deviation from the Combined Trace to the Final Trace was occasioned by the directions of the Central Environmental Agency (CEA), which had indicated that the Combined Trace should be moved on to the Original Trace at one point in order to avoid the recreation area of the Weras Ganga/Bolgoda Lake wetland. However, in counter opposition, the appellants argued that this deviation by the Road Development Authority (RDA) went far beyond the deviation directed to be done by the CEA and, as a consequence, affected property owners who had not been even remotely aware that the Expressway might affect their properties.

The Supreme Court gave judgement in favour of the appellants but restricted itself to an award of compensation for the violation of the right not to have been given adequate notice that their lands were going to be acquired as a result of the changed trace.

The judgement of the Court is notable in two primary respects. Firstly, it is distinguished for its strong articulation of the 'public trust' doctrine: that powers vested in public authorities are not absolute or unfettered but are held in trust for the public, to be exercised for the purposes for which they have been conferred, and that their exercise is subject to

judicial review by reference to those purposes. Accordingly, executive power is also necessarily subject to fundamental rights review in general, and to Article 12(1) in particular, which guarantees equality before the law and the equal protection of the law. The "protection of the law" would include the right to notice and to be heard. Administrative acts and decisions contrary to the "public trust" doctrine and/or violative of fundamental rights would be in excess or abuse of power, and therefore void or voidable.

Secondly, the judgement is important for the reason that the application to the Supreme Court was on appeal from the judgement of the Court of Appeal and would therefore normally not have involved matters concerning violation of rights (which are impugned in fundamental rights applications made directly to the Supreme Court in terms of Article 126(2) of the Constitution). However, in the instant case, the Court utilised Article 126(3) of the Constitution in order to determine the violation of the rights of the petitioners under Article 12(1) of the Constitution in terms of the right to be heard before the trace of the expressway was altered in a manner that affects their lands, followed by the ordering of compensation commensurate to the violation of that right alone. Article 12(1) provides for the equality of all persons before the law and the entitlement to equal protection of the law.

Specifically, Justice MDH Fernando ruled that,

a) The deviation of the route at Akmeemana and Bandaragama constituted "alterations" within the meaning of section 23EE of the NEA, Regulation 17(i)(a), and CEA condition III. The changes were substantial, as a committee of judges appointed by the Court of Appeal to conduct an empirical study of the affected areas also found; they adversely affected the appellants and their property rights; they were changes in respect of the route of the Expressway, and the route was a principal component of the project; and they were changes proposed before the commencement of the project;

b) The affected villagers, as persons affected, were entitled to notice and to be heard as per the principles of natural justice, and their fundamental right to equal treatment and to the equal protection of the law, which entitled them to notice and a hearing. Even if the deviations were not alterations, they were adversely affected thereby and were therefore entitled to a hearing, under the *audi alteram partem* rule as well as Article 12(1);

c) Section 23EE of the NEA and Regulation 17(i)(a) further required the RDA to notify the CEA of alterations and obtain CEA approval; and so did CEA condition III. A "supplemental report" in terms of Regulation 17(ii) was necessary;

d) Having regard to the purposes and procedure, the CEA was obliged to consider the Final Trace in substantially the same way as those two Traces. That was a power and a duty, which the CEA held subject to a public trust, to be exercised for the benefit of the public, including affected individuals. The CEA was not empowered to delegate that power and duty to any other body, and least of all to the project proponent itself - for that would make the project proponent the sole and final judge in its own cause. The 1999 CEA approval did not constitute, and cannot be construed as constituting, an absolute, uncontrolled and irrevocable delegation to the RDA to determine the Final Trace;

e) In any event, CEA condition IX required the Final Trace to be moved on to the Original Trace, and not just near the Original Trace, and thus the location of the Final Trace was contrary to the CEA approval.

Evaluating the approach of the Court of Appeal, Justice Fernando held that although the Court of Appeal seemed to agree in regard to certain considerations (i.e. that the rights of the affected villagers had been infringed, that their sacrifice had not been duly recognized, and that the Court should minimize as much as possible the effect on their

rights), nevertheless it had felt obliged to choose between two options only: to grant relief or to dismiss the applications. This approach did not, however, take note of the impact of the fundamental rights on its writ jurisdiction. Thus,

a) While the circumstances were such that the Court of Appeal could reasonably have concluded that, on balance, the Final Trace should be left undisturbed, one of the major considerations was cost - as well as delay, which also involved cost. Accordingly, if a judicial discretion was exercised in favour of the State, *inter alia,* to save costs, it was only equitable that the affected villagers should have been compensated for the injury to their rights;

b) Had the matter been referred to the Supreme Court under Article 126(3), the villagers would have been held entitled to compensation in lieu of further Environmental Impact Assessment procedures. It is only right therefore that compensation for the violation of rights is ordered.

The *Mundy* decision has since then come to be noted for its cogent articulation of the applicable principles both in relation to the public trust doctrine as well as in regard to the interlinking of the fundamental rights jurisdiction of the Supreme Court with the writ jurisdiction of the Court of Appeal. However, the judges did not go so far as to order a supplementary environmental assessment in respect of the final trace, which was, in actual fact, the substantive basis of the villagers' case.

In addition, despite engaging in its constitutional authority to 'grant such relief or make such directions as it may deem just and equitable' (emphasis added), the Court confined itself to a narrow finding of the violation of the right to natural justice. Consequently, it did not address the violations of other rights occasioned by the actions of the respondent, particularly the blatant denial of information regarding the acquisition of their lands.

3.2 Duty of Public Officers to act according to Law

In *Farwin v Wijeyasiri, Commissioner of Examinations and Others*,[31] the Supreme Court, while recognising the right to higher education, as set out in Article 13 of the International Covenant on Economic, Social and Cultural Rights as well as defined as an objective of Sri Lankan State Policy as laid down by Article 27(2)(h) of the Constitution, emphasized the duty on the part of the officials of the Department of Examinations to conduct examinations with adequate security measures to ensure the integrity of the examination, to ensure that answer scripts are not tampered with and to conduct a full and open investigation in respect of any serious allegation of irregularity.

In the instant case, it was held that there had not been a proper investigation by the 3rd respondent, a Deputy Commissioner of Examinations, upon allegations by the petitioner who had sat the GCE (A-Level) examination in April-May 2002, that two sheets from her answer script had been removed and later sent anonymously to her father, resulting therefore in a violation of Article 12(1).

3.3 Doctrine of Legitimate Expectation

Three decisions during 2004 dealt with the process of selecting students to a Faculty of Medicine based on an admission policy of the University Grants Commission (UGC) as contained in the Handbook of the UGC for the academic year 2001/2002.[32]

The petitioners contended that the UGC had failed to apply the stated and publicised policy in calculating the minimum marks (i.e., the 'cut off' mark) for admission to a Faculty of Medicine, thereby defeating

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[31] (2004) 1 SLR 99, judgement of Justice Mark Fernando with Justices Wigneswaran and Weerasuriya agreeing.

[32] SC(FR) Application No. 306/2001, *Anushika Madhavi Jayatilleka and Others v UGC and Others,* SC(FR) Application No. 280/2001, *Kithsiri Bandara Samarakoon and Others v UGC and Others,* SC(FR) 307/2001, SC Minutes 25.10.2004, judgements of (Dr.) Justice Shiranee Bandaranayake with Justices Nihal Jayasinghe and Raja Fernando agreeing.

their legitimate expectation that the academic policy hitherto applicable to students would also be applied to them. In ruling that the UGC was bound by its stated policy to admit 900 students to the Faculty of Medicine during the year in question, thus rendering unconstitutional its adoption of a hypothetical base mark of 800, which barred the petitioners from admission, the Court determined a violation of Article 12(1) of the Constitution.

The argument of the UGC was that the non-selection of the complete contingency of 900 students was due to the prevailing situation in the North and the consequent difficulty of sending students to the University of Jaffna. The judges refused to accept this contention, pointing out that the UGC would have had these difficulties in mind when publishing its academic policy for that particular year and could not now be allowed to plead such difficulties in retrospect.

This decision may usefully be contrasted with two other decisions of the Court during the period under review where the applicability of the doctrine of legitimate expectation was disallowed, i.e., in *HR de Silva v Colombo Municipal Council (CMC) and Others* and in *Dr. MN Sriskandarajah v Secretary, Ministry of Health and Indigenous Medicine*.[33] In the former case, the Supreme Court considered a claim of a Deputy Commissioner of the CMC that he had a legitimate expectation to be appointed to the post of Municipal Commissioner, dismissing the same on the basis that the petitioner was not entitled to such claim either upon seniority in the CMC or by his credentials or qualifications. A further bar, in the mind of the Court, was the fact that the petitioner had not been permanently released by the Public Service Commission of the Central Government in order to enable him to accept a permanent position in the CMC which belonged within the provincial public service.

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[33] SC(FR) Application No. 209/2001, SC Minutes 21.10.2004, judgement of Justice Shiranee Tillekewardene J. with Sarath Nanda Silva C.J. and Wigneswaran J. agreeing and SC(FR) Application No. 490/2000, SC Minutes 25.10.2004, judgement of (Dr.) Justice Shiranee Bandaranayake with Justices Nihal Jayasinghe and Raja Fernando agreeing .

Similarly, in the latter case, in deciding that a consultant obstetrician and gynaecologist could not succeed in his claim that his application for the post of consultant obstetrician and gynaecologist at the Family Health Bureau had been unfairly rejected by the respondents, the Court took the view that a legitimate expectation cannot be said to rise in this regard due to the petitioner submitting a handwritten, incomplete application that did not mention that he was eligible for Board certification at the time of application.

In both these cases, it was significant that the petitioners had been acting in the posts for which they applied. This fact was counter weighed by other considerations that effectively barred relief being given.[34]

4. Determinations of the Supreme Court in 2004 in reference to Religious Conversions

In previous years, the Supreme Court had been called upon to decide the constitutionality of bills seeking to incorporate religious orders whereupon, the Court had, in the process, laid down particular principles that emphasized the predominance of Article 9 of the Constitution, which gives Buddhism the foremost place in the Republic.

For example, in re a Bill titled '*Provincial of the Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka (Incorporation)*'[35] the Court found a private member's Bill seeking to incorporate a Roman Catholic order inconsistent not only with Article 10 of the Constitution, which guarantees freedom of thought, conscience and religion, but also Article 9. The judges declared that while the Constitution guarantees the manifestation, observance and practice of one's own religion, the propagation and spreading of

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[34] See also *Amunpura Seelawansa Thero and Others v Additional Secretary, Public Service Commission and Others*, SC(FR) Application No. 575/2003, SC Minutes 23.11.2004 and *Abdul Muthalif Farook v Chairman, PSC, Uva Province and Others*, SC(FR) Application No. 508/2002, SC Minutes 25.10.2004 for judicial articulation of the commonly accepted principle that a right cannot be urged if it is an illegality.

[35] SC Determination No. 19/2003. The Bench comprised Justices (Dr.) Shirani Bandaranayake, HS Yapa and Nihal Jayasinghe.

Christianity would not be permissible, as it would impair the very existence of Buddhism and the Buddha Sasana.[36] Whether the impact of Article 14(1)(e), which entitles every citizen the freedom, either by himself or in association with others and either in public or in private, to manifest his religion or belief in worship, observance, practice and teaching, was sufficiently considered in these determinations became a moot point in retrospect.

The year under review crystallized a heightening of religious tensions, which continued to manifest itself in the legal arena. In mid-year, the Supreme Court was called upon to determine the constitutionality of a Bill titled the 'Prohibition of Forcible Conversion of Religion,' the purpose and object of which was stated to be, *inter alia*, to "provide for prohibition of conversion from one religion to another by use of force or allurement or by fraudulent means and for matters incidental therewith or incidental thereto."[37] Twenty one petitions were filed challenging the constitutionality of the Bill, primarily on the basis that the overbreadth of its clauses raised the possibility of abuse due to genuine conversions though a real process of transfer of faith also being impugned.[38]

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[36] In re a Bill titled '*Christian Sahanaye Doratuwa Prayer Centre (Incorporation)*' SC Determination No. 2/2001, by a Bench comprising Chief Justice Sarath Nanda Silva and Justices Shirani Bandaranayake and Ameer Ismail, the judges held that a bill seeking to set up a prayer centre which included among its objects, assisting people to enable them to set up in self employment or to obtain job opportunities, was inconsistent with Article 10 of the Constitution. Stating that particular sensitivity attaches to issues of freedom of thought, conscience and religion, the Court took the view that the linking of what could be seen as commercial and economic activities with the observance and practice of a religion would be contrary to constitutional norms. See also the Determination of the Court in re a Bill titled '*New Wine Harvest Ministries (Incorporation)*' SC Special Determination No. 2/2003 for similar judicial views in this regard by a Bench comprising Chief Justice SN Silva and Justices HS Yapa and TB Weerasuriya.

[37] SC Special Determinations Nos. 2-22/2004. The Bench comprised Justice TB Weerasuriya, Justice NE Dissanayake and Justice Raja Fernando.

[38] The Bill had in its preamble, a general reference to the predominance of Article 9, stating further that the "Buddhist and the non-Buddhist are now under serious threat of forcible conversion and proselyzing by coercion or by allurement or by fraudulent means."

In its determination, which considered these challenges together with the twenty one intervenient-petitions that supported the Bill, the Court outlawed certain of its clauses. Among those declared unconstitutional were clauses 3(a) and 3(b), (and necessarily therefore clause 4(b), relating to the implementation of the preceding clauses) which required the 'convert,' the facilitator and the witness to such conversion ceremony to notify the Divisional Secretary of the fact of one conversion to another and was ruled to infringe Article 10, guaranteeing to every person, the freedom of thought, conscience and religion including the freedom to have or to adopt a religion or belief of his choice. The clauses thus needed to be passed by the special majority prescribed by Article 84(2) of the Constitution as well as be approved at a Referendum as mandated by Article 83(a) of the Constitution.

Clause five of the Bill was contested on the basis that it arbitrarily bequeathed power in specific classes of persons to institute proceedings before a magistrate in respect of an alleged infringement of the clauses, including 'attorneys-at-law' and 'any person authorised by the Minister.' The clause was determined as irrational and arbitrary, violating Article 12(1). It was recommended that any institution of proceedings be in accordance with Section 136 of the Criminal Procedure Act and subject to the written sanction of the Attorney-General.

Again, clause six, which stipulated that the Minister may make rules or regulations for the enforcing and carrying out of the provisions of the act, was determined as violative of Article 76(1) of the Constitution in that it was overly broad and ambiguous.[39]

Clause eight of the Bill contained the interpretation terms as to what was meant by allurement, force and fraudulent means. It was necessarily linked to clause two of the Bill, which stated that "no person shall convert or attempt to convert, either directly or otherwise, any person from one religion to another by the use of force or by

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[39] This constitutional article is to the effect that Parliament shall not abdicate or in any manner alienate its legislative power and shall not set up any authority with any legislative power.

allurement or by any fraudulent means nor shall any person aid or abet such conversion."[40] The Court upheld the constitutionality of clause 2 and also expressed the view that the terms 'force' and 'fraudulent means' are already defined in the Penal Code, thus making their inclusion in the Bill of no extraordinary import. However, it did not comment on the inclusion of the term 'allurement', which was primarily a new term brought in specifically in relation to the question of forcible conversions.

While recommending that particular amendments be effected to clause eight in order that the interpretation terms be defined in relation to the primary objective of the Bill, the judges did not hold the said clauses in their existing form as unconstitutional. These recommendations included the interpolation of 'for the purpose of converting a person from one religion to another' after the word 'temptation' in clause 8(a) as well as at the end of clause 8(c) and 8(d). In addition, it recommended the interpolation of the word 'wilful' after the word 'includes' in clause 8(d).

An argument put forward by some petitioners was that the proviso to clause 4 of the Bill which included women (along with minors and a range of other persons classified in the schedule for this purpose including the mentally disabled) in reference to whom enhanced punishment was stipulated upon contravention of Section 2, was an archaic distinction that did not have any place in a modern statute. However, the Court was not disposed to agree. The judges cited Article 12(4) of the Constitution (which permitted special provision to be made by law for the advancement of women) as support for their view. Unfortunately, the counter contention that the advancement of women

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[40] The term 'allurement' was defined in clause 8 (a)(i) and (ii), as offers of any temptation in the form of any gift or gratification, whether in cash or in kind as well as grant of any material benefit, whether monetary or otherwise and the grant of employment or grant of promotion in employment; the term 'force' was defined in clause 8(c) as including a show of force, including a threat or harm or injury or any kind and threat of religious displeasure as well as condemnation of any religion or religious faith; the term 'fraudulent means' was defined in Clause 8(d) to include 'misinterpretation' or 'any other fraudulent contrivance.'

cannot be ensured by the impugned inclusion with its derogatory overtones insofar as the cognitive capacity of women were concerned as opposed to men, did not find judicial favour.

Towards the end of the year, another determination of the Court was delivered in re a Bill titled 'The Nineteenth Amendment to the Constitution' seeking, *inter alia,* to make Buddhism the official religion of the Republic.[41] This Bill sought to repeal Chapter II of the Constitution (effectively Article 9) and to substitute in its place a new Chapter, which made Buddhism the official religion of the Republic (as opposed to it being given the foremost place). It also stipulated that 'other forms of religions and worship may be practiced in peace and harmony with the Buddha Sasana'.The Court decided that the Bill was unconstitutional, requiring two-thirds majority in Parliament and approval by a referendum in that it sought to repeal Article 9 of the Constitution.

5. Judicial Response of the Court of Appeal in the context of its jurisdiction in terms of Article 140 of the Constitution

During the period under review, the filing of writ applications in the Court of Appeal under Article 140 of the Constitution increased in number. Cases, which would normally have constituted classic fundamental rights petitions, were being converted into the different – and often far more difficult – context of writ applications involving the denial of a legal right as opposed to the more general violation of a fundamental right. While the inter-linking of fundamental rights protection and the invocation of writ remedies became stronger, these developments were buttressed by judicial observations in regard to the manner in which the constitutional enshrining of fundamental rights has impacted positively on the writ jurisdiction of the appellate courts.

In 1995, the Supreme Court articulated this principle in *Perera v Edirisinghe*[42] in respect of the link between the writ jurisdiction and

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41 SC Determination No. 32/2004. The Bench comprised Justices TB Weerasuriya, Shiranee Tillekewardene and Raja Fernando.

42 (1995) 1 SLR 148, per Justice Mark Fernando at page 156.

fundamental rights as arising from Article 126(3) of the Constitution. This constitutional article is to the effect that, in instances where evidence of an infringement of fundamental rights may properly arise in the course of hearing a writ application, such application must be referred to the Supreme Court, which may grant such relief or make such directions as it may deem just and equitable. [43]

It was judicially contemplated in this case that in its consideration of such instances, though the Court would still be exercising the writ jurisdiction, its powers of review and relief would not be confined to the old 'prerogative' writs. On the contrary, constitutional principles and provisions have restricted the area of administrative discretion and immunity, correspondingly expanding the nature and scope of the public duties amenable to *Mandamus* and the categories of wrongful acts and decisions subject to *Certiorari* and *Prohibition,* as well as the scope of judicial review and relief.[44]

In one decision delivered in early 2004,[45] which is analysed in detail above, Justice Mark Fernando took pains to re-iterate that,

> the jurisdiction conferred by Article 140 however is not confined to "prerogative" writs or "extraordinary remedies" but extends

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[43] Article 126(3) states, "Where in the course of hearing in the Court of Appeal into an application for orders in the nature of a writ of *habeas corpus, certiorari, prohibition, procedendo, mandamus* or *quo warranto*, it appears to such Court that there is *prima facie* evidence of an infringement or imminent infringment of the provisions of Chapter III or Chapter IV by a party to such application, such Court shall forthwith refer the matter for determination by the Supreme Court."

[44] It is significent that Justice Fernando, in this decision, infers that a right can arise out of common law as well as by statute or regulation. Vide his assertion that Article 12(1) ensures equality and equal treatment even when a right is not guaranteed by common law, statute or regulation and this is confirmed by Articles 3 and 4(d). On the facts of the case, rules and examination criteria read with Article 12 was held to confer a right on a duly qualified candidate to the award of the Degree and a duty on the University to award such Degree without discrimination.

[45] See note 30 above, at page 13 of the judgement.

subject to the provisions of the Constitution, to orders in the nature of writs of certiorari etc.

Taken in the context of our constitutional principles and provisions, these "orders" constitute one of the principal safeguards against excess and abuse of executive power, mandating the judiciary to defend the sovereignty of the People enshrined in Article 3 against infringement or encroachment by the executive, with no trace of any defence due to the crown and its agents.

In *Dr. Visakuntharam Kunanathan v University of Jaffna and Others*,[46] the Court discussed the public duty imposed on university authorities to act fairly and in a non-discriminatory manner in the context of university appointments in terms of the Universities Act and the Public Trust doctrine. In this case, a Visiting Professor of Surgery, former Head, Department of Surgery, University of Jaffna and Honorary Consultant Neurosurgeon, Jaffna Teaching Hospital, had returned to the country on the invitation of the University of Jaffna and the assurance of a permanent position at the said University.

Though his contract as Visiting Professor of Surgery at the University was repeatedly extended for more than five years, his applications for the permanent position were successively rejected on the purported basis that he had not obtained Board certification by the Post Graduate Institute of Medicine, even though he was eminently qualified on all other grounds and the post had remained unfilled.

In issuing a writ of mandamus directing the 1st to 6th respondents to appoint the petitioner forthwith to the post of senior lecturer, Grade One in surgery at the Jaffna University, the Court of Appeal pointed out that the Post Graduate Institute of Medicine (PGIM) had decided to grant the petitioner the privilege of Board certification subject to confirmation of the Senate of the University of Colombo. The University Grants Commission (UGC) in whom is vested the powers to make

[46] CA (Writ) Application No. 1559/2003, CA Minutes 01.11.2004, judgement of Justice S Sriskandarajah with Saleem Marsoof J. (P/CA). The judgement is presently in appeal in the Supreme Court.

ordinance, the scheme of recruitment and the procedure for appointment of staff to Higher Educational Institutions by law, had also requested the University to appoint the petitioner to the post of senior lecturer Grade One. In the circumstances of the case, the Court did not view Board certification as an indispensable prerequisite and declared the petitioner entitled to his appointment.

The case is instructive for the judicial stand in dismissing objections taken by the State that writ did not lie because the petitioner's complaint arose out his contract of employment with the University. The Court of Appeal had earlier (in the order by P Wijeyaratne J) extended an order of interim relief to the effect that the Petitioner should be appointed to the post until a suitable person is so appointed, stating that though the matter related to a contract of employment, the said contract had statutory underpinnings, given the application of the provisions of the University Act and the legitimate expectations of the Petitioner, and therefore was amenable to issue of writ.[47]

Certain decisions by the Court during 2004 considered matters of university discipline. Diametrically different judicial views were evidenced in two particular cases involving some common petitioners and on substantially similar facts where university students accused of two incidents of indiscipline including assault on a doctor and female nurses, alleged that disciplinary action taken against them in respect of the incidents contravened their right to natural justice inasmuch as,

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[47] The interim order by Court is of 19.12.2003. In its substantive order, the Court cited *WKC Perera v Prof. Daya Edirisinghe and Others*, see note 42 above, and *Heather Mundy v Central Environmental Authority and Others*, see notes 30 and 45 above. For decisions during the period relating to matters determined to lie purely within the contractual sphere therein not attracting the writ jurisdiction of the Court, see *CA Galapatti and Others v Minister of Education and Others*, CA(Writ) Application No. 1033/98,CA Minutes 16.07.2004, per Gamini Amaratunge J.,*HMI Karunaratne v National Housing Development Authority and Others*, CA(Writ) Application, CA Minutes 21.01.2004, per P Wijeyaratne J., *Shamal Dharsini Fernando v Sri Lanka Ports Authority and Another*, CA(Writ) Application No. 737/2002, CA Minutes 08.07.2004, per P Wijeyaratne J.

a) They were not given the right to examine documents produced at the inquiry and permission to cross examine witness giving evidence against them;

b) They were not given the list of witnesses and documents for the prosecution nor were they permitted to call their own witnesses.

Considering their applications, one bench of the Court upheld the right of students to legal representation, an opportunity to peruse the statements made against them and to cross examine witnesses in one instance, contrasting specifically with a wholly contrary view by another Bench of the Court in the previous year where writ was not issued on the Court coming to a finding that the disciplinary inquiry by the university authorities had been conducted fairly and that to accede to the demands of the petitioner students would 'frustrate the purpose of the inquiry.'[48]

In the latter instance (decision delivered in 2003), Justice Shiranee Tillekewardene ruled that a "matter of discipline, unless it is patently capricious would be a matter that is wholly within the purview and control of the university." That the petitioner students had requested to examine an apparently unendingly long list of witnesses including all the medical students of that faculty, officers of the respondent university, doctors and nurses of a teaching hospital as well as three wheeler drivers plying their trade near the university, were factors that weighed heavily in the mind of the Court against granting relief.

In contrast, delivering his decision in 2004, Justice K Sripavan took into account the fact that any inquiry involving serious consequences to students in reference to their academic career should be conducted in accordance with all the requirements of a fair adjudication. He asserted that:

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[48] *Rajakaruna v University of Ruhuna and* Others, CA(Writ) Application No. 1317/2002, CA Minutes 19.07.2004, judgement of K Sripavan J., presently on appeal as contrasted to *Rajakaruna v University of Ruhuna and Others v University of Ruhuna and Others*, CA(Writ) Application No. 1316/2002, CA Minutes 30.07.2003 , judgement of Shiranee Tillekewardene J. (P/CA).

> In the realm of university discipline, it is perhaps possible to distinguish between decisions on academic matters, for example, success or failure in examinations and non-academic or disciplinary matters. In the former situation, the rules of natural justice clearly do not apply in the normal sense. The Courts may refuse to interfere with academic decisions for the further ground that they are within the exclusive jurisdiction of the lecturers and examiners. However, a different yardstick may apply to non-academic or disciplinary matters which may result in the expulsion of a student from a university on a charge which will ensure that he is unlikely ever to be admitted to the profession for which he had been training.

He reiterated this assertion in a later case again involving university discipline (*Chintaka Wipulanga v Dr. Sujeewa Amarasena and Others*[49]) where too, the writ of certiorari was issued against a university lecturer for not exercising his power to censure a student reasonably, in good faith and on correct grounds.

In *KLD Dayasagara and Others v the National Gem and Jewellery Authority and Others*,[50] the Court of Appeal considered the application of twenty four petitioners who had been appointed to the Gem and Jewellery Research and Training Institute on a permanent basis and informed of certain entitlements and privileges enjoyed by the employees of the respondent. The petitioners argued that such privileges and entitlements could not have been reduced by reason of Section 54(2)(g) of Act No. 50 of 1993 (by which the 1st respondent authority was created and the 2nd respondent institute established), which prohibited any such reduction. Consequently, the said reduction by the 2nd respondent was illegal and without lawful authority.

On their own part, the respondents took up the position that the reduction in benefits to the employees was as a reason of change of

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[49] CA(Writ) Application No. 95/2004, CA Minutes 16.09.2004.
[50] CA(Writ) Application No. 393/2002, CA Minutes 27.04.2004.

policy of government and that the extension of such benefits would be contingent on the availability of funds.

In quashing the impugned decisions by way of mandamus and granting a writ of certiorari directing the respondents to pay the stated privileges and benefits, Justice P Wijeyaratne emphasized that Section 54(20(g) of Act No. 50 of 1993 reflected government policy enacted into a statute and as such, prevailed over circulars issued in pursuance of government policy which the respondents relied upon to justify their decision. In the same way, the concept of profit generation had no relevance to the payments of privileges and benefits as conditions of employment inasmuch as the 2nd respondent institute, by nature of its functions, was never a profit generating institution.

Meanwhile in one order impacting on the conducting of elections, the Court rejected an application brought by a public interest group calling upon the Court to compel President Chandrika Kumaratunga to appoint the members of the Election Commission in terms of powers vested in her under the 17th Amendment to the Constitution.[51]

Article 41B of the Constitution (through the 17th Amendment) mandates that the appointment of the members of the Elections Commission should be by the President pursuant to recommendations made in this regard by the Constitutional Council, a body set up under the 17th Amendment to ensure non-politicised appointments to public bodies. The petitioner's argument was that the basic features contained in Article 41B of the Constitution did not permit the President to wield

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[51] *Public Interest Law Foundation v the Attorney-General and Others*, CA Application No. 1396/2003, CA Minutes 17.12.2003, judgement of K Sripavan J. with N Udalagama J. agreeing. Despite over two and a half years having passed since the recommendations in respect of the members of the Commission were made by the Constitutional Council, the Elections Commission had not been constituted due to a deadlock between the Council and the President regarding the recommendation of one individual as the Chairman of the Commission. In consequence, the current Elections Commissioner had been virtually compelled to continue to perform in his post, overseeing several elections, despite his pleas of ill health and frequent calls upon the government and President Kumaratunga to appoint the Elections Commission.

unfettered powers in respect of the appointment of the Elections Commission. Accordingly, she had no discretion but to make the appointments once the Council had forwarded the recommendations.

The Court was, however, not inclined to accept this contention. The bar in this regard was Article 35(1) of the Constitution which gives a 'blanket immunity' to the President from having proceedings instituted or continued against her in any court in respect of anything done or omitted to be done in her official or private capacity, except in limited circumstances constitutionally specified in relation to, *inter alia*, ministerial subjects or functions assigned to the President and election petitions. The present case did not come within the ambit of that exception and the applicability of Section 35(1) was held to make the petition not properly constituted in law.[52]

This decision highlights the grievous plight of citizens when processes of constitutional governance are subverted and the courts are themselves bound by constitutional provisions that do not permit the judges to go beyond a particular point in striving to redress an obviously illegitimate status quo.

One possible legislative solution to this continuing impasse is to amend Article 41B to provide that where there is a deadlock between the President and the Constitutional Council regarding the recommendations of the appointees, the President may request the Council to reconsider its recommendations for reasons stated. If after reconsideration, the Council makes the same recommendation, the person recommended will be deemed to have been duly appointed if the President fails to make the appointment within one month.[53]

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[52] This instance needs to be distinguished from cases where actions of subordinate officers are sought to be justified, relying on the orders of the President. Such a reliance has long been held to be unconstitutional. Vide particularly *Karunatilleke v Dissanayake* and *Senasinghe v Karunatilleke*, see note 28 above, as well as *MND Perera v Balabatabendi and Others*, see note 26 above.

[53] However, there appears to be no sustained interest by political parties in resolving this deadlock.

6. Decisions of the United Nations Human Rights Committee in response to Individual Communications under the Optional Protocol of the ICCPR

The Communication of Views by the Geneva based United Nations Human Rights Committee, finding violation of Covenant rights in the *Victor Ivan* case and the *Singarasa* case during 2004, has continuing serious implications for Sri Lanka.[54]

While both concern fundamental issues regarding protection of the right to expression and publication as well as the right to fair trial, the second brings into focus crucial concerns regarding Sri Lanka's Prevention of Terrorism Act, which remains in the statute books in its un-amended and problematic form.

Sri Lanka is now increasingly being taken before the Committee in cases that specifically challenge decisions of the country's Supreme Court, resulting in positive findings of violations of rights secured to all individuals subject to the country's jurisdiction in terms of the ICCPR. The Sri Lankan State acceded to the ICCPR and its Optional Protocol in 1980 and 1997 respectively, thereby accepting the competence of its Geneva based Human Rights Committee to accept petitions from individuals alleging a violation of the Covenant rights, for which they have obtained no relief from Sri Lanka's Supreme Court. In the

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[54] The following analysis draws extensively from discussions by this writer in "Focus on Rights," *the Sunday Times*, 5 September 2004 and 12 September 2004. For past decisions of the Committee against Sri Lanka, see Views of the UN Human Rights Committee in Communication No. 950/2000: Sri Lanka, 31/07/2003 (CCPR/C/78/D/950/2000) (Jurisprudence) – the *Jegetheeswaran Sarma* case and Views of the UN Human Rights Committee in Communication No. 916/2000: Sri Lanka 26/07/2002 (CCPR/C/75/D/916/2000) (Jurisprudence) – the *Jayalath Jayawardene* case. The latter concerned a violation of Covenant rights occasioned by the failure by the People's Alliance Government to investigate death threats to the life of parliamentarian Jayalath Jayawardene, following allegations by President Chandrika Kumaratunga that he was involved with the LTTE. In the former case, the Committee found against the Sri Lankan State in a complaint filed by a father from Trincomalee, whose son disappeared in army custody in 1990.

sub-continent, only Sri Lanka and Nepal permit their citizens to individually appeal to the Committee, though all South Asian nations are bound to periodically submit general reports to the Committee on measures taken to implement the Covenant.

The overall importance accorded to the communication of views by the United Nations Human Rights Committee under the ICCPR has formidable impact in international law in respect of the countries against whom they are issued. Once States ratify the Covenant and the Optional Protocol, their citizens can submit individual communications to the Committee regarding acts, omissions, developments or events occurring after the date on which the Protocol entered into force for that State or from a decision relating to acts, omissions, developments or events after that date which are alleged to violate Covenant rights. The complainant should have exhausted all domestic remedies before submitting a complaint to the Committee, and the same matter may not also be examined under another procedure of international investigation or settlement.

It is relevant to remember that for many decades, the eighteen member expert group of jurists which constitute the Committee abstained from expressing their views in individual communications as forcefully as the Strasbourg institutions (The European Court of Human Rights and formerly the European Commission on Human Rights) endeavoured to do in respect of violations of the European Convention on Human Rights by member states. In recent times, this has changed in a most welcome manner, both in the General Comments (issued periodically on particular articles of the Covenant) as well as in the increasingly stern views of the Committee on individual petitions as recent Communications of Views in respect of Sri Lanka demonstrates.

But, what of the critics who maintain that all this is irrelevant in the context of Sri Lanka's national sovereignty? There are very simple but salient answers to this question. One great achievement of the modern age has been the evolution of international law norms that bind all countries, excepting rogue administrations, to obey basic human rights standards. It is no excuse to this rule of obedience to say that the domestic laws permit flouting of such standards. The horrendous

example of the atrocities that the Nazi laws and courts - though perfectly legal in the sense of that word - permitted, is sufficient for acceptance of that truth. In the years since then, we have formulated an international legal regime that compels countries, notwithstanding national sovereignty, to abide by its norms. This is how, for example, the final judicial tribunal of a country can be held accountable beyond its shores without explicit provision for such appeal in the domestic legal regime where the country concerned binds itself to adherence to such international human rights standards.

The two cases determined in 2004 resulting in adverse findings against the Sri Lankan State concerned communications lodged in the first instance by a newspaper editor and in the second instance, by a detainee serving a thirty five year sentence at Boosa Prison, Sri Lanka.

The first (and more familiar) appeal by the Editor of the *Ravaya* newspaper was that the Attorney-General of Sri Lanka had, by transmitting to the High Court several indictments charging him with criminal defamation during the period 1993 to 1998, failed to properly exercise his discretion under statutory guidelines, which require a proper assessment of the facts as required in law for criminal defamation prosecution. He argued a violation of freedom of expression under Article 19 of the Covenant, as well as his right to equality and equal protection of the law under Article 26. The indictments had been issued against him during the periods of two previous Attorneys-General of Sri Lanka, Thilak Marapana and Sarath Nanda Silva.

The *Ravaya* editor also pleaded a violation of Article 2(3) of the Covenant, based on the refusal of the Supreme Court to grant him leave to proceed with his fundamental rights application against the Attorney-General, thereby depriving him of an effective remedy.[55]

Before the Supreme Court, the issue was whether the Attorney-General acted arbitrarily in filing criminal indictments against the *Ravaya* editor,

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[55] *Victor Ivan v Sarath N Silva* (1998) 1 SLR 301, judgement by Justice Mark Fernando with Justices Wadugodapitiya and Bandaranayake agreeing.

violating his fundamental right to equality (Article 12(1)), his fundamental right to freedom of speech and expression including publication (Article 141(a)) and the fundamental right to engage in his lawful profession (Article 14(1)(g)).

Here, the Court asserted that a decision of the Attorney-General to grant sanction to prosecute or to file an indictment or the refusal to do so could be reviewed in principle, as for example, where the evidence was plainly insufficient, where there was no investigation, where the decision was based on constitutionally impermissible factors and so on. The decision thereon had to be guided by statutory criteria and could not be arbitrary but must have some distinct public interest and benefit. However, the judges took the view that if any faults in investigation had occurred which resulted in at least one criminal defamation indictment being improperly filed against him, this was due to a lapse on the part of those whose duty it was to investigate and not on the part of the Attorney-General.

Yet, as was contended at that time, liability is that of the State regardless of whether blame could be laid at the door of the investigating officers or the prosecuting officers. If a prosecution had been launched based on faulty investigation, the primary responsibility remained with the State, as represented in that case by the Attorney-General. The fact that the Supreme Court preferred not to proceed so far, accords with the laying down of very high standards of "culpable ignorance or negligence" on the part of the Attorney-General in order to justify intervention by court.[56]

Insofar as the UN Committee was concerned, it is important to note for purposes of accuracy that it did not disagree with the general

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[56] This segment of the analysis borrows from a paper on "Justicising the Law; Public Accountability of the Sri Lankan Legal Profession During the Past Fifty Years" by this writer for a conference held to mark fifty years of Law, Justice and Governance in Sri Lanka for the Law & Society Trust in 2001. For a fuller discussion on principles relevant to the Public Accountability of the Attorney-General in relation to Prosecutorial Discretion and Fair Trial, see articles published in the *LST Review* 15, no. 211 (May 2005) and the *Sri Lanka Journal of International Law* published by the Faculty of Law, University of Colombo.

reasoning of the Supreme Court in that application, or for that matter, its ultimate decision. Instead, the Committee's view that Covenant rights had been violated arose from reasoning of a different kind altogether.

It preferred not to get involved in the 'thicket of facts' involving the issuing of the criminal defamation indictments and as to whether the decision to grant sanction by the Attorney-General amounted to a violation of Covenant rights. This is understandable, having reference to the strict 'margin of appreciation' that the Committee accords national judicial tribunals with regard to the facts of particular cases.

The Committee instead restricted itself to its view that the pendency of three indictments for criminal defamation served on the *Ravaya* editor in 1996 and 1997 for several years (even up to the time of the final submissions made by the parties) were in violation of Article 14, paragraph 3(c), of the Covenant, (right to be tried without undue delay). Additionally, the delay left him in a situation of uncertainty and intimidation, despite his efforts to have the cases terminated, and thus had a chilling effect, which violated Article 19 of the Covenant, (right to freedom of expression), read together with article 2(3) (right to effective remedy).[57]

The second Communication of Views in the *Singarasa* case[58] is primarily important for the unequivocal direction that it gives the State to amend sections of the Prevention of Terrorism Act No. 48 of 1979 (as amended), (PTA), that are incompatible with the guarantees of fair trial under the Covenant. Particularly, Section 16(2) of the PTA is

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[57] Views of the UN Human Rights Committee in Communication No. 909/2000: Sri Lanka 26/08/2004 (CCPR/C/81/D/909/2000)(Jurisprudence) – the *Victor Ivan* case. Where domestic jurisprudence concerning the right to be tried without undue delay is concerned, see *Jayasinghe v AG* (1994) 2 SLR 74, where an employee, interdicted without pay, was declared entitled to have disciplinary proceedings concluded without inordinate delay. There is no explicit guaranteeing of this right constitutionally excepting of course, a general right to a fair trial in Article 13(3).

[58] Views of the UN Human Rights Committee in Communication No. 1033/2004: Sri Lanka 26/08/2004 (CCPR/C/81/D/1033/2001) (Jurisprudence) – the *Singarasa* case.

brought under inquiry. It imposes the burden of proving the voluntary nature of a confession made to an Assistant Superintendent of Police (ASP) on an accused detained under the special provisions law.

The application related to a detainee under the PTA whose sentence of imprisonment was predicated solely on his confession before an ASP, who had previously interrogated him in the capacity of a police constable and asked to sign a statement, which had been translated and typed in Sinhalese by another police officer who also acted as an interpreter during this time. When Singarasa had refused to sign the statement, as he could not understand it, he alleged that the ASP then forcibly put his thumbprint on the typed statement.

Singarasa did not have legal representation and pleaded that he had been forced to sign a confession and had then had to prove that it had been extracted under duress and was not voluntary in terms of Section 16(2), which imposed the burden on him. Section 16(2) had been impossible to fulfil, given that he had been compelled to sign the confession in the presence of the very police officers who had tortured him.[59]

At a *voir dire* hearing in the High Court, the Court concluded that the confession was admissible, pursuant to section 16(1) of the PTA, which renders admissible any statement made before a police officer not below the rank of an ASP, provided that it is voluntary. The confession was admitted despite the Court noting that there were "injury scars presently visible on the [author's] body" and acknowledging that these were sequels of injuries "inflicted before or after this incident." He had also failed to complain to anyone at any time about the beatings,

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[59] The judicial medical report produced at his trial in the High Court confirmed that he displayed scars on his back and a serious injury, in the form of a corneal scar on his left eye, which resulted in permanent impairment of vision. The report also stated that "injuries to the lower part of the left back of the chest and eye were caused by a blunt weapon while that to the mid back of the chest was probably due to application of sharp force."

including the Magistrate. Singarasa was convicted and sentenced to fifty years imprisonment in 1995.[60]

His appeal to the Court of Appeal was dismissed though his sentence was reduced. Thereafter, in January 2000, the Supreme Court also refused special leave to appeal, from which decision, Singarasa appealed to the Geneva based Committee.

The question was as to whether his rights under Article 14, paragraph 3(g) of the Covenant had been violated by his being forced to sign a confession and subsequently to prove its voluntary nature. The UN Committee answered this question in the positive. In so doing, it pointed to its jurisprudence which had laid down the principle that no one shall "be compelled to testify against himself or confess guilt" which must be understood in terms of the absence of any direct or indirect physical or psychological coercion from the investigating authorities on the accused with a view to obtaining a confession of guilt.

It was considered implicit in this principle that the prosecution prove that the confession was made without duress. Interestingly, the Committee pointed out that even if, as argued by the Sri Lankan State, the threshold of proof regarding the forced nature of a confession is "placed very low" and "a mere possibility of involuntariness" would suffice to sway the court in favour of the accused, it remains that the burden was on the author, and this would not suffice. Its reasoning was uncompromising:

> The willingness of the courts at all stages to dismiss the complaints of torture and ill-treatment on the basis of the inconclusiveness of the medical certificate (especially one obtained over a year after the interrogation and ensuing

[60] The sentencing was under section 23(a) of the *State of Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 1989* with the *Public Security (Amendment) Act No. 28 of 1988*, of having conspired by unlawful means to overthrow the lawfully constituted Government of Sri Lanka, and (read together with the provisions of the PTA) of having attacked four army camps with a view to achieving the said objective.

> confession) suggests that this threshold was not complied with. Further, insofar as the courts were prepared to infer that the author's allegations lacked credibility by virtue of his failing to complain of ill-treatment before its magistrate, the Committee finds that inference to be manifestly unsustainable in the light of his expected return to police detention.

The UNHRC found a violation of his right under ICCPR Article 14, paragraph 3(g) (namely that no one shall "be compelled to testify against himself or confess guilt."), read together with ICCPR, Article 2, paragraph 3, and ICCPR Article 7. The State was directed to amend sections of the PTA that are incompatible with the guarantees of fair trial under the Covenant.

In addition, the delay between conviction and the final dismissal of the author's appeal by the Supreme Court (29 September 1995 to 28 January 2000) in Case No. 6825/1994 was ruled to have resulted in a violation of the rights contained in ICCPR, Article 14, paragraphs 3(c), and 5, read together, which confers a right to review of a decision at trial without delay.

The State was put under an obligation to provide Singarasa with an effective and appropriate remedy, including release or retrial and compensation. It was also directed to avoid similar violations in the future and to ensure that the impugned sections of the PTA are made compatible with the provisions of the Covenant.

Both the *Victor Ivan* case and the *Singarasa* Case, as well as the other cases where the UN Committee ruled on a violation of Covenant rights by Sri Lanka, buttress the numerous instances where Sri Lanka's Supreme Court has thought it fit to call upon the ICCPR and its obligations by which the State is bound, in seeking to expand the provisions of the domestic constitutional document.

Most importantly, in *Weerawansa v AG*, [61] the Court was bold to state that,

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[61] (2000) 1 SLR 387 at 409.

a person deprived of personal liberty has a right of access to the judiciary and that right is now internationally entrenched to the extent that a detainee who is denied that right may even complain to the Human Rights Committee.

Should this Court have regard to the provisions of the Covenant? I think it must. Article 27(15) requires the State to 'endeavour to foster respect for international law and treaty obligations in dealings among nations.' That implies that the State must likewise respect international law and treaty obligations in its dealings with its own citizens, particularly when their liberty is involved. The State must afford to them the benefit of the safeguards which international law requires.

7. Conclusion

In his smoothly crafted theory of a Mr. Justice Hercules as a "sort of philosopher king in judicial garb, generously endowed with superhuman skill, learning, patience and acumen" and deciding "hard cases" coming before him by creative interpretation of existing legal resources, Ronald Dworkin was being naturally provocative.[62] Admittedly philosopher judges are hard to come by in these uncouth times.

However, while refraining from imposing such harsh standards of perfection on judicial mortals or indeed, considering the law as an impossibly 'seamless web'[63] it is reasonable to expect a consistently coherent justification of rights to underpin judicial thinking insofar as decisions of the Court of Appeal and of the Supreme Court are concerned, particularly in the area of public law.

As far as domestic jurisprudence is concerned during 2004 from this standpoint, though we saw deliberate efforts on the part of some judges to expand the canvas of the rights chapter of the Constitution, these

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[62] R. Dworkin, *Taking Rights Seriously* (Cambridge : Harvard University Press, 1977),116-117.

[63] Ibid.

developments were not necessarily uniform. Regrettably, academic analysis of such decisions, (either positively or negatively), has been sparse, raising grave concerns in regard to the vital interplay between academic discourse and judicial thinking which is an essential pre-requisite of a strong and energetic jurisprudence.

Also lacking was activist documentation of cases where leave to proceed had been refused by Court in order to ascertain the judicial reasoning and/or the context underlying such refusals. Critical engagement of civil society with the due functioning of the legal and judicial process in Sri Lanka continues to be necessary. Such a constructive and (crucially) apolitical engagement has not been evidenced so far.

From a different perspective, the direct interventions by the UN Committee in reference to Sri Lanka's obligations in terms of the ICCPR signify the taking of complaints beyond the domestic judicial institutions in a manner that may be unpalatable to many.

However, where domestic courts fail to win the confidence of the people in particular instances, recourse to monitoring mechanisms situated elsewhere by virtue of obligations that Sri Lanka has willingly incurred in international law, perforce becomes unavoidable. As demonstrated most singularly in 2004, this is a somewhat unsettling reality that we may well need to get accustomed to.

III

INTEGRITY OF THE PERSON

Amila Jayamaha *

1. Introduction

This chapter seeks to examine the violations of the integrity of the person, which took place during the year 2004. It also seeks to highlight developments, both negative and positive, in relation to the integrity of the person during the year under review, with special reference to the "Zero Tolerance Policy on Torture" of the Human Rights Commission of Sri Lanka as well as judicial developments fundamental to the protection of the integrity of the person. Another significant development during the year was the Views of the United Nations Human Rights Committee in answer to a Communication forwarded by Nallaratnam Singarasa, which Communication highlighted the role that international covenants and human rights bodies could play in providing enhanced protection to the integrity of the individual.

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As has been reported in previous years, the conflict between the Government and the Liberation Tigers of Tamil Eelam (LTTE) has provided, during the past two decades, the primary context for violations of rights relating to the integrity of the person. Since the Ceasefire Agreement between the Government of Sri Lanka and the LTTE came into operation on 22 February 2002, the number of conflict related violations of rights relating to the integrity of the person by the military forces of the Government and the police, has been greatly reduced. However, violations on the part of the LTTE escalated drastically during the year under review, causing increasing concern both within the country and internationally.[1] The violations were perhaps exacerbated by the split within the inner ranks of the LTTE in March 2004, when the commander of LTTE forces in the East, V Muralitharan or Colonel Karuna, split off from the main LTTE forces loyal to supreme leader Vellupillai Prabhakaran, based in the Vanni. In April 2004, the Vanni LTTE attacked and defeated Karuna's eastern forces, which quickly disbanded.

While no new arrests were made during the year under the Prevention of Terrorism Act (PTA), it was reported that around 40 people remained in detention under the PTA at the end of 2004.[2]

Incidents of torture, arbitrary arrest and detention, deaths in police custody and extra-judicial killings continued to be reported during the course of the year under review.

2. Violations of the Integrity of the Person

Despite judicial pronouncements by the Supreme Court buttressing the protection afforded to the integrity of the person and the guaranteeing of personal security, as well as efforts made by the National Human Rights Commission of Sri Lanka and public statements and campaigns

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1 "Sri Lanka: Human rights organizations urge visiting Tamil Tiger delegation to end killings & recruitment of child soldiers," Press release from ICJ, Human Rights Watch and Amnesty International, ASA 37/005/2004 (Public), 06 October 2004. http://www.amnestyusa.org/countries/sri_lanka/document.do?id=80256DD400782B8480256F2500501DC8 .

2 *Amnesty International Report 2005: the state of the world's human rights*, (United Kingdom: Amnesty International Publications, 2005), 234.

by the international community, namely human rights groups such as Human Rights Watch, Amnesty International and the International Commission of Jurists, drawing attention to incidents and situations of continued rights violations, numerous incidents of violation of the integrity of the person were reported during the year under review.

2.1 Torture

Notwithstanding the fundamental right to freedom from torture guaranteed by Article 11 of the Constitution,[3] extensive reports of torture were reported during the year. The most highlighted instances of torture were that of K P Tissa Kumara which resulted in his contracting tuberculosis and the torture and subsequent death of a bar manager on World Temperance Day. These two incidents stood out due to the particularly brutal nature of the torture involved.

Torture of K P Tissa Kumara

In February, the Welipenna Police arrested K P Tissa Kumara, who was later reportedly assaulted by a Sub-Inspector of the police station for about two hours while being handcuffed to the iron rails of the detention cell. The Sub-Inspector was also reported to have forced a tuberculosis patient, also in the custody of the Welipenna Police, to spit into Kumar's mouth.[4] Kumara was later diagnosed with tuberculosis.[5]

Kumara filed an application regarding the violation of his fundamental right to freedom from torture in the Supreme Court, alleging that he had been infected with tuberculosis due to the direct action of the police.[6] He was granted leave to proceed for the alleged infringement of his fundamental right to freedom from torture and freedom from arbitrary arrest and detention guaranteed to him under the Constitution.[7] The case was pending at year's end.

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3 "No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

4 "No Reduction in police Torture," *Sunday Island*, 02 May 2004.

5 "AHRC calls for immediate release of TB patient," *Island*, 05 May 2004.

6 "TB-infected detainee's case: Leave to proceed in FR case against police," *Sunday Island*, 16 May 2004.

7 Ibid.

Temperance Day Torture case

Herman Quintus Perera, a restaurant manager and father of two children, was allegedly killed by the Polonnaruwa police on 3 October 2004 (World Temperance Day).

According to the restaurant owner, their bar was closed on 3 October as directed by the Government to mark World Temperance Day. Two police officers requested alcohol and were refused by Perera. The officers later returned with reinforcements in a police jeep. The policemen had allegedly assaulted the employees of the restaurant and taken Perera and three other workers to the police station. On 4 October, it was reported that Perera had succumbed to the injuries sustained in the police assault.[8]

The police version given by an Assistant Superintendent of Police (ASP) to several media channels was that there had been a fight when the police raided the restaurant where they suspected illicit liquor was being sold and that the victim had died during the fight.[9] Four policemen were arrested and were pending trial at year's end.[10]

2.2 Arbitrary Arrest and Detention

In violation of the fundamental right to freedom from arbitrary arrest and detention guaranteed by Articles 13(1)[11] and 13(2)[12] of the

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8 "Cops lose temper on World Temperance Day: Refusal to serve liquor leads to barman's death," *Island,* 05 October 2004.

9 Asian Human Rights Commission (AHRC) - Urgent Appeals (UA-132-2004). http://www.ahrchk.net/ua/mainfile.php/2004/813/.

10 "Polonnaruwa Ranketha Hotel murder: four police officers interdicted," *Daily Mirror,* 06 October 2004.

11 Article 13(1) states, "No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest."

12 Article 13(2) states, "Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law."

Constitution, the following are some of the alleged instances of arbitrary arrest and detention as reported by the Asian Human Rights Commission (AHRC).

D G Premathilaka was detained without reasons being given, by officers attached to the Katugastota Police Station from 8 to 9 January 2004.[13] According to Premathilaka's statement, he was severely assaulted by the policemen from the Katugastota police station because he had given up the sale of illicit liquor which he had previously been involved in.

On 16 February 2004, D G Athula Saman Kumara, a businessman in Katugastota, was arrested while carrying on his business by a group of police officers attached to the Katugastota Police Station. He was not informed of the reason for the arrest and was allegedly severely tortured.[14]

On 7 June 2004, Moningal Akila Dilhara de Silva,[15] aged 17, was arrested at his home by six officers from the Panadura Police. No reasons were given for his arrest. It was alleged that de Silva was tortured at the police station.[16]

2.3 Extra Judicial Killings by the Police / Deaths in Police Custody

In the case of *Kottabadu Durage Sriyani Silva v Chanaka Iddamalgoda, Officer-in-Charge, Police Station, Payagala*,[17] the Supreme Court upheld the right to life as being implicitly guaranteed by Articles 11 and 13(4)[18] of the Constitution. The Court held, *inter alia*,

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13 AHRC – Urgent Appeals (UA-03-2004). http://www.ahrchk.net/ua/mainfile.php/2004/588/.

14 AHRC – Urgent Appeals (UA-20-2004). http://www.ahrchk.net/ua/mainfile.php/2004/622/.

15 AHRC – Urgent Appeals (UA-77-2004). http://www.ahrchk.net/ua/mainfile.php/2004/714/.

16 "Police on trial for torture," *Sunday Times*, 18 July 2004.

17 SC Application No. 471/2000, SC Minutes 08.08.2003 (final judgment).

18 Article 13(4) states "No person shall be punished with death or imprisonment except by order of a competent court, made in accordance with procedure established by law."

> Although the right to life is not *expressly* recognised as a fundamental right, that right is impliedly recognised in some of the provisions of Chapter III of the Constitution. In particular, Article 13(4) provides that no person shall be punished *with death* or imprisonment except by order of a competent Court. That is to say, a person has a right not to be put to death because of wrongdoing on his part, except upon a court order. Expressed positively, that provision means a person has a right to live, unless a court orders otherwise. Thus Article 13(4), by necessary implication, recognises that a person has a right to life ... if, therefore, without his consent or against his will, a person is put to death, unlawfully and otherwise than under a court order, clearly his right under Article 13(4) has been infringed.
>
> Article 11 guarantees freedom from torture and from cruel and inhuman treatment or punishment. Unlawfully to deprive a person of life, without his consent or against his will, would certainly be *inhuman* treatment, for life is an essential pre-condition for being human.

Within the context of the right to life being upheld as being a right guaranteed to all persons, the guarantee of which right was reiterated in the year under review in *Wewalage Rani Fernando and three Others v OIC, Seeduwa Police Station and 08 Others*,[19] continued reports of extra judicial killings by the police and deaths in police custody in the year under review were rendered all the more serious and disturbing.

In 2003, Gerald Mervin Perera was granted a declaration by the Supreme Court that his fundamental rights, guaranteed to him under Articles 11, 13(1) and 13(2), had been infringed by the actions of the respondents who were police officers attached to the Wattala Police Station. He was granted the sum of Rs. 800,000 as compensation for the torture he was made to undergo and the State was held liable to pay his medical expenses. A case was subsequently filed against the police officers under the Convention against Torture Act of 1994 in the Negombo High Court. Perera was shot on 21 November, a few days before he was to give evidence in the said case, and subsequently died of his injuries. It was reported that Perera was under pressure to

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[19] SC FR 700/2002, SC Minutes 26.07.2004.

withdraw the case filed under the Convention against Torture Act.[20] The suspects who were later arrested included some of the very same police officers against whom Perera had taken action.[21]

The following are some of the alleged incidents of extra judicial killings by the police and deaths in police custody reported during the year under review. It is noteworthy that the Country Report on Human Rights Practices – 2004 on Sri Lanka of the U.S. Department of State,[22] reports the occurrence of as many as 13 deaths in police custody. However, it is submitted that the actual number of deaths could be far higher given that many such incidents often go unreported.

On 10 January 2004, a clash took place between two groups of young people at a musical show in Gampola. Following this clash, a large number of spectators were allegedly assaulted by police officers attached to the Gampola police station. Some of the spectators were then detained, and later beaten. In reaction to this, some spectators launched a protest. It was alleged that the police, numbering around ten both in uniform as well as civilian clothing, fired at the people in order to disperse the crowd. Dissanayake Mudianyaselage Suranga Sampath, was alleged to have been struck by a bullet fired by the police. He was later taken to the Gampola hospital, where the doctor who examined him certified him dead.[23]

Jayasiri Sanjeewa Perera was shot dead on 25 January during an attempt to arrest a person. The police claimed that they had opened fire because of the possibility of a bomb attack by a person inside the house.[24]

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20 Asian Human Rights Commission, "Dossier on Gerald Mervin Perera," http://srilankahr.net/pdf/Dossier%20of%20Gerald%20Mervin%20Perera%20%5B1Dec2004%5D.pdf.

21 "More arrested in Gerard Perera killing," *Island*, 25 December 2004.

22 *Sri Lanka: Country Reports on Human Rights Practices – 2004*, released by the Bureau of Democracy, Human Rights and Labour, US Department of State, 28 February 2005. http://www.state.gov/g/drl/rls/hrrpt/2004/41744.htm.

23 AHRC – Urgent Appeals (UA-12-2004). http://www.ahrchk.net/ua/mainfile.php/2004/606/.

24 "AHRC condemns police shooting spree," *Sunday Leader*, 21 March 2004.

Ajit Rohana was shot dead allegedly by an officer of the Wennappuwa police while he was travelling in a van with some friends. The police version of the incident was that the vehicle had proceeded after ignoring calls to stop and that therefore they followed the van and shot at it. The death was said to be a result of this.[25]

Mohamad Naushad was shot dead on 13 February. The police claimed that while they were trying to arrest Naushad, he had allegedly tried to stab an officer and that therefore they opened fire.[26]

On 22 February, Bellanavithanage Sanath Yasaratne, aged 22, was allegedly assaulted and shot dead by a police constable and two other officers attached to the Baduraliya Police Station in the course of an inquiry.[27] A post-mortem inquiry, conducted by the Judicial Medical Officer (JMO) of the Nagoda Hospital, confirmed that the death of the victim was due to gun shot injuries. The Magistrate's Court inquiry concluded that the death was a homicide caused by the shooting.[28]

Ranjit Lilaratne was shot dead on 10 March at the police post at Walkada Jadawa, Kathigolla, Anuradhapura. The police contended that the victim was shot while allegedly trying to escape after being arrested.[29]

H M Nirosha was shot dead on 10 March allegedly by officers of the Haldumwal police who maintain that she was accidentally hit while they were shooting at a mad dog with a T-56 semi-automatic rifle.[30]

In November, the police shot dead 'Divulapitiye Dhammika', identified as a notorious gangster and his accomplice. The statement of the police was that the deceased had ignored an order to surrender and had subsequently been killed in a shoot out.[31] In the same month, the

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25 Ibid.
26 Ibid.
27 AHRC – Urgent Appeals (UA-24-2004). http://www.ahrchk.net/ua/mainfile.php/2004/629/.
28 "AHRC condemns police shooting spree," *Sunday Leader*, 21 March 2004.
29 Ibid.
30 Ibid.
31 "Police kill notable gangster," *the Island*, 15 December 2004.

Police Crime Unit shot dead 'another dangerous criminal' known as G Chaminda Roshan Silva alias Thoppi Chaminda, who was wanted in connection with several murders and extortion cases. It was reported that he was shot dead when he attempted to throttle a policeman while in custody.[32]

On 26 December, 'Ata' Indika, described as a notorious gangster, was reported killed when he tried to escape while being taken by police to a hideout where he had allegedly hidden some weapons.[33]

The year under review saw a sharp increase in the number of alleged criminals and suspects killed in the course of being arrested or being transported while in police custody. The similarity of the reasons given to justify the fatal shootings that took place was noted in a newspaper editorial which stated, "... in almost all these cases the excuse given out is that each suspect taking the police to show their arms caches suddenly pulls out a grenade or a gun to attack the policeman who immediately fires back killing the suspect on the spot. It is even stranger that judicial officers who inquire don't see the one too many coincidences. In one instance the shooting was attributed to a handcuffed suspect attempting to strangle a police officer!"[34]

Increasing media reports of killings of suspects by the police also caused much concern amidst civil society and human rights organisations. The Civil Rights Movement (CRM) drew the attention of the Human Rights Commission to the numerous press reports of killing of suspects while in police custody. CRM pointed out to the Commission similarities to the newspaper reports of the killing of several suspected members of the Janatha Vimukthi Peramuna (JVP) in 1989 - 91, after their arrest.

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32 "Killers on the run," Sunday *Observer*, 26 December 2004. See also, "Most dangerous criminal in WP killed," *Sunday Observer*, 28 November 2004.

33 *Police gun down 'Ata' Indika*, http://www.lankanewspapers.com/news/2004/12/121.html.

34 "A spate of police killings in Sri Lanka," World Socialist Web Site, http://www.wsws.org/articles/2005/apr2005/sril-a28.shtml.

3. Violations of the Ceasefire Agreement relating to the integrity of the person

In entering into the "Agreement on a ceasefire between the Government of the Democratic Socialist Republic of Sri Lanka and the Liberation Tigers of Tamil Eelam" (hereinafter referred to as the Ceasefire Agreement), the parties to the conflict "recognise[ed] the importance of bringing an end to the hostilities and improving the living conditions for all inhabitants affected by the conflict" as well as "recognise[ed] that groups that are not directly party to the conflict are also suffering the consequences of it."[35] As such, one of the objectives of the Ceasefire Agreement remains the protection of the security of citizens and their property, a protection guaranteed to all inhabitants.

Of particular importance to the protection of the integrity of the person is Article 1.2 of the Ceasefire Agreement, which states,

> Neither party shall engage in any offensive military operation. This requires the total cessation of all military action and includes, but is not limited to, such acts as:
>
> a) The firing of direct and indirect weapons, armed raids, ambushes, assassinations, abductions, destruction of civilian or military property, sabotage, suicide missions and activities by deep penetration units;
>
> b) Aerial bombardment;
>
> c) Offensive naval operations.

As part of measures to restore normalcy, the parties undertake "in accordance with international law, [to] abstain from hostile acts against the civilian population, including such acts as torture, intimidation, abduction, extortion and harassment."[36] Further, the "parties agree

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[35] Preamble to the Agreement on a ceasefire between the Government of the Democratic Socialist Republic of Sri Lanka and the Liberation Tigers of Tamil Eelam. http://www.slmm.lk/documents/cfa.htm.

[36] Ceasefire Agreement, Article 2.1.

that search operations and arrests under the Prevention of Terrorism Act shall not take place. Arrests shall be conducted under due process of law in accordance with the Criminal Procedure Code."[37]

The Sri Lanka Monitoring Mission (SLMM) was established under the provisions of the Ceasefire Agreement to enquire into any instance of violation of its terms and conditions.[38] Accordingly, "It shall be the responsibility of the SLMM to take immediate action on any complaints made by either Party to the Agreement, and to enquire into and assist the Parties in the settlement of any dispute that might arise in connection with such complaints."[39]

The following is a compilation of the number of complaints received/ inquired into by the SLMM in the year under review, of particular relevance to the protection of individuals and civilians not involved in military activities.[40]

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[37] Ibid., Art. 2.12.
[38] Ibid., Art. 3.
[39] Ibid., Art. 3.11.
[40] Compiled number of complaints accessible at www.slmm.lk.

Category	Total no. of complaints against		Ruled as violations		Ruled as no violations		Pending cases
	LTTE	GOSL	LTTE	GOSL	LTTE	GOSL	
Hostile acts against the civilian population	22	3	6	1	9	2	5
Torture	3	3	2	0	0	1	1
Abduction of adults	314	3	80	0	47	1	118
Abduction of children	107	0	55	0	17	0	30
Child recruitment	454	0	283	0	36	0	94
Forced recruitment of adults	42	0	13	0	11	0	8
Assassinations	33	1	3	0	1	0	15

The number of complaints received is estimated by the SLMM to be only a part of actual violations. Further, the large number of cases pending at year's end is due to lack of adequate information in many instances.

It is noteworthy that the mandate of the SLMM provides for making of complaints only by the Parties to the Ceasefire Agreement. Thus, civilians are effectively prevented from making complaints directly to the SLMM, thereby greatly reducing the protection afforded to the rights of civilians through the provisions of the Ceasefire Agreement. Further, the Ceasefire Agreement contains no provisions relating to the sanctions/penalties that could be imposed by the SLMM in the event of a complaint against a Party being ruled as a violation.

While both parties violated the conditions and terms of the Ceasefire Agreement, violations by the LTTE were more numerous and more serious and thus, the most highlighted.

The most serious violations of the integrity of the person by the LTTE were the continued recruitment of children as combatants and the carrying out of extra-judicial killings.

3.1 Child soldiers

Despite an end to active hostilities and repeated pledges by the LTTE leadership to end its recruitment of children, the practice continued in the year under review, with the re-recruitment of children released from the LTTE's eastern faction in April 2004, causing the most concern.

As of 31 October 2004, the United Nations Children's Fund (UNICEF) had documented 3,516 new cases of underage recruitment since the signing of the Ceasefire Agreement (including the re-recruitment of formerly released child soldiers). The LTTE formally released only 1,206 children during this time. Of the cases registered by UNICEF, 1,395 were outstanding as of November 2004. It was noted by UNICEF that the number of cases it registers represent only a portion of the total number of children recruited, as some families may be unaware of the possibility of registering, may be afraid to do so, or may have difficulty reaching a UNICEF office. It is a notable fact that of the children who have been released or returned from the LTTE, only about 25 percent had previously been listed in the UNICEF database, leading to the suggestion that the total number of children remaining with the LTTE may be as much as four times higher than the 1,395 figure suggests.[41]

Following the disbanding of Karuna's forces in the east, it was reported that around 2,000 child soldiers under Karuna fled or were encouraged by their commanders to return to their families.[42] The child combatants who thus returned home were reported to have been subjected to a major re-recruitment drive by the LTTE, with UNICEF documenting

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[41] Data supplied by UNICEF, 02 November 2004, quoted in *Human Rights Watch*, 16 no. 13(c), (November 2004). http://hrw.org/reports/2004/srilanka1104/.

[42] *Human Rights Watch*, op. cit., 4.

nearly one hundred cases of re-recruitment, mostly from the Batticaloa district, between April and August 2004.[43]

Continued recruitment of children on the part of the LTTE is a violation of the Ceasefire Agreement and also reneges on numerous commitments made by the LTTE to end their recruitment and use of child soldiers. This is evidenced by the disparity between the number of recorded recruitments and the number of child combatants released by the LTTE. Between January 2002 and 01 November 2004, UNICEF documented a total of 4,600 cases of under-age recruitment. During the same period, the LTTE was reported to have released only 1,208 children from its forces.[44]

The LTTE's continued recruitment of children violates international human rights and humanitarian law, which expressly prohibits the recruitment of children as soldiers and the participation of children in active hostilities.

The primary legal standard relating to the use of children in situations of armed conflict is set by the provisions of the Convention on the Rights of the Child, which was ratified by Sri Lanka in 1991.[45] This is further reflected in Protocol II to the Geneva Conventions of 1949, which applies during non-international armed conflicts (civil wars) and prohibits states and non-state armed groups from recruiting or using children under the age of fifteen in armed conflict. That the Protocol applies equally to both state and non-state armed groups is significant in that it allows for the actions of the LTTE to fall within the ambit of the Protocol. Thus, the prohibition on the recruitment and use of children below the age of fifteen is now considered customary international law, and is binding on all parties to armed conflict.

Sri Lanka is also party to the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, which was adopted by the United Nations in 2000 and which entered into force in 2002. The Protocol raised the standards set in the

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43 Ibid., 38.

44 *Human Rights Watch*, op. cit., 49.

45 Article 38(2) of the Convention states that State Parties should take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.

Convention on the Rights of the Child by establishing eighteen as the minimum age for any conscription or forced recruitment or direct participation in hostilities. The Protocol also places obligations upon non-state armed forces through Article 4, which states, "Armed groups that are distinct from the armed forces of a state should not, under any circumstances, recruit or use in hostilities persons under the age of eighteen."[46]

The continued use of children in armed conflict by the LTTE was highlighted in the report on children and armed conflict of the United Nations Secretary-General to the Security Council, which report covered the period from 10 November 2003 through December 2004.[47] The report stating, *inter alia*,

> During 2004, more than 1,000 cases of new recruitment and re-recruitment were reported to UNICEF, a high percentage of the recruits being girls. Re-recruitment was particularly high in the eastern part of the country. Altogether, there have been more than 4,700 cases of child recruitment, some involving children as young as 11, since April 2001. Of these children, more than 2,900 have returned or been released to their families, including approximately 1,230 who were formally released and over 1,660 who went home following fighting in eastern Sri Lanka in April 2004 and the fall of the Karuna faction of LTTE. In addition, at least 550 children have run away from LTTE during the reporting period.

3.2 Killings by the LTTE

Killings, torture, abductions and other human rights violations on the part of the LTTE continued unabated during the year under review notwithstanding provisions of the Ceasefire Agreement, which prohibit such actions. As noted in the joint statement of Amnesty International,

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[46] Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts, A/RES/54/263, adopted 25 May 2000, entered into force 12 February 2002. Sri Lanka ratified the protocol on 8 September 2000.

[47] "Children and armed conflict," Report of the Secretary-General, A/59/695–S/2005/72, 9 February 2005. http://www.reliefweb.int/rw/RWB.NSF/db900SID/HMYT-69NQ9A?OpenDocument& rc=3&cc=uga.

Human Rights Watch and the International Commission of Jurists, victims of killings have included activists from Tamil political parties not aligned with the LTTE, members of a rival LTTE faction in the east, and alleged Sri Lankan military informants.[48]

The following are some instances of alleged violations of the integrity of the person by the LTTE during the year under review, as highlighted in media reports and by human rights organisations.

Kumaravelu Thambaiah, an academic in the Eastern University, was gunned down by two callers at his home in Batticaloa on 24 May 2004. Journalist G. Nadesan was gunned down six days later on 30 May.[49] Members of the Karuna faction were suspected to have carried out both these killings.[50]

On 07 July 2004, a suspected woman LTTE suicide bomber, assigned to assassinate Ealam People's Democratic Party (EPDP) leader and Minister Douglas Devananda, blew herself up at the Kollupitiya Police Station, killing four policemen and injuring nine others.[51] This was the first suicide attack right in the heart of the capital city of Colombo since the ceasefire agreement was signed.[52]

On 07 July 2004, two Tamil youths, Balasuntaram Sritharan, aged 23 years, and Thillaiamapalam Suntararajan, aged 24, were summarily executed in the East allegedly by the LTTE on allegations that they were members of the renegade Karuna faction.[53]

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48 "Sri Lanka: Human rights organizations urge visiting Tamil Tiger delegation to end killings & recruitment of child soldiers," op. cit.

49 *Political Killings and Sri Lanka's Stalled Peace*, University Teachers for Human Rights (Jaffna), Special Report No: 18, 28 March 2005. http://www.uthr.org/SpecialReports/spreport18.htm#Newintro.

50 "Human Rights News : Sri Lanka: New Killings Threaten Ceasefire," Human Rights Watch. http://hrw.org/english/docs/2004/07/27/slanka9153.htm.

51 "Devananda survives 10th assassination bid," *Daily News*, 08 July 2004.

52 "Sri Lanka should seek UN support to arrest the killings," *Island*, 03 August 2004.

53 Ibid.

Kanapathipillai Mahendran alias 'Sachchi Master' and Saravanamuthu Shanthakumar, members of a rival LTTE faction, were shot dead inside the Batticaloa prison on 15 July 2004, by a suspected LTTE cadre who was an inmate at the same prison.[54]

Abdul Majeed Nisaja was shot dead in her house on 19 July 2004, by an alleged LTTE gunman.[55]

On 21 July 2004, Velayutham Raveenthiran, Pradeshiya Sabha Chairman (EPDP) of the Alayadivembu Pradeshiya Sabha in the Amparai district was shot dead by the LTTE. On the same day, Jothinayagam Ravisankar, an employee of the Insurance Corporation, was allegedly tortured and shot dead by the LTTE.[56]

Suntharam Panchalingam was abducted on 22 July 2004 and his body found on 24 July.[57]

Alagiah Kirupairajah was shot dead allegedly by the LTTE on 23 July 2004.[58]

On 24 July 2004, Sithamparapillai Thusjanthan, an employee of the Kalmunai Buildings Department, was allegedly killed by the LTTE.[59]

Eight members of the renegade Karuna faction of the Batticaloa – Amparai district Liberation Tiger organisation were shot dead on 25 July 2004, at a safe house in Kottawa.[60]

Kandiah Yogarasa, commonly known as Plote Mohan, was shot dead at in Colombo on 31 July 2004, allegedly by a pistol gang of the LTTE. He was reported to be a close associate of the LTTE renegade leader Karuna and a top informant for the Army. Information given by the

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54 Ibid.
55 "Killing fields of Sri Lanka," *Daily Mirror*, 06 August 2004.
56 Ibid.
57 Ibid.
58 Ibid.
59 Ibid.
60 "Eight killed in Kottawa safehouse," *Daily Mirror*, 26 July 2004.

deceased was known to have helped the Army to carry out many successful operations against the LTTE.[61]

On 16 August 2004, two unidentified men on motorbikes, shot and killed Kandasamy Iyer Balanadarajah, Media Secretary of the EPDP, while he was on the wayside close to his home in Wellawatte. The pistol men were suspected to be from the LTTE.[62]

Vallisundaram, a Pradeshiya Sabha member of the Valikamam North Pradeshiya Sabha representing the EPRLF, was killed by LTTE gunmen on 27 August 2004.[63]

On 28 August 2004, Tissaveerasingham Dushman Kumar, an ex-LTTE cadre allegedly working with the Directorate of Military Intelligence (DMI), was shot dead by four persons believed to be belonging to the LTTE.[64]

LTTE member *Jude* was shot dead near the bus station at Akkaraipatru in Amparai District on 9 October. It was reported that that the assailant, identified as *Vithuhan* of the Karuna faction, was killed by the police Special Task Force (STF) while attempting to escape.[65]

On 19 October 2004, former TNA MP Kingsley Rajanayagam was shot dead by unidentified gunmen allegedly belonging to the LTTE.[66] The deceased, who was said to be an associate of Tiger dissident Col. Karuna, was elected as MP in April 2004, but resigned later due to alleged pressure from the LTTE.[67]

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61 "LTTE guns down 'dreaded' informant Plote Mohan," *Sunday Times*, 01 August 2004.

62 "Government condemns murder of EPDP Media Secretary," *Daily News*, 17 August 2004.

63 "EPRLF member shot dead," *Island*, 28 August 2004.

64 "LTTE bumps off another informant," *Island*, 29 August 2004.

65 Refugee Council, *Sri Lanka Project Briefing, 25 October 2004*. http://www.refugeecouncil.org.uk/downloads/briefings/country/srilanka_oct04.pdf.

66 "Former TNA MP shot dead by suspected LTTE gunmen in Batticaloa," *Daily News*, 20 October 2004.

67 Refugee Council, *Sri Lanka Project Briefing, 25 October 2004.*, op. cit. See also, *Ex TNA MP shot dead in Batticaloa*, http://www.tamilnet.com/art.html?catid=13&artid=13182.

Dayalan, an army informant, was killed on 04 November 2004, by a person on a motorbike and suspected to be from the LTTE pistol gang. A youth described as an army informant was shot dead in Negombo by a gang.[68]

Where the LTTE has engaged in assassinations of members of army intelligence who are not military but civilians, it is in violation of Article 3 common to the Four Geneva Conventions of 1949.[69] Article 3 states, *inter alia*,

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> (2) To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

The LTTE is bound to follow the principles laid down in the Geneva Conventions in that it binds all parties to a conflict, whether or not they are State parties.

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[68] "Two more informants shot dead," *Daily Mirror,* 05 November 2004.

[69] The 1949 Geneva Conventions entered into force on 21 October 1950 and were ratified by Sri Lanka on 28 February 1959.

4. Zero-Tolerance Policy on Torture of the Human Rights Commission

In May 2004, the Human Rights Commission of Sri Lanka (HRC) announced its plans to implement a "Zero-Tolerance Policy on Torture" with the view of dealing with the high incidents of torture of persons by law enforcement officers of the country – the stance of the HRC being that the "law enforcement institutions which should be the protectors of rights and enforcers of law and order shall not be the perpetrators of right violations – torture, degrading, cruel and inhuman degrading treatment."[70]

As the key feature of the "Zero-Tolerance Policy on Torture", the HRC set up a special Unit named the "Torture Prevention and Monitoring Unit (TPMU)" with the objective being to "eliminate or minimise incidents of torture in Sri Lanka, in particular at the hands of law enforcement officers."[71]

The salient features with regard to the operation of the TPMU involved –

1. dealing with issues of torture by law enforcement officers and other public officers;

2. the operation of a 24-hour desk to receive complaints relating to incidents of torture, the commencement of investigations into them immediately as well as the operation of a hotline to receive these complaints;

3. the recruitment of 10 more Investigation Officers who will be specially assigned to handle complaints of torture;

4. the appointment of a number of "Accredited Visitors" (AVs) at district level who will be authorised to make visits to the Police Stations and other detention centres (law enforcement offices) under the power vested in the HRC;

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70 "Human Rights Commission of Sri Lanka: Establishment of a Torture Prevention & Monitoring Unit (TPMU)," prepared by N. Selvakkumaran, Member, HRC-Sri Lanka, 2004.

71 Ibid.

5. the engagement of an Inquiry Officer, preferably a retired Judicial Officer, to conduct inquiries when complaints and recorded statements are obtained and forwarded. Torture cases are to be handled on a priority basis by this special inquiry officer; and

6. the reporting of findings (with recommendations) by the Inquiry Officer to the HRC, which will make its decision and convey it to the National Police Commission (NPC), the Inspector-General of Police (IGP) and/or the Attorney-General for necessary action.[72]

The action contemplated was that when a complaint of torture is received by the TMPU, one of the AVs, living in close proximity to the alleged place of torture/detention, would be contacted to make an immediate visit to the place and conduct an independent fact-finding investigation into the allegation. The AV has to send a report on the incident within two days of the complaint. In order to ensure objectivity and to check on the exercise, another AV in the area will also be commissioned to conduct a separate and independent fact-finding investigation. After receipt of the reports from the AVs and if they reveal any acts of torture, a team of investigators from the TMPU or the nearest Regional Office will be sent the following day to conduct a formal investigation into the complaint, which task has to be completed within a space of a week.

The team has to submit a report on the investigation along with these statements and evidence to the Director/Investigations and Inquiries who will make a decision as to whether there is a prima facie case to conduct an inquiry. Where the decision is in the affirmative, a retired judicial officer, whose services are engaged for the purpose, will conduct an inquiry into the matter within a period of three weeks. The findings and recommendations of the Inquiry Officer will be submitted to the Commission for its decision as to whether there has been a violation of Article 11. In the event of such a determination being made, such determination as well as a suitable recommendation to deal with the case, will be transmitted to the NPC, the IGP and the Attorney-General for necessary action.[73]

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[72] Ibid.

[73] See note 70 above.

In addition to the setting up of the TPMU, other elements of the policy were, *inter alia*, the summoning before the HRC of the OIC of the relevant police station whenever there is a death in custody with an adverse medical report and discussions with the NPC to secure the interdiction of police officers found guilty of torture by the HRC or the Supreme Court.[74]

With regard to the implementation of the "Zero-tolerance Policy on Torture" and the overall mandate of the HRC, a total of 182 inquiries were concluded in 2004 with 1233 inquiries pending at year's end. Of the 4032 complaints received during the year where further inquiries were allowed, 284 involved arrest/detention, 710 torture and 32 death in custody.[75] The large number of cases pending at year's end served as a telling comment on the practical workings of the HRC in spite of efforts to broaden and streamline the mandate of the HRC to better deal with human rights violation, particularly with regard to the integrity of the person.

5. Proposed re-implementation of the Death Penalty

On 19 November 2004, Colombo High Court Judge Sarath Ambepitiya and his bodyguard were shot and killed at his official residence in Colombo. Following this incident, a statement was released by the Office of President Chandrika Kumaratunga that the death penalty would be re-initiated for rape, murder and narcotic dealings with immediate effect. The decision to reintroduce the death penalty was made by the President at an emergency meeting with the Minister of Public Security, Law and Order, and other security officials.[76]

This decision of the President was strongly censured with several key human rights organisations speaking out against the move. The HRC of Sri Lanka criticised the decision, stating that the death penalty would not contribute towards lessening the crime rate. The Secretary of the HRC, D H Siriwardene, stated that the Commission "categorically

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74 "Zero-tolerance policy on torture," *Island*, 11 May 2004.

75 Information supplied by Mr. Nimal G. Punchihewa, Director/ Investigations and Inquiries, Human Rights Commission.

76 "Death Penalty Comes into Force," *Sunday Times*, 21 November 2004.

disapproves of the measures taken to reinstate the death penalty as such a step would be against human rights and the Commission would strongly advise officials against it re-implementation."[77] He further stated, "despite the popular belief that, reinstating the death penalty would lower the escalating crime rate, statistics show that countries, including the USA, have seen a rise in crimes, since introducing the death penalty. The death penalty alone is not sufficient to control crime."[78]

Amnesty International (AI), in a statement issued on 23 November 2004, expressed concern over the reintroduction of the death penalty. AI condemned the decision stating that "the death penalty is a violation of the right to life and is the ultimate cruel, inhuman and degrading punishment... the reactivation of the death penalty by Sri Lanka would be a retrograde step, ending a 27 year moratorium on executions."[79] AI further urged the President and the Government to search for other solutions to address criminality and to withdraw plans to reactivate the death penalty.[80]

In this context, it is noteworthy that soon after the assassination of the High Court Judge, the Bar Council of the Bar Association of Sri Lanka (BASL) too demanded that the President reintroduce the death penalty.[81]

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77 "HRC: Death penalty no panacea for lawlessness," *Daily Mirror*, 23 November 2004.

78 Ibid.

79 "Sri Lanka: Amnesty International Concerned at Reactivation of Death Penalty," Amnesty International Public Statement, ASA 37/007/2004, 23 November 2004; "AI worried over invocation of death penalty," *Daily Mirror*, 25 November 2004; "Amnesty claims CBK promised not to hang," *Island*, 25 November 2004. See also, "Say 'No' to the Gallows," statement by the Civil Rights Movement, 02 February 2003.

80 Ibid.

81 See note 76 above.

6. Views of the United Nations Human Rights Committee in response to an Individual Communication by Nallaratnam Singarasa

With the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) entering into force on 23 March 1976,[82] the Human Rights Committee (hereinafter referred to as the Committee) set up under the ICCPR was given the jurisdiction to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the ICCPR. The Optional Protocol specifies that an acceding State party recognises the competence of the Committee to receive and consider communications relating to alleged violations of rights set out in the ICCPR, from individuals subject to its jurisdiction.[83] In invoking the jurisdiction of the Committee through submitting a written communication, individuals should necessarily have exhausted all available domestic remedies.[84]

Of particular relevance to Sri Lanka, is the individual communication submitted to the Committee on behalf of Nallaratnam Singarasa on 21 November 2001. At the time of the application, Singarasa, a Tamil, was serving a sentence of 35 years imprisonment at the Boosa Prison. It was submitted that the instant application, arising in relation to a conviction upheld on appeal in Case No. 6825/94, and prolonged pre-trial detention in Case Nos. 6823/94 and 6824/94, involved breaches of rights as guaranteed by Articles 14 paragraph (1), (2), (3) subparagraphs (c), (f) and (g), and paragraph (5); Article 2(1) read with Article 26; and Article 2(3) read with Article 7 and Article 14 of the Covenant.

Torture, remand in detention without bail, there being no interpreter present during the investigation process, the 'voluntariness' of the confession and its admissibility, the delay in being tried were some of the issues that formed the crux of the complaint made to the Committee.

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82 Sri Lanka acceded to the *International Covenant on Civil and Political Rights* on 11 June 1980 and the *Optional Protocol* on 03 October 1997.

83 *Optional Protocol*, Art. 1.

84 Ibid., Art. 2.

Material facts of the Communication [85]

As submitted in the Communication, Singarasa was arrested on 16 July 1993. He was taken to an army camp and accused of being a LTTE supporter. Singarasa alleged assault by members of the security forces during this period. Singarasa was later detained in the army detention camp within Batticaloa Prison in pursuance of an order by the Minister of Defence under section 9(1) of the Prevention of Terrorism Act. The detention order was not served on Singarasa and he was not informed of the reasons for his detention.

During the period between 17 July 1993 and 30 September 1993, three policemen assisted by a former Tamil militant who worked with the security forces, interrogated Singarasa. It was alleged that for two days after the arrest, Singarasa was subjected to torture and ill-treatment and assault. He was questioned in Tamil by the police officers, who spoke little Tamil. He had neither legal representation nor interpretation facilities at this time, nor was he given any opportunity to obtain medical assistance.

Singarasa was produced for the first time before the Batticaloa Magistrate sometime in August 1993, and remanded back into police custody. The Magistrate did not review the detention order, pursuant to section 10 of the PTA.

It was claimed that on 11 December 1993, Singarasa was forced to sign, by placing his thumbprint, a typed document, which was in Sinhala, which he could neither read nor understand. This typed document was later produced by the prosecution as evidence of a confession by Singarasa.

After fourteen months in detention, Singarasa was indicted before the High Court in September 1994 in three separate cases;

a) On 5 September 1994, he was indicted in Case No. 6823/ 94, together with several named and un-named persons, of

[85] Communication submitted for consideration under the first Optional Protocol to the International Covenant on Civil and Political Rights on behalf of Nallaratnam Singarasa, UN Reference No. G / SO 251/51 Sri Lanka, 21 November 2001. http://www.interights.org/doc/final%20comm%20sent%20by%20mr.%20ganeslingam.doc.

having committed an offence under Sections 2(2)(ii) read with section 2(1)(f) of the PTA, namely, receiving armed combat training under the LTTE Terrorist Organisation at Muttur between 1 January 1989 and 31 December 1989.

b) On 28 September 1994, he was indicted in Case No. 6824/94, together with several other named persons and persons unknown, of having committed an offence under section 2(1)(a) read with section 2(2)(i) of the PTA, namely of having caused the deaths of army officers at Arantawala between 1 November 1992 and 30 November 1992.

c) On 30 September 1994, he was indicted in Case No. 6825/94, together with several other named persons and persons unknown, on five counts, the first of having conspired by unlawful means to overthrow a lawfully constituted Government of Sri Lanka, and the remaining four of having attacked four army camps.

In this context, it is noteworthy that Singarasa first had access to a legal representative when the High Court assigned him state counsel on 30 September 1994. He then retained private counsel.

The medical report of the Judicial Medical Officer who examined Singarasa on the Court's order, stated that he had scars on his back, and a grievous injury, being a corneal scar on his left eye, resulting in permanent impairment of vision.

With regard to the alleged confession by Singarasa, the High Court decided on 2 June 1995 that the confession was admissible, pursuant to section 16(1) of the PTA, which renders admissible any statement made before a police officer not below the rank of an ASP, provided that it is not found to be irrelevant under section 24 of the Evidence Ordinance. Under Section 16(2) of the PTA the burden of proving that any such statement is irrelevant is placed upon the accused. The Court therefore admitted the confession despite defence counsel's motion to have it excluded on the grounds that it had been extracted from the author 'under threat' and was therefore irrelevant under section 24 of the Evidence Ordinance. The medical report was not taken into account in the process of considering whether the confession was voluntary. In holding that the confession was voluntary, the High Court

relied upon Singarasa's failure to "complain to anyone at any time about the beatings," and found that his failure to inform the Magistrate of the assault indicated that he had not behaved as a "normal human being."

On 29 September 1995, the High Court convicted Singarasa in Case No. 6825/94 on all five counts, and on 4 October 1995, it sentenced him to 50 years rigorous imprisonment; the judgment being founded on the alleged confession.

Singarasa preferred an appeal to the Court of Appeal (CA No. 208/95) on 9 October 1995 seeking to set aside the conviction and sentence. On 6 July 1999, almost five years after the conviction, the Court of Appeal unanimously affirmed the conviction, but reduced the sentence to a total of 35 years. Singarasa filed a petition for special leave to appeal[86] before the Supreme Court of Sri Lanka on 4 August 1999, on the ground that certain matters of law arising in the Court of Appeal's judgment merited consideration by the Supreme Court. Special leave to appeal was refused on 28 January 2000.

Views of the Committee[87]

In considering the admissibility of the Communication before it, the Committee noted that although Singarasa (hereinafter referred to as the author) was convicted at the first instance before the Optional Protocol entered into force for Sri Lanka, both the decision of the Court of Appeal and the refusal of special leave to appeal by the Supreme Court were made after such entry into force. Therefore, the Committee considered the communication to be reviewable by the Committee. However, the Committee held itself without jurisdiction to look into the author's claims relating to automatic detention without bail.

Answering the submission by the State party that the author had not exhausted all domestic remedies due to the existence of the remedy

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[86] Leave to Appeal No. SC (Spl) LA No. 182/99.

[87] Communication No. 1033/2001: Sri Lanka. 23/08/2004. CCPR/C/81/D/1033/2001. (Jurisprudence). Views of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights. http://www.worldlii.org/int/cases/UNHRC/2004/42.html.

of a Presidential Pardon, the Committee held that such a remedy was an 'extraordinary' remedy and as such, not an effective remedy for the purposes of the provisions of the Optional Protocol.

With regard to the right of the author to have his conviction and sentence reviewed by a higher tribunal, the Committee was of the view that the fact the author did not agree with the decision of the Court of Appeal did not amount to a violation of such right of review.

Accordingly, the Committee proceeded to consider the merits of the communication in terms of violations alleged on the basis of torture and unfair trial, i.e., Article 14 alone and read with Article 7.

As to the claim of a violation of article 14, paragraph 3 (f), due to the absence of an *external* interpreter during the author's alleged confession, the Committee noted that this provision provides for the right to an interpreter during the court hearing only, a right which was granted to the author. However, as evidenced by court proceedings, the confession took place in the sole presence of two investigating officers – the Assistant Superintendent of Police and the Police Constable – the latter having typed the statement and provided interpretation between Tamil and Sinhalese. In these circumstances, the Committee concluded that the author was denied a fair trial in accordance with article 14, paragraph 1, of the Covenant by solely relying on a confession obtained in such circumstances.

As to the delay between conviction and the final dismissal of the author's appeal by the Supreme Court (29 September 1995 to 28 January 2000) in Case No. 6825/1994, the Committee considered that the delay in the instant case violated the author's right to review without delay and consequently held in favour of a violation of Article 14, paragraphs 3(c), and 5 of the Covenant.

The Committee also found the author having to assume the burden of proof that the confession was extracted under duress and was not voluntary, to be violative of Article 14, paragraphs 2, and 3(g), read together with Article 2, paragraph 3, and 7 of the Covenant.

The Committee after reviewing the facts before it as well as the submissions of the State party, thus held as follows,

> The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on civil and political rights, is of the view that the facts before it disclose violations of articles 14, paragraphs 1, 2, 3, (c), and 14, paragraph (g), read together with articles 2, paragraph 3, and 7 of the Covenant.
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> In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective and appropriate remedy, including release or retrial and compensation. **The State party is under an obligation to avoid similar violations in the future and should ensure that the impugned sections of the PTA are made compatible with the provisions of the Covenant.** [Emphasis added]

Taking cognisance of the fact that " by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant," the Committee made a direction to the State party to furnish, within 90 days, information about the measures taken to give effect to its Views. The State party was also requested to publish the Committee's Views.

Failure of the State party to give effect to the Views of the Committee

In terms of the Views communicated by the Committee on 21 July 2004, it was recommended that the State party, i.e., the Government of Sri Lanka, take steps to provide Singarasa with an "effective and appropriate remedy, including release or retrial and compensation." The State party was also given a set period of 90 days or three months within which to provide information to the Committee about the steps taken to give effect to its Views.

As highlighted by Amnesty International,[88] the Sri Lankan Government failed to carry out the recommendations in that Singarasa still remained in prison at the end of the 90 days given to the Sri Lankan Government to respond to the Committee. In its response, the Sri Lankan Government claimed, "not to have the legal authority to execute the Committee's decisions to release the convict or grant retrial."[89] This resulted in a statement being made to the 61st session of the United Nations Commission on Human Rights that "the State party should enact legislation to demonstrate respect for the Optional Protocol, otherwise such accessions are purely an exercise in external diplomacy without any meaning for the protection and improvement of human rights."[90]

At the end of the year under review, Nallaratnam Singarasa remained in prison and the provisions of the PTA remained unchanged.

7. Judicial Developments in relation to the protection of the integrity of the person

The protection given to the integrity of the person by the law was upheld through various judgements delivered in the course of the year under review, with the highlights being the first conviction under the Convention Against Torture Act, the reiteration of the non-limitation of Article 11 to physical action and the recognition of the right to life as being implicit in the provisions of Articles 11 and 13.

Ten years after the enactment of the Convention against Torture and other Cruel, Inhuman or Treatment Degrading Treatment or Punishment Act, No. 22 of 1994, the first conviction under the Act was recorded in the year under review; the judgement being delivered by the High Court of Colombo on 19 January. The case involved the alleged theft of four gems from the office of a gem dealer who alleged that the victim, a

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88 "Sri Lanka: Free Nallaratnam Singarasa," Amnesty International Press Release, ASA 37/006/2004 (Public), News Service No. 278, 04 November 2004. http://www.amnestyusa.org/regions/asia/document.do?id=80256DD400782B8480256F42005D1B41.

89 "Sri Lanka urged to fulfil int'l obligations over rights protection," Asian Legal Resource Centre (ALRC) Press Release, ALRC - PL - 30 - 2005. www.ahrck.net/pr/mainfile.php/2005mr/174/.

90 Ibid.

business acquaintance and a broker, was responsible. The victim, on being arrested, was taken to the Wellawatta police Station and allegedly assaulted by the accused police officer, then attached to the crimes division as an acting Officer-in-Charge. Thereafter, he was kept in the police station for two days and only taken to before a magistrate following protests by family members. In assessing these facts, it was determined by the Colombo High Court that the prosecution had established beyond reasonable doubt that the accused had assaulted the victim in order to obtain a confession from him. This he had done in his official capacity as a police officer, who is in fact a public officer. The accused was convicted to the minimum seven years rigorous imprisonment and payment of a fine of Rs. 10,000/= in default of which, a further two years of rigorous imprisonment was ordered.[91]

In *Shahul Hameed Mohammed Nilam and Others v K Udugampola and Others*,[92] the petitioners, all of whom were members of the long range reconnaissance patrol of the Directorate of Military Intelligence, complained that their fundamental rights guaranteed in terms of Articles 11, 12(1), 13(1) and 13(2) were infringed by the actions of the respondents in the raid of the petitioners' safe house and subsequent arrest and detention. The Court granted leave to proceed for the alleged infringement of Articles 11, 12(1), 13(1) and 13(2).

In considering the alleged violation of Article 11, the Court observed that "it is well settled law that Article 11 could be applicable to physical as well as psychological trauma and the only required criterion is that consideration should be given to the circumstances of each case to see whether the incident complained of would come within the purview of 'degrading treatment'."[93] The petitioners' complaint on the infringement of Article 11 was based on the degrading treatment meted out to them in the kind of incarceration they were subjected to and the

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91 "Saying No to Torture: A Judgement of Historical Significance," *Daily Mirror*, 10 July 2004 and "One small step in combating practices of torture," *Sunday Times*, 20 June 2004.

92 SC (FR) Applications Nos. 68/2002, 73/2002, 74/2002, 75/2002, 76/2002, SC Minutes 29.01.2004, judgement of (Dr.) Justice Shiranee Bandaranayake with Chief Justice Sarath Nanda Silva and Justice P Edussuriya agreeing.

93 Ibid., at page 32 of the judgement.

manner in which the petitioners were transferred from one place to another. In holding that Article 11 had been violated, the Court stated,

> the plea of the 1st petitioner at the time they were arrested by the 1st respondent that the petitioners were a special team conducting operations against the LTTE and that since such operations were conducted with the utmost secrecy, any publicity given to them would endanger their lives fell on deaf ears resulting in tragic consequences ... In such circumstances, on a consideration of the totality of the events that took place, I am of the view that the actions meted out by the respondents would have aroused feelings of humiliation and the suffering that the petitioners had to undergo was of an aggravated kind that reached the expected level of severity that is necessary to establish a violation of Article 11 of the Constitution on the basis of degrading and inhuman treatment. This position is further strengthened by the fact that the petitioners were Army Officers who were only carrying out the duties which were assigned to them by their Superior Officers.[94]

In considering the alleged violation of Article 13(1), the Court stated that "our law does not permit an arrest or framing of charges without assigning valid reasons" and held that the petitioners' rights under the said Article had been infringed given that "at the time of the arrest of the petitioners, the 1st respondent had no valid basis for such arrest and he had not informed the petitioners the reason for their arrest."[95]

With regard to the allegation of unlawful detention, that the petitioners were arrested on 02 January 2002 and that they were detained at the Police Station, Kandy from the early hours of 03 January 2002 until 05 January 2002, was not disputed. Thereafter, the petitioners were detained at the Katugastota Police Station from 05 January 2002 to 13 January 2002. The respondents took up the position that the petitioners were arrested under the provisions of the Prevention of Terrorism Act (PTA) and detained in terms of Section 7(1), which provides for the detention of a person arrested under sub-section (1) of Section 6 to be kept in custody for a period not exceeding seventy

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94 Ibid., at page 38 of the judgement.
95 Ibid., at page 25 of the judgement.

two hours. Section 7(1) further provides that if there is no Detention Order under Section 9 in respect of such a person, he should be produced before a Magistrate before the expiry of seventy two hours. In the event of no valid Detention Order being available, such a person should be produced before the Magistrate before the expiry of seventy two hours, and an application made in writing on that behalf by a police officer not below the rank of Superintendent that such person be remanded until the end of the trial of such person. In the instant case, the application made to the Magistrate of Kandy on 07 January 2002, was not made by a police officer not below the rank of Superintendent, but by the Officer-in-Charge of the Police Station, Kandy. The request was made on the basis of the petitioners be detained on the basis of the Detention Orders. The Court held that even though a request was made for Detention Orders, there was no evidence to show that Detention Orders under Section 9(1) of the PTA were issued by the Minister of Defence and that it is abundantly clear that the detention of the petitioners since 06 January 2002 was in any event unlawful and therefore the petitioners' fundamental rights guaranteed in terms of Article 13(2) were violated.

Wewalage Rani Fernando and three Others v OIC, Seeduwa Police Station and 08 Others[96] involved an application filed by the wife and three minor children of Lama Hewage Lal who was arrested by the officials of the Seeduwa Police Station. He subsequently died while in the custody of Negombo Prison officials. The petitioners alleged that the said Lama Hewage Lal died as a result of torture while in detention and thus at a time when he was deprived of his personal liberty. A declaration that the deceased's rights guaranteed by Articles 11, 12(1), 13(2), 13(4) and 17 was prayed for. The petitioners also claimed the compensation the deceased would have received if not for his death. The Court granted leave to proceed for the alleged infringement of Articles 11, 13(4) and 17 of the Constitution.

With regard to the alleged violation of Article 11, the Court held, on a consideration of the evidence, that although there were allegations by the petitioners that the deceased was assaulted by the police officers, he was not suffering from any injuries at the time he was brought to the Negombo prison. The Court further determined that from the time the deceased was brought to the Negombo prison, he was subjected to assault, with the severe assault that took place on 07 November 2002

[96] SC FR 700/2002, SC Minutes 26.07.2004.

leading to his death. It was further held that the allegation that the deceased had stolen two bunches of bananas "would not be a matter that should be taken into account when considering whether there has been a violation of his fundamental rights guaranteed by the Constitution."[97]

In considering the liability of the prison officials in whose custody the deceased was at the time the death occurred, the Court observed that "assault on a prisoner by Prison Officers, who are Officials of the State must be considered to be an especially grave form of ill-treatment. This indicates that the officers concerned have exploited the vulnerability of the victim." Having reference to the Rules relating to Jail Guards contained in the Prisons Ordinance as well as the Standard Minimum Rules for the Treatment of Prisoners adopted by the United Nations Congress on the Prevention of Crime and the Treatment of Offenders, the Court further observed that the "Prison Officers are bound not only to perform such duties for the purpose of preserving discipline and enforcing diligence, cleanliness, order and conformity to the rules of the prison, but also to treat the prisoners with kindness and humanity."[98]

With regard to the alleged violation of Article 13(4), it was stated "a careful reading of Article 13(4) of the Constitution clearly reveals that no person shall be punished with death or imprisonment except by an order of a competent Court. Accordingly if there is no order from such a Court no person shall be punished with death and unless and otherwise such an order is made by a competent Court, any person has a right to live,"[99] thus reiterating the implicit right to life guaranteed by the Constitution as first expressed in the case of *Kottabadu Durage Sriyani Silva v Chanaka Iddamalgoda, Officer-in-Charge, Police Station, Payagala.*[100] It was further stated "when Article 13(4) ... creates a right to life, even impliedly, there cannot be a situation where such right is without remedy." On a consideration of the circumstances, the Court held that "Article 13(4) should be interpreted broadly to mean that the said Article recognises the right to life impliedly and that by reading Article 13(4) with Article 126(2) of the Constitution which would include the lawful heirs and/or dependents to be able to bring in an action in a situation where death had occurred as a result of violation of Article 11."[101]

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97 Ibid., at pages 13-14 of the judgment.
98 Ibid.
99 Ibid., at page 17 of the judgement.
100 SC No. 471/2000, SC Minutes 08.08.2003 (final judgment).
101 See note 96 above, at pages 18-19 of the judgement.

The Court awarded the petitioners the sum of Rs. 1 million in equal shares as compensation and costs of which a sum of Rs. 925,000 was payable by the State and Rs. 25,000 each payable by the 3rd, 4th and 5th respondents. This is the highest amount of compensation awarded in a fundamental rights application. In determining the quantum of compensation, the Court took into account the fact that the deceased was a father of three minor children and the "treatment meted out to him while he was at the Negombo Prison has painted a gruesome picture where a hapless prisoner was brutally tortured and left alone tied to an iron door to draw his last breath." The Court also took into consideration the reason for the incarceration of the deceased; his stealing two bunches of bananas valued at Rs. 850, which offence is punishable under Section 367 of the Penal Code with imprisonment of either description for term which may extend to three years, or a fine or with both. The observation being made that "the punishment meted out to the deceased was far in extent that what is provided by section 367 of the Penal Code and more importantly it is to be remembered that the deceased, who was 36 years of age, faced his death while he was in the custody of a State Prison at a time when he was deprived of his personal liberty."[102]

In *Pathiranage Erandaka and S K Leelawathie v Gamini Halwela, Officer-in-Charge, Police Station, Hakmana and Others*,[103] the petitioners, one of whom was a minor at the time material to the application and represented by his mother, alleged that they were assaulted while in Remand Prison. The Court determined that "notwithstanding the non-availability of the identity of the persons who had assaulted the petitioners, the Medico-Legal Reports of the petitioners reveal that both petitioners have sustained injuries."[104] Even though the petitioners alleged violation of their fundamental rights under Article 11 by the 2nd, 3rd and 7th respondents, the Court held that the petitioners had not discharged their burden of proving that these three respondents or some of them were responsible for the alleged violation and in view of there being insufficient material supporting the allegations against each individual respondent, they cannot be held responsible for the alleged violation. However, given that the medical reports supported the view that the petitioners sustained injuries while in Remand Prison, the Court determined that "although a particular

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[102] See note 96 above, at page 20 of the judgement.
[103] SC (Special) No. 63/2001, SC Minutes 27.02.2004.
[104] Ibid., at pages 6-7 of the judgement.

respondent is not held responsible for the injuries sustained by the petitioners, the State would become responsible for the violation of the petitioners' fundamental right guaranteed to them under Article 11 of the Constitution."[105] Accordingly, the State was directed to pay the sum of Rs. 25,000 each for the two petitioners as compensation.

8. Conclusion

Even as the Human Rights Commission announced its "Zero Tolerance Policy on Torture," two incidents of assault relating to HRC officers were reported during the year under review. In June 2004, HRC officers attempting to investigate a complaint of torture were harassed and intimidated by police officers at the Paiyagala Police Station in Kalutara District. On 27 September, Ruwan Chandrasekera, an officer at the Jaffna Human Rights Commission office, was assaulted by police from the main Jaffna Police Station while investigating a complaint from a detainee's family about incommunicado detention. While the HRC filed a torture case against the police officer, the HRC and the Senior Superintendent of Police in Jaffna were investigating the case at year's end.[106] It is suggested that a better system of investigation be implemented in order to guarantee the safety of those investigating into allegations of torture and other human rights violations by the police.

On 09 July 2004, the LTTE opened its Human Rights Secretariat in Kilinochchi. Formally titled the NorthEast Secretariat on Human Rights (NESHOR), the Secretariat was launched to "monitor the human rights violations in the northeast and implement actions to strengthen the human rights there."[107] The assertion by human rights organisations that "while the establishment of a human rights secretariat is an encouraging development, the LTTE must show by direct example, rather than words alone, that its stated commitment to human rights is more than window dressing,"[108] is reiterated in calling for steps to curb extra-judicial killings and child recruitment on the part of the LTTE.

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105 Ibid., at page 11 of the judgement.

106 See note 22 above.

107 "NorthEast Secretariat on Human Rights (NESOHR) launched in Kilinochchi," http://www.lttepeacesecretariat.com/mainpages/n09074.htm.

108 "Sri Lanka: Amnesty International and Human Rights Watch concerned at increased killings in East," Amnesty International Public Statement, AI Index: ASA 37/003/2004 (Public), 26 July 2004. http://www.amnestyusa.org/regions/asia/document. do?id=80256DD400782B8480256EDF00603BF2.

IV

17TH AMENDMENT TO THE CONSTITUTION: A REVIEW OF SOME INSTITUTIONS UNDER IT

M. C. M. Iqbal *

1. Introduction

Since Sri Lanka became independent from British rule in 1948, there has been a steady decline in the efficiency of various organs of the State, especially in the public services, police and law enforcement institutions. In fact, when the first political appointment was made to a high position in the public service in 1969,[1] 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."[2] This became more and more acute as time went by and the malady spread like a cancer to every limb of the State. By the end of the twentieth century, it was the common perception that the decline in the administration of the country was due to political interference. Successive governments have faced repeated accusations of not taking meaningful steps to deal with this malady, promptly and effectively.

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1 This refers to the appointment of Mr. Ananda Tissa de Alwis as Permanent Secretary to a Ministry in 1969.

2 Editorial, *Sunday Times*, 17 February 2002.

In an attempt to put things right, the Government introduced a draft of a revised constitution in October 1997 and later in August 2000. These drafts included specific provisions to deal with this matter. But unfortunately, this did not become a reality until the latter part of 2001 when political developments precipitated a crisis. With the Sri Lanka Muslim Congress (SLMC) withdrawing its support from the People's Alliance (PA) government in June 2001, the PA ran the risk of losing its majority in Parliament. Consequently, the PA thought it prudent to enter into an alliance with the Janatha Vimukthi Peramuna (JVP).

The JVP, which then had 10 seats in the Parliament, signed a Memorandum of Understanding (MoU) with the PA on 5 September 2001 and extended its support to the PA conditionally. At the time of the signing of the MOU, a draft of a constitutional amendment agreed to by the opposition was ready. Among the terms of the MoU was an undertaking given by the PA to bring about a change in the Constitution to enable a Constitutional Council to be created to recommend persons to independent commissions such as the Public Service Commission, the Judicial Service Commission, the Election Commission, the Police Commission, the Bribery Commission, the Human Rights Commission and other designated Commissions. As it would only be possible for the President to appoint persons recommended by the Constitutional Council to such bodies, it was hoped that political interferences in the activities of these Commissions would be brought to an end.

The 17th Amendment to the Constitution, which incorporated the changes necessary to create the Constitutional Council and the independent commissions, was presented to Parliament in September 2001 and enacted in October 2001. However, the Constitutional Council was constituted only in March 2002.

2. The Constitutional Council

This important piece of legislation, which brought about a drastic change in the Constitution, was rushed through Parliament without adequate time being allowed for the public or even for members of Parliament to

debate the issues concerned. Yet, the fact remains that the 17th Amendment was the first measure to be passed by Parliament, which had a restrictive effect on the so far unfettered powers of the President of Sri Lanka. The President cannot appoint any person he/she chooses to a Commission without the recommendation of the Constitutional Council (CC).[3]

One of the prime objectives in creating the Constitutional Council was to free the Commissions created by the 17th Amendment from political interference. However, this objective appears to be at variance with the very manner in which this Council has been constituted.[4] The Speaker, the Prime Minister and the Leader of the Opposition are key members of the Constitutional Council. They are all politicians and play a dominant role in the Council in recommending persons for appointment to the Commissions. Besides, while any attempt to interfere with the work of the Public Service Commission (PSC), the Judicial Service Commission (JSC), the National Police Commission (NPC), etc. has been made a punishable offence,[5] any such attempt with the work of the Constitutional Council is neither prohibited nor punishable. This may create the impression that the Constitutional Council is open to external interferences.[6]

The Constitutional Council is one of the most important bodies created by the Constitution to ensure justice and fair play in the governance of the country, yet its members have no binding interest in the institution. At a critical moment such as when the Parliament stands dissolved, the Speaker, the Prime Minister and the Leader of the Opposition could not justifiably be expected to perform their functions in the CC

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3 Subsequently the Supreme Court held that though a recommendation was mandatory, acting on such recommendation was not so.

4 This important point was raised by Mr. H.L de Silva, PC in an article published in the *Sunday Island*, 10 November 2002.

5 *17th Amendment to the Constitution*, Articles 61(c), 111L and 155F(4).

6 This point was argued before the Supreme Court in the matter of the determination of the constitutionality of the aborted 18th Amendment to the Constitution: In *Re the Eighteenth Amendment to the Constitution* (2002) 3 SLR 71-84.

diligently and judiciously when they would need to be busy electioneering to ensure their re-election.

It can also be argued that when Parliament is dissolved, there is no Speaker and no Leader of the Opposition, and that the Prime Minister exists only as the caretaker Prime Minister. Hence, they cannot legitimately continue to be members of the Constitutional Council at such a time. What is more, Article 41E of the 17th Amendment states that it is the Speaker who is authorised to convene meetings of the Constitutional Council and he cannot legitimately summon a meeting while he is no longer Speaker, as Parliament would have ceased to exist at such time.

Dr. B S Wijeweera, who has done extensive studies on the 17th Amendment and its implications, has discussed these issues at length and makes the following points.[7]

In order to overcome this difficulty (meaning the situation where the Parliament stands dissolved) the 17th Amendment provides for the constitutional fiction that both the Speaker and the Leader of the Opposition(LO) are deemed to hold their respective offices till such time the proper persons are selected by a new Parliament. So, in this country we can have a Speaker (enjoying all the perks of office) without a Parliament and a LO with no Opposition to lead.

Article 41A of the 17th Amendment states that the Constitutional Council shall consist of the following:[8]

a. The Prime Minister;
b. The Speaker;
c. The Leader of the Opposition;
d. A person appointed by the President;

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7 *Sunday Island*, 21 March 2004 and 7 November 2004.

8 Though the composition of the Constitutional Council has already been explained in Rukshana Nanayakkara, " 17th Amendment to the Constitution," in the *Sri Lanka State of Human Rights 2002* (Colombo: Law & Society Trust, 2002), 26-60, it is repeated here for the convenience of the reader.

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

Those members from category (e) and (f) hold office for three years and cannot be appointed to such position for a second term. The President's nominee also holds office for a period of three years but there is nothing to prevent such person from being appointed for a second term.

After the promulgation of the 17th Amendment, certain other duties and functions have been assigned to the Constitutional Council, as provided for by Article 41 F. They are as follows:

- Recommendation of Members to the Hon. Speaker to be appointed to the Parliamentary Scholarship Board under Section 5(i)(a) of the Parliamentary Scholarship Board Act.
- Determining the criteria together with the Hon. Minister in charge of the subject of Finance, to be used in the selection of the Chairman and the four members under sub section (1) of Section 4(2) of the Welfare Benefits Act.
- Consideration and giving approval under Section 4(2) of the Welfare Benefits Act No. 24 of 2002 when consulted by the Hon. Minister in charge of the subject of Finance, to the appointment of suitable persons to be appointed as the Chairman and the Members of the Welfare Benefits Board.
- Consideration and giving concurrence under Section 3(1) of the Public Utilities Commission Act No. 35 of 2002, to the recommendation of the Minister in charge of the subject of Policy Development and Implementation, for the appointment of the five members to the Public Utilities Commission of Sri Lanka.
- Consideration and giving concurrence under Section 8(2)(C) of the Monetary Law (Chapter 323) Act as amended by the

Monetary Law (Amendment) Act No. 32 of 2002, to the recommendation of the Minister in charge of the subject of Finance, for the appointment of three members to the Monetary Board of the Central Bank.

2.1 The Organisational Structure and Staff of the CC:

The Constitutional Council has a Secretary and an Assistant Secretary and is divided into the following main divisions for administrative purposes:

- The Secretarial Division, which attends to matters pertaining to meetings of the Council and Committee Meetings. It also maintains a data bank.
- The Administration Division, which attends to transport, housekeeping and maintenance of the garden.
- The Finance Division, which attends to accounts and payments.

Article 41D(2) states: " The Council may appoint such officers as it considers necessary for the discharge of its functions, on such terms and conditions as shall be determined by the Council." The Council is served by a staff of five who have been released from Parliamentary Secretariat on secondment. Assistance is obtained from the staff of the Parliament, as and when necessary.

2.2 Activities of the Council

The Constitutional Council has had to face a number of challenges since it was formed. It successfully resisted attempts by the President in 2003 to make the Council change its procedure in making appointments to Commissions such as the Bribery Commission. This attempt was made to overcome an impasse in selecting a person to fill a vacancy in the Bribery Commission.

It is the practice of the Constitutional Council to pick persons from a database compiled for such purposes for membership to independent commissions. The candidates have been ranked according to their academic qualifications rather than by their experience in the relevant fields and on a structured marking scheme drawn up for such purpose.

This system has its weaknesses, and some of the academics chosen have failed to live up to expectations as they have little practical experience of matters entrusted for their deliberations. Very senior and experienced retired public officers find their names low down on the list because they have not had time during their career to obtain academic distinctions and write books even though they excelled in their fields. Further, the strict measures adopted by the Constitutional Council in the selection procedure have deterred and discouraged prospective candidates for posts in these Commissions.[9]

In an article titled, *"CC* says no to CBK's requirement for recruitment changes," Professor G L Peiris is reported to have stated that "the procedure adopted by the CC required very meticulous and detailed examination of the records of individuals who were being considered for positions and was therefore undesirable."[10] The point made by Prof. Peiris is debatable. Others may be inclined to the view that 'meticulous and detailed examination of the records of individuals' is very necessary if these Commissions are not to be corrupted. The problem relating to the Bribery Commission arose because the Constitutional Council superimposed its own marking scheme and interview procedure on specifications that had already been laid down by law.[11] The Bribery Commission should have been treated as an exception because Parliament had already spelt out the requirements for membership.

The recommendation procedure continued even in 2004, in spite of the criticisms levelled against it, and was one reason for the nearly two-year delay in filling the vacancy in the Bribery Commission. Mr. W J M Lokubandara, the Speaker and Chairman of the Constitutional Council, had this to say in Parliament in connection with the dispute on the appointment of an Election Commissioner;[12]

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9 *Sunday Times*, 10 August 2003, 4.
10 *Sunday Times,* 10 August 2003, 8.
11 *Bribery Commission Act*, Section 2(2)(a).
12 This is a translation of the words spoken in Sinhala by the Speaker. It is an amalgam of several interventions he made during a debate in Parliament on 10 September 2004.

> The President does not accept the recommendations made by the CC and the CC cannot do anything or recommend another until the nominee declines. According to the 17th Amendment to the Constitution, the President is not bound by law or moral right to respond to the CC as to why the appointment was not made. [13]

During the debate on this matter in Parliament, the former Speaker of the Parliament Mr. Joseph Michael Perera said, "For two years the President has not made the appointment (recommended by the CC). We accept that 25% of the 17th Amendment is problematic and despite our promises we are unable to rectify it." [14]

That shows the dilemmas faced by the Constitutional Council in the performance of its functions and underscores the need for changes in the Constitution to remove such snags.

Be that as it may, there was an attempt to add to the functions of the Constitutional Council by a joint Opposition move to submit amendments to the State Media Regulations. These amendments would have enabled the Constitutional Council to make appointments to high posts in the Associated Newspapers of Ceylon Ltd., the Sri Lanka Rupavahini Corporation and the Sri Lanka Broadcasting Corporation.[15] This goes to show that in spite of the problems faced by the Constitutional Council, it is still looked upon as a body that could perform a useful function in making independent nominations to key institutions.

3. The Bribery Commission

The official title of this Commission is the Commission to Investigate Allegations of Bribery or Corruption, but is popularly referred to as the Bribery Commission. There cannot be good governance in a country where bribery and corruption are rampant. Therefore, this Commission has a key role to play in providing the climate for good governance.

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13 "Constitutional Change for CC See Saw, *Daily Mirror*, 11 September 2004, 4.

14 Ibid.

15 "Big say to CC in State Media – joint opposition to move amendments," *Daily Mirror*, 16 July 2004.

The last Annual Report of this Commission set out its mission as follows:

> The Mission of the Commission is to spearhead the fight against bribery and corruption and illegal accumulation of assets by public servants, through the execution of programmes of prevention, investigation and prosecution, in a just and fair manner, without fear or favour, within the framework of the rule of law.[16]

The Bribery Commission is an institution created under the provisions of the Commission to Investigate Allegations of Bribery or Corruption Act No. 19 of 1994, which was passed unanimously by the Parliament of that time. Under the Act, the President on the recommendation of the Constitutional Council appoints the members of the Commission.[17]

3.1 The Composition, Staff, Functions and Powers of the Commission

The Bribery Commission is constituted of three members, two of whom have to be retired judges of the Superior Courts. The three Commissioners are assisted by a Director-General whose duty it is to ensure that the orders of the Commission are carried out. The Director-General is appointed by the President with the concurrence of the Commission. The Director-General is assisted by a Director, Administration and a Deputy Director, Finance. There is also a Director of Investigations and a Deputy Director (Legal) to assist the Director General. The investigators are police officers released for service in the Commission by the Police Department. There are 98 police officers working in this Commission. However, the legal officers are permanent officers who have been recruited by and for the Commission. There

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16 *Annual Report of the Commission to Investigate Allegations of Bribery or Corruption (CIABOC) for the year 2003*, (Colombo, 2004), vii.

17 *Act No. 19 of 1994* anticipated the establishment of the Constitutional Council and provided for appointment on the recommendation of the Constitutional Council until such time the appointments were to be made on the recommendation of the Prime Minister as an interim measure.

are 17 of them in the Commission.[18] The Secretary to the Commission reports directly to the Commission and is responsible for providing the administrative support to the Commission. He avails of the services of the civilian staff provided to him by the Ministry of Public Administration. All the members of staff are duty bound to take an oath of secrecy, a breach of which is punishable under Section 22 of the Act. Some time in 2003, the President was reported to have directed a Commissioner to disclose details of the allegations of bribery against a former minister, which led to the Commissioner being taken to court, but he was discharged. The Act does not stipulate who should prosecute in the event of a violation of the secrecy clause under Section 17 of the Act. Section 22 makes contravention of secrecy an offence punishable by a Magistrate's Court, but there is no mention in the Act of who should initiate such proceedings.

The main functions of the Commission as set out in the Bribery Commission Act No.19 of 1994 are briefly as follows:

- **Prevention** - Harnessing public co-operation for the prevention of bribery.
- **Investigation** - Investigations are launched only upon the receipt of a communication by the Commission under section 4 Part II of the Act, provided however that such communication is –
  a. genuine and that
  b. it discloses material upon which an investigation ought to be conducted.
- **Prosecution** - Institution of actions and prosecution of such cases in the appropriate court where investigation had disclosed adequate evidence of an offence under the Bribery Act or the Declaration of Assets and Liabilities Law No. 1 of 1975.
- **Reporting** - Preparing reports in terms of Section 26 of the Bribery Commission Act and forwarding them to the President to be presented in Parliament.

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[18] Fredrica Jansz, "The Pipedream of Crushing Corruption," *Sunday Leader*, 9 May 2004.

The Bribery Commission Act vests all the powers relating to investigations and prosecutions with the Commission. The members of the Commission could exercise these powers either sitting individually or together. If a member exercises any such power sitting separately, such exercise shall be deemed an act of the Commission. However, the current Commission has the practice of submitting individual decisions of members to prosecute persons of the rank of a Head of Department and above to the full Board of the Commission for concurrence by a majority decision.[19] This practice was adopted to avoid allegations of partiality being levelled against one member or the other. It should be noted that the Bribery Commission is the only independent commission where individual members can act on their own with regard to complaints made to the Commission.

Part II of the Act lays down the powers of the Commission. They are as follows:

- Special investigative powers in special circumstances such as when there is a complaint against a Member of Parliament when it could commence the investigation without the prior approval of the Speaker.[20]
- The Commission does not need to initiate criminal proceedings through the Attorney General, as was the case prior to the Bribery Commission Act No. 19 of 1994.

A separate Legal Division of the Commission attends to the function of instituting cases and prosecuting them in Courts. Thus, the Bribery Commission enjoys much more power than any other law enforcement agency in the country.

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[19] This is not a legal requirement.
[20] *Annual Report of the Bribery Commission for 2003,* op. cit., 8.

3.2 Activities of the Commission

Following the filling of the vacancy in the Bribery Commission in July 2004, the Commission recommenced its activities and the institution of cases. Soon thereafter, (according to a news report), the Commission reviewed 400 complaints against politicians, police officers and public servants[21] and resumed investigations after a gap of 18 months. Of one hundred indictments to be filed, 18 were against Police Officers, 5 against Forest Officers, and 4 against officers of the Justice Ministry. Another news item in the same newspaper stated that investigations were pending relating to 1200 complaints, 150 of which were against politicians and that it would take at least two years to complete these investigations. The Director General stated that 98 per cent of the complaints were anonymous.[22] He went on to state that to date the Commission had dealt with 30,000 cases 'from a peon to a Secretary in the Public Service.' In 2003, it had handled 13,500 cases. He went on to state that the Commission had conducted 120 awareness programmes in 2004. These statistics are somewhat confusing, and cannot be verified until the annual report of the Commission for 2004 is published.

The term of the Commission expired on 15 December 2004 and at the time of writing, the President had yet to appoint any successors.

3.3 The Independence of the Commission

As stated earlier, the 17th Amendment made specific provisions to ensure the independence of the Commissions coming within its purview. Yet, with regard to the Bribery Commission there is a need to make certain legal and structural changes for the Commission to be made independent. There is a need for legal provisions enabling the Commission to recruit all the staff it needs. The dependence of this

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21 *Sunday Times*, 18 July 2004.

22 " Report on the interview with the Director General", *"Sunday Times"*, 31 October 2004, 11.

Commission on the Treasury for approval of the staff cadre and on Parliament for sanctioning its personnel emolument, has brought its independence into question. Such problems also exist for the other Commissions under the 17th Amendment. Thus, the question arises as to how the Bribery Commission could be independent when it has to depend on staff provided by the Ministry of Public Administration and the Police Department, as their loyalties may be divided. Besides, these institutions can tighten their grip on the Bribery Commission by restricting the quantity and quality of the personnel made available.

The absence of any provision in the Act to enable the Commission to continue to perform its functions even when there is a vacancy in its membership has caused an extended period of inactivity. During the 18 months taken to fill the vacancy created by the death of Justice T M Abeyweera, the activities of the Commission were at a standstill. The ability of other Commissions to continue their work without a break in such circumstances places the Bribery Commission in a significantly disadvantageous position.[23]

At a media conference held on 9 August 2004, the Director-General of the Bribery Commission is reported to have stated that the Commission had urged the Law Commission to introduce some specific amendments to the Act to enable it to have absolute independence to investigate bribery or corruption.[24]

There is no doubt that there is a need for the law to be amended in respect of the matters mentioned to enable the Commission to be truly independent and continue working without any hindrance or interruption even when there is a vacancy for a Commissioner.

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[23] Articles 54(g), [PSC], 104(3), [Elections], 111E(4), [JSC], and 155B(4) of the provide as follows - "The Commission shall have the power to act notwithstanding any vacancy in the membership and no act or proceedings shall be or be deemed to be invalid by reason of any such vacancy or defect in the appointment of a member." This is not so with the Bribery Commission.

[24] Anura Maltipe, *Sunday Observer*, 15 August 2004.

4. The Public Service Commission

In 1948, when Sri Lanka became independent, it inherited highly centralized administrative structures, designed to suit the requirements of the British rulers whose prime concern was the collection of revenue and maintaining law and order. Perhaps it was because the British realized the need to re-orient the public service to cater to the needs of the masses in independent Sri Lanka that the first Constitution, which was based on the recommendations of the Soulbury Commissioners, provided for a Public Service Commission (PSC), which was reasonably independent from the Executive.[25] But the independence of this PSC was soon eroded due to political exigencies. Successive governments found the independence of the PSC to be a fetter on the power of the Executive, which wanted to have its own men in key positions of the public service and to protect their favourites from disciplinary action. Examples of political appointments included the appointment of Mr. Hema Basnayake, who was then the Attorney-General, to the post of Chief Justice, overlooking the rights of the most senior Judge of the Supreme Court for appointment to this post; the appointment of a civilian as Inspector General of Police; and the appointment of Mr. Ananda Tissa de Alwis, a politician, as a Permanent Secretary to a Ministry. This trend continued until the adoption of the 1972 and 1978 Constitutions, which vested the power of appointments to senior positions in the public service in the Cabinet of Ministers. Another step in that direction was taken with the Thirteenth Amendment to the Constitution when the Provincial Councils Act was passed in 1987. These enactments provided for a Provincial Public Service and Provincial Public Service Commissions appointed by the respective Governors of the Provinces. With the establishment of the Provincial Councils, a large slice of the public service went out of the hands of the 'central' Public Service Commission.

Though the 1978 Constitution vested the powers of appointment, transfer, dismissal and disciplinary control of public officers in the

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[25] *Ceylon (Constitution) Order in Council of 1947*, Sec. 58 (as amended).

Cabinet, the PSC continued to exist and the Constitution provided for the delegation of the powers of the Cabinet to the PSC in terms of Article 55(3). The PSC in turn delegated some of its powers to the Secretaries of Ministries and Heads of Departments who owed a loyalty to the Government, which facilitated the politicisation of the public service.

It is against this background that the 17th Amendment to the Constitution was adopted. The PSC was one of the Commissions that came under the purview of the 17th Amendment, perhaps with the hope that it would be able to insulate the public service from political influence and rescue it from the abyss into which it had fallen.

4.1 The Composition and Staff of the PSC

The PSC consists of nine members appointed by the President on the recommendation of the Constitutional Council. At least three of them are persons who have had not less than fifteen years experience as a public officer. One of the nine members of the PSC is appointed by the President as the Chairman of the PSC on the recommendation of the Constitutional Council.

No person can be a member of the PSC if he is or becomes a Member of Parliament, Provincial Council or other local authority.[26] On the other hand, if a person who is already holding a position in the public service becomes a member of the PSC, he shall cease to hold such office. He will also be ineligible for any other position in the public or judicial service after he ceases to be a member of the PSC.[27] A person appointed to the PSC shall hold office for a period of three years and is eligible for re-appointment for only one more term. One of the important provisions regarding the PSC is that it can continue to perform its functions even if there is a vacancy in its membership.

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[26] *17th Amendment*, Art. 54 (2).
[27] Ibid., Art. 54 (3).

The Secretary is the key member of the staff of the PSC, and has a large retinue of officers released to the PSC by the Ministry of Public Administration to assist him/her. There is provision for the PSC to appoint Committees with a Secretary each to attend to specific matters for which the PSC can delegate its authority. It cannot, however, recruit persons to its own cadre without Treasury approval.

4.2 The powers of the PSC

Article 55(1) of the Constitution as amended by the 17th Amendment 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), which reads as follows, negates this expectation: "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 shows that the Cabinet retains powers over Heads of Departments and gives the impression that what was given with the right hand has been taken away with the left hand. There is no use having an independent Public Service Commission if it cannot exercise control over Heads of Departments and protect them from political manoeuvres. In other words, despite the provisions of Article 55(1), the public service continues to be in the grip of politicians who could manipulate it through Heads of Departments. If the words 'with the concurrence of the Commission' had been used in Article 55(3) instead of 'after ascertaining the views of the Commission,' this provision would have been of some significance. It is difficult to imagine that political interference has in fact ceased with the establishment of an independent Public Service Commission under the 17th Amendment.

5. Administrative Appeals Tribunal

A significant feature of the 17th Amendment with regard to public service personnel matters is the creation of a body called the Administrative Appeals Tribunal with powers to hear appeals from decisions of the PSC and the Police Commission.[28] Earlier, an aggrieved officer had only the option of going before the Supreme Court with a Fundamental Rights violation application. While many did benefit from this remedy, many other aggrieved officers did not have the financial means to go before the Supreme Court. The Supreme Court on many occasions held that no arbitrary action could be permitted against any public officer, who is entitled to equal protection of the law.

The Administrative Appeals Tribunal was established under the provisions of the 17th Amendment by the Administrative Appeals Tribunal Act No. 4 of 2002. It consists of three members appointed by the Judicial Services Commission, each of whom should have at least 20 years experience as a public officer or 10 years in the legal profession. This is an appellate body against decisions of the PSC and the Police Commission. No record of its activities is available, so no comment can be made on the performance of this Tribunal. It is hoped that in time to come, such records will be made public at least through its annual reports.

6. Expectations, Praxis and Prospects

As stated earlier, the 17th Amendment to the Constitution was passed at a time when the administration was in a state of crisis both due to inefficiency and widespread bribery and corruption. The reputation of the public service was at a very low ebb and was criticized particularly by the JVP, which was then in the opposition. When the need arose for the government to lean on the JVP to keep itself in power, the JVP made use of the opportunity to include the reform of the administrative system as a key issue in the MoU it signed with the People's Alliance. The 17th Amendment was the outcome of this union. The JVP, not so

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[28] *17th Amendment*, Art. 155 L.

much the PA, thought that the creation of independent institutions by the 17th Amendment would restore the administrative setup to a healthy state. The then opposition also hoped to curb the discretionary power of the President over appointments to these key institutions.

The 17th Amendment was passed on 3 October 2001 but, as stated earlier, the appointment of the key institution it created, namely, the Constitutional Council, took place only on 22 March 2002.[29] The Constitutional Council was established in the hope that it would recommend appropriate persons to the bodies specified in the 17th Amendment and help in achieving " good governance by recognizing the principles of equity, transparency, and the elimination of unfairness and invidious discrimination and arbitrariness." The concluding lines in the First Report of the Constitutional Council [30] are worth mentioning here:

> The Seventeenth Amendment is an important step in the direction of good governance; but it should not cause a thrill of a delirious joy through the country, as though at last a sovereign medicine were found for all the diseases of the body politic. Formidable difficulties lie ahead for those who will serve in high office and as members of commissions, as well as for each and every citizen concerned with the welfare of our nation. But let us not grow weary while doing good, for in due season we shall reap if we do not lose heart. Therefore, as we have opportunity, let us do good to all.

The practical problems that some of the bodies created by the Constitutional Council had to face have already been discussed. Even though these bodies were expected to be independent, they depend to a large extent on funds provided by the Parliament based on estimates of expenditure submitted by the General Treasury. Not all these bodies could raise funds on their own. Therefore, it is well nigh

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29 First Report of the Constitutional Council, presented by the Hon. M. Joseph Michael Perera, Speaker, Parliamentary Series No. 14 of the fifth Parliament of Sri Lanka.

30 Ibid, 53.

impossible for these institutions to have the kind of equipment and the staff they consider necessary to perform effectively. This factor seriously impedes the progress of these institutions.

Yet, undoubtedly the 17th Amendment is a step in the right direction. Though the manner in which it became law stifled the chances of a full discussion of the issues and failed to create a flawless remedy to many of the ills the country faces in providing good governance to its citizens, it is nevertheless a reasonable first step in that direction and could be improved upon in time to come.

It has also been pointed out that the 17th Amendment did not provide for gender representation in the various institutions created by it; "this reflects the ideological limitations of a Parliament where representation of women MPs is at a very low level."[31]

Be that as it may, the 17th Amendment was undoubtedly a significant step towards establishing a culture of good governance in the country. It is hoped the various persons appointed to the respective institutions will live up to the expectations placed on them, and that governments of the future will identify the flaws in the system put in place by the 17th Amendment and make the necessary amendments to the Constitution to enable these institutions to be truly independent and fulfill the expectations of the people.

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[31] Rukshana Nanayakkara, "17th Amendment to the Constitution," op. cit., 59.

V

THE NATIONAL HUMAN RIGHTS COMMISSION AND THE NATIONAL POLICE COMMISSION **

Basil Fernando *

1. THE NATIONAL HUMAN RIGHTS COMMISSION

1.1 Introduction

For the Human Rights Commission (HRC) of Sri Lanka, 2004 brought in new perspectives as well as new experiences. The new Commissioners were officially appointed on 3 April 2003 and started operating in May of that year. They tried to introduce new perspectives and working approaches to the activities of the Commission. The basic perspectives that had been introduced by the end of 2003 were carried into the following year, but by the end of 2004, these new perspectives and working methodologies had created certain frictions within the Commission's staff.

2005 will be a crucial year in deciding whether the new approaches that the Commissioners have tried to introduce will become rooted

** This article is mostly based on previously published material by the author.

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both within the Commission and outside, thereby overcoming the unhappy legacy the Commissioners inherited from their predecessors. In this article we will examine the new perspectives and approaches that the new Commissioners tried to introduce, the obstacles that they face, and suggest some recommendations to better realize the objectives contained in the Human Rights Commission Act (Act No. 21 of 1993).

1.2 The Strategic Plan of the Commission

In 2004, the Commission put forward a three-year strategic plan as the basis of its work. This plan was developed in consultation with foreign experts and the local human rights community, where organisations took the trouble to engage in dialogue with the HRC to give their comments, suggestions and recommendations.

The following goals were adopted in the plan to represent the Human Rights Commission's long-term aspirations, which not only included efficiency in the official and public sector, but within the Commission itself.[1]

1. Stronger institutions and procedures for human rights protection and a culture among all authorities of human rights awareness and accountability.
2. Public awareness of their fundamental and other human rights and a willingness and capacity to enforce them.
3. The development of the Commission into an efficient and effective organisation able to fulfil its mandate to promote and protect the human rights of everyone in Sri Lanka.
4. A final resolution resulting from the peace process that respects the fundamental and human rights of all in Sri Lanka.

These goals were further explained under the Objectives and Activities in the strategic plan. As for the first goal, immediate and sustained reduction of human rights violations by the authorities was proposed,

[1] *Strategic Plan 2003 – 2006* of the Human Rights Commission of Sri Lanka dated 30 September 2003.

for which purpose a specific programme to combat torture was to be developed, through effective monitoring and follow up; surprise visits to all places where people are detained including juvenile homes, psychiatric institutions, police stations and prisons, to examine whether the procedures and conditions in these institutions are consistent with national and international standards and to suggest appropriate remedial action; a recruitment and training programme to enable the Commission's staff to undertake the monitoring of these places of detention; the development of a visit monitoring manual to standardize monitoring, investigation and reporting of investigations of detention centres and a thorough review of the complaints process to improve the institutions' capacity to deal with human rights abuses.

The HRC also wanted to develop the capacity to undertake regular fact-finding missions to look into systematic abuses of human rights. Some of the suggestions were to dispatch missions to inquire into economic and social rights issues relating to floods; to review the mission to Gampaha to implement official language policy; to develop a system of local 'special rapporteurs' whereby specialists would report to the Commission on important human rights issues and incidents; to engage a 'special rapporteur' in particular to prepare a report on the right to housing in the plantation sector and to engage another expert to report to the Commission on the human rights implications of high security zones in the Jaffna peninsula; to develop the capacity to initiate the Commission's own investigations and inquiries in response to media reports and other information of human rights abuses; to raise the visibility of, and identify solutions to, human rights abuses by authorities; to undertake at least one national inquiry per year involving public hearings on human rights issues by the Commission, the first of which will be on the rule of law, impunity and the violations of fundamental rights; to provide human rights policy advice to the authorities. Further activities are also spelled out in the strategic plan, as are the objectives and activities for goals 2, 3 and 4.

1.3 Major Obstacles Hindering Implementation of the Strategic Plan

A review of the Commission's work will show that the strategic plan adopted in September 2003 for the most part has not been

implemented. The Commission needs to review its plan and explain why it has not been able to implement any significant aspect of the plan despite nearly half the time period for it's implementation having elapsed. The human rights community in Sri Lanka should also review the plan with a view to creating a greater understanding of the difficulties involved in the area of implementation. It can then start to take the concrete steps that are needed to make the HRC as effective and efficient as it has stated it wishes to become.

The review presented here takes account of a range of observations, including those made by international experts who have been trying to assist the Commission, international reviewers such as the expert from the Danish Centre for Human Rights, regional and local human rights groups and also the internal reviewers assigned by the Commission itself. From these and other sources, the following factors can be identified as major obstacles preventing the implementation of the strategic plan:

- HRC staff are poorly qualified. An estimated 81 per cent of the permanent staff lacked the required qualifications for their post. Some holding important posts as investigators do not have GCE
- Advance Level qualifications. At least one of the regional coordinators does not even have a GCE Ordinary Level certificate, having passed only three subjects at the Ordinary Level examination.[2]

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[2] *Sri Lanka - a Former Inquiry Officer of Human Rights Commission speaks out* – AHRC Statement dated 25 October 2004, http://www.ahrchk.net/statements/mainfile.php/2004statement/213/. (Interview by Mr. Shelton Ranarajah, a senior lawyer and a former deputy cabinet minister, who was appointed to the inquiring panel at Kandy, but who states that all his recommendations were ignored by the area office and the Commission itself.)

- Poor working habits were formed under the two previous sets of Commissioners, during which time no attempt had been made to nurture basic human rights norms and standards.[3]
- The Commissioners have been unable to supervise HRC staff adequately, as they are not engaged full time in the work of the HRC.
- Lack of professional staff to deal with investigation and mediation has led to a degeneration of the inquiry system.[4]
- Education programmes have been ineffective.[5]
- The unsatisfactory nature of area officers, at least one of which (in the Kandy Area Office) came under severe public criticism.

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3 In a report submitted to the HRC of Sri Lanka on 2 June 2002, (*Article 2,1,* no. 3, http://www.article2.org/mainfile.php/0103/36/) by the AHRC, it criticizes the habit of having arbitration relating to torture complaints made to the HRC. These arbitrations were unprincipled in that torture is a crime in Sri Lanka since 1994 and therefore it was not within the authority of the HRC to make settlements in torture cases. Besides this, some cases were settled for very low sums and always these settlements were in favour of the perpetrators rather than the victims. See further: "A Joint Statement issued on 12 December 2002 in the Asian Civil Society Forum 2002 held in Bangkok," *in Sri Lanka Legal Reforms and Human Rights*, 1 no. 2 (published by the AHRC with several local NGOs, June 2003): 78-79.

4 See note 3 above.

5 Numerous complaints by the local and regional NGOs surfaced on this issue on many occasions during recent years. The issue came to be highlighted particularly relating to the case of Chamila Bandara who complained of torture by several officers of the Ankumbura Police. A HRC of Sri Lanka inquiry into the matter conducted by the Acting Area Co-ordinator in Kandy concluded that the complaint was unfounded. However, a Special Unit of the Police conducting an inquiry into the same matter found that the complaint of torture was true. The matter came for international scrutiny after the victim gave testimony before the UN Human Rights Committee during a session for the review of Sri Lanka periodic report. The inquiry was reopened by the HRC and was given to a one-man inquiring committee which found the complaint to be true and that the original HRC report was incorrect. After the HRC of Sri Lanka took action to transfer the Acting Area coordinator of Kandy a trade union of the staff of the HRC led by the Director of Education conducted a strike to obstruct the implementation of the HRC decision. Later the Acting Area Co-ordinator filed an action before the appeal court to challenge his transfer. The case bears number CA (Writ) Application No. 2521/4. This case is currently pending.

In its strategic plan, the HRC stated that it would give top priority to eliminating torture. On 19 April 2004, the Commission issued a short statement entitled, "Zero-Tolerance Policy on Torture". In this paper, the HRC of Sri Lanka announced certain elements of its policy regarding the elimination of torture:

> The setting up of a 24 hour special unit for torture and emergency cases, investigation on torture cases will begin within 24 hours of the incident being reported, whenever there is a death in custody with an adverse medical report, the OIC of the police station will be summoned before the HRC, discussions with Police Commission to secure interdiction of police officers found guilty of torture by the Human Rights Commission or the Supreme Court.

In addition, the HRC will work with the police to implement the Memorandum of Understanding between the HRC and the IGP. The elements of that understanding were:

Posters with regard to the rights of suspects shall be displayed in all three languages in all police stations and training programmes on human rights at the Police Training Institute will be strengthened. Family members and lawyers will be able to visit anyone held in detention. OICs of stations to be held directly accountable for cases of torture at the police station. The Human Rights Commission, the Inspector General of Police and the Police Commission to consider the possibility of indicting police officials who have been held guilty of fundamental rights violations before the Supreme Court.

The proposed Torture Prevention and Monitoring Unit was established on 27 May 2004. However, the Asian Human Rights Commission (AHRC) pointed out certain limitations of the policy, noting that torture prevention should focus on the implementation of the Convention Against Torture Act (Act No. 22 of 1994) CAT Act in Sri Lanka, which makes torture a heinous crime punishable under the law. This approach was necessary as in the past torture had been treated in a 'soft' manner, with some HRC officers settling torture cases for payments of as little as Rs. 1,000.00 (about US$ 10.00). Such settlement reduced inquiries relating to torture into arbitration.

For implementation of the CAT Act to become effective, criminal investigation into torture must be improved and criminal trials on torture must be expedited both at the level of the Attorney-General as well as in courts. The HRC should study the existing procedures of investigation and prosecution and suggest means of improvement. The Commission must critically monitor those procedures and engage both civil society and relevant institutions, such as the National Police Commission, to improve them.

Thus, the HRC's Zero-Tolerance torture policy must be critically assessed with a view to overcoming problems of implementation. To improve inquiries by the HRC, an investigation procedure should be laid down which should be observed by the inquiring officers.

The need for witness protection in torture cases has also been pointed out:

> Everyone knows that the most difficult obstacle in eliminating torture is that the complainants fear the consequences after making complaints against security personnel. The fear is well founded, as the poor in particular have been subjected to harsh punishments after making complaints. Most frequently they have been implicated in crimes which they did not commit.[6]

The AHRC also pointed out that there are rogue elements among the staff of the HRC who act contrary to the mandate of the Commission and, in fact, assist the alleged perpetrators of torture. Regarding deaths in custody, AHRC said that it is essential to develop a comprehensive policy relating to all custodial deaths, be they in police custody or the custody of other security forces. It further pointed out that the HRC's concept of dealing only with cases where the medical report mentions torture or other injuries is flawed, as often police officers manipulate evidence in order to move responsibility for such deaths from the police themselves.

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6 "The Inadequacies of the Torture Prevention Policy Adopted by the Human Rights Commission of Sri Lanka," *Protection and Participation – South Asia Legal Reforms & Human Rights*, 1, no. 1 (Hong Kong: AHRC): 2.

It was also noted that the disciplinary procedure following Supreme Court judgements given against the police, particularly on the issue of torture, must be developed and codified in consultation with the National Police Commission. Furthermore, the HRC must develop a specialist unit dealing with the victims who come forward to make complaints of torture, which is presently not addressed within the Zero Tolerance Policy. Such a unit should be developed with the voluntary participation of psychiatrists, doctors, counsellors and other concerned persons able to deal with trauma-related issues.

1.4 Attacks on Officers of the Human Rights Commission

During the period under review, there were some serious attempts by the officers of the National Human Rights Commission to visit those places of detention where complaints of illegal detention and torture had been received. However, these visits came under attack, and on two occasions – at Paiyagala Police Station and at Jaffna Police Station – direct physical threats and assaults were levelled against the human rights officers. There is a case pending before the courts on the attack on the HRC officers at the Jaffna Police Station.

What made this worse was an internal circular (No. 1796/2004, dated 27 September 2004) issued by the former Inspector General of Police placing limits on the rights to visit police stations for inspection purposes. It prescribes that human rights officers who come for inspections must inform the Assistant Superintendent of Police (ASP) before entering such premises. This prior warning enables the officers in detention centres to remove the torture victims or take them to secret places before the inspecting officers arrive, thereby negating the purpose of the visits. The practical consequence of this circular has been to discourage human rights officers from visiting places of detention and to encourage police officers to engage in torture without any fear of being detected. This matter needs urgent resolution by way of negotiations with relevant authorities such as the Inspector General of Police, Attorney-General and relevant ministers with the view to having this circular recalled. [7]

[7] *"Sri Lanka seeking to institutionalise torture in police stations and impunity for those who carry it out."* http://www.ahrchk.net/statements/mainfile.php/2004statement/229/.

1.5 Need for an Internal Disciplinary Code for HRC Officers

Problems relating to the functioning of the Human Rights Commission Area Office at Kandy resulted in major controversy throughout 2004. The issue relating to Chamila Bandara, whose complaint of torture was not properly investigated by the Kandy Area Coordinator, and the matter of thirteen missing files from that office together with numerous other complaints, brought to the forefront the issue of disciplinary control within the HRC.

Chamila Bandara, a seventeen year old boy, had complained of torture by officers of Ankumbura Police Station. Yet, the Kandy Area Co-ordinator did not hold a proper inquiry into these allegations, as found by a one-man independent inquiry committee appointed by the Commission. This matter led to a strike on the part of the staff union and the filing of a case in the Appeal Court by the Kandy Area Co-ordinator (CA (Writ) Application No 2521/04) on the basis that he had not been partial in his handling of the matter and, consequently, asking that the finding of the inquiry committee which resulted in him being brought down to Colombo for six months training be quashed. The Court refused interim relief in the matter and the substantive application pending before Court at the time of writing.

The Chamila Bandara case was instrumental in highlighting various lacunae within the HRC in relation to the disciplinary control of its staff. Since the inception of the HRC, no internal disciplinary code or procedure has been developed. In the absence of such a procedure, the HRC has had to follow the Establishments Code, which is now outdated. This situation should not be allowed to continue, as the very nature of the HRC calls for a very specific form of discipline on the part of its officers.

The disciplinary code for the HRC should lay down criteria for the behaviour of its staff and particularly of investigation officers. Human rights work requires high moral standards and public faith in the Commission can be built only on the basis of such standards. Any perception of bias towards perpetrators, corruption or negligence is

likely to have a devastating impact on the work of the Commission. Thus, the laying down of a disciplinary code and process for the Commission's staff should be treated as a matter of priority.

1.6 Response of the HRC to the murder of Torture Victim Gerald Perera

The shooting of a well-known torture victim, Gerald Perera, on 21 November 2004, prior to him giving evidence before the Negombo High Court on 2 December 2004, had a chilling effect on all victims of torture as well as the human rights community in Sri Lanka. His death on 24 November 2004 was widely reported in the local print and electronic media.

The HRC reacted quickly, stating publicly that such events would discourage victims from making complaints and calling the offices of the Inspector General of Police and the Attorney-General for a meeting on what action would be taken to prosecute the offenders, to ensure that the torture case would continue, even without the complainant, and to prevent any recurrence of such a shooting. The HRC also designated a lawyer to represent the Commission at the hearing in Negombo into the torture case filed against several police officers. The quick reaction of the HRC and the decision to directly intervene by ensuring representation in the court case points to a very healthy direction that the HRC should take in the future. The HRC should consider representing itself in all torture cases filed under the Act No. 22 of 1994.

1.7 Reports

The HRC published the following reports in 2004:

1) Legal Analysis of the problems of IDPs.
2) Human Rights Situation in the Eastern Province.
3) Observation on the State Home for Women - Methsevana.
4) Report on the Anuradhapura Hospital.

1.8 Implementation of Decisions

The HRC annual report for the period of 10 April 2001 to 31 March 2003, mentions the issue of interim orders of the HRC. In the case where a group of families were being evicted from their homes on the grounds that they were encroachers, the Commission sought to intervene to prevent the eviction and made an interim order to that effect. But this order was challenged in the Court of Appeal and the case was still pending at the time of writing. Meanwhile, people who have been evicted from their houses remain stranded, without any real solution to their problem.

1.9 Conclusion

The new batch of commissioners has been trying to make the Commission more effective and efficient and has outlined its policy through its strategic plan. Specific importance is given to torture and a unit has been created for this purpose. The implementation of the strategic plan is the crucial issue faced by the Commission. The most difficult issue that it must resolve is the competence of its staff; the staff capacity must be equal to the tasks of the Commission. It is unavoidable that new staff will need to be brought in on permanent, part-time or even voluntary basis if the Commission is to develop.

The staffing issue, however, should not be allowed to obstruct the effective and efficient functioning of the organisation. In the field of the implementation of rights, it is essential that the HRC use its mandate of advising government agencies and recommending new legislation effectively, to speedily bring about a law for witness protection in Sri Lanka. This is the only effective response to the massive levels of intimidation of victims and the murder of Gerald Perera, as well as to continuing torture and other gross violations. Another matter of priority that the Commission must deal with is strengthening disciplinary procedures for its own staff.

2. The National Police Commission

2.1 Introduction

The National Police Commission (NPC) is one of the most potentially powerful institutions created by the 17th Amendment to the Constitution of Sri Lanka. The 17th Amendment came into force on 3 October 2001. It created a number of commissions over important institutions that the legislature felt should be brought under the control of constitutional bodies. The 17th Amendment was perhaps the most important constitutional measure to have been introduced in recent years.

In passing the 17th Amendment almost unanimously, the legislature expressed its consensus on the fact that there had been a considerable deviation from the democratic process in previous decades and that drastic constitutional measures were necessary to bring basic institutions of the country back within the framework of the rule of law and democracy.

'The politicization of institutions,' which was the evil that the 17th Amendment was meant to overcome, has never been clearly defined. However, what 'politicization' has come to mean in the context of national institutions is not difficult to describe. For the purpose of this chapter, we will look into what politicization has meant to the policing institution of Sri Lanka. Over a period of twenty-five years the policing institution lost its monolithic command structure with the result that we ended up with numerous 'commanders' giving orders to the police at police stations as well as others functioning at different branches of the policing institution.

Some of these outside 'commanders' were as follows: the country's executive (meaning the President); members of the President's security apparatus; the Prime Minister, Cabinet Ministers and Deputy Ministers and the bureaucracy serving under them; local members of parliament

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[8] That is, the United Party from 1977 to 1994, and the Coalition Government led by the Sri Lanka Freedom Party from 1994 up to the time of the 17th Amendment.

from the ruling party;[8] members of provincial councils and other local government bodies, particularly those of the ruling party; any person perceived to be an influential person associated with the ruling party; local organisers of the ruling party; businessmen and others who were perceived to have influence with the ruling party.

The 'orders' that came from such political sources included the following: the physical elimination of political opponents[9] on the basis of lists issued by local members of parliament from the ruling party or by others who were perceived to have consent from the ruling party – such physical eliminations became known as disappearances, but in reality meant extra judicial killings after illegal arrest and often severe torture, of over 30,000 according to official figures, although other sources put the number closer to 60,000; the harassment of political opponents; subverting the electoral process through acts such as illegal arrest, detention and torture of political opponents; disrupting the electoral process through direct or indirect assistance for illegal activities such as impersonation, filling or stealing of ballot boxes and the like; depriving persons of the normal legal rights to make complaints at police stations and to have them investigated; generally spreading an aura of intimidation and fear which made the exercise of rights of the citizens, including the proper functioning of their lawyers, extremely dangerous.

The task, then, of the NPC within the overall purview of the 17th Amendment was to correct the situation described above and to make the policing institution function within a monolithic command structure. This structure would be controlled and supervised only by a constitutional body whose members would be selected by the Constitutional Council on the basis of competence and merit.

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9 'Political opponents' refers to those who were thought to be members or sympathizers of the JVP and also members of political parties other than the ruling party. However, those killed included a large number of persons who were only implicated by others on 'insurgent links.' The implication often came through personal enemies who made use of their influence with the ruling party members to include the names of others in the death lists.

After certification of the NPC, the Constitutional Council recommended the names of seven persons to form the Commission. The letters of appointment were issued by the President to those seven persons on 24 November 2002.

2.2 Powers of the NPC in relation to Police Promotions

The manner of corrective action to be taken by the NPC was defined under the 17th Amendment; Article 155G(1)(a) vested the powers of appointment, promotion, transfer, disciplinary control and dismissal of police officers other than the Inspector General of Police with the Commission. In the exercise of that power, the NPC is mandated to act in consultation with the Inspector General of Police. Further, under Article 155G(2) of the Constitution, the Commission was mandated to establish a public complaints procedure, which would enable it to entertain, investigate and provide redress for such complaints.

It is in the light of this historical background and the mandate of the Commission that the work of the Commission for the year 2004 should be reviewed and assessed. During a large part of 2004, just as in 2003, a considerable extent of the NPC's time was consumed in dealing with promotions within the police department. The justification for allocating such time to this task was that past inadequacies in dealing with promotions had created an enormous amount of frustration among police officers of different ranks and led to many failings in policing. The NPC tried to deal with this frustration, particularly in regard to officers of ranks such as Chief Inspector, Assistant Superintendent of Police, Superintendent of Police, Deputy Inspector General, and Senior Deputy Inspector General.

As for officers below those ranks, the Commission delegated its power by a Gazette Extraordinary 1299/9 of 30 July 2003. A three-member committee was formed, consisting of a retired High Court Judge, a retired District Court Judge and a retired Deputy Inspector General of Police. They were given, *inter alia*, "the power of promotion to the rank of Police Sergeant, Sergeant Major, Sub Inspector and

Inspector of Regular Police Service (including the Special Task Force and the Directorate of Intelligence) to be effected in accordance with Schemes of Promotion approved by the Commission."

At one point, the NPC was subjected to public criticism on the basis that it had promoted some undeserving persons. One case in particular involved the promotion of an officer in prison, serving a sentence for murder. It was later found that the Commission had to depend on information provided by the office of the Inspector General of Police, whereby omissions in the documents provided had led to errors that were quickly corrected.

However, such incidents point to an important direction that the work of the Commission should take if it is to effectively and promptly perform the task of promotions as well as other tasks such as appointments, transfers, disciplinary control and the dismissal of police officers. The Commission needs to develop its own independent database on all police personnel. With modern technology, it would not be a formidable task to document the relevant information on all police officers in one database maintained by the Commission with the consultation and co-operation of the Inspector General of Police. Such a database would also facilitate other functions that the NPC is legally bound to implement, such as legal procedures under the Establishments Code (a code governing the behaviour of all government servants). For instance, the provision that a state officer indicted for a criminal offence should be immediately suspended from his employment pending trial, is one that the NPC is presently finding difficult to implement, as it does not have the necessary files on all police officers.

2.3 Powers of the NPC in relation to the Public Complaints Procedure

The NPC's powers for disciplinary control and its duty to establish a public complaints procedure to entertain and investigate public complaints against any police officer or service, and to provide redress for such complaints, are two distinct obligations and this distinction needs to be emphasized.

The Commission only recently began to realize its duty for disciplinary control of the police, however, it has yet to fully grasp the implications of Article 155G(1)(a). It became a matter of controversy in 2004 that many complaints made relating to the police were about torture and harassment by police officers.

According to the Commission's Chairperson, most of these complaints were made against officers below the rank of Inspector of Police. When the inaction regarding those complaints resulted in a public outcry, the Chairperson explained that the power of disciplinary control for officers below the rank of Inspector had been delegated to the Inspector General of Police. This led to public controversy and soon the Commission promised to correct its position by withdrawing this notification and investing the power within the Commission itself as originally stipulated by the 17th Amendment.

The announcement to this effect was made on 20 August 2004 by the Chairperson at a consultation held jointly by the Law & Society Trust, the Asian Human Rights Commission (AHRC) and the World Organisation on Torture (OMCT). At this meeting the Chairperson also said that, "earlier this issue (disciplinary control) was handled by the Inspector General of Police but under the 17th Amendment this responsibility has fallen upon the Police Commission. So, we are attending to and giving police torture priority." He further stated that investigators are to be recruited to probe the increasing rate of police torture in Sri Lanka. In 2003, 15 per cent of the complaints received by the NPC related to police torture, while 40 per cent related to inaction on public complaints.

There are many more issues that arose regarding the use of disciplinary control, which are yet to be settled. For instance, what would be the impact of a finding against any police officer by the Supreme Court of Sri Lanka on a fundamental rights application filed under Section 126 of the Constitution? A prevalent view within the police establishment regarding the matter in the past has been that such a finding should

have no impact on the promotion or dismissal of officers, since the Establishments Code governing the discipline of state officers does not have any provisions regarding fundamental rights violations.

Although this view has been indirectly confirmed in one fundamental rights application case, it is erroneous and dangerous for many reasons. The Establishments Code was created many decades ago under colonial rule, when there was no recognition of fundamental rights. Since 1972, fundamental rights have been part of the Sri Lankan Constitution and since 1978, a legal remedy has been constitutionally made available for the violation of such rights. To continue to claim that a law enforcement officer can violate such rights and not face disciplinary consequences is an absurdity both in the constitutional context of Sri Lanka today and in the international context.

The international context is particularly important due to the fact that Sri Lanka has not only ratified the International Covenant on Civil and Political Rights, but has also signed the Optional Protocol, empowering any Sri Lankan citizen to go before the UN Human Rights Committee to complain against such violations by the State. Furthermore, even to go by the Establishments Code itself, the Code recognizes as offences any violations relating to the Constitution and the law.

Yet another objection made against the violations of fundamental rights being regarded as a breach of discipline, is that the decisions of the Supreme Court are made on the basis of affidavits filed by the parties, and that no cross-examination is allowed under these proceedings. However, the proceedings in the Supreme Court are by way of affidavits and counter-affidavits, in which both parties are fully allowed to challenge any of the facts presented by the other party. This evidence is examined by the judges of the highest court in Sri Lanka. That such a judgment should be of no value in assessing disciplinary matters relating to the promotion and dismissal of officers cannot be sustained on any valid grounds.

The manner in which the NPC has dealt with this matter so far has been to stop promotions of officers against whom such findings are made for a period of five years. However, in light of Sri Lanka's Constitutional law and the international legal principles on human rights, the weight of such findings on disciplinary issues should be reassessed. Whether any officer found guilty of serious torture, such as in the case of Gerald Perera should ever be promoted or should be allowed to remain a policeman at all, must be considered not only from a legal point of view but also from a moral standpoint. If there are officers among the police of higher ranks found to have violated fundamental rights by the Supreme Court, what impact would this have on the public as to the meaning of law enforcement?

The separate duty of the NPC to establish a Public Complaints Procedure under Article 155G(2) of the Constitution requires that the Commission work out such a procedure and establish it within a proper legal framework. The Asian Human Rights Commission, working in consultation with two legal experts in Sri Lanka,[10] submitted a draft of that procedure to the Commission. The Commission has been studying this procedure and it is hoped that it will adopt such a procedure as soon as possible. Such adoption must be accompanied by public announcements and the establishment of centres where complaints can be received. The establishment of independent and competent bodies to adjudicate on such complaints is also crucial.

Initially, the NPC recruited eight officers to be its provincial co-ordinators. However, at the time of writing the Commission had not worked out detailed procedures as to how such co-ordinators should attend to public complaints. Generally, the approach has been to work towards settlements and to provide some relief to the victims. However, this approach can bring serious problems and erode the faith of victims. For example, there was a complaint against the co-ordinator in Kandy, for acting in collusion with torture perpetrators. Since then, two officers

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[10] "The draft of the Public Complaints Procedure compiled by Dr. Jayantha De Almeida Guneratne and Ms. Kishali Pinto-Jayawardena at the request of the Asian Human Rights Commission (AHRC) in December 2003 is annexed to this chapter, (without the annexed to the said draft), for the easy reference of readers.

have been recruited at NPC headquarters specifically to deal with public complaints. This may be the beginning of a stronger mechanism for independent investigations.

The Commission has been left to acquire resources for its own development. It is of course the obligation of the State to provide financially for all its requirements. While these requirements need to be stressed, there must also be an independent attempt by the Commission to develop its strategy plans and to raise the necessary funds from approved sources. Perhaps the NPC could examine the manner in which the Human Rights Commission of Sri Lanka approaches resource generation.

While overwhelming sections of the police support the development of the NPC and see its capacity to strengthen their profession, there is a minority that has tried to build opinion against it, particularly in its attempt to enforce disciplinary control and to eliminate torture. It has been argued by some in the Inspector's Union and even by a Deputy Inspector General of Police that the application of fundamental rights, (meaning in particular complaints relating to torture), is an obstruction to the functioning of the police in their investigations. There have even been threats of strikes by the police if they continue to be investigated. Given the highly subversive nature of the situation that the NPC was created to correct, such resistance is only to be expected. Those engaged in influencing public opinion about the better functioning of the rule of law and democratic institutions, will have an important role to play in creating the necessary intellectual and moral ethos for the NPC to realize its constitutional objectives.

While the NPC has faced some adverse publicity, mostly led by errant police officers, by and large support for the Commission is quite evident within the media. However, more conscious and studied attempts to enhance the functioning of the Commission are necessary. It is primarily the duty of the human rights community in Sri Lanka to develop strategies to deal with the relevant issues. The Inspector General of Police and the higher police officers in particular should try

to understand the new constitutional scheme as contained in the 17th Amendment. This scheme is a departure from all previous conceptions of the police institution since its inception. The new scheme, as contained in the 17th Amendment, came as a response to the unique and catastrophic situation the country faced decades earlier. Thus, the idea of the NPC is not a borrowed one, but is a unique creation responding to a concrete reality in Sri Lanka. Cooperation between the NPC and higher elements of the policing service will make it possible to undergo a transformation that is in the best interests of the country, and which is desired by everyone.

2.4 Conclusion

The constitutional mandate of the National Police Commission is enormous; however, the material resources of the Commission are miniscule. The responsibility for resolving this incongruity lies with the Commission itself.

By developing a thoroughly structured strategic plan, the Commission will more likely receive support from the UNDP and bilateral agencies, which it so eagerly requires if it is to assist in the process of bringing stability to Sri Lanka. It is also more likely that greater co-operation will develop between the Inspector General of Police and the police hierarchy if a strategic plan is developed and the police hierarchy is kept informed of this.

What is required of the National Police Commission, therefore, is a strategic plan that incorporates highly imaginative and evolving methodologies, so that its mandate can be realised. The collapse of the basic institution of the rule of law – the police – led to the creation of this unique mandate.

Indeed, of all national institutions created in recent times, perhaps the one that bears the most vital mandate is the National Police Commission, because without a radical reform of the police, brought from within, the issues of social stability and the increase of crime

and corruption in Sri Lanka cannot be controlled. It is to be expected that there will be heavy resistance to the development of the Commission from those who benefit from the present state of anarchy: namely, many politicians, criminal elements and those in the police service who benefit from such criminal elements. Under these circumstances, it is the duty of civil society to defend and support the Commission so that it will develop into an institution of great strength. Vigorous support and monitoring from civil society will counteract other pressures arising from vested interests.

As 2004 came to a close, the world witnessed one of the greatest natural catastrophes known to human kind - the tsunami. While the tsunami has taken and affected the lives of millions in Asia as well as other parts of the world, it has also created an unprecedented level of compassion and co-operation among people from all different nations. With enormous financial resources being channelled into the reconstruction of Sri Lanka, for example, money should not prove an obstacle in repairing the devastation of that country.

However, it must be remembered that the restoring of a country also involves the rebuilding of its damaged legal structure and law enforcement as much as the reconstruction of damaged roads, buildings and general infrastructure. It is now up to the NPC to recognise this and take the opportunity to raise its material resources and bring Sri Lanka's legal structure and law enforcement to a more viable level. By way of the Constitution, this is the Commission's duty to the Sri Lankan nation.

ANNEXURE - 1

Procedural Implementation of Article 155 G (2) - 17th Amendment

Final Draft -December 2003

Amendment 17, Section 155G(2)

"The Commission shall establish procedure to entertain and investigate public complaints and complaints of any aggrieved person made against a police officer or the police service, and provide redress in accordance with the provisions of any law enacted by Parliament for such purposes."

Explanatory Note

The 17th Amendment to the Constitution of Sri Lanka, insofar as it provides in Article 155G(2) for the mechanism of complaints against the police, is a unique provision compared with other legal procedures:

a. Other complaint procedures provide only for internal inquiries;
b. Under 155G(1), disciplinary control of the police service belongs to the Commission. Thus control of all aspects of procedures for public complaints is the responsibility of the Commission

Creation of the procedures is a constitutional obligation that has yet to be realized. Although ASPs, DIGs and the like have, so far, had the duty of investigation of complaints, disciplinary procedures in the police thus far have been arbitrary and ad hoc. The following submission is a working template that seeks to fulfil the mandate of Amendment 17 Section 155G(2).

With reference to the scope of the submissions, the procedure is not related to all aspects of police discipline, but rather confined to complaints by aggrieved parties and public complaints. Thus, issues of disobedience to superiors and other internal matters are not part of this procedure, though in other jurisdictions these are taken together. This implies that our draft can exclude these aspects.

Preamble: Principles of the Amendment 155.G

Whereas the 17th Amendment amending the Constitution of Sri Lanka was passed by the Parliament of Sri Lanka in order to bring about greater transparency and accountability in public institutions and in the process of governance, in order that citizens' rights be safeguarded, particularly in so far as restoring law and order and public confidence in the rule of law is concerned;

Whereas the Police Commission was created under the 17th Amendment as aforesaid, to engage in reform of the police service by functioning as an independent inquiry body into public complaints against the service as a whole as well as individual police officers;

Whereas the 17th Amendment, by virtue of Article 155G (2) imposes a specific duty on the Police Commission to establish procedures to entertain and investigate public complaints or complaints of aggrieved persons against an individual police officer or the police service and provide redress in accordance with law;

Whereas there is tremendous public concern about the police force in general and their capacity to enforce law and order in the context of a severe deterioration of discipline, inadequate training and common prevalence of practices of torture by police resulting in public confidence in an independent police service deteriorating to an extent that threatens the very foundations of law and order in Sri Lanka;

And given therefore, that an urgent need exists for the establishing of systematic and transparent procedures under Article 155G (2), in order that public complaints are entertained, investigated and redressed in the manner required by the Constitution;

These following Rules are established by the Police Commission under Article 155G (2) of the Constitution.

Chapter 1: Entertainment of Complaints

1.1 Public Complaints and Complaints by Aggrieved Parties Against Offender(s) Regarding Specific Incidents

01. Any person, persons or body of persons, who are personally aggrieved or who may become aware of any action or inaction on the part of any police officer or officers leading to a violation of statutory and/or constitutional and/or public duties imposed on such officer or officers or involving a violation of the rights of any person, may complain to the Commission in the manner hereinafter provided for;

02. Such action/inaction or violation of statutory and/or constitutional duties and/or public duties by police officer/s in respect of which a complaint may be lodged as aforesaid, includes particularly;

a) death of a person in police care or custody;
b) allegations of torture and/or cruel, inhuman or degrading treatment and/or injury to a member of the public in police care / custody and by any action of a police official;
c) road traffic incidents in which a police vehicle is involved;
d) shooting incidents in which a police officer discharges a firearm in the course of a police operation;
e) allegations of bribery or corruption involving police officers;
f) miscarriage of justice resulting from misconduct by a police officer;

This would include;

(i) refusal/failure/postponement to record a statement sought to be made to the police;
(ii) undue delay in making available certified copies of statements made to the police by any person on payment of the usual charges;
Explanation: - a lapse of more than 48 hours shall be regarded as 'undue delay' unless the Officer-in-Charge of the relevant police station or any officer under

delegation of authority by such Officer-in-Charge, gives in writing the reasons for any delay beyond the stipulated period which may be brought to the notice of the Commission which shall inquire into the said alleged cause for the delay.

(iii) discouraging complainants or witnesses from making statements;

(iv) use of abuse words, threats or intimidation on complainants or witnesses;

(v) chasing away complainants/witnesses who come to make complaints or statements;

(vi) failure to maintain records - Erasing or otherwise altering records;

(vii) making deliberate distortions in statements recorded;

(viii) failure to read the statements over to the signatories before getting the signatures;

(ix) exhibiting partiality towards members of political parties in the carrying out of official duties;

(x) making false reports and statements to court;

(xi) deliberate fabrication of cases;

(xii) negligence in filing cases without evidence;

(xiii) failure and/or refusal on the part of any police officer to co-operate with any Attorney-at-Law looking after the interests of his or her client and/or any attempt to deny a person his or her unfettered right to obtain legal representation.

g) any alleged misconduct and/or breach of discipline (Vide Annexure One to these Rules) on the part of a police officer or officers;

h) racist and /or discriminatory and/or sexist conduct by police officers or conduct which offends the constitutional guarantee of equality before the law;

i) arrestable offences allegedly committed by a police officer;

j) any dereliction of the mandatory duties imposed on police officers by virtue of Section 56 of the Police Ordinance;

k) any attempt to deny any individual the freedom of speech or freedom to engage in a lawful occupation, profession and business;
l) any attempt to coerce/intimidate/subvert a medical officer or any other public officer into submitting false documents or engage in dereliction of that officer's duties;
m) in relation to arrests;

(i) failures to make notes on each stage of the arrest;
(ii) failure to wear uniform or identification items as police officers;
(iii) failure to use official transport with identification marks as a police vehicle;
(iv) failure to inform the reasons for arrest

Provided that where a complaint is pending investigation by a police officer, the complainant will have a right of appeal to the NPC if reasons are provided for in writing by the complainant as to why investigations have been unsatisfactory and such reasons are accepted by the NPC or an officer delegated by the NPC.

1.2 Public Complaints and Complaints by Aggrieved Parties Against the Police Service

Individuals or organizations may submit complaints relating to general deficiencies or concerns of the police service.

These may relate to general issues of police "mis-management and abuse of power in the public sphere" pertaining to a particular locality or in general. For example, prevalence of torture in a particular police station may be the subject of such a complaint.

Similarly, misbehaviour of police officers in a particular area or acts or omissions by police officers in a specific area,. absence of some services generally expected from the police such as immediate police response to crimes in a locality and similar violations such as a number

of fabricated cases and delayed investigations and alike issues of police "mis-management and abuse of power in the public sphere" pertaining to particular area can come under this category.

Public inquiries undertaken by the NPC on its own initiative or by the request or order by the courts or at the request of the State with regard to the police service in general may come under this category.

1.3 The Submission and Entertainment of Complaints

1. Where the complaints are to be made:
   Complaints can be made at the head office and local offices of the NPC.[12]
2. The manner in which complaints could be made:
   Complaints could be made (a) through the post, (b) by fax, (c) by telephone, (d) in person, (e) by electronic mail.
3. What is necessary for a complaint:
   The complaint should be made in the manner set out in the First Schedule to these Rules.

1.4 Automatic Complaints System

All Officers-in-Charge of police stations, ASPs and/or DIGs and/or SPs shall refer to the Commission, all cases specified in the following categories regardless of whether there has been a complaint or not;

(a) deaths in police care or custody;
(b) fatal road traffic incidents in which a police vehicle is involved;
(c) shooting incidents in which a police officer discharges a firearm in the course of a police operation;
(d) allegations of corruption involving police officers;
(e) miscarriages of justice resulting allegedly from misconduct by a police officer;
(f) allegations of racist and / or discriminatory and/or sexist conduct by police officers;
(g) an arrestable offence allegedly committed by a police officer; and

(h) allegations of torture and injury of a person in police custody or care and by any action of a police officer.

1.5 Pro-Active Role of the NPC

The NPC may undertake *suo motu* investigations into all or any of the instances set out in sub section 1.5 above.

1.6 The Registering, Documenting and Archiving (Archiving is separate of registration and documentation) of Complaints

1. How to Register and Document a Complaint: There should be guidelines as to how the complaints are registered and documented.
   (a) If the complaint has been made orally, it should be reduced to writing and read to the complainant who would sign himself to attest the contents of the written complaint.
   (b) Written complaints received directly or by post or electronic means should be stamped by the receiving officer indicating the time and date it was received.
   (c) All complaints should be registered on a register of complaints with a unique number, which will be the case number for further follow up. The complainant must be informed of the unique number for further follow up.
   (d) The copies of complaints should also be maintained on a computerized database in which the same unique numbering system should be followed and should also include proceeding tracking information indicating current status and responsible officer.
   (e) Care should be taken to maintain cross-referencing with regard to complaints received in order that similar complaints received with regard to police officer/s under sub-section 1.1, 1.2 and 1.4 can be cumulatively evaluated by the NPC at a given time and/or referred to by a member of the public upon authorisation given to that effect by the NPC.

(f) All steps towards the protection of records must be followed. The NPC should draft regulations relating to the protection of the documents of the NPC, which would allow aggrieved parties, and/or members of the public access to completed case records upon permission given by the NPC.

2. How the Complaints will be Archived: The NPC should also issue guidelines as to how these complaints will be maintained and protected, either through protection of written records or use of electronic recording.

CHAPTER 2: Procedure Relating to the Investigation of Complaints and Disciplinary Inquiries Thereto.

2.1 Procedure Relating to Investigations against Particular Police Officers under Section 1.1 and/or the Automatic Complaints Procedure under Section 1.4

STAGE ONE

a) Immediate inquiries (Quick Response) to intervene and stop an ongoing violation against a person to ensure his/her protection and to record the initial statements and observation.
b) Inquiries to determine whether there is a prima facia case to proceed with.
c) Comprehensive fact-finding inquiries to collect all the evidence relating to the complaint.

STAGE TWO

a) Recommendations made to appropriate prosecutorial authority for the purpose of instituting criminal action against the perpetrators.
b) Where findings of such investigation indicate a breach of statutory and/or constitutional and/or public duty on the part of any police officer, the provisions of sub-section 2.2 shall apply *mutatis mutandis*.

Stage One

a) *immediate inquiries (Quick Response) to intervene on an ongoing violation against a person to ensure his or her protection and to record the initial statements and observation.*

Duties of the First Response Officer:

- On reception of the complaint, he will visit the premises where the alleged violation has taken place or continues to take place.

- He will record the statements of the victims and the alleged perpetrators and make observations on the condition of the victim/s and record such observations.

He will issue such instructions as required for the protection of the victim such as immediate medical attention when required, or reallocation of the victim to stop re-victimisation by the perpetrators, and recommend such other measures as to ensure protection of the victim, family and witnesses.

b) *Inquiries to determine whether there is a prima facia case to proceed with,*

Duties of a NPC authorized officer -

An authorized officer(s) will go through the available evidence and make a determination as to whether there is a prima facia case to proceed with. Where the determination is not to proceed with further investigation, the reason for such determination should be recorded by the authorized officer. Any such recommendation must be conveyed to the complainant;

c) Comprehensive fact finding inquiries to collect all the evidence relating to the complaint. An authorized Special Investigation Unit should conduct a comprehensive investigation,

Duties of Investigators

* Recording all the statements of witnesses available;

- viewing / examining and copying necessary records;
- making photographs and causing forensic examination as required by the circumstances
- referring the case for an expert opinion as and when required;
- taking all other necessary steps to ensure that all the available evidence has been collected.
- At the end of the investigations, to review the evidence and make recommendations and submit the file for subsequent action by the NPC.

Stage Two

Recommendations made to appropriate prosecutorial authority for the purpose of instituting criminal action against the perpetrators.

- Where the NPC is satisfied that evidence of a criminal offence or offences exist under the prevalent law the NPC will refer the matter for investigation to the relevant authorities with the observation of the NPC that a prima facia case exists against the alleged perpetrators. An information note should be conveyed to the complainant.
- NPC should follow up such reference and obtain reports on the progress of such investigations and subsequent prosecutions;
- Such reports should be made available for public scrutiny at the offices of the NPC unless the said reports are excluded from public scrutiny on express orders of the NPC.

2.2.Procedure Relating to Complaints that Constitute Breach of Public and/or Statutory and/or Constitutional Duties

Explanation:

Breach of Public and/or Statutory and/or Constitutional Duties shall include actions of police officers prohibited in terms of sub-sections (f),(g), (i), (j), (k),(l) and (m) of Section (02) of Section 1.1 above and shall also include adverse findings against any police officer by the Supreme Court in the exercise of its fundamental rights jurisdiction under Article 126 of the Constitution and wilful refusal and/or failure of any police officer to comply with a request made by the NPC (or an officer delegated by the NPC) in pursuance of investigations carried out under these Rules read with the duties imposed upon such police officer under Section 3.1 of these Rules.

Upon a complaint being received to this effect or upon such breach being disclosed during investigations conducted under the preceding sub-section of these Rules, an officer of the NPC will record all the relevant statements and collect all evidence of acts of police officer/s that are categorized as breach of Public and/or Statutory and/or Constitutional Duties as defined above within two months of the said complaint being received or disclosed and will refer the report therein to a Committee of the NPC for inquiry;

- On the basis of the comprehensive investigation contemplated in the preceding sub-section, the NPC will conduct a disciplinary inquiry into whether disciplinary action should be taken against the alleged perpetrators, during which inquiry, the alleged perpetrators will be charge sheeted and interdicted from service;

- The inquiry will be conducted within two months of the preliminary report being submitted to the NPC and will be conducted by a three member panel of the NPC presided over by the Chairman or by a member of the NPC with authority delegated thereto by the Chairman of the NPC;

- The complainant and/or affected persons thereto will be notified by the NPC of the said inquiry. The alleged perpetrators will be given the right to defend themselves as required by law;

- After the inquiry, the Committee of the NPC shall make their findings in writing to the NPC;

- On the basis of such finding, the NPC will take appropriate disciplinary action as provided by law. Such decision must be conveyed in writing to the complainants, the perpetrators and the IGP;

- A right of appeal from such decision of the NPC will exist to the Administrative Appeals Tribunal established under Article 59 of the Constitution;

2.3 Procedure Relating to Investigation of Complaints Against the Police Service under Section 1.2

Procedure Relating to Complaints against the Police Service.

a) Upon the receipt of complaints against the police service, the NPC shall delegate the complaint to an officer of the Special Investigation Unit of the NPC for follow up action;

b) Such officer shall record all the statements of witnesses available, view/examine and copy necessary records, make photographs and cause forensic examination as required by the circumstances, refer the case for an expert opinion as and when required, take all other necessary steps to ensure that all the available evidence has been collected;

c) At the end of the investigations, which shall not be longer than a period of three months, the officer shall submit the report to the NPC;

Provided that, if a written request is made to the NPC for an extension of this time period for explainable reasons, such

extensions may be granted for one month at a time, provided that the entire time period shall not extend for more than six months;

d) Upon the receipt of the report, a three member Committee of the NPC shall deliberate on the report and shall cause the same to be notified to the complainant. Written representations may be called for by the public under the hand of the Secretary to the NPC if such is considered to be necessary. Such views may be furnished in writing or the committee of the NPC may also make available time for oral representations;

e) Such deliberations shall be in public unless the NPC sets down in writing, the reasons why it should be held in camera;

f) The report of such sub-committee of the NPC shall be submitted to the NPC sitting as a body within three months of the complaint being made along with the findings and/or recommendations of the said committee and the NPC shall, within two months of the report being submitted, authorise the implementation of the same with suitable modifications;

g) The findings of the NPC shall, along with the investigative report, be filed in the offices of the NPC to enable public scrutiny unless reasons are given in writing by the NPC as to why the report and/or the findings cannot be made public.

CHAPTER 3: The Powers of the NPC, its public accountability and matters incidental thereto

3.1.The Accessibility of Information for an Effective NPC to complete Investigations

For investigations to be thorough, the NPC will need open access to all relevant informat ion.

In terms of the power given to the NPC under Article 155G(2) to investigate complaints against any police officer or the police service, which has been given effect to in these Rules read together with the MoU entered into between the IGP (or the acting IGP) and the NPC , all police officers are under

(a) a legal obligation to produce and/or give access to the NPC documents or other material as called for;

(b) allow members of the NPC to take away the actual or copies of the documents or other material, and

(c) allow entry to police premises

Explanatory Note:

Breach of these duties will result in disciplinary sanctions being visited on the errant police officer by the NPC acting under Section 2.2 of these Rules:-

1. NPC should have full access, when appropriate, to all necessary information from both the public and private sector.

2. Simultaneously the NPC should abide by the following guidelines when handling the information.

3. The NPC in their dealings with the complainant, should have the discretion to disclose information from the investigation of complaints subject only to harm test.

4. The NPC should have the freedom to use information received from reports and other documents from police forces, after excluding sensitive or demonstrably confidential material, to compile guidance, promotional and other material for the purpose of continuous improvement in the complaints procedure and in raising the public's awareness and understanding of the complaints procedure.

3.2 The NPC and its response to the Complainant(s)

1. Once the investigatory process mandated with regard to all complaints against a police officer is complete, the complainant(s) should be sent a full written account of the investigation setting out the way the investigation had been conducted, a summary of the evidence, the conclusions, which include the proposed action to be taken against the officer concerned, reasons for those conclusions and any action taken to prevent a recurrence.

2. If necessary, a member of the NPC should meet the complainant or the family of the complainant, explain the results of the investigation and findings.

3.3. Duty of Fairness on the Part of NPC Officers and Prohibition on Collusion with the Police in any Form or Manner Whatsoever

1. All officers of the NPC shall be under a duty to act fairly in entertaining, acting upon or investigating complaints as mandated under Sections 1 and 2 of these Rules.

2. Any officer of the NPC found colluding with any police officer or officers in any form or manner whatsoever in the carrying out of their duties as contemplated by these Rules will be immediately suspended from work and upon inquiry being held, will be forthwith dismissed from the service of the NPC.

3.4. NPC and Public Accountability

The NPC should not only be unbiased, but must be perceived by the public to be unbiased. To ensure transparency and maintain the public confidence the NPC,

1. The NPC should present an annual report of its activities through means that will be accessible to the public.
2. NPC finances should generally be produced and available.
3. The NPC should provide an opportunity to assess the public confidence of NPC, through public debates and surveys.

Explanatory Note:

Breaches of Discipline would include:

Violation of duties imposed by the Establishments Code of the Government of the Democratic Socialist Republic of Sri Lanka

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The First Schedule of Offences Committed by Public Officers

1. Non-allegiance to the Constitution of the Democratic Socialist Republic of Sri Lanka.
2. Act or cause to act in such manner as to bring the Democratic Socialist Republic of Sri Lanka into disrepute.
3. Anti-government or terrorist or criminal offences.
4. Bribery or Corruption.
5. Being drunk or smelling of liquor within duty hours or within Government premises.
6. Use / possession of narcotic drugs within hours or within Government premises.
7. Misappropriate or cause another to misappropriate public funds.
8. Misappropriate Government resources or cause such misappropriation or causes destruction or depreciation of government resources wilfully or negligently.
9. Act or cause to act negligently or inadvertently or wilfully in such manner as to harm Government interests.
10. Act in such manner as to bring the public service into disrepute.

11. Divulge information that may harm the State, the State Service or other State Institution or make available or cause to make available State documents or copies thereof of outside parties without the permission of an appropriate authority.
12. Alter, distort, destroy or fudge State documents.
13. Conduct oneself or act in such manner as to obstruct a public officer in the discharge of his duties, or insult, or cause or threaten to cause bodily harm to a public officer.
14. Refuse to carry out lawful orders given by a senior officer or insubordination.
15. Any violation of provisions of the Establishments Code, Financial Regulations, Public Service Commission Circulars, Public Administration Circulars, Treasury Circulars, Departmental handbooks or Manuals or wilfully, inadvertently or negligently act in act in circumvention of such provisions.
16. Aid and abet, or cause to commit the above offences.

The Second Schedule of Offences Committed by Public Officers

Offences, though not falling within the First Schedule above, are caused owing to the inefficiency, incompetence, inadvertence, lack of integrity, improper negligence and indiscipline of an officer.

Explanatory Note:

Disciplinary Control: What does this involve?

It involves a clear understanding of what are the breaches of discipline are. Thus,

1. The NPC, as well as all members of the police service, should know what constitute breaches of discipline in the police force and what are consequences of each type of discipline that is breached.

2. For this to happen it is necessary to write it down; acts, which will lead to disciplinary actions and possible punishments, must be written down to avoid uncertainty and confusion.

   This is not difficult and the list needs to be long; however, breaches of discipline common to Sri Lankan police must be included in such a listing.

3. Procedure of entering complaints, inquiring and redress must also be written down.

Annexure 2

A Discussion Paper

This is a discussion paper submitted by the Asian Human Rights Commission to the National Police Commission on the need to develop a strategic plan for the practical realisation for the NPC's mandate.

Realisation of the mandate of the National Police Commission

The realisation of this mandate in practical terms will require proper organisation of the NPC to deal with the following matters:

A. Appointments.
B. Transfers.
C. Promotions.
D. Disciplinary control.
E. The establishment of the Public Complaints Procedure.

A strategic plan must cover all the areas of organisation including logistics of organizing the NPC to achieve the aforementioned aims.

A. Appointments

This would require that the relevant files be studied by a group of staff officers on the basis of guideline and criterion set out by the commissioners of the NPC so that commissioners will be in a position to make the relevant appointments on appropriate dates and avoid frictions arising from the failures to make the relevant appointments on due dates. The following logistical questions arise from this:

a. How many officers are required on a regular basis to do such work?
b. What would be the relevant qualifications expected of such officers?
c. What would be the salary scales of such officers?
d. What would be the office space needed?
e. What would be the material resources needed such as computers and the like?
f. Any other resources needed.
g. What would be the cost in monetary terms?

B. Transfers

Transfers are a very vital part of the NPC mandate. In fact, from the point of view of public debate this is one of the areas, which have not been adequately discussed. The issue of transfers has a lot to do with properly organising the policing service. For example, the long-term stay of police officers in one particular locality can be a very serious reason for the increase of corruption. In fact, in dealing with police abuse of power, development of proper systems of transfers becomes essential. Thus, the laying down of principles and criterion relating to transfers is also a basic task for the NPC.

At the moment the transfer issue is very much dealt with in the same way as punishment transfers relating to various offenders. Such transfers are done on an ad hoc basis. Even supervision of the implementation of transfers remains a problem. For example, an officer may be transferred from one station but may not report to the next station and continue to receive the salary from the former station. This would mean the need for closer scrutiny of the actual implementation of transfers.

Thus, looking into the logistics of this unit, the same questions need to be asked as in the case of the appointments. However, the number of staff needed and the logistics required may be more limited than that of the unit for the appointments. However, in terms of the expertise needed by way of staff, there may be need for different types of skills required in this area. Thus, the same questions as mentioned in paragraph A need to be asked with necessary variations for the requirements of the category under B.

C. Promotions

Here again there is a great deal of work that needs to be done by staff officers to properly advise the NPC on who is qualified for various promotions. Though the bulk of work may be less than the categories under paragraphs A and B, the NPC should determine how many staff and resources are needed for this work. Thus, the same basic questions asked in paragraph A need to be asked and answered with suitable modifications in drafting the part in the strategic plan for dealing with promotions.

D. Disciplinary Control

This is an area in which many submissions have been made in the past. Perhaps logistically, this department of the NPC would require more personnel with varying talents. The establishment of a disciplinary procedure is itself a difficult task for the commission. This department will require four divisions:

(i) the first for receipt of complaints and the proper documentation of such.

(ii) The second for the investigation of complaints at two stages; an investigation at the initial stage and a second one for more in depth inquiries.

(iii) The third would be for final inquiry bodies that will decide on the culpability of the alleged violators and recommend appropriate punishments to the commission.

(iv) The fourth would be a division relating to the matter of protection for the complainants and their families.

Regarding all these sections, the questions raised in paragraph A in terms of needed personnel and resources needs to be evaluated and broken down into monetary terms.

E. The establishment of the Public Complaints Procedure

The NPC has already received a submission from two Sri Lankan lawyers working together with the AHRC on this issue. The initial part of fulfilling the mandate consists of a number of persons with the necessary experience to work out the procedures for receiving, investigating and granting redress to public complaints. Dealing with the actual investigations and redress may be related to the work under Disciplinary Control, which has been dealt with above in paragraph D. However, the scope of the Public Complaints Procedure is much larger than merely dealing with disciplinary matters. Under the constitution, the Public Complaints Procedure should also involve inquiries into the police service as a whole. This means that the inquiries are not confined to the individual complaints of specific violations but general inquiries into the problems of the police service as perceived by the public,

should be part of this mandate. Once again, logistical matters will have to be worked out in terms of personnel and resources needed and the monetary consequences arising therefrom.

All these will involve the development of a proper database within the NPC. This will require staff, competent to work on database management and general computer skills. In fact, such a staff, once in place, will reduce the work of the NPC significantly. They will also help in the avoidance of duplicating work by other units. For example, computerized personal data will help in sorting out the various aspects of the NPC mandate such as appointments, transfers etc. As in the case of other items, the questions raised in paragraph A need to be raised also in terms of personnel, resources and the monetary implications regarding these items also.

Conclusion

Above are some of the basic elements that need to be dealt with in a strategic plan. Thus, the writing of this plan itself will require effort. Perhaps the initial decision that should be addressed by the NPC is to work out the mode for the creation of the strategic plan. It may be that two or three persons should be assigned to do this job within a time frame and then submit it to the NPC. The NPC can then deal with the proposed plan and adopt it after making appropriate changes. Thereafter, the plan could be submitted to the Government for approval and thereafter submitted to the various donors such as the UNDP, SIDA and others. In fact, the assistance of such organisations can be obtained at the drafting stage as they have had experience in drafting such plans for many organisations. The Human Rights Commission of Sri Lanka has also some experience in this matter and if the NPC so desires their advice could be obtained on the technical aspects of how they have worked out their own strategic plan. The Asian Human Rights Commission is more than willing to offer whatever service in this regard without any financial implications to the NPC.

VI

THE RIGHT TO RELIGION

R K W Goonesekere *

1. Introduction

The debate on freedom of religious worship, provoked by the rise of evangelical Christian churches and proposed legislative changes, is not new. For some years, there have been murmurings of protest by Buddhist and Hindu laity that new Christian churches were being established by outsiders in their neighbourhoods and prayer meetings were being held in the open or in a rented house or room. In some ways, it was reminiscent of American history, where a stranger would ride to a new township, construct a simple hall and lead the townsfolk in Christian worship. But in these early years, the people had come to America from Christian countries and were receptive to the word of Christ. Not so here, where many religions have taken root, including Christianity, and the new churches eager to attract followers were seen differently – as engaged in open and not so subtle conversions to Christianity or a change of Christian faiths. A few disturbing incidents

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largely passed unnoticed. I remember about ten years ago being retained by a local authority close to Colombo, which had granted approval to a Christian religious group for the construction of a meeting hall. When it was made known that prayer meetings were to be held, the permit was cancelled on a flimsy excuse, and even a request for a fresh application form for a building permit was refused. What had happened was that the predominant Buddhists in the area had objected to the activities of this church which, they claimed, had been forced out of the adjacent town, also by angry Buddhists. I had a hopeless case and was glad to settle with an undertaking that a form would be given and the application duly considered.

Within a short space of time, more and more of these evangelical churches, as they are generally known, appeared everywhere in the country – in towns, rural areas, plantations, war-damaged districts, near refugee camps, etc. They went by a variety of names, at times boldly painted on walls of buildings. They appeared independent of each other and inspired by a pastor; the unifying factor was prayer and reading of the Bible.

Evangelism, as distinct from traditional forms of Christian worship, was not unknown, and a few such churches had been established and recognised before; their activities in spreading the faith were not interfered with and were sometimes seen only as an irritant. But the difference here was the proliferation of churches and the absence of formal structure. Not only non-Christians but Christians too were attracted from their traditional churches. President Bush in a recent campaign speech (heard by the writer) proudly proclaimed to a mid-west audience that he was a 'born again' Christian who, thanks to the charismatic Rev. Billy Graham, was able to give up a hard drinking habit acquired as a young man. Exemplary living and the shedding of bad habits are associated with the spreading of evangelism. Not surprisingly, the established Christian churches were unsure of their reactions to a brand of Christianity which showed some contempt of their rituals and hierarchy of clergy. But the ways of winning converts and the indifference shown at times to the rights of followers of other faiths inevitably caused resentment, in particular among Buddhists and Hindus.

2. The Incorporation Bills

The spirit of religious tolerance prevailing in the country prevented serious clashes breaking out with threat to lives and property, but the mood was to curb evangelism. The first challenge took the unusual form of preventing the statutory incorporation of a church which had been in existence for some years. Such incorporation of religious and other associations, not by government initiative but by a Private Member's Bill, was not uncommon. For a Private Member's Bill, special procedure has been laid down by Standing Orders of Parliament so that Parliament retains control over legislation.[1]

A Bill titled "the Christian Sahanaye Doratuwa Prayer Centre (Incorporation)" was presented in Parliament in 2001 as a Private Member's Bill. It was placed on the Order Paper and leave was granted by resolution of Parliament. This was the First Reading of the Bill. Its constitutionality was challenged by a citizen under Article 121 and the petition was accepted by the Supreme Court without seeking to distinguish between a Government Bill and a Private Member's Bill. Of the many charitable, religious and social organisations functioning in the country, it could be presumed that some would not go through the trouble of seeking incorporation by Act of Parliament unless an advantage was to be gained. Whether the conferment of such advantage was unconstitutional had not bothered the Supreme Court before but it now became a matter for the Court to determine.

The Court reasoned that if the Bill were passed a law would be enacted giving a statutory right to the Prayer Centre to raise and spend money and because the objects were not purely religious there would be undue pressure put on persons to change their religion. "The freedom

[1] See Standing Orders 47 and 48. The Bill was referred to a Standing Committee or Select Committee after the Second Reading which Committee "can require proof of the facts and other allegations set forth in the Bill as showing that it is expedient that the Bill should be passed, and may take such oral and other evidence as it may think requisite ..." The Committee has enormous powers over the clauses of the Bill and reports to Parliament. But the important fact is that the Bill is placed on the Order Paper of Parliament at the earlier stage when the Bill and the motion to introduce it are delivered to the Secretary-General of Parliament.

guaranteed by Article 10[2] to every person to adopt a religion or belief of his choice," said the Court, "postulates that the choice stems from the free exercise of one's thought and conscience without there being any fetter of allurement which in any way distorts that choice."[3] This argument was supported by the finding that the powers of the association would permit the Centre to engage in commercial and economic activities. The fact that diverse religious associations with similar powers had been allowed to be incorporated in the past was to the Court not a reason for refusing to consider whether the provisions of the Bill before Court were inconsistent with the Constitution. Said the Court ,"the freedom guaranteed to every citizen by Article 14(1)(e)[4] of the Constitution to practise a religion and engage in worship and observance by himself or in conjunction with others, should be taken as distinct from the freedom guaranteed by Article 14(1)(g)."[5] Going against the current of sensible liberal thinking over the years, the fundamental rights provisions of the Constitution were used to put restrictions on religious activities.

The Supreme Court's decision on the Bill was reached without examination of the facts relating to the Prayer Centre or its activities, something that the Select or Standing Committee of Parliament would have considered very important and decisive. In fact the Court made it a point to say that it was unnecessary to examine the material produced by the objector "because it does not have a direct bearing on the questions of law that arise for consideration" and thus the decision became one based on conjecture. A more appropriate time, it is submitted, to consider a Private Member's Bill, especially one to

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2 " 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."

3 SC Determination No. 2/2001.

4 " ... the freedom, either by himself or in association with others and either in public or in private, to manifest his religion or belief in worship, observance, practice and teaching."

5 The citizen's freedom "to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise." By contrast to the narrow interpretation of a religious association's powers which go counter to practice, the Indian Constitution, Article 25(2)(a) recognises that a religious association can "engage in any economic, financial, political or other secular activity which may be associated with religious practice" but reserves to the State the right to regulate or restrict such activity.

incorporate an association, would be after the Parliamentary Committee proceedings are over, and the Court could have declined jurisdiction at this stage, but the point was not taken.

Two years later, a Bill titled "New Wine Harvest Ministries (Incorporation)" was similarly challenged. Unlike the earlier Bill, a petition was filed in support of the Bill so that arguments to counter the objections could be placed before the Court. When the objector contended that religious freedom did not extend to economic activity that assisted the spread and promotion of the faith, it was countered by the argument that it was "part and parcel of every religion to promote its beliefs, doctrines, practices, and the practice of all religions involve altruistic objectives to uplift the socio-economic conditions of the people regardless of their faith or pursuits."[6] The Court might have agreed, so it appears, if such 'uplifting' was restricted to persons professing the same religion, but not when it extended to persons of other religions. "The allurement which would result in the process of uplifting socio-economic conditions would distort the freedom which every person should have to observe a religion or belief of his choice as guaranteed by Article 10 of the Constitution."[7]

A few months later the Bill titled "Provincial Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen (Incorporation)" was also held to be inconsistent with Article 10.[8] For the first time Article 9[9] was invoked by the objector who argued that propagating Christianity by providing material and other benefits would affect the very existence of Buddhism. It would appear that the Court's reasoning was that neither spreading a religion nor spreading knowledge of a religion was included in the right to manifest a religion (Article 14(1)(e)). Is the Court saying that to allow the incorporation of the Menzingen Order would be to enact a law that would conflict with the

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6 From the SC Determination No. 2 of 2003.

7 Ibid.

8 SC Determination No. 19 / 2003.

9 "The Republic of Sri Lanka shall give to Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster the Buddha Sasana, while assuring to all religions the rights granted by Articles 10 and 14(1)(e)."

State's duty to foster Buddhism? If so, the interpretation is unduly restrictive of freedom of religion.

The Determination, also for the first time, referred to ICCPR Article 18(2) and the prohibition of coercion to effect a change of faith.[10] On a question of interpretation, it is submitted that 'coercion' can in certain contexts include moral coercion where the intention is to convert by gifts or other material benefits. The decisions of European Court of Human Rights in the Greek cases[11] and of the Supreme Court of India in *Stanislaus v State of Madhya Pradesh*[12] were cited in the Determination. It has to be mentioned that these decisions interpreted anti-conversion laws and were out of context in the Incorporation cases.

What was new in the last Determination is how the Supreme Court looked at Article 9. The Court referred to the fact that there is no guarantee of a fundamental right to propagate a religion in our Constitution[13] and therefore "if efforts are taken to convert another person to one's own religion such conduct would hinder the very existence of the Buddha Sasana." What the Court meant by 'efforts' was providing material and other benefits, which could include educational, health and other social services.

The Determination has wrongly cut down the scope of religious freedom in Articles 9 and 10 to the rights in Article 14(1)(e). Since all religions and beliefs were included in the concept of freedom of thought, conscience and religion it was necessary for the State to have the right to restrict some manifestations when necessary and this was

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10 This Article expanding the UDHR Article 18 on freedom of religion added, "No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice."

11 *Kokkinakis v Greece* (1994) 17 EHRR 397, *Larissis v Greece* (1998) 27 EHRR 329.

12 AIR 1977 SC 908.

13 The Indian Constitution Article 25(1) guarantees "the right freely to profess, practise and propagate religion." The *Stanislaus* judgement interpreted 'propagate' restrictively to mean not the right to convert but to transmit or spread one's religion by an exposition of its tenets.

the sole function of Article 14(1)(e) read with Article 15(7).[14] Freedom of religion in Article 10 of our Constitution is an absolute right and not subject to restrictions except by the process of a law, which has a special majority and is approved by a Referendum.[15] This is not the case in India, where freedom of religion is differently expressed and is not an absolute right.[16]

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[14] The exercise of "the fundamental rights declared by ... Article 14 shall be subject to such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society." The Courts will recognise the State as having a margin of appreciation in determining whether a restriction is strictly required by the circumstances. No right is given to the Courts to abridge fundamental rights. This is also a point taken by H L de Silva PC in "*Constitutional Protections of Minority Rights in Sri Lanka*" (Address to the Ceylon Muslims Association). In his analysis of the three Determinations, he said that the Supreme Court had gone beyond the scope of interpreting the Constitution by seeking to impose restrictions on fundamental rights and freedoms, which is properly the function of the legislature.

[15] Art. 83.

[16] Art. 25, "Freedom of conscience and free profession, practice and propagation of religion – (1) Subject to public order, (note – national security is excluded) morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion." (Note – freedom to manifest a religion is not separately dealt with in the Indian Constitution). In *Ramji Lal Modi v State of Uttar Pradesh* AIR 1957 SC 620 the Supreme Court held that right to freedom of religion was expressly made subject to public order etc. and therefore "it cannot be predicated that freedom of religion can have no bearing whatever on the maintenance of public order or that a law creating an offence relating to religion cannot under any circumstances be said to have been enacted in the interests of public order." In another case, *Arun Ghosh v State of West Bengal* AIR 1970 SC 1228, the Supreme Court held that if a thing disturbs the current of life of the community and does not merely affect an individual it would amount to disturbance of the public order. The Supreme Court in *Stanislaus* took these pronouncements to justify State Acts meant to avoid disturbances to the public order by prohibiting conversion from one religion to another in a manner reprehensible to the conscience of the community. This was not seen as regulation of religion but the exercise of the State's power to legislate for breaches of public order (a State subject). *Stanislaus* was cited in the Determination of the Sri Lankan Supreme Court without noting the differences in the two Constitutions. The Indian Supreme Court had

It was obvious that the failure to achieve incorporation could not stop the activities of the churches, and there was agitation for an anti-conversion criminal law to halt inroads made by Christianity on other religions. It was argued that whatever the past history of Christianity, it was now accepted by Church doctrine that propagating the religion by exercising the right to convert, sometimes asserted as a duty to convert unbelievers, has its limits, and transgression of these limits would make such conversions unethical. The prohibition of the use of force, the destruction of symbols of other religions, was the beginning of the setting of limits followed by prohibiting other forms more appropriate to modern times – use of fraud and deceit, terms that may have different meanings when applied to change of religion. 'Allurement' has been the last and has emphasised that an unethical conversion need not be by physical coercion. But it is also the most controversial. For those who today are inclined to take a protectionist stance towards a particular religion, 'allurement' is the nub of an anti-conversion law, defined narrowly to steer clear of violating the constitutionally guaranteed right to freedom of all religions. It is ironic that prohibition of allurement to effect conversion, which was first recognised in Greece as affording protection to an orthodox Christian Church, should now figure prominently to protect non-Christians from the zeal of a new brand of Christianity.

The ICCPR Article 18, as shown above, takes note of the limitation to propagating a religion by prohibiting use of coercion to change a

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to consider whether Indian anti-conversion State laws (referred to above) came under the Constitutional limitations on religious freedom. In other Constitutions, religious freedom may be absolute but manifestation is made subject to public order or some other conditions. The Greek Constitution states, "The performance of rites of worship must not prejudice public order or public morals." (Article 13(2)). Under the Turkish Constitution prayers, worship and religious services cannot be exercised "with a view to undermining the territorial integrity of the State and unity of the nation," (Article 14(1)). The European Court of Human Rights in *Leyla Sahin v Turkey* (29 June 2004) upheld the ban on wearing of the Islamic headscarf in State higher education institutions by circular as justified by the principle of secularism in the Constitution and being within the margin of appreciation given to the State.

person's religion. Since coercion is not defined, it is open to argument that it includes moral coercion, which could catch-up not only use of fraudulent means but also allurement.[17] The Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion has the same Article, but not the European Convention for the Protection of Human Rights and Freedoms, thus avoiding the issue of what is ethical and unethical conversion.

The prohibition of the use of coercion involves recognition of the right to retain one's religion. Though freedom to change one's religion or to adopt a religion is inherent in freedom of religion, freedom of preserving one's religion is not expressly stated. But ICCPR General Comment No. 22 states the freedom to "have or adopt a religion" necessarily entails "... the right to retain one's religion or belief," thus drawing a connection between coercion in whatever form and one's present religion or belief.

3. The Anti-Forcible Conversion Bill

The possibility of an anti-conversion law generated public discussion and response from readers of newspapers vigorously espousing reasons for and against such law; writers to the Sinhala newspapers were mostly for. The Buddha Sasana Presidential Commission in its Report published in the last quarter of 2003 gave a list of 110 Christian Associations registered under the Companies Act, and recommended that an Interfaith Advisory Council constituted of representatives of each religion should give approval for the registration of new missionary or fundamentalist groups (*Sunday Times,* 04 January 2004). The Catholic Bishops Conference, while giving good reasons for not having

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[17] Even before the Greek Constitution prohibited proselytism (now see Art. 13(2)), it was a criminal offence to engage in proselytism which was defined as "any direct or indirect attempt to intrude on the religious beliefs of a person of a different religious persuasion, with the aim of undermining those beliefs, either by any kind of inducement or promise of an inducement or moral support or materiai assistance, or by fraudulent means or by taking advantage of the other person's inexperience, trust , need, low intellect or naivety." The Indian States that have anti-conversion laws use 'allurement' or 'inducement'.

an anti-conversion law, said "We are aware that the present climate is due to the concerns that 'unethical' conversions from one religion to another are taking place. We too express our unequivocal disapproval of the use of material enticements to gain converts" (*Island,* 17 January 2004). Meanwhile, the Civil Rights Movement, in a statement issued on 25 January 2004, gave reasons why an anti-conversion law should not be pursued:

> It is neither practicable nor desirable to try to legislatively define conversions by 'unethical' means, while protecting the constitutional right to manifest one's religion or belief. Such a law must necessarily be imprecisely defined. The right to abandon the religion one is born into and the right to adopt a religion of one's choice has always been recognised in our society. People change their religions for a multiplicity of reasons, sometimes very personal; in the sphere of thought and belief the law cannot delve into people's minds.

When it was clear that the Government was not going to sponsor an anti-conversion law, a Buddhist monk who had just been elected to Parliament introduced a Private Member's Bill titled "Prohibition of Forcible Conversion of Religion" to create a new offence. It was claimed that it was unethical conversions of the kind that evangelists were alleged to be performing that were to be stopped, and not genuine or true changes of faith which, it was conceded, were fully accepted by the country and now guaranteed by Articles 9 and 10. The long title of the Bill was careful to limit the application of the law to conversions from one *religion* to another *religion* "by use of force or allurement or by fraudulent means." The Preamble referred to Buddhism being the foremost religion professed and practised by the majority of the people, the duty of the State to protect and foster the Buddha Sasana, Buddhists and non-Buddhists being under serious threat of forcible conversion and proselytising by coercion or by allurement or by fraudulent means, and to religious leaders realising the need to protect and promote religious harmony. It was the reference to 'allurement' that attracted the most opposition after it was generally conceded

that provisions for registration of conversions could not be allowed to stand.

Clause 2 of the Bill prohibited causing or attempting to cause another to renounce his religion and adopt another religion by the use of fraud (in the broad sense) and Clause 4(a) made it a criminal offence punishable with imprisonment for a term up to five years and a fine up to Rs. 150,000. The abetment of the offence carried the same punishment. The proviso to Clause 4(a) and Schedule 1 made the conversion of a minor (under 18), a woman (could be married) or any person referred to in the Schedule (altogether 11 categories) an aggravated offence where the punishment could be 7 years and the fine Rs. 500,000.[18] The offence could be committed by any person and not only by a priest, monk, pastor or other religious dignitary. The conversions were not nullified by the conviction.

Clause 3 required the adoption of a new religion, even voluntarily, to be notified by the person converted and the person responsible for the conversion, to the Divisional Secretary (presumably to be recorded in a book of conversions prescribed by the Minister by regulation). If this was not done, they became guilty of an offence punishable with 5 years imprisonment and a fine of Rs. 150,000. The only limiting factor implied in Clause 3 was that in the case of the person responsible for the conversion or facilitating the conversion for a conviction, there should be some ceremony of conversion.

There were many persons authorised by Clause 5 to initiate criminal proceedings in the Magistrate's Court besides the police acting on a

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[18] It is a hotchpotch of a list – samurdhi beneficiaries, prisoners, inmates of rehabilitation centres or refugee camps or detention centres, physically or mentally disabled, employees of organisations, members of armed forces or police, students, inmates of hospitals, any other category prescribed by the Minister.
Cf. the Greek definition of proselytism where taking advantage of a person's inexperience, trust, need, low intellect or naivety was not treated as an aggravating circumstance but commission of the offence in a school or philanthropic institution was treated as such a circumstance.

complaint by a 'person aggrieved'; for instance, a person 'acting in the public interest' or 'any person authorised by the Minister' could initiate proceedings.

Clause 8 is the interpretation clause that defines 'convert', 'allurement', 'force', 'fraudulent', all key words in the Bill. To convert was narrowly defined to mean making a person renounce his religion and adopt another religion. It is a change of religion and not religion or faith.[19] Allurement was explained as offering a temptation in the form of (i) any gift or gratification whether in cash or kind, (ii) granting a material benefit, whether monetary or otherwise, (iii) granting of employment or promotion in employment.[20] The definition of force included the threat of religious displeasure or condemnation of any religion or religious faith.[21]

After the Bill was placed on the Order Paper, its constitutionality was challenged by 21 Petitioners (mostly religious organisations but also including well-known secular human rights groups and individuals) and supported by 21 intervenient Petitioners. The Human Rights Commission expressed its concern to clauses infringing fundamental rights provisions of the Constitution in a report submitted to the Attorney-General and expected its contents to be conveyed to Court. Oral submissions were restricted and supplemented by written submissions. The Deputy Solicitor-General who represented the

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19 By contrast, in Greek law proselytism meant, "to intrude on religious beliefs of a person of a different persuasion "(see footnote 17 above), a definition which permitted Greek Courts to punish change of faith within a religion. The *Orissa Freedom of Religion Act* (1967) prohibited a change "from one religious faith to another". But the *Madhya Pradesh Dharma Swatantraya Adhiniyam Act* (1968) prohibits change from one religion to another.

20 This was the definition in the English version of the Bill used in the Determination. In the Sinhala version, it was slightly different. *The Orissa Act*, which used the term 'inducement', defined it as including the offer of any gift or gratification either in cash or in kind and the grant of any benefit either pecuniary or otherwise.

21 In *the Orissa Act*, it includes threat of divine displeasure or social excommunication.

Attorney-General was closely questioned by Court on the position of the Attorney-General. His reply was that except on a few matters, the Attorney-General supported the Bill.[22] The Court (Justice T B Weerasuriya, Justice N E Dissanayake and Justice Raja Fernando) was limited in time by the Constitution to make its Determination and did not refer in detail to the submissions of Counsel.

4. The Supreme Court Determination

In its Determination[23] the Court did not see anything wrong in prohibiting a change of religion by allurement (which was paraphrased as offering a benefit 'calculated to fascinate a person to leave his religion') but thought the definition should bring out by the amendment suggested by the Court that the temptation was for the purpose of conversion. The amendment makes no significant change. The Court also did not question the right of religious organisations to engage in acts of benevolence or charity, but added, "What is improper in this context is the wilful engagement of a deceitful exercise to secure a conversion." The judgement of the European Court of Human Rights in *Kokkinakis* was the only authority cited but reference was made to ICCPR Article 18(2) because it prohibits use of coercion. Subject to the proposed amendment in the definition of allurement Section 2 was held not unconstitutional. The objectors did not succeed in their attempts to show that Section 2 was violative of Articles 9 and 10.

The extended meaning given to 'force' was justified by an unconvincing reference to Section 169C(2)(b) of the Penal Code.[24] Similarly, the definition of the term 'fraudulent' was approved if limited to wilful acts and made subject to the same amendment as in the case of allurement.

Clause 3 requiring notification of conversion to the Divisional Secretary was held to be inconsistent with Article 10 as it would be a restraint

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22 As in the case of the *Incorporation Bills*, the Attorney-General did not have to defend the Bill, as it never went through his hands.

23 Announced in Parliament only on 4 January 2005.

24 This section made it an election offence to interfere with the free exercise of the franchise by inducing a voter to believe that he will be rendered an object of divine displeasure or of spiritual censure.

on a person's freedom of thought, conscience and religion. The reporting obligation violates the right to keep one's religion a purely personal affair. General Comment 22 to ICCPR Article 18 states, "in accordance with Article 18(2) and 17 no one can be compelled to reveal his thoughts or adherence to a religious belief."

The punishments for the offence of forcible conversion (Clause 4) were not considered excessive or disproportionate, but it was considered arbitrary and irrational to exclude the applicability of the provisions of the Criminal Procedure Code Act, and the Court suggested the deletion of this clause to cure the defect (why the Court referred to Section 14 of the Criminal Procedure Code which gives the normal punitive powers of a Magistrate is not clear). The Court saw nothing wrong with the selection of the persons whose forcible conversion merited enhanced punishment except that the list should not be extended by the Minister. The inclusion of women was strangely justified on the argument that Article 12(4) gives special protection to them.

The categories of persons authorised to institute proceedings (Clause 5) was seen to be irrational and arbitrary and violative of Article 12(1). The rule-making power given by Clause 6 was also held to be overly broad and ambiguous, and inconsistent with the legislative power given to Parliament by Article 76(1).

At the hearing, the Court showed interest in the argument that Article 9, although giving foremost place to Buddhism, also went on to guarantee absolute freedom of all religions in accordance with Article 10. This was in reply to the contention that the law was intended to prevent Buddhism being eroded in the country by the dubious activities of new churches. Justice Weerasuriya drew the attention of Counsel supporting the Bill to General Comment 22 Para 9: "the fact that a religion is recognised as a State religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including Articles 18 and 27 nor in any discrimination against adherents of other religions or non-believers."

The Civil Rights Movement, one of the petitioners, had also strongly urged that the protection afforded to Articles 10 and 14(1)(e) by Article 9 is that restrictions cannot be placed on Article 14(1)(e) through Article 15(7). A meaningful exercise of the freedom to choose a religion or belief would necessarily depend on the completeness of knowledge about different religions and beliefs through recourse to the freedoms guaranteed by Article 14(1)(e).

Contrary to expectations created at the hearing the Court did not uphold the objections to Clause 2. The prohibition on conversion by allurement was approved via ICCPR Article 18(2), which states, "no one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice," and by an extract from the majority opinion in *Kokkinakis v Greece*. There was no reference to Article 15(7). The extract from the Greek case draws a distinction between bearing Christian worship and improper proselytism. The latter, it was said could "take the form of activities offering material or social advantages with a view to gaining new members for a church or exerting improper pressure on people in distress or need; it may even entail the use of violence or brainwashing; more generally, it is not compatible with respect for the freedom of thought, conscience or religions of others." The last clause is consistent with General Comment 22, which states that Article 18(2) bars coercions, which compel persons to recant their religion.

What should be remembered is that the European Court's opinion in *Kokkinakis* and other cases from Greece were made in the historical background of Christianity being the State religion in Western countries. Proselytism was prohibited in Greece and made a criminal offence before the Universal Declaration of Human Rights or the International Covenant on Civil and Political Rights. Criminalising proselytism was challenged in the European Court of Human Rights for the first time in *Kokkinakis*, that is, after many prosecutions of Jehovah's Witnesses in Greece. One can surmise that it was for this reason that the European Court was reluctant to hold that the law was inconsistent with the Article on religious freedom. In our country, the tradition is the opposite; we have a tradition of tolerance and we do

not have a State religion. It is strange that in 2004 the Court has to rely on Greek law or cases to justify the need for an anti-conversion law.

5. Conclusion

There were no winners or losers. Both sides were given something by the Determination, which has put stumbling blocks in the way of an anti-conversion law. Clause 2, which was the crux of the Bill, was not struck down, and that is disappointing to the many who objected to the Bill, but obviously obnoxious provisions did not escape comment. In particular, the possibility that criminal prosecutions could be launched by anyone with an inquisitive nose was removed by requiring the Attorney-General's sanction for a prosecution. Having regard, however, to genuine, bona fide acts that are socially beneficial and have had long acceptance in the country, it would still leave many good persons and organisations uneasy about their actions, even if fear of prosecution has receded. It is also surprising that the punishments were not considered excessive or disproportionate, or the need for special categories of 'victims' questioned. That women should be lumped together with mentally retarded persons and prisoners etc is not acceptable in this day and age. Even the Attorney-General sought to remove women from the list.

Article 10 was crucial to the interpretation of Clause 2 and all counsel appearing had something to say on this, quoting textbooks and decided cases. But there is only a bare reference to Article 10 in the analysis of Clause 2 by the Court. The passage in the judgement of Ranasinghe J in *Perera v Weerasuriya* (1985) 2 SLR 177 that religious beliefs need not be acceptable, logical, consistent or comprehensible to merit constitutional protection "unless where the claim is so bizarre, so clearly non-religious in motivation," has become in the Determination "Article 10 protects absolutely the holding of any religious belief of his (i.e. a person's) choice, no matter how bizarre or irrational." From this it was deduced that choice of a religion stems from the free exercise of one's thought and conscience "without any fetter which in any way distorts one's choice," i.e. without any attempt by another to effect a

change of belief. The point almost missed is the oblique reference to Article 14 (1) (e). After referring to the definitions of allurement etc. and having approved them with a slight modification, there follows a conclusion: "Therefore restrictions sought to be placed by the Bill through 15(7) on Article 14(1)(e) are designed to ensure public order, morality and for the purpose of meeting the just requirements of the general welfare of a democratic society," but the conclusion is a non-sequitur if one looks at the reasons for the Court upholding Clause 2. No arguments were addressed to Court that maintenance of law and order had become a problem. In fact, evidence was the other way: that there had been attacks on churches, pastors and members of their congregations, and these had not been dealt with by the police. The National Christian Evangelical Alliance of Sri Lanka has a record of reported anti-Christian incidents from 1987 to 2004. For the period of 2003 to January 2004, there are 135 incidents listed. Attacks on churches have also been reported in local newspapers. The Human Rights Commission of Sri Lanka took the step of appointing a Special Rapporteur to submit a report on Human Rights and Conversion because religious freedom was in issue. The report has yet to be made public. All this was before the anti-conversion Bill.

As pointed out earlier, the right to religion expressed in the Indian Constitution is not absolute, whereas Article 10 of our Constitution as judicially recognised makes religion an absolute or unconditional right for all persons. But how a person manifests (i.e. reveals or declares) his religion is rightly a matter that can be subject to restrictions by law, for example, a person can be prevented from standing on a box at a busy road junction and preaching. In the same way, the playing of loud music accompanying prayers and disturbing the people of the neighbourhood, or persistent and unwelcome intrusions on the privacy of religious beliefs of others, can be controlled by appropriate laws. One need not take extreme cases like human sacrifice or ritualistic infliction of wounds on chosen victims. Even here in our region, allowances have to be made for acceptance of certain religious practices like holy men walking naked in Indian streets during festival times, or flagellation or self-torture as religious discipline at Kataragama. But to have a law so draconian in its sweep as the Forcible

Conversion Bill, which seeks to put innocent people in peril of criminal law, is an altogether different thing.

More relevant, the Determination could have given a meaning to 'religion' in the definition of conversion. Religion is not defined in any human rights instrument and is not understood narrowly. ICCPR General Comment 22 says, "Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms belief and religion are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional beliefs." The Orissa High Court rightly rejected the restriction of religion to belief in a Creator and reverence for his Being in *Yulitha Hyde v State* (1973) AIR 116 (Orissa) for the reason that "there are well-known religions in India like Buddhism and Jainism which do not believe in God or in any Intelligent First Cause." A religion, continued the Court, "has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well-being but it would not be correct to state that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules to its followers to accept. It may prescribe rituals and observances, ceremonies and modes of worship, which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress." The Supreme Court in *Emmanuel v State of Kerala* AIR 1987 SC 748 said, "the question is not whether the belief is genuinely or conscientiously held as part of the profession or practice of religion. Our personal views and reactions are irrelevant."

Where the Determination fails is in not giving a clear interpretation of the scope of religious freedom. The right to religious belief and the right to adopt a religion may be unconditional but there still remains the question whether and what limits could be placed on the right to spread a religion. When freedom of religion became a recognised human right integral to freedom of thought and conscience, it was removed from its theological and philosophical roots and became a value, a value that had to take place with other values, the most important here being the right to retain one's religion and the right to impose

legitimate restrictions on manifestation of religion. Even the Catholic Bishops Conference accepted this when it condemned conversion by "wrongful and illegitimate means" (*Island*, 19 December 2003). How does one bring in coercion as qualifying the right to religion if not through Article 15(7)? It is submitted that ICCPR Article 18(2) makes explicit what has been left unsaid in Article 10 of our Constitution. By ratifying the ICCPR, including Article 18(2), our Courts can in interpreting Article 10 take into account the prohibition on the use of coercion in the exercise of the right to adopt a religion, without referring to Articles 14(1)(e) or 15(7). Coercion here refers to an abuse of the right given to a person to influence the decision of another in the matter of religious belief. What can amount to coercion is best left outside the law, especially the criminal law.

The Judges had little time to reflect on the wider issue of the relationship between the State and religion. The message they gave was that the State had the right to punish persons who spread religious ideas in a manner which, at worst, was crossing the line of good behaviour. It is well to remember the words of Judge Pettiti of the European Court of Human Rights:

> The domain of spiritual, religious or philosophical beliefs belongs to the intimate sphere of beliefs and the right to express them. It is dangerous to allow the existence of a repressive system with no protection for the citizens and one has seen the hazards created by authoritarian regimes declaring freedom of religion in their Constitutions whilst restricting it by instituting criminal offences on parasitism, 'subversiveness' or proselytism.
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> *Kokkinakis v Greece* (1994) 17 EHRR 397 at 428.

VII

THE RIGHT TO VOTE

Asanga Welikala *

1. Constitutional and Legal framework of the Franchise in Sri Lanka

Sri Lanka has a long, if flawed, history with regard to universal adult franchise dating back to the Donoughmore Constitution of 1931, when the principle was first introduced as an initial step towards representative and responsible government under British colonial rule. Indeed limited voting rights were granted under property qualifications even earlier. The subsequent Constitutions of 1947, 1972 and 1978 as essentially democratic instruments have all been underpinned by the franchise, although the politics of electoral representation as framed by those constitutional instruments have been at the heart of the country's post-colonial conflicts.

Under the current Constitution of 1978, in the Republic of Sri Lanka, sovereignty is reposed in the people. Sovereignty includes the powers of government, fundamental rights and the franchise in terms of Article

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3, which is an entrenched provision of the Constitution subject to the most rigid procedure for amendment. The franchise is guaranteed under Article 4(e) as an explication of the manner in which the sovereignty of the people is to be enjoyed and exercised, and may be exercised in elections for the President of the Republic, Parliament and at Referenda by qualified and registered citizens.

Chapter XIV, entitled the Franchise and Elections, further sets out the framework for the exercise of the franchise, including franchise rights, disqualifications to be an elector, the requirements of candidates contesting public office, the system of proportional representation and the mechanisms for the administration of elections.

Framed by this constitutional context, there is a supporting body of statutory law that govern elections and referenda, creating procedures and developing the constitutional substance contained in Chapter XIV as amended by the Fourteenth, Fifteenth and Seventeenth Amendments. The statutory framework extends to elections to Provincial Councils following the devolution of power under the Thirteenth Amendment.[1]

One of the noteworthy features of the Sri Lankan Constitution is that Chapter III, which sets out the fundamental rights directly enforceable by application to the Supreme Court, does not recognise an explicit right to vote. However, the right to freedom of speech and expression is an enforceable fundamental right (Article 14(1)(a)) and the Supreme Court has admitted by way of interpretation the right to vote as inherent to free expression.

In *Karunathilaka v Dissanayake (No. 01)*, the Court held that the Election Commissioner's unjustified fettering of discretion so as to delay elections to a Provincial Council violated the petitioner's right to vote as an element of free expression. Mark Fernando J. speaking for the Court, held:

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1 *Parliamentary Elections* Act No. 1 of 1981 as amended; *Elections (Special Provisions)* Act No. 14 of 2004; *Presidential Elections Act* No. 15 of 1981 as amended; *Provincial Councils Elections Act* No. 2 of 1988 as amended; *Local Authorities Elections Ordinance* No. 53 of 1946 as amended; *Referendum Act* No. 7 of 1981. See also Centre for Policy Alternatives, *The Right to Vote and the Law relating to Election Petitions* (Colombo: CPA, 2000).

When Article 14(1)(a) entrenches the freedom of speech and expression, it guarantees *all* forms of speech and expression. One cannot define the ambit of that Article on the basis that, according to the dictionary, 'speech' means 'X', and 'expression' means 'Y', and therefore 'speech and expression' equals 'X' plus 'Y'. Concepts such as 'equality before the law', 'the equal protection of the law', and 'freedom of speech and expression, including publication', occurring in a statement of constitutionally entrenched fundamental rights, have to be broadly interpreted in the light of fundamental principles of democracy and the Rule of Law which are the bedrock of the Constitution... [An] election involves a contest between two or more sets of candidates contesting for office. A voter had the right to choose between such candidates, because in a democracy it is he who must select those who are to govern – or rather, to serve – him. A voter can therefore express his opinion about candidates, their past performance in office, and their suitability for office in the future. The verbal expression of such opinions, as, for instance, that the performance in office of one set of candidates was so bad that they ought not to be re-elected, or that another set deserved re-election – whether expressed directly to the candidates themselves, or to other voters – would clearly be within the scope of 'speech and expression'; and there is also no doubt that 'speech and expression' can take many forms besides the verbal. But although it is important for the average voter to be able to speak out in that way, that will not directly bring candidates into office or throw them out of office; and he may not be persuasive enough even to convince other voters. In contrast, the most effective manner in which a voter may give expression to his views, with minimum risk to himself and his family, is by silently marking his ballot paper in the secrecy of the polling booth. *The silent and secret expression of a citizen's preference as between one candidate and another by casting his vote is no less an exercise of the freedom of speech and expression, than the most eloquent speech from a political platform.* To hold otherwise is to undermine the very foundations of the Constitution.[2]

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2 *Karunathilaka v Dissanayake (No. 01)* (1999) 1 SLR 157 at 173–4, emphasis added.

2. Sri Lanka's International Obligations in respect of the Right to Vote

In the exercise of its fundamental rights jurisdiction, the Supreme Court has often cited Sri Lanka's international obligations under treaty as binding on the State in respect of citizens. Sri Lanka is a signatory to most international instruments protecting the right to vote, including the International Covenant on Civil and Political Rights (ICCPR). The ICCPR provides in Article 25 for a wide range of rights relating to political participation and citizenship including explicitly, the right to vote.[3] In the recent *Chief Minister's case*, the Supreme Court held that,

> What is involved is the right of the electorate to be represented by persons who have faced the voters and obtained their support... That is wholly consistent with Article 25 of the [ICCPR], which recognises that every citizen shall have the right and the opportunity to take part in the conduct of public affairs, directly or *through freely chosen representatives*.[4]

3. Mechanisms for the conduct of Elections and Referenda

In late 2001, the Seventeenth Amendment to the Constitution was passed which, *inter alia*, sought to effect fundamental changes to the way elections are conducted in Sri Lanka. A new Chapter XIVA was

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[3] Article 25 of the *International Covenant of Civil and Political Rights (ICCPR)* states: Every citizen shall have the right to and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) to have access, on general terms of equality, to public service in his country. See esp. S. Joseph, J. Schultz & M. Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford: OUP, 2000), Chapter 22.

[4] *Centre for Policy Alternatives (Guarantee) Ltd and Another v Dayananda Dissanayake, Commissioner of Elections and Others* (2003) 1 SLR 277 at 291, emphasis in original. Note that in the report, the Court cites Article 25 of the *ICCPR* as that of the International Covenant on Economic, Social and Cultural Rights.

inserted into the Constitution, which abolished the old office of the Commissioner of Elections and replaced it with an Election Commission. The need to depoliticise the conduct of elections was the primary impetus for the Seventeenth Amendment.

The new independent Election Commission was to be appointed by the President on the recommendations of the Constitutional Council. The latter was to recommend nominees 'from among persons who have distinguished themselves in any profession or in the fields of administration or education.'[5] The object of the Commission is 'the conduct of free and fair elections and Referenda.'[6]

The Commission is vested with a wide range of powers in order to enforce the law relating to elections and referenda. It is empowered to prevent the misuse of public property by prohibiting the use of movable or immovable property of the State or of a public corporation to promote or prevent the election of a political party or candidate. It can issue guidelines to the media to ensure unbiased and fair election coverage. In the case of contravention of such guidelines by the Sri Lanka Rupavahini Corporation and the Sri Lanka Broadcasting Corporation, the Commission has the power to appoint a Competent Authority to take over the management of political or other broadcasts impinging on the election until the conclusion of the election. The Commission is further vested with powers to deploy police and the armed forces to ensure a free and fair election. Its members have private immunity from suit for anything done in their official capacity, but the Commission's immunity is subject to the Supreme Court's writ and fundamental rights jurisdiction and the Court of Appeal's jurisdiction in respect of election petitions.

While the Election Commission remained unconstituted during the April 2004 general elections, a savings clause – Section 27 – of the Seventeenth Amendment Act entitled the Commissioner of Elections holding office prior to the amendment to exercise the powers of the Commission until such time as the Commission was constituted. Thus, ironically, on the first occasion that the provisions of the Seventeenth Amendment in relation to elections were brought into operation, there

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5 Art. 103 (1).
6 Art. 103 (2).

was no Commission and its powers had to be exercised by the Commissioner of Elections. We shall return to this issue later.

4. Electoral Reform in the Public Policy Debate – the Interim Report of the Parliamentary Select Committee on Electoral Reforms (January 2004)

In August 2003, a Select Committee of Parliament was appointed with all party representation under the chairmanship of Mr. Dinesh Gunawardena MP to consider reforms to the current electoral system. The terms of reference of the Committee required it to recommend reforms to the law relating to elections to Parliament, Provincial Councils and local authorities, including consequential amendments to the Constitution. The Select Committee called for submissions from political parties and civil society, which pertained to a wide variety of matters regarding electoral reform such as:

1. Reforms to the electoral system including postal voting, framework for the recognition of political parties, period of nomination for elections, fixing the date of elections, annulment of polls, procedure in relation to election petitions;
2. Number of Members of Parliament;
3. Introduction of the National Identity Card as a voting requirement;
4. Introduction of electronic voting machines and computerisation of electoral registers;
5. Establishment of a Standing Committee of Parliament on the Franchise and Elections;
6. Declaration of assets and liabilities by candidates;
7. Representation of women.

In its Interim Report presented in January 2004,[7] the Committee made several provisional recommendations with regard to many of these matters. Among the most significant was the Committee's endorsement of the view of a majority of submissions by the public that reform to the electoral system should involve the retention of the principle of proportional representation in the context of a 'mixed system' that also contains elements of 'first past the post.' However, the Committee

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[7] Interim Report of the Select Committee on Electoral Reforms (January 2004), Parliamentary Series No. 24, Fifth Parliament (Second Session).

did not make specific proposals in this regard, deeming the 'modalities and particulars of the system to be adopted' as requiring further consideration.

From the perspective of developments relating to the franchise in 2004, the most important recommendation in the Interim Report was with regard to the introduction of the National Identity Card as a requirement of voting. In principle, this was a reform that had broad support among election officials, political parties and civil society. However, when the government presented legislation in this respect in October 2004, there were several practical problems of implementation that needed to be surmounted before the requirement could be fairly introduced as a formal legal requirement for the exercise of the franchise. These matters will be discussed in greater detail below.

5. Non-constitution of the Election Commission and the effect of Section 27 of the Seventeenth Amendment

As discussed earlier, the Election Commission remained unconstituted when the first parliamentary elections after the Seventeenth Amendment was passed were called for in April 2004. The reason for this was that a dispute had arisen between the President and the Constitutional Council with regard to the latter's recommendation for appointment as Chairman of the Election Commission. The President sent the recommendation back to the Constitutional Council for reconsideration, whereupon it inquired into the allegations (primarily of party political bias) upon which the President's objections were based. The Council concluded that there was no merit in the objections and resubmitted the nomination for appointment by the President. The President has, however, thus far refused to make the appointment. The question arises therefore as to whether in terms of the law, the President was entitled to refuse to appoint a person nominated by the Constitutional Council for appointment to, *inter alia*, the Election Commission.

Article 41B(1) states that "*No person shall be appointed by the President* as the Chairman or a member of any of the Commissions specified in the Schedule to this Article, *except on a recommendation of the [Constitutional] Council*" [emphasis added]. Article 41B(3) places a duty on the Council to recommend such appointments to the President, whenever the occasion arises. Thus, the Constitutional Council is the sole initiator of action and the singular arbiter of

credentials for appointments to the Election Commission under paragraph (1), and paragraph (3) is a safeguard against procrastination by the Council whenever appointments become due.

The President has no substantive power at all, but merely a ceremonial function as head of state to make the appointment in terms of a recommendation. It is therefore manifestly clear from the wording of this provision that no discretion of refusal was envisaged for the President in respect of appointments to the Election Commission.

The principal legislative intention in creating the Constitutional Council as a non-partisan, representative body of eminent persons was to transfer to it the power of appointments in respect of certain matters from political actors. With regard to the administration of elections, the Election Commission was established with a strengthened framework of powers, and its independence was sought to be protected through this new mode of appointment. If the President as the leader of a political party and elected chief executive continued to retain a discretion in appointments to the new body, then the entire scheme of Article 41B is negated. In violation of the letter and the spirit of the Seventeenth Amendment, however, the Election Commission remains unconstituted to this day.

Notwithstanding the non-constitution of the Election Commission, Section 27(2) of the Seventeenth Amendment allows the person holding the office of Commissioner of Elections immediately preceding its enactment, to exercise the powers of the Commission until the latter is constituted. As such, Mr. Dayananda Dissanayake, Commissioner of Elections, was entitled to the powers of the unconstituted Election Commission with regard to the conduct of the General Elections of April 2004, which gave rise to several interesting issues of law during 2004. In particular, the role of the state media in the conduct of election campaigns and consequent influence on the franchise, and secondly, the question regarding the jurisdiction of the Court of Appeal and the Supreme Court in the judicial review of acts and omissions of the Commissioner of Elections in the exercise of powers of the (unconstituted) Election Commission. This second matter arose primarily in relation to a major issue of contention relating to the franchise and representation in 2004: the appointment of National List Members of Parliament.

6. Role of the State Media

As mentioned earlier, Article 104B(5) gives the Election Commission certain powers of regulation over the media in general, and the Sri Lanka Broadcasting Corporation (SLBC) and Sri Lanka Rupavahini Corporation (SLRC) in particular. Under Article 104B(5)(a), the Commission has the power to issue, in respect of the holding of any election or referendum, such appropriate guidelines to any broadcasting or telecasting operator, or any proprietor or publisher of a newspaper, as the Commission considers necessary to ensure a free and fair election. Article 104B(5)(b) places a special obligation on the chairpersons of the SLBC and the SLRC, "to take all necessary steps to ensure compliance with any guidelines as are issued to them under sub-paragraph (a)." In terms of Article 104B(5)(c), where either of those state media institutions contravenes such guidelines "... the Commission may appoint a Competent Authority ... who shall, with effect from the date of such appointment, take over the management of ... [the SLBC or the SLRC] ... in respect of all political broadcasts or any other broadcast, which in the opinion of the Commission impinge on the election, until the conclusion of the election ..." During the period a Competent Authority has taken over such management, the SLBC or the SLRC cannot discharge any function connected with such management.

The powers of the Competent Authority referred to in Article 104B(5)(c) are enumerated in detail in the Competent Authority (Powers and Functions) Act No. 3 of 2002. Under the 16 sub-sections of Section 2 (a – p), the Competent Authority (CA) is empowered to supervise and control radio and television services of the SLBC and SLRC respectively while maintaining in the public interest, and in the conduct of a free and fair election, high standards in programming. The CA assumes all the powers and functions assigned to the corporations under their enabling legislation,[8] not only in relation to management, but also programming, production, advertising and content regulation. Section 3 of the Act requires the CA to ensure compliance by the SLBC and SLRC of not only the guidelines issued by the Election Commission,[9] but also the statutory conditions set out in the provision regarding

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8 *Sri Lanka Broadcasting Corporation Act* No. 37 of 1966 and *Sri Lanka Rupavahini Corporation Act* No. 6 of 1982.

9 Art. 104B(5)(a).

good taste and decency, balance, accuracy, impartiality and the public interest.

As usually happens in Sri Lanka during election campaigns, the role of the state media institutions was the subject of controversy in 2004 also. The Commissioner of Elections issued guidelines to the media in March 2004. During the course of the campaign, the conduct of the SLBC and SLRC were seen to be falling short of the constitutional and statutory standards of balance and impartiality expected of them, and in the last week of the campaign, the Commissioner of Elections appointed a Competent Authority in respect of both institutions to enforce the guidelines.

The Election Commissioner's guidelines for fair and balanced reporting were impugned by the Sri Lanka Rupavahini Corporation by way of a fundamental rights application to the Supreme Court on 31 March 2004, as was the Commissioner's appointment of a Competent Authority to take over certain news and political programmes that were seen to be flouting those guidelines. The petitioners' prayer for interim relief by way of suspending the guidelines and staying the appointment of the Competent Authority was rejected by the Supreme Court.

These events are all the more remarkable for the fact that the legal exercise was played out as if the state media institutions were an organic part of the United People's Freedom Alliance (UPFA). That is, in bringing into sharp relief, perhaps inadvertently, the real nexus between the state media institutions and the political party that controls them, the affair demonstrated more forcefully than the most pungent academic or political criticism, the wholly unacceptable nature of our state media institutions. Even the fact that the Commissioner was exercising powers conferred by the Seventeenth Amendment (and the attendant enabling legislation, the Competent Authority (Powers and Functions) Act No. 3 of 2002) was not sufficient deterrence in the attempted justification for using state media institutions in the pursuit of party political interest.

7. The Principle of Nominated Legislative Membership and the National List

Several challenges to the legality of nominations and appointments through the National List were mounted in the months following the

General Elections of April 2004. Given the historically widespread abuse of the constitutional framework for national list appointments, it is useful to reflect on the political rationale underpinning the principle of nominated legislative membership as an entry point to a discussion on the issue in 2004.

In Ceylon under the Soulbury Constitution one half or 15 members of the Senate, were elected under a system of proportional representation by means of a single transferable vote, and the other 15 members were appointed by the Governor-General, which under responsible government, meant in effect, the Cabinet. The justification for appointed legislators in what was meant to be a representative democracy is to be found in the report of the Soulbury Commission.[10]

The main purpose was to prevent "hasty and ill-considered legislation reaching the Statute Book"[11] and to interpose delay "for the purpose of giving time for reflection and consideration."[12] It also argued that minority representation could be strengthened through appointed members. In addition, it was assumed that appointed members would be persons of eminence in the community and distinction in the professions, who could "make a valuable contribution to the political education of the general public." The Commission argued that "these eminent individuals of high intellectual attainment and wide experience of affairs might be averse from entering political life through the hurly-burly of a parliamentary election; but party or communal ties might be expected to rest less heavily on them and they would be able to express their views freely and frankly without feeling themselves constrained to consider the possible repercussions upon their electoral prospects."[13] The Commission further reasoned that "those who, rightly or wrongly, feel themselves menaced by majority action, may regard a Second Chamber not merely as an instrument for impeding precipitate legislation, but as a means of handling inflammatory issues in a cooler atmosphere."[14]

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10 *Ceylon: Report of the Commission on Constitutional Reform* (September 1945), Cmd. 6677: Chapter XIV

11 Ibid., para. 295.

12 Ibid., para. 304.

13 Ceylon: Report of the Commission on Constitutional Reform, op. cit., para. 296.

14 Ibid., para. 298.

Thus the appointed Senators were expected to enhance the ventilation or deliberative function of the Second Chamber in the legislative process, to add a voice of authority and reason to public debate even when such views were unpopular, to allow minorities without a sufficient electoral base representation, and finally, to reinforce the Senate's function as a counter-majoritarian instrument. As it turned out, the Soulbury Senate achieved none of these worthwhile objectives leading to Jennings's mordant assessment in 1953 that "in one respect only have anticipations been fulfilled. When the question of opposing this particular proposal of the Soulbury Commission was under discussion in 1945 it was decided not to oppose very strenuously because 'It won't do any harm'."[15]

In the unicameral legislatures under the Constitution of 1972 and initially, the Constitution of 1978, there was no provision for the appointment of legislators. However, by Article 99A, introduced by the Fourteenth Amendment to the present Constitution (and in turn amended by the Fifteenth Amendment) in 1988, provision was made for political parties and independent groups to nominate a certain number of unelected members to Parliament. The entitlements of parties were decided on the basis of their electoral showing.

Although the intent and purpose of reintroducing the nomination principle is not clear from the text of the Constitution, there is reference in the fourth paragraph of Article 99A to at least one objective sought to be realised. This requires the Elections Commissioner to determine "whether the number of members belonging to any community, ethnic or otherwise, elected to Parliament...is commensurate with its national population ratio and request the...[party making the nomination]...in so nominating persons...to ensure as far as practicable, that the representation of all communities is commensurate with its national population ratio." This requirement is almost entirely redundant, since proportional representation has impelled political parties to ensure ethnic and religious diversity in their lists of nominations to some extent, in addition to stimulating the growth of religion, ethnicity or regionally based political parties. On the other hand, the smallest minorities such as Malays and Burghers would not find representation under this scheme.

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15 I. Jennings, *the Constitution of Ceylon*, 3rd ed. (Oxford : OUP, 1953), 99.

In a representative democracy where the franchise constitutes a core political value, the principle of appointed legislative membership may still be defensible if the framework for such appointments ensures at least some of the objectives set out in the Soulbury Report. In federal Canada, where the Senate is appointed (and thereby faces a serious credibility crisis), the Constitution at least lays down some criteria that must be adhered to. These include such federalist requirements as regional representation at the centre, but even then, it has been the case that those objectives have not been met.

In Sri Lanka, the only requirements are that persons nominated must have been included in the national list of candidates submitted by a party before the elections, or that that person should have been a (losing) candidate in the general election.

When the Constitution of 1978 was enacted, it provided in Article 62 for a Parliament consisting of one hundred and ninety six directly elected members. However, the Fourteenth Amendment to the Constitution (1988) increased this number to the present two hundred and twenty five. According to the new Article 99A introduced by the Amendment, the additional twenty nine members were to be apportioned to parties in proportion to the total votes polled by each party at the election. After the Commissioner of Elections has so determined the entitlement of each party, the General Secretary of such party would nominate names from among a list of candidates now known as the National List (or from among persons who were on the nomination list but failed to be elected).

In terms of the procedure laid down in Article 99A, the National List must be submitted to the Commissioner of Elections *within the nomination period*. Once this is done and on the expiry of the nomination period, the Commissioner must forthwith publish the lists in the *Gazette* in addition to which he must cause such lists to be published in a Sinhala, Tamil and English newspaper. These provisions are salutary. When the Fourteenth Amendment re-introduced the principle of nominated legislative membership into our constitutional instrument, it took the caution of making the process as democratic as possible by requiring the Commissioner to ensure that the electors have knowledge of not only parties' candidates for direct election, but also those they intend to nominate after the election.

As described earlier, following declaration of the election results, the Commissioner apportions the additional seats among parties and gives notice. Within a week of the Commissioner's notice, parties entitled to additional seats must nominate from among the National List or from among those who were on the nomination list for election, persons to be declared elected as Members of Parliament. The latter provision, which allows parties to nominate persons rejected by the electorate, is regressive in the extreme, but at least restricts the category of persons who may be nominated by parties.

With regard to the category of persons who may be so nominated, the first condition imposed by Article 99A is that such person must be qualified to be elected as a Member of Parliament in terms of Articles 90 and 91. The second condition is that which has been explained before: the nominee's name must have been on the lists (either the list of candidates for direct election or the National List) submitted to the Commissioner of Elections during the nomination period.

The third paragraph of Article 99A expressly makes this abundantly clear. Therefore the maxim *expressio unius est exclusio alterius* (the express mention of one thing implies the exclusion of another) must be applied in interpreting Article 99A, making a derogation from its requirements legally impossible.[16] If a person's name does not appear in either of the two lists submitted by a party to the Commissioner, then he is not entitled to be nominated to Parliament after the election.

However, the auxiliary legislation to Article 99A, the Parliamentary Elections Act No. 1 of 1981 as amended, seems to have been insidiously drafted so as to provide a deliberate lacuna for parties to exploit. This is where Section 64 of the Act, in the literal sense, seems to suggest that once a National List member resigns, the relevant party may fill the vacancy by nominating *any* member of such party. In this way, a literal interpretation of Section 64 on the filling of vacancies seeks to give political parties a wider choice than the discretion envisaged by the Constitution, which restricts the field of choice to names appearing on the nomination paper or the pre-published National List. Indeed the pernicious practice based on this interpretation of Section 64 has had pervasive currency among political parties, and

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[16] For illustrations of the maxim, see *Thomson v Hill* (1870) LR 5 CP 564; *In re Kerala Education Bill* (1958) AIR 956 SC; *Kariapper v Wijesinghe* (1967) 70 NLR 49.

was also the case in 2004. Thus by seemingly allowing parties to obviate the constitutional requirement of pre-electoral publication of national lists, Section 64 undermines representative democracy and the electoral process in Sri Lanka. This provision has strengthened party hierarchies at the expense of the electoral choice of Sri Lankan voters.

It is to be noted, however, that in a recent challenge to the legality of an appointment under the apposite provision of the Provincial Councils law,[17] the Supreme Court held that political parties cannot fill vacancies arising out of resignations by nominating any member of such party. The Court upheld the petitioners' position that the nomination must be of a person whose name was included in the nomination papers of the party. In setting aside the decision of the Court of Appeal, Mark Fernando J. observed that,

> when constitutional or statutory provisions have to be interpreted, and it is found that there are two possible interpretations, a Court is not justified in adopting that interpretation which has undemocratic consequences in preference to an alternative more consistent with democratic principles, simply because there are other provisions, whether in the Constitution or in another statute, which appear to be undemocratic.[18]

8. National List Nominations consequent to the General Election of April 2004

Nevertheless, an indication of things to come was given early in the 2004 campaign when it emerged that the name of Mr. Ratnasiri Wickramanayake, a former Prime Minister and senior member of the Sri Lanka Freedom Party did not appear in either the nomination list or the National List of the UPFA. The President issued a press statement in February to assert that nevertheless, Mr. Wickremanayake would be treated as the UPFA's first name on the National List.[19] It was thus apparent that the practice of inserting names

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[17] *Centre for Policy Alternatives and Saravanamuttu v Dissanayake, Weerawanni and Others and Edrisinha v Dissanayake, Weerawanni and Others*, SC Appeals Nos. 26/2002 & 27/2002, SC Minutes 27.05.2003

[18] Ibid., at page 10 of the judgement.

[19] *Daily Mirror*, 26 February 2004.

of 'dummy' candidates on the list, who resign almost immediately upon declaration as Members of Parliament to make way for the 'real' candidates, was contemplated on this occasion also.

When as expected Mr. Wickramanayake was nominated by his party as National List Member, and the Commissioner of Elections upheld the nomination by declaring him elected, several applications were made to the Court of Appeal for writs against the appointment. These applications, filed by the Centre for Policy Alternatives (CPA) and Mr. Rohan Edrisinha of the Faculty of Law, University of Colombo, were ongoing in the Supreme Court at the time of writing.

Preliminary objections on behalf of the respondents were taken on several grounds, particularly whether the Court of Appeal had jurisdiction to hear the matter in view of Article 104H, and whether the matter involved an interpretation of the Constitution, in which case the question would have to be referred to the Supreme Court for determination in terms of Article 125.

9. Jurisdiction of the Court of Appeal under Article 104H

The original writ jurisdiction (other than *Habeas Corpus*, in which case Article 141 as amended applies) in Sri Lanka is conferred upon the Court of Appeal under Article 140 of the Constitution. The respondents relied upon Article 104H introduced by the Seventeenth Amendment in arguing that the jurisdiction of the Court of Appeal in respect of the Election Commission, and perforce the Commissioner of Elections when exercising the powers of the Commission under Section 27 of the Seventeenth Amendment, was ousted. Article 104H states that the jurisdiction of the Court of Appeal under Article 140 shall, in relation to any matter that may arise in the exercise of its powers by the Election Commission, be exercised by the Supreme Court. The question therefore was whether in the context of the Election Commission remaining unconstituted, Article 104H applied to the exercise of the Commission's powers by the Commissioner of Elections. If it did, then the proper court of original writ jurisdiction in respect of the impugned actions would be the Supreme Court, not the Court of Appeal.

It appears that the jurisdiction question in terms of Articles 104H (read with Article 104A(a)) has conclusively been settled by a five judge bench of the Supreme Court in *Ghany v Dayananda Dissanayake*

(2004).[20] In this case, a candidate in the local government elections to the Colombo Municipal Council of 2002 sought writs of *Mandamus* and *Certiorari* against officers of the Commissioner of Elections for allegedly refusing him a recount.

The Deputy Solicitor General on behalf of the Commissioner of Elections and his officers took, *inter alia*, the preliminary objection to jurisdiction in terms of Article 104H, which the Court of Appeal upheld.[21] On appeal, the Supreme Court rejected the reasoning of the Court of Appeal with regard to Article 104H. Mark Fernando J. speaking for the Court held,

> The interpretation of the relevant provisions must commence on the basis that 'Election Commission' means the yet-to-be-established Election Commission, and not its officers, and not the Commissioner of Elections...[22] Article 104H must be read with Article 104A (a). Read together, those two provisions manifest a clear intention to transfer to this Court a part of the writ jurisdiction of the Court of Appeal, namely, in relation to any matter arising in the exercise *by the Election Commission* of its powers, and also to make decisions, directions and acts *of the Election Commission* final and immune from judicial review except under Articles 104H, 126 (1) and 130. *Ex facie*, neither Article applies to acts and omissions of the Commissioner of Elections, or of its officers[23]...To put it another way, Article 104H effects an ouster of the jurisdiction of the Court of Appeal only upon *an exercise* of the powers of the Election Commission, *by the Commission itself*. Article 104H does not apply to an exercise of the powers of the Election Commission *by any other persons*. The words 'but the Commission' are words of limitation. If Parliament had intended that Article 104H should also apply to an exercise of those powers by the Commissioner of Elections, it would have removed those words of limitation, so that Article 104H would have read: '...in relation to any matter that may arise in the exercise of the powers conferred on the Commission by the Constitution or any other law', omitting the words 'by the Commission' and 'on it'.[24]

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20 *Ghany v Dayananda Dissanayake, Commissioner of Elections* (2004) 1 SLR 17 (SC).

21 Judgment of the Court of Appeal, 17 October 2002, unreported.

22 *Ghany v Dayananda Dissanayake*, op. cit., at page 26 of the judgement.

23 Ibid., emphasis in original.

24 Ibid., at pages 26-27 of the judgement, emphasis in original.

The Supreme Court explained the meaning of Section 27 of the Seventeenth Amendment in the following way:

> Section 27(2) [of the Seventeenth Amendment to the Constitution] is a transitional provision, which enables the Commissioner of Elections during that period to exercise and perform the powers and functions (a) of the office of Commissioner of Elections (under pre-existing laws), and (b) of the Election Commission. While Section 27(2) empowers the Commissioner of Elections to exercise the powers of the Election Commission, it does not make such exercise, or deem such exercise to be, an exercise of power by the Election Commission. Article 104H(1) itself is a good example: it empowers the Supreme Court to exercise the writ jurisdiction of the Court of Appeal; but when it does so, it is nevertheless an exercise of that jurisdiction by the Supreme Court, *qua* Supreme Court, and it can hardly be argued that when the Supreme Court does exercise that jurisdiction, that it would be, or would be deemed to be, an exercise by the Court of Appeal. Likewise in this case even if the Commissioner did exercise the powers of the Election Commission, it was nevertheless an exercise by the Commissioner of Elections.[25]

Accordingly, in the challenges to the appointment of Mr. Ratnasiri Wickramanayake, the Court of Appeal rejected the preliminary objection raised by the Respondents as to jurisdiction. In the judgment of the Court of Appeal of 7 July 2004, Marsoof J. (P/CA) concluded that "This Court is bound by the decision of the Supreme Court in [*Ghany*] to the effect that the Court of Appeal will continue to exercise the supervisory jurisdiction over the Commissioner of Elections until such time as the Election Commission is constituted."[26]

10. Interpretation of the Constitution and Article 125

In view of that fact that the Court of Appeal would have to consider the application of Section 64 of the Parliamentary Elections Act No. 1 of 1981, a preliminary objection was taken on behalf of the respondents

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[25] Ibid., at page 28 of the judgement.

[26] *Edrisinha v Commissioner of Elections and Others,*. CA App. No. 799/2004 (unreported), at page 6 of the judgement.

that that would, necessarily, involve the interpretation of Article 99A of the Constitution. If that were the case, the Court of Appeal must refer the constitutional questions to the Supreme Court for determination, since interpretation of the Constitution falls within the sole and exclusive jurisdiction of that Court.[27]

The Court of Appeal in its judgment of 7 July 2004 rejected this objection. Marsoof J. (P/CA) held:

> It is too early to predict whether or not any questions involving the interpretation of the Constitution itself will arise in the course of the hearing and determination of this application ... While this Court is mandated by Article 125(1) to refer any question or questions involving the interpretation of the Constitution to the Supreme Court, such reference can only be made as and when such question or questions of interpretation in fact arise for interpretation. From the submissions of learned counsel for the Petitioner it can be gathered that what they are contending at the moment, is that the 'elective principle' said to be enshrined in the Constitution should be applied to the interpretation of Section 64(5) of the Parliamentary Elections Act. This involves, in the view of the Court, the application of certain constitutional principles and provisions to the interpretation of an ordinary Act of Parliament. In the opinion of the Court no question of interpreting of the Constitution has [arisen] so far in these proceedings...[28]

Thus, the distinction was made between mere *application* of the Constitution (which the Court of Appeal was competent to do) and the *interpretation* of the Constitution (in which case Article 125(1) applies). This finding, *inter alia*, was contested by the respondents in seeking leave to appeal from the Supreme Court, who argued that the interpretation Section 64(5), because of its reference to Article 99A, involved the interpretation of Article 99A as well. Strenuous argument by counsel for the petitioners that the particular interpretation of Section 64(5) they were urging involved merely the application of Article 99A and the due consideration of certain immanent constitutional principles did not find an impression with the Supreme Court.

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27 Art. 125(1).

28 *Edrisinha v Commissioner of Elections,* op. cit., at page 8 of the judgement.

It is useful at this juncture to consider prior judicial authority on the manner in which Article 125(1) is brought into operation. In *Billimoria v Minister of Lands* (1978-79-80), Sharvananda CJ held:

> Counsel have invited us to make order on constitutional disputes. It appears from the order of the Court of Appeal that some dispute as to the interpretation of the Constitution did arise in the course of the argument. Article 125 of the Constitution requires any dispute on the interpretation of the Constitution to be referred to this Court. What is contemplated in Article 125 is 'any question relating to the interpretation of the Constitution' arising in the course of legal proceedings. This presupposes that in the determination of a real issue or controversy between the parties, in any adversary proceedings between them, there must arise the need for an interpretation of the provisions of the Constitution. The mere reliance on a constitutional provision by a party need not necessarily involve the question of the interpretation of the Constitution. There must be a dispute on interpretation between contending parties. It would appear that Article 125 is so circumscribed that it must be construed as dealing only with cases where the interpretation of the Constitution is drawn into the actual dispute and such question is raised directly as an issue between the parties or impinges on an issue and forms part of the case of one party, opposed by the other, and which the Court must of necessity decide in resolving that issue.[29]

Similarly in *Mahindasoma v Maithripala Senanayake and Others* (1996), Gunawardana J. in granting interim relief, after delineating arguments by the parties as to the substance of the application, observed that: "Thus a substantial question of law has arisen as to whether the Governor has a discretion when he acts under Article 154B(8)(c) of the Constitution, which can only be decided, after hearing full argument, having given the opportunity to the Respondents to file their objections."[30]

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[29] *Billimoria v. Minister of Lands* (1978-79-80) 1 SLR 10 (SC) at 16–17, emphasis added.

[30] *Mahindasoma v Maithripala Senanayake and Others* (1996) 1 SLR 366 (CA) at 366.

Therefore, there is strong appellate authority for the proposition that the Supreme Court should consider questions of constitutional interpretation only at such time as the Court of Appeal may refer any such question to it. Undoubtedly, Article 125(1) gives the Supreme Court exclusive jurisdiction in respect of interpretation of the Constitution. But it also describes a procedure whereby the Court of Appeal is required to refer to the Supreme Court any question of constitutional interpretation that arises in the course of any proceeding. Any such reference can only be made following the full submissions of the parties on the substance of the claim so that the Court of Appeal has the opportunity to determine whether there indeed exists a question of constitutional interpretation as opposed to mere application of constitutional principles and/or provisions. Accordingly, the Supreme Court should only become seized of the matter once the Court of Appeal refers any such questions of constitutional interpretation to the Supreme Court.

This reading of Article 125(1) of the Constitution is reinforced by Rule 64(1) of the Supreme Court Rules 1978, which provides that:

> Whenever any other Court or tribunal or other institution empowered by law to administer justice or to exercise judicial or quasi-judicial functions, refers any question to the Supreme Court for determination in terms of Article 125 (1) of the Constitution, such Court, tribunal or other institution shall –
>
> (a) submit a written reference to the Supreme Court setting out concisely and clearly the question for determination.

Rule 64(1) thus stipulates that the specific questions of constitutional interpretation must be submitted to the Supreme Court in writing. Accordingly, it could be argued that in the instant case, the provisions of Article 125(1) have not been triggered in the sense that the Court of Appeal did not provide the Supreme Court with the specific questions of constitutional interpretation, which would thereby engage the Supreme Court's exclusive jurisdiction over the matter.

In granting leave, however, the Supreme Court was persuaded by the respondents that the petitioners' contentions regarding Section 64(5) inevitably entailed an interpretation of Article 99A, for which, the sole and exclusive jurisdiction rests with the Supreme Court. The Court

has directed counsel to formulate the questions of constitutional interpretation for its consideration.

11. Elections (Special Provisions) Act No 14 of 2004

In October 2004, the Government presented to Parliament a Bill to amend the elections law so as to require voters to produce valid identification as a condition of exercising the franchise. The principal purpose of the Elections (Special Provisions) Bill was to provide for the requirement that a voter produces a valid identity document in proof of identity before a ballot paper is issued to him or her (*vide* clauses 2 and 3). Accordingly, the Bill went on to provide for consequential amendments to the law relating to elections to Parliament (Part II), the Presidency (Part III), Provincial Councils (Part IV), and local authorities (Part V), as well as the method of voting at Referenda (Part VI).

The Bill was certified to be urgent in the national interest by the Cabinet and, under the provisions of Article 122 of the Constitution, the President referred it to the Supreme Court for determination as to constitutionality. The Supreme Court deemed that the only aspects of constitutionality in respect of the Bill that arose for its consideration were whether: (a) it adversely affects the franchise as provided in Article 4(e) of the Constitution; and whether (b) it is inconsistent with Article 12(1) which guarantees to every person the equal protection of the law.

In making its determination on the first question, the Supreme Court bench comprising Silva CJ, Yapa J. and Udalagama J. observed that "...the Constitution guarantees every citizen being a qualified elector the right to exercise the franchise at Elections and Referenda. The name of the person being entered in the register of electors is a necessary pre-requisite for the exercise of the franchise. *The proposed amendment, in our opinion is a safeguard against impersonation and thereby enhances the exercise of the franchise by ensuring that the person whose name is in fact entered in the register of electors is issued a ballot paper for the purpose of voting.*"[31] The Court also adduced in support Article 93 of the Constitution, which stipulates that voting shall be free, equal, and by secret ballot, and found that the proposed amendment would enhance these requirements.

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[31] SC (SD) No. 24/2004, Hansard, 17 August 2004: clns. 1191 – 1192, emphasis added.

In concluding that the Bill was consistent with Article 12 (1) as well, the Court found that,

> The necessary implication of the amendment is that a person whose identity cannot be ascertained with reference to a valid identity document is not issued a ballot paper. *Thus the law makes a distinction between persons whose identity could be ascertained with reference to a valid identity document and persons whose identity cannot be so ascertained...We are of the opinion that this distinction is reasonable in relation to its objective being the prevention of impersonation and is based on intelligible criteria*"[32]

The Bill throughout referred to a 'valid identity document', and to no particular form of identity such as the National Identity Card (NIC), passport, etc. Clause 3 of the Bill described 'valid identity document' to mean 'any document issued by the Government of Sri Lanka in pursuance of any law for whatever purpose, with which the identity of the holder may be ascertained.' In fact, the Supreme Court in its determination expressly alluded to the wide nature of this clause and assured itself that "...documents such as a passport, a driving licence, or a postal identity card would come within the purview of this definition."[33]

Ex facie, there seemed to be nothing objectionable in the Bill or in the Supreme Court's determination of its constitutional conformity. The mischief sought to be addressed – impersonation in elections – is a widespread form of electoral abuse in Sri Lanka, and the means of its prevention – requiring the production of valid identification in correspondence to a name in the electoral register, has been supported not only by election monitoring groups such the Centre for Monitoring Election Violence (CMEV), but also, repeatedly, by the Commissioner of Elections himself. The Select Committee on Electoral Reforms alluded to above, in its Interim Report also recommended the introduction of the NIC as a requirement for the exercise of the franchise, and went so far as to propose a constitutional amendment to give effect to this.[34]

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32 Ibid., cln. 1192, emphasis added.
33 Ibid., cit., cln. 1191.
34 Parliamentary Series, No. 24 at 45 et seq.; and Appendix II.

Efficacy in principle notwithstanding, closer consideration of the practical implications of the proposed law if brought into *immediate force* would have entailed serious consequences for a large section of Sri Lankan voters.

Despite the fact that the Registration of Persons Act No. 32 of 1968 has been in force for over three decades, the situation is that a massive 3,873,276 citizens (i.e. almost 4 million out of the registered 12,920,719 electors), or 30% of all registered voters in Sri Lanka, do not have NICs. According to the statistics of the April 2004 General Election, the largest concentrations of voters without NICs are predictably in the Northern Province, to a slightly lesser degree the Eastern Province, and the plantation communities in the Uva and Central Provinces. In the Jaffna District for example, none of the registered 644,279 electors, or 0%, have a NIC; statistics for Mullaitivu and Killinochchi are of course unavailable.

The problem, though most acute in these areas, is not restricted to them. For instance, in the Western Province, the most physically proximate to central administration, Colombo District has 239,225 persons, and Gampaha and Kalutara Districts 314,461 and 143,067 persons respectively, without NICs.

The argument that these figures only relate to NICs, while the Bill envisaged any form of identification issued by the government was problematic, because in the rural areas and in the war-ravaged North-east, the lack of the most basic form of official identification, the NIC, denotes that it is highly likely that other documents such as passports and driving licences are unavailable as well. Therefore, in stark terms, the fact of the matter was that the Bill in its original form, if brought into force immediately, would have had the effect of disenfranchising 30% of the Sri Lankan electorate.

This is why the Select Committee on Electoral Reform (and the Elections Commissioner, whose recommendations the Committee adopted) was extremely concerned to ensure that if the NIC was introduced as a requisite for the exercise of the franchise, then every citizen qualified to be registered as an elector had to be guaranteed a NIC as a condition precedent to the new regime. In fact, the Committee "...recommended that necessary steps be taken to implement a

programme of action by the Commissioner of Registration of Persons to issue the National Identity Card to all those who are not issued with same *within a period of six months*."[35] Adopting the recommendations of the Commissioner of Elections, the Committee further proposed a phased, calibrated process through which to ensure to every elector a NIC before the commencement of the new regime; by any standards, a colossal administrative undertaking. Indeed, all of the Committee's recommendations in relation to this issue are predicated on the condition that all electors are in possession of a NIC.

The Bill brought before Parliament was most indefensible in this respect. It neither provided for a moratorium for the Registrar of Persons to ensure compliance, nor did it provide that department with the massive infusion of funding that is needed for an accelerated programme of action. According to an unofficial estimate, the department may require finances in excess of 190 million if it is to succeed in issuing NICs to all those who do not presently hold one.

In the circumstances, the Opposition (particularly, the UNP and the Upcountry Tamil parties) moved to introduce a committee stage amendment to the Bill. This sought, *inter alia*, to defer the application and enforcement of the proposed law until the Election Commission, as well as political parties represented in Parliament, are satisfied that valid identity documents are available to all qualified electors entitled to vote in Sri Lanka. In response to this move, the government, to its credit, convened a meeting of parties represented in Parliament to discuss amendments so as to accommodate the concerns of the Opposition.

The ensuing compromise was reflected in a new Part I containing general provisions of the Elections (Special Provisions) Act No. 14 of 2004. Section 1 of the Act contains the specific undertaking that it shall not come into operation until the expiry of one year from the date of certification (i.e., 18 November 2005). Under Section 2(1), the Election Commission is required within that period to ensure that all administrative arrangements for the issue of identity cards have been satisfactorily made.[36] This was so as to ensure that all persons entitled to vote are not precluded from obtaining identity cards and exercising

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[35] Interim Report of the Select Committe on Electoral Reforms (January 2004) , op cit., 45-46, emphasis added.

[36] *Registration of Persons Act* No. 32 of 1968, Sec. 14.

their franchise. The Commission was also required to publish in the Gazette a certification of its satisfaction with regard to these arrangements. The proviso to Section 2(1) requires the Commission to give due consideration to the views of political parties with parliamentary representation before making its certification. Furthermore, under Section 2(2), the Election Commission is expected to require the Commissioner for the Registration of Persons to confirm by way of a certificate that necessary administrative arrangements have been made.

Section 4 is an interpretation clause, which seeks to describe the term 'valid identity document'. This means any document issued by the Government of Sri Lanka under any law for whatever purpose with which the identity of the holder may be ascertained, "...and shall include a photograph of a person who does not posses any other identity document, duly certified to be that of such person by the Grama Niladhari or the Estate Superintendent as the case may be, and authenticated by the Divisional Secretary of the...Division...within which such person resides or by an officer authorised...by the Election Commission."

This provision was clearly intended to be availed of by voters in the upcountry plantation sector, a large majority of whom are not yet properly registered, particularly because they lack the basic documentation necessary to do so. There must be extreme sensitivity to the predicament of this community that has been subjected to such atrocious indignities as being disenfranchised and rendered stateless in the past. However, as a basic policy proposition, the purpose of this Act must be to ensure that everyone has a proper identity document, not to prolong such *ad hoc* arrangements as photographs certified, of all people, by a private actor such as an estate superintendent.

One other question needs to be raised with regard to the process the Government adopted in respect of this Bill. Electoral reform has been in the agenda for at least a decade in Sri Lanka. The principle of introducing the NIC as a requisite for the exercise of the franchise is among the least controversial issues in this debate; both political parties and civil society are in agreement that this is a good and desirable step towards dealing with an aspect of electoral malpractice. Why then, did the government choose to send this to the Supreme

Court as an Urgent Bill, with the aura of haste shrouded in secrecy that that entails?[37]

If the Bill was subjected to pre-enactment review in the ordinary fashion, would not the Supreme Court have had the benefit of fuller argument and also taken into cognisance some of the issues canvassed above regarding the consequences of the enactment? Suffice it to raise these questions here, because the use of Article 122 is the subject of a larger controversy in Sri Lanka outside the scope of this discussion.

12. The General Election in the North and East

The General Election of April 2004 has been universally described one of the most free and fair elections in the recent past. The only blemish, it appears, is what prevailed in the North and East during the campaign, which was marked by threats, intimidation, and physical violence including several murders.

Independent monitors such as the Centre for Monitoring Election Violence (CMEV) observed that:

> This situation of heightened insecurity in the North and East imposed severe constraints on candidates from all political parties in carrying on with their election campaign. Direct threats as well as the general atmosphere of fear and intimidation led to the resignation of several candidates. In addition, recruiting polling agents for Election Day became a problem for many of the non-TNA candidates...In this context, CMEV reaffirmed its position that the ability of all candidates to campaign throughout the North and East was 'integral to a free and fair election' and reiterated its conviction that 'every voter in Sri Lanka must be able to exercise their franchise and must also be able to make a free and fair choice between contesting political parties and candidates."[38]

Noteworthy here is that most of the intimidation and attacks were against candidates and parties opposed to the LTTE-backed TNA. The LTTE enjoys tangible political power in the North and East, even outside the Districts of Killinochchi and Mullaitivu. Given the LTTE's

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[37] Note that the Supreme Court is expressly directed by Art. 122(1)(c) to only communicate its determination to the President and the Speaker.

[38] *CMEV Final Report on Election Related Violence,* General Election April 2004, 5.

stated desire for an institutionally expressed role in the governance of the North-East, and its *de facto* power as an almost omnipotent non-State political actor in the region, it is cause for serious apprehension that the legitimacy of the election and the conditions for a free and fair campaign were to be in question only in areas under its influence.

13. Reflections on Electoral Reform in Sri Lanka

In the General Election of 2004, the principal concern of the UPFA was to obtain a mandate from the people to change the Constitution of 1978 through extra-constitutional modalities in order to effect two major changes. Along with abolition of the Executive Presidency, reform to the current electoral system were the twin features of the constitutional reform exercise proposed by the UPFA, although to this date, it is not at all clear what the precise changes are. The electoral system is, of course, central to the constitutional reform debate in Sri Lanka, not least because the much-maligned current model of proportional representation does in fact require reform.

The academic and political debate over electoral reform has been taking place in Sri Lanka for some years now, but it is nevertheless important in the present context, to identify the multiplicity of issues involved. In such an exercise, it is useful at the outset to restate the conceptual focus of the debate as essentially a question as to the particular form (i.e., institutional structure) by which representative democracy, a congenial political value as well as an objective, may be realised in Sri Lanka. It is only by articulating the nature of the democracy we want in Sri Lanka that the questions regarding problems in the current system and the options for reform may be properly framed, understood and answered.

In deeply divided societies like Sri Lanka, characterised by ethno-political tensions, democracy, and how it works, are inherently problematic issues. Democracy understood simply as majority rule, serves to consolidate and institutionalise the perpetual dominance of numerically larger groups. This serves to exclude numerically smaller groups in society from the political decision-making process, and in turn, leads to an erosion of loyalty to political institutions on the part of excluded groups. Sri Lanka's conflict and ethnic claims to self-determination and secession stem from the anomaly that exists between the constitutional structures for government and the pluralist ethno-political make up of the polity. The electoral system is integral

to the way democracy functions, and the fact that the country functioned under the simple plurality or 'first past the post' (FPP) system from 1931 to, in effect, 1989, both reflected the majority's perception of democracy as essentially majoritarian, at the same time as it institutionalised and reinforced perceptions of discrimination on the part of minorities.

One of the positive features of the Constitution of 1978 is that it introduced proportional representation. In multicultural polities such as ours, proportional representation is one of many constitutional devices of ethnic accommodation that are imperative to ensuring unity in diversity. By ensuring representation to minority groups, the system allows not only their presence within legislative bodies, but also impels governments to take minority concerns and interests seriously.

Proportional representation, by deterring massive majorities and thereby unresponsive and arrogant governments, is also important in ensuring inclusivity, deliberation and sensitivity. All these factors tend to promote a more democratic culture of government.

Thus, it becomes absolutely clear that proportional representation is an essential political principle of representative democracy that requires its acceptance as the point of departure in a values-based discussion on electoral reform in Sri Lanka. It is on this conceptual basis that the specific form of a viable and fair electoral system for Sri Lanka may be designed.

John Stuart Mill in the classic *Considerations on Representative Government* of 1861 made an observation that is striking in its prescient relevance to the current context in Sri Lanka. He said,

> Two very different ideas are usually confounded under the name democracy. The pure idea of democracy, according to its definition, is the government of the whole people by the whole people, equally represented. Democracy as commonly conceived and hitherto practised is the government of the whole people by a mere majority of the people, exclusively represented. The former is synonymous with the equality of all citizens; the latter, strangely confounded with it, is a government of privilege, in favour of the numerical majority, who alone possess practically any voice in the State. This is the inevitable consequence of the manner in which the votes are now taken, to the complete disfranchisement of minorities.

In reforming the electoral system, therefore, the challenge is to ensure that the mistakes of the past are not repeated in the future.

14. First Past the Post (FPP) vs. Proportional Representation (PR)

The first past the post system was a British legacy in Sri Lanka. It was the electoral system that prevailed under the Donoughmore Constitution from 1931 to 1948, under the Soulbury Constitution from 1948 to 1972, and the First Republican Constitution from 1972 to 1978, until the present Constitution introduced the proportional representation system.

Elections to the UK Parliament continue to be held under this system whereby the candidate obtaining the highest number of votes within a relatively small territorial constituency is elected. Thus even where all the other candidates have together obtained a higher number of votes than the winning candidate, the latter is nevertheless elected. Critics argue that this is not democratic, in the sense that there is the possibility that more people in the constituency actually voted against the winning candidate.

One of the positive features of the FPP system is that it encourages a close nexus between voters and their representative. The territorial extent of FPP constituencies tends to be relatively small, and a representative must have regular and direct contact with his or her constituents to ensure their continued support.

A characteristic of democracies with the FPP system is that they tend towards a two or three party political system and to produce strong parliamentary majorities. Therefore, FPP is often advanced as system, which is better suited for stable government. While stability is one consideration in designing an electoral system, it is important to remember there are also other relevant matters like fairness and equitable representation that cannot be ignored.

In enabling strong majorities, FPP tends to be unsatisfactory in at least two respects. Firstly, experience has shown that FPP systems tend to grossly distort the intentions of the people. That is, the breakdown of vote percentages actually cast for political parties and

groups do not correspond to parties' representation in terms of seats. In some situations, we have seen how parties, which have not obtained even 50% of the total votes, have formed governments with two-thirds majorities. For example (see box), in the General Election of 1970, the United Front (UF), which received only 49% of the total votes cast, obtained a parliamentary representation of 77% or a two-thirds majority. In the General Election of 1977, the United National Party (UNP) which received 51% of the votes obtained as much as 83% of the seats in Parliament, or a five-sixth majority.

Parliamentary Election – 1970

Party	Votes	Seats	% Votes	% Seats
United Front	2,440,476	116	49	77
UNP	1,895,341	17	38	11
Federal Party	345,727	13	5	9
Tamil Congress	115,567	3	2	2
MEP	46,571	0	0.93	0

Parliamentary Election – 1977

Party	Votes	Seats	% Votes	% Seats
UNP	3,175,991	140	51	83
SLFP	1,683,753	8	30	5
TULF	399,043	18	6	11
LSSP	227,548	0	4	0
CP	159,326	0	3	0
CWC	35,743	1	0.5	0.6

It is self-evident that from the perspective of democratic values, this type of massive parliamentary representation that does not correspond to the total number of votes obtained by a political party is completely unacceptable.

Moreover, over-confident governments with strong majorities are more likely to become authoritarian than those, which have to govern by coalitions. In the latter case, governments are more reflective of groups and interests represented in the legislature and whose support also, the government cannot take for granted.

We have seen that on both occasions when under FPP Sri Lanka had governments ruling with two-thirds majorities or more, they have tended to act undemocratically. The more extreme of these actions have included constitutional change for partisan advantage, and interference with the people's right to vote.

In 1970-77, the United Front government introduced a Constitution that created a supreme legislature (the National State Assembly), which in turn made the Prime Minister commanding a majority of members overly powerful. It also subordinated the judiciary and weakened its independence. The United National Party government that swept to power on a landslide five-sixth majority, created an over-mighty executive President, weakened Parliament, and was able because of its majority, to introduce constitutional amendments to extend its own life. It is clear that this type of behaviour is wholly unacceptable and in reforming the electoral system we must seek to introduce a system that focuses on the people's wishes as expressed at an election, and not the convenience of a political party in government.

Proportional Representation (PR) in principle addresses these concerns with regard to FPP. The central object of PR is to ensure that representation in political institutions is as proportionate as possible to the percentage of votes obtained by each party or group that contested an election. This is not only more democratic, in multicultural countries such as Sri Lanka, PR is essential as a means of ensuring groups' representation in political institutions. It is important to remember that PR is essentially a principle, and there are many PR based systems different from each other in the world. Of the 211 States and territories in the world where there are direct elections, 75 use some form of PR, while 68 use FPP.

15. The Sri Lankan System of Proportional Representation: Criticisms and Responses

The Constitution of 1978 introduced the present electoral system to Sri Lanka, which is based on PR. The Sri Lankan electoral system is a party list system using the single transferable vote (STV). That is, the vote is first cast for a political party, each of which publishes a list of candidates during the nomination period. After choosing the political

party, the voter may declare preferences for a maximum of three candidates from the chosen party's list. This is called the single transferable vote (STV), which improves voter choice.

The present PR system, which has been in operation since 1989 when it was used for the first time in the parliamentary elections of that year, has been subject to four main criticisms. Firstly, it has been argued that the system causes inefficiency in government because it is difficult for a single party to obtain a majority in Parliament. Thus, parliamentary majorities have to be cobbled together after elections, which opens up space for corruption and behind the scenes horse trading. In coalition governments, it has been further argued that smaller parties, particularly ethnicity-based parties, wield a disproportionate degree of influence.

This criticism is not entirely valid. PR does give smaller parties representation, where otherwise they would have none. Coalition governments are not necessarily bad, in the sense that they promote inclusivity and make it difficult for purely partisan decisions to be made. It ensures that the legislative majority, i.e., the government, is not dominated by a single party, and that political decision-making must take into account a multiplicity of interests, particularly those of minority groups. Furthermore, we must remember that 'minority representation' does not only relate to ethnic or religious minorities. In Sri Lanka's political system, any party other than the well-entrenched UNP and Sri Lanka Freedom Party (SLFP) are placed at an electoral disadvantage at the constituency or polling division level. Thus parties such as the Janatha Vimukthi Peramuna (JVP) and the Jathika Hela Urumaya (JHU), which represent a substantial body of alternative opinion in the Sinhala community and among Buddhists, would have their parliamentary representation drastically reduced if not for PR with its large district based electoral unit encompassing several polling divisions. The preference vote system also helps junior partners in electoral alliances to win more influence within the alliance by demonstrating greater popularity, as in the case of the JVP in the United People's Freedom Alliance (UPFA) in some districts.

A second criticism has been that the PR system has destroyed the link between voter and representative because candidates are not elected on the basis of constituencies but from among a list of

candidates put forward by political parties and groups and on the much larger territorial unit of the electoral district. This is true.

A related criticism is that because candidates must campaign over the large extent of an electoral district, the system is extremely expensive for candidates and even dissuades some from running for office. While this may be valid to some extent, it is important to remember that in actual practice, Sri Lankan political parties draw up their list of candidates in relation to the polling divisions in each district. In this way, candidates concentrate much of their campaign and other political activities on the much smaller unit of the polling division rather than the entire district. Indeed, political parties' organisers are appointed on the basis of polling division and not electoral district. For example, in the Colombo district, Ravi Karunanayake is the UNP's organiser for Kotte and his counterpart from the UPFA is Arjuna Ranatunga, but both are formally Members of Parliament for the Colombo District.

Another point that has been raised in criticism against PR in Sri Lanka relates to the preference votes. It is said that the competition for preference votes creates not only a dangerous level of rivalry between parties, but within parties as well, and thereby leads to greater election-related violence and malpractices. The provision for marking preferences is a positive feature of the PR system in that it gives the voter an extended choice as to which candidates are preferred among the party list. Experience has shown that the conclusion that preference voting intensifies rivalry within parties is not true. The intensity of the competition between parties and its violent results are due to the unsatisfactory nature of our political culture, not the electoral system.

Fourthly, it has been argued that the current system requires reform in order to make it more proportionally representative and fair as well as to remove the dominance of the party in the system. A PR-based system that has long been proposed as ideal for Sri Lanka is the German 'mixed' system, which combines elements of both FPP and PR.

16. The German Electoral System

The principal attraction of the German electoral system is that it ensures legislative representation in strict proportion to the votes obtained by respective parties while it also includes the positive feature of promoting

a closer connection between voter and representative found in the FPP system. Although frequent references are made to various reform proposals as being inspired by the German model, it is clear that these proposals (such as those made during the previous PA administration and the recent conclusions of the Select Committee on Electoral Reforms of the last Parliament) made during the last decade depart in significant respects from the German model.

Under the German Federal Electoral Law, electors have two votes. One half of the members of the Bundestag, the German federal legislature, are elected by direct vote in 328 constituencies under FPP. The remaining 328 members are proportionally allocated according to provincial lists of candidates put up by parties.

Of the two votes, the first is for a constituency representative and the second, for a political party. It is open to a voter to vote for two different political parties in the constituency and the list. The entitlement of seats on a national basis among political parties is decided by reference to the number of votes parties have received (i.e., the votes cast for each party's list). The calculation is according to a complex mathematical formula known as the Niemeyer method, which ensures that the distribution of seats is in exact proportion to the percentage of votes obtained by each political party.

When this is decided, and the number of constituency seats already won by a party is deducted from that figure, the remaining number of seats is filled by reference to the party list. Unlike in Sri Lanka, the voter has no preference votes with regard to the party list. The German party list is also not a national list; parties put out lists for each Lander (province). Also, unlike Sri Lanka, the party has no discretion as to which candidates to nominate from the lists after the election, because the order of names in the list is fixed before the election and a party's entitlement is filled by reference to that fixed order. The farce that goes on in Sri Lanka whereby parties decide which candidates from the list, and indeed from outside the list, are nominated to the legislature is absent in this scheme.

Sometimes, the number of constituency seats won by a party may be greater than that party's entitlement of seats calculated on the votes obtained by the party. In such a situation, the number of members of the national legislature is increased to accommodate the extra

representatives to the extent that enables proportionate representation of all parties entitled to seats and not merely the parties exceeding their entitlement.

In this way, the German system provides for the best aspects of FPP and PR to be blended in a system that also takes into consideration matters like the appropriate role of political party leaderships in the electoral process, the need for stability, and fair representation of most, if not all, stake-holders in society.

VIII

THE RIGHT TO HEALTH AS A SOCIO-ECONOMIC RIGHT IN SRI LANKA : ITS SCOPE AND LIMITS

*J de Almeida Guneratne**

1. Introduction – Scope and Objects of the Chapter

The Committee on Economic, Social and Cultural Rights of the United Nations in its General Comments identified four essential elements of the right to health:

(i) Availability – public health and health care facilities, goods and services and programmes should be available in sufficient quantity.

(ii) Accessibility – health facilities, goods and services have to be accessible to every one without discrimination.

(iii) Acceptability – all health facilities, goods and services must be respectful of medical ethics and culturally appropriate.

(iv) Quality – health services must be scientifically and medically appropriate and of quality.

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An initial question one would be prompted to ask is whether the Sri Lankan constitutional cum statutory regime adequately responds to the said four elements and secondly, whether there is an adequate institutional cum administrative framework in place necessary to implement that statutory commitment.[1]

Bearing in mind that the Constitution of Sri Lanka does not expressly recognise the right to health as a fundamental right or otherwise[2] and having regard also to the fact that there is no authoritative judicial pronouncement either on such a right, whether expressly or impliedly, the primary object of this chapter is to examine the options that could be pursued to promote recognition of a right to health.[3] Towards that objective, the existing statutory regime as well as relevant judicial precedents will be examined and commented upon, drawing inspiration from international standard setting norms and from initiatives taken by other jurisdictions. This chapter will also address certain consequential issues that arise from the concept of a right to health.

2. The Right to Health and Constitutional Provisions

Neither in the Chapter on Fundamental Rights in the Constitution nor in the Chapter on Directive Principles of State Policy is there any reference to the right to health. This stands in contrast to some other socio-economic rights such as housing, which finds expression at least in the Directive Principles of State Policy.[4] A strained argument perhaps may be advanced in the context of Article 27(2)(c) that the said Directive Principles acknowledge the State's commitment to environmental health, which may be regarded as an aspect of the broad concept of the right to health on account of the phrase 'the continuous improvement of living conditions' employed in the said Article. Article 27(2)(14) may be used to buttress such an argument. That Article decrees that "The State shall protect, preserve and improve the environment for the benefit of the community."[5]

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1 This latter question does not fall within the scope of this paper.
2 As opposed to a statutory right.
3 In the sense of 'justiciability' of such a right.
4 Article 27(2)(c) of the Constitution.
5 Other provisions carrying an implied impact are discussed later in this chapter.

3. The Right to Health and International Norms

Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises in explicit terms the right to health. Apart from the ICESCR, there are a host of international covenants recognising the right to health. Article 5(e)(iv) of the Convention on the Elimination of Racial Discrimination, Article XI of the American Declaration on the Rights and Duties of Man and Article 25 of the Universal Declaration of Human Rights serve as examples.[6] Although Sri Lanka has ratified the ICESCR, it has not been incorporated into domestic law either in any statute or in any provision in the Constitution as noted earlier. Against that background, first, the statutory regime and then authoritative judicial decisions impacting on the right to health and medical care in Sri Lanka will be examined.

4. Statutory Regime relating to Health

4.1 The Penal Code

Under the Penal Code,[7] the unlawful or negligent[8] or malicious spreading[9] of any infectious disease dangerous to life is made punishable with imprisonment or fine. These provisions not only reveal a statutory right to life but also establish a clear link between the right to life and the right to health. Thus, sometimes when it is argued that the Constitution does not expressly recognise the right to life, what is meant is that the Constitution does not expressly recognise the right to life as a right in the Fundamental Rights Chapter for the violation of which an application under Article 126(1) read with Article 17 of the Constitution might or might not be brought. It is that right that was in effect recognised by the Supreme Court decisions of *Silva v Iddamalgoda*[10] and *Wewalage Rani Fernando v OIC, Seeduwa Police*

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6 See also the Preamble to the Constitution of the World Health Organisation (WHO).

7 Vol. II, Chapter 25, Legislative Enactments of Sri Lanka (LESL) 1980 (Revised).

8 Ibid., Section 262.

9 Ibid., Section 263.

10 (2003) 2 SLR 63 per Justice (Dr.) Mark Fernando. (See also the judgment of Justice (Dr.) Shirani Bandaranayake on a preliminary ruling, (2003) 1 SLR 14).

Station[11] in construing Articles 11 and 13(4) of the Constitution as implying the right to life itself.

When one takes into consideration the opening words of Article 13(4) that, "no person shall be punished with death or imprisonment except by order of a competent Court made in accordance with procedure established by law..." and compare the same with the wording in Sections 262 and 263 of the Penal Code that, "whoever unlawfully or negligently (or maliciously) does any act, which is likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment ... or fine," it becomes clear that just as much as Articles 11 and 13(4) could be construed (as the Supreme Court did)[12] as implying the right to life in the Constitution enabling a victim's heirs to file an application for violation of Article 11 , Sections 262 and 263 of the Penal Code lend themselves to the proposition that there is clear statutory recognition of the right to life.[13] On account of the demonstrable nexus between that right and the acts contemplated in the said Sections of the Penal Code relating to health, it is submitted that there is little room for doubt that the right to health is statutorily recognised in the law of Sri Lanka. That proposition is buttressed by the provisions of Sections 264 to 271 of the said Code, which make several acts hazardous to the health of persons punishable offences.

The question that remains to be addressed is, like in the case of the right to life, whether an argument could be addressed that the right to health could also be regarded as being impliedly recognised in the Constitution, thus making the same amenable to the fundamental rights jurisdiction of the Supreme Court. Then, if not, what measures ought to be pursued to achieve that objective and further, what purpose it would serve in the context of the Constitution and law of Sri Lanka in a rights related sense. With that objective in mind, other pieces of legislation and subsidiary legislation may now be examined.

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11 SC/FR/700/2000, SC Minutes 26.07.2004.

12 See note 11 above.

13 Sections 293 to 298 of the *Penal Code* throw further light on this proposition.

4.2 Classification of Legislation Impacting on Health Concerns

Besides the provisions contained in the Penal Code, legislation impacting on health concerns may be conveniently classified into four broad categories, namely;

(1) Legislation pertaining to the regulation of different systems of medicine,
(2) Legislation directed at the organisation and administration of health care,
(3) Legislation relating to the control and treatment of diseases, and
(4) Legislation dealing with inter-sectoral cooperation.

4.2.1 Legislation pertaining to the Regulation of Different Systems of Medicine

The Homeopathy Act No. 7 of 1970,[14] the Medical Ordinance No. 26 of 1927 (as amended)[15] and the Ayurveda Act No. 31 of 1961 (as amended)[16] fall into this category.* Through provisions regarding development and encouragement of measures for the investigation of diseases and for the improvement of public health, the Homeopathy Act has shown a legislative commitment to the right to health. Section 23(h) in particular, which provides that the Council (established under the Statute) is empowered to suspend or withdraw recognition to any recognised homeopathic institution which is not conducted in accordance with such conditions as are required under the Act, is of special significance.[17] The same legislative commitment is depicted in the provisions of the Medical Ordinance dealing with the erasure of names from the relevant registers of medical practitioners,[18] dentists,[19]

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14 Vol. VI, Chapter 117, (LESL) 1980 (Revised).
15 Vol. VI, Chapter 113, (LESL) 1980 (Revised).
16 Vol. VI, Chapter 116, (LESL) 1980 (Revised).
* The valuable research material made available in the preparation of this paper in this regard by Ms. Chithralega Thavachelvam, LL.B. (Col.) and Attorney-at-Law, Project Co-ordinator – Right to health (Law & Society Trust, Colombo) is hereby acknowledged.
17 This aspect will be commented on later.
18 Sec. 33(c).
19 Sec. 45(c).

midwives,[20] pharmacists[21] and nurses.[22] The Ayurveda Act is to a like effect.[23]

4.2.2 Legislation Directed at the Organisation and Administration of Health Care

The Health Services Act. No 12 of 1952 (as amended),[24] the Nursing Homes (Regulation) Act No. 16 of 1949 (as amended),[25] the Medical Wants Ordinance (as amended),[26] the Food Act,[27] the Cosmetics, Devices and Drugs Act No. 27 of 1980[28] and the Poisons, Opium and Dangerous Drugs Ordinance No. 17 of 1929 (as amended)[29] may be accommodated under this heading.

While positive health care is the underlying theme behind the first three statutes referred to above, the latter three are specifically directed at preventing injury to health of a user of any item of food[30] or device[31] or dangerous drug[32] resulting in penal consequences to any person who may cause such injury to health.[33]

4.2.3 Legislation Relating to the Control and Treatment of Diseases

Diseases (Labourers) Ordinance No. 10 of 1912 (as amended),[34] Venereal Diseases Ordinance No. 27 of 1938,[35] Lepers Ordinance No. 4 of 1901 (as amended),[36] Mental Diseases Ordinance No. 1 of

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20 Sec. 52(c).
21 Sec. 57(c).
22 Sec. 64(c).
23 Sec. 57(c).
24 Vol. XVII, Chapter 550, (LESL) 1980 (Revised).
25 Vol. XVII, Chapter 551, (LESL) 1980 (Revised).
26 Vol. XVII, Chapter 558, (LESL) 1980 (Revised).
27 Vol. XVII, Chapter 544, (LESL) 1980 (Revised).
28 Vol. XVII, Chapter 545, (LESL) 1980 (Revised) as further amended by Act No. 38 of 1984.
29 Vol. XVII, Chapter 549, (LESL) 1980 (Revised) as further amended by Act No. 13 of 1984.
30 Sec. 2(1)(a) of the *Food Act.*
31 Sec. 5 of the *Cosmetics, Devices and Drugs Act.*
32 The *Poisons, Opium and Dangerous Drugs Act* in general. See also Sections 265 to 269 of the *Penal Code.*
33 For example, Sec. 26 of the *Cosmetics Act* and Sec. 18 of the *Food Act.*
34 Vol. XVII, Chapter 557, (LESL) 1980 (Revised).
35 Vol. XVII, Chapter 556, (LESL) 1980 (Revised).
36 Vol. XVII, Chapter 560, (LESL) 1980 (Revised).

1873 (as amended),[37] Contagious Disease Ordinance No. 8 of 1866 (as amended)[38] and the Quarantine and Prevention of Diseases Ordinance No. 3 of 1897[39] together with Section 264 of the Penal Code fall into this category.

The ground common to these statutes is that they all address both preventive as well as curative aspects of medicines and thus leave no room for any doubt in so far as the legislative recognition of the right to health.

4.2.4 Legislation Dealing with Inter-Sectoral Co-operation

The Inter-Sectoral National Consultative Council Act of 1987, which was brought about as an amendment to the Health Services Act,[40] the National Health Development Fund Act No. 13 of 1981 (as amended by Act No. 17 of 1984) and the National Dangerous Drugs Control Board Act No. 11 of 1984 may be viewed as some of the more recent legislative measures taken under this head. As a broad proposition, it may be stated that these statutes have been designed to improve the working and implementation of the laws classified under the three categories discussed earlier in this chapter.

4.3 Subsidiary Legislation Impacting on the Right to Health

Several provisions of the Local Authorities Ordinance and the Nuisances Ordinance (as amended)[41] recognise both expressly and impliedly the right to health. Section 100 of the Municipal Councils Ordinance[42] imposes a duty on Municipal Councils to cleanse and empty drains that may be injurious to public health. Similar duties are imposed in

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37 Vol. XVII, Chapter 559, (LESL) 1980 (Revised).
38 Vol. XVII, Chapter 555, (LESL) 1980 (Revised).
39 Vol. XVII, Chapter 553, (LESL) 1980 (Revised).
40 See note 24 above.
41 Vol. XVII, Chapter 562, (LESL) 1980 (Revised), Secs. 2(1), (4) and (11).
42 Vol. XVIII, Chapter 576, (LESL) 1980 (Revised)

regard to unsanitary buildings,[43] conservancy and scavenging,[44] and nuisances[45] on the said local authorities.[46]

5. The Right to Health and its Statutory Recognition and Implementation

5.1 Criminal Prosecutions and Article 140 Applications

The foregoing analysis of several laws and subsidiary legislation establish firmly a statutory right to health in Sri Lanka. While the Penal Code provisions highlighted in this chapter[47] reveal that penal consequences would entail if that right is violated in the circumstances laid down in those provisions, thus resulting in criminal prosecutions, an application under Article 140 of the Constitution of Sri Lanka[48] would be the remedial action or relief available to a person whose health has been placed in jeopardy on account of statutory functionaries failing to discharge their functions and/or duties relating to the regulation of different systems of medicine or the organisation and administration of health care or the control and treatment of diseases or aspects of inter-sectoral cooperation.[49]

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[43] Sec. 124 of the *Municipal Councils Ordinance.*
Compare Sec. 123 of the *Urban Councils Ordinance* (Vol. XVIII, Chapter 577) and Sec. 98 of the *Pradeshiya Sabhas Act* No. 15 of 1987.

[44] Sec. 129 of the *Municipal Councils Ordinance.*
Compare Sec. 118 of the *Urban Councils Ordinance* and Sec. 93 of the *Pradeshiya Sabhas Act.*

[45] Sec. 132 of the *Municipal Councils Ordinance.* To a like effect is Sec. 126 of the *Urban Councils Ordinance and* Sec. 100 of the *Pradeshiya Sabhas Act.*

[46] See also Sec. 137 which imposes a statutory duty on medical practitioners and occupiers of buildings to report on infectious diseases and epidemics for the breach of which penal consequences are provided.

[47] See notes 8 and 9 above.

[48] For example, an application for an order in the nature of a writ of Mandamus.

[49] See also Article 154P(3)(b) of the Constitution read with Sec. 7 of the *High Court of the Provinces (Special Provisions) Act* No. 16 of 1990.

5.2 Authoritative Judicial Precedents impacting on the Right to Health

At the outset, it must be noted that there is no authoritative express judicial pronouncement on the right to health in Sri Lanka. The observation was earlier made that there are penal consequences visiting any person who violates certain provisions of the Penal Code[50] and certain other statutes[51] relating to another's life and health. Reference was also made to the question as to what remedial action could be taken for the breach of functions imposed on certain functionaries relating to the regulation of different systems of health, the organisation and administration of health care, the control and treatment of diseases and inter-sectoral cooperation. Bearing these considerations in mind, it is proposed to examine certain judicial precedents, though not expressly pronouncing upon a right to health, that could be construed as impliedly acknowledging such a right.

The Supreme Court decision in *SmithKline Beecham Biological S.A. and Another v State Pharmaceutical Corporation of Sri Lanka and Others*[52]

The rubella viral vaccine is used on pregnant women to immunise their babies, thus carrying the implication that the non-use of it could expose them and newborn babies to risk of health and life. Upon the State Pharmaceutical Corporation (SPC) (on behalf of the Director of Health Services) calling for tenders for the supply of the vaccine, only SmithKline, which was a past supplier and whose products were registered with the Cosmetics and Drugs Authority (CDA), tendered in terms of the government tender procedure and requirements. However, only 2.5 million doses were awarded to Smith Kline. BS, which was not even registered at the relevant time with the CDA, was awarded 2 million doses in breach of tender requirements, allowing it time to obtain registration. The Supreme Court found the SPC's conduct violative of Article 12(1) of the Constitution in that it offended the principle of equal opportunity.

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50 Ibid.

51 For example, *The Cosmetics Act* and the *Food Act*, see note 33 above.

52 (1997) 3 SLR 220.

The following observations may be made as arising from the judgment of the Supreme Court.

Acknowledgement of the right to life (and health)

It was noted earlier that the right to life as a constitutional right was recognised by the Supreme Court in the context of Articles 11 and 13(4) of the Constitution.[53] The Supreme Court decision in the *SmithKline* case may also be regarded as a decision recognising the right to life in the context of Article 12(1) of the Constitution. In that case, Justice Amarasinghe observed, "when any authority is dealing with a product concerned with the lives of the people including the unborn citizens of Sri Lanka, as in the case of Rubella Vaccine, ... would the government compromise, may it gamble? Can it afford to do with less than the best available in terms of efficiency?"[54]

Implied response to imperative concomitants of the right to health

The four elements of the right to health as identified by the United Nations were noted earlier.[55] The availability criterion in regard to health care facilities and goods is seen satisfied in the initial steps taken by the SPC (on behalf of the Director of Health Services) to secure a vaccine under consideration. The judicial response to the criterion of quality is reflected in the words, "... would the government compromise, may it gamble? Can it afford to do with less than the best available in terms of efficiency?"

It is submitted that the *SmithKline* case is a judicial decision that has in effect or impliedly upheld both the right to life and the right to quality of healthcare.

Sanjeewa, Attorney-at-Law (on behalf of Gerald Mervin Perera) v OIC Wattala [56]

Consequent to being subjected to torture by the police, the petitioner was medically advised to seek immediate treatment at a leading

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53 See notes 10 and 11 above.
54 See note 52 above, at page 237 of the judgement.
55 See page 1.
56 (2003) 1 SLR 317.

hospital. He admitted himself to the intensive care unit of a private hospital and later claimed reimbursement for the medical expenses he had incurred. Counsel for the respondents argued that the charges at the private hospital in question were exorbitant and that the petitioner could have sought treatment at a State hospital.

Right to life and its links to a right to quality of health and/or healthcare

Rejecting the argument advanced on behalf of the respondents, the Supreme Court upheld the right to life and the right to medical care as an aspect of the right to health. Having made the observation that many Sri Lankans opt for treatment in private hospitals, however good the standard of treatment in State hospitals may be, because of fear of delays, overcrowding, strikes, shortages of equipment and drugs, Justice M DH Fernando held thus, "Citizens have the right to choose between State and private medical care in order to save (a) patient's life..."[57]

It will be noted that the right to choose between state and private medical care was recognised in the context of a patient's life being in issue, thus upholding a right to quality of healthcare so far as it is linked to the right to life. The question whether a citizen (or a person) would be entitled to quality of health services when life itself is not in issue, however, remains a question that needs to be addressed.

Acknowledgement of Article 12 of the International Covenant on Economic Social and Cultural Rights (ICESCR)

In declaring the citizen's right to choose between state and private medical care when a patient's life is in issue, Justice Fernando called in aid Article 12 of the ICESCR, which recognises the right of everyone "to the enjoyment of the highest attainable standard of physical and mental health."[58]

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57 Ibid.
58 Ibid.

Denial of medical treatment (services) of a patient's choice and the right to health

In *Udeni Renuka Gunawardena v Dr. Guruge Wimalasiri and Others*,[59] a government hospital, *inter alia*, had refused to perform a Caesarean operation, which refusal was against the petitioner's wishes as she desired such an operation. The petitioner had then admitted herself to a private hospital for the birth. Subsequently, the petitioner's application based on an alleged violation of her fundamental rights was dismissed by the Supreme Court. She alleged in her application that at a time she was in a serious condition, the saline tubes had been ripped off her and she had been chased from the labour room to the ward. The Court found that these factual allegations raised in the context of Articles 11 and 12(1) of the Constitution had not been established and in the process the Court does not appear to have addressed its mind to a patient's right to choose, particularly a pregnant mother's right to choose a certain kind of medical service (Caesarean delivery) in preference to another (normal delivery) particularly when the same was available at the state hospital in question. The Committee on Economic, Social and Cultural Rights of the United Nations had identified accessibility as an essential element of the right to health, that is, health facilities, goods and services have to be accessible to everyone without discrimination.[60] In the context of Article 12(1) of the Constitution, which postulates non-discrimination and non-arbitrariness, wouldn't it have been arbitrary and discriminatory to deny the petitioner the right to choose between a Caesarean operation as opposed to a normal delivery, particularly in the light of *Gerald Perera's* case?[61] This is another aspect that remains to be addressed in the future in the context of the concept of the right to health.

6. The Right to Health – its scope and content as judicially recognised

The foregoing analysis of the available case law in Sri Lanka reveals that not only has the right to health been recognised statutorily but that it has been upheld in a Constitutional context as well. Availability and quality of health care facilities, goods and services as essential elements of the right to health,[62] right to quality of health services and

59 SC (FR) Special 69/99, SC Minutes 26.01.2004.
60 See page 1.
61 See note 56 above.
62 The *SmithKline* decision, see note 52 above.

its links to the right to life.[63] The above, taken cumulatively lend support to the argument that the Supreme Court has impliedly recognised a Constitutional right to health within the framework of Articles 11 and 12(1) of the Constitution. Further, despite the decision of the Supreme Court in *Udeni Renuka Gunawardena v Dr. Guruge Wimalasiri and Others*[64] in which the Court was not called upon to consider the matter from the standpoint of the right to health, the argument that the denial of medical services of a patient's choice could amount to a denial of accessibility to the right to health may possibly be urged in another appropriate case.

7. Adequacy of the Scope and Content of the Right to Health in Sri Lanka

Although the statutory regime and Constitutional provisions as judicially interpreted surveyed above lend support to the proposition that the right to health is recognised in the law of Sri Lanka, it remains to address the adequacy of its scope and content. Towards that end, the legal and constitutional position of some foreign jurisdictions in regard to the right to health will be examined.

7.1.1 Argentina and the case of *Viceconte Ministry of Health and Social Welfare*[65]

The right to medicine

The Constitution of Argentina expressly incorporates, *inter alia*, the ICESCR and permits the direct application of international human rights norms.[66] Furthermore, a liberal approach to the concept of locus standi has been accepted within the framework of the Constitution enabling individuals and organisations, in the public interest, to institute proceedings concerning rights violations.[67]

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[63] The *Gerald Mervin Perera* case, see note 56 above.

[64] See note 59 above.

[65] See, for a comprehensive account of the facts of the case, *Litigating Economic, Social and Cultural Rights*, (Geneva: COHRE, 2003), 60-65.

[66] See, Constitution of Argentina, 1853, Article 43 (as amended in 1994).

[67] Called an Amparo action (class action).

The Pampas region of Argentina was struck by a haemorrhagic fever and the rate of deaths began to increase. The Argentinean Government, which had obtained a vaccine[68] in the past from an American private supplier, that could counter the fever, was unable to do so on this occasion because the supplier had stopped production. Consequently, the vaccine was non-accessible. A law student from the affected region instituted an amparo action[69] asking the State to construct its own laboratory to produce the vaccine in order to make it accessible. Following a response on the part of the Ministers of Health and Economy, who initiated a budget proposal in Parliament, the original Court ruled the question moot and while the Court ruled that it had no jurisdiction to look into the matter, the petitioner's claim for ecological reconstruction (to prevent the disease)[70] also failed for evidentiary complexity.[71] The Federal Court of Appeal, however, upheld the petitioner's claim holding that the government was legally obliged to intervene to provide health care when the same was not forthcoming from individuals and the private sector.

The following features discernible from the judgment and consequential matters arising therefrom may be noted at this point as bearing relevance to the Sri Lankan situation.

Significance of incorporating the terms of the ICESCR relating to the right to health in the Constitution and the concepts of justiciability and locus standi

As noted earlier, the Argentinean Constitution incorporates international treaties relating to the right to health. The Court inferred principally (from the fact of such incorporation) the right of any individual (and not only a person directly affected) to institute proceedings concerning the right to health.[72]

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[68] Described as the Candid I vaccine.

[69] See note 67 above.

[70] That is, to rehabilitate those environments where the disease was spreading.

[71] *Litigating Economic, Social and Cultural Rights,* op. cit., 61.

[72] Besides the ICESCR, Article XI of the American Declaration on the Rights and Duties of Man and Article 25 of the Universal Declaration of Human Rights.

Reflections on the Sri Lankan situation – is there a need to elevate the right to health to Constitutional status?

Article 15(7) recognises "protection of public health" as a provision qualifying the fundamental rights recognised in Articles 12,13 and 14 of the Constitution. Thus, to that extent it could be contended that the said Article recognises impliedly a right to health. Articles 27(2)(g), 27(13) and (14) may be regarded as buttressing that right. Yet, Article 29 reflects precisely the converse of the Constitutional provision in Argentina. However, as demonstrated in an earlier part of this chapter, a clear statutory right to health in Sri Lanka is discernible.

Two competing arguments are possible in the wake of this statutory cum constitutional scenario. One argument would be to the effect that whatever statutory right and implied right in Articles 27(2)(g), (13) and (14) of the Constitution there may be, the same is taken away on account of Article 29. The counter-argument to that may be grounded on a three-fold basis. First, that a right to health is not (at any rate expressly) recognised in the Constitution (the reference to "protection of public health" being in the context of and restricted to the applicant claiming rights based on Articles 12,13 and 14) and thus the statutory right that is discernible is not caught up in terms of Article 29 of the Constitution and therefore remains justiciable. Secondly, that in any event, Article 29 could not have been intended to set at nought the gamut of statutory provisions that incorporate a statutory right to health which include Sections 262 and 263 of the Penal Code as well,[73] which is further buttressed by the fact that Article 16(1) of the Constitution provides for the continuance of "all existing written law and unwritten law notwithstanding any inconsistency with the preceding provisions of the Constitution" and not the subsequent provisions which would include Article 29. Thirdly, even if the contrary arguments are possible, given the fact that the issue is one regarding justiciability and therefore consequentially involving the jurisdiction of Courts, a presumption must necessarily be drawn in favour of a jurisdiction which enhances the protection of the rule of law and against an interpretation that undermines it by seeking to take away existing rights.[74]

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[73] See notes 8 and 9 above.

[74] See, by analogy of reasoning Justice (Dr.) Mark Fernando in *Peter Atapattu v People's Bank* (1997) 1 SLR 208 at 222.

Thus, upon reflection on the Sri Lankan situation, it is submitted that, even without the need to elevate the right to health to constitutional status, the said right very much exists within the statutory framework of the country. This right, upon an objective and purposive construction of the relevant constitutional provisions referred to above, remains justiciable. This proposition stands further vindicated on the basis of the few available judicial precedents in Sri Lanka which were referred to earlier.[75] Nevertheless, the scope and content of such a right remains to be addressed if it is not accorded constitutional status. For example, could the *Viceconte* case have been decided similarly within the statutory cum constitutional framework of Sri Lanka?[76] This question leads to reflection of other issues arising from the judgement handed down by the Argentinean Federal Court of Appeal.

Personal Obligation of relevant Ministers to implement the Right to Health

Another striking feature in the Argentinean decision is where the Court compelled the government to provide a vaccine to prevent an endemic fever and imposed that obligation personally on the Ministers of Health and Economy within a specified time schedule. How that personal obligation was effected is the significant feature in the judgement. The Minister of Economy was the Minister who had control over the release of budgeted funds. By requiring the construction of a laboratory, the Minister was compelled to reallocate budgeted funds of which he had control and release funds for the said construction. While this became his personal obligation, the obligation on the part of the Minister of Health was to construct the laboratory for the purpose of manufacturing the required vaccine.

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[75] See notes 52 to 61 above.

[76] Contra for instance the limited scope within which the Supreme Court of Sri Lanka had to grapple with in the *SmithKline* case, see note 52 above.

Reflections on the Sri Lankan situation – conversion of undisputed political decisions to legal obligations

It is a generally accepted proposition that courts will not interfere with resource allocation and technical policy decisions.[77] The Argentinean Court was, however, able to overcome this problem on account of the government being forced to admit the need for the vaccine in question to arrest the ongoing epidemic. This was the result of intense lobbying and campaigning. Thus, a political decision having been reached, which acknowledged the need for the vaccine in question, a public policy debate was avoided in court. The Court would anyway not have been inclined in any event to entertain such debate, since issues of jurisdiction would have arisen.[78] On the contrary, what the Court was invited to do in the case was merely transforming or converting an undisputed political decision to a legal obligation.

The decision carries an object lesson for Sri Lanka and focuses attention on the role that civil society as well as stakeholders and the media are required to play in carrying out effective campaigning and lobbying to secure undisputed political decisions on socio-economic and cultural rights, including the right to health, in a bid to prepare the groundwork to have such decisions converted to legal obligations through the interventions of Courts.[79] The practical value to society of such social action is amply demonstrated by the fact that the upshot of the Court's decision in Argentina was the development of a Social Plan to deliver basic medicines.

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77 Subject to the qualification that, where a change of existing policy is sought to be effected, individuals who might be adversely affected must be given an opportunity to be heard. See *Dayaratne v Minister of Health and Indigenous Medicine* (1999) 1 SLR 393. See also *ex parte Asif Mahmood Khan* (1984) 1 WLR 1337 and *ex parte Liverpool Taxi Fleet Association* (obiter) (1972) 2 QB 299. Compare also *Council of Civil Service Unions v Minister for Civil Service* (1985) 1 AC 374.

78 In such situations, indirect ways of asserting rights might have to be resorted to, for instance, through the right to information and expression, thereby subjecting to public scrutiny governmental inactions or decisions.

79 Such social initiatives are imperative to make the government publicly accountable in situations that do not under existing procedures compel such accountability through judicial intervention, for example, use of funds for tsunami victims.

7.1.2 India and the Right to Health

The case of *Paschim Bangakhet Mazdoor Samity v State of West Bengal*[80] was a case in which a patient died in consequence of denial of emergency medical treatment at a public hospital, which had no facilities including space (a bed) to accommodate the patient. Upholding that the right to life expressly implied in Article 21 of the Constitution had been violated, the Supreme Court held that the obligation on the part of the State to preserve human life and to improve health facilities towards that end exists irrespective of financial constraints.

In *Consumer Education and Research Centre v Union of India*,[81] the Court, while reaffirming the connection between the right to life and the right to health, held that it is a fundamental right of a workman not only to be protected from health hazards in the workplace but also to have the State take affirmative action to promote health, strength and vigour of the workman during employment as well as after retirement.

In *Mahendra Pratap Singh v State of Orissa*,[82] the right to health was extended to cover the state's obligation to provide at least primary health care centres in villages.[83]

7.1.3 Advances made in other selective jurisdictions: specific Constitutional incorporation of the Right to Health – South Africa and Venezuela

South Africa and Venezuela fall into the category of countries where their constitutions make express provisions recognising the right to health.[84] While Section 27 of the South African Constitution gives expression to the right in the form of a right of access to health care

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80 (1996) SOL Case No. 169 (S.C. India).

81 1995 SOL Case No. 266.

82 1997 (Orissa) 37.

83 These Indian authorities were extracted from Megan Bremer, "Flexing Constitutional Muscles to Enforce Health Rights: Case Studies from India, South Africa and Venezuela," *Moot Point* 7 (2003-2004): 112-128.

84 The Argentinean Constitution was referred to earlier.

services including reproductive health care[85] and a right not to be refused emergency medical treatment,[86] the Constitution of Venezuela firmly establishes the right in unqualified terms[87] apart from the fact that the Supreme Court has acknowledged the Venezuelan law which permits the direct invocation of international conventions by a citizen,[88] thus opening up Article 12 of the ICESCR in its application to the right to health.

In pursuance of these positive constitutional provisions the South African Courts have upheld the obligation of the State to provide health care services, in effect, as including the obligation to increase such services to HIV/AIDS patients by compelling nationwide distribution of the drug Nevirapine (NVP) to be given to mothers during childbirth which had been found to prevent mother to child transmission of the disease.[89] Likewise, the Venezuelan Supreme Court,[90] rejecting the Government's financial constraints or budgetary inhibitions argument, has held that the right to health had been violated by the state on account of its failure to provide the antiretroviral (ARV) therapies medically proven to prolong the lives of HIV/AIDS patients, to which category the petitioners belonged.[91]

In contrast, having regard to Article 27(2) of its Constitution which states "the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights...,"[92] the South African Constitutional Court, being influenced by the budgetary constraints the government was subjected to, adopted a restrictive view of the right to health in that the decision

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85 Sec. 27(1).

86 Sec. 27(3), although Sec. 39' binds the Constitutional Court to take into consideration international law including the ICESCR.

87 Article 76.

88 *The Cruz Bermudez* case (July, 1999) discussed in "Flexing Constitutional Muscles to Enforce Health Rights: Case & Studies from India, South Africa and Venezuela." op. cit., 121-125

89 *Minister of Health and others v Treatment Action Campaign and Others*, CCT 8/02. See further, "Flexing Constitutional Muscles to Enforce Health Rights: Case & Studies from India, South Africa and Venezuela,." op. cit., 121-125.

90 The *Cruz Bermudez* case.

91 See for a fuller discussion, note 88 above.

92 That is, health care, food, water and social security.

of a state hospital which had denied admission to a man who was suffering from chronic renal failure, and whose life could only be prolonged by an ongoing dialysis treatment, was upheld on the reasoning that although the right not be refused emergency medical treatment under section 27(3) of the Constitution would include the State's obligation not to deny a person remedial treatment that is necessary and available to forestall harm in the case of a sudden catastrophe or emergency, it did not extend to providing on-going treatment of chronic illness for prolonging life.[93] The Court held "... to hold otherwise would make it substantially more difficult for the State to fulfil its primary obligations... to provide health care services to everyone within its available resources."[94]

Against the background of the positive developments in other jurisdictions relating to the right to health as recounted above, it is proposed to assess the existing scenario in Sri Lanka with a view to suggesting not only improvements to the existing legal cum constitutional framework but also reflecting upon fresh initiatives that need to be taken by civil society in general and other stakeholders towards making real the right to health.

8. The need for a more viable framework and fresh initiatives to make real the right to health in Sri Lanka – lack of initiative to have such right enforced or implemented

8.1 Statutory Right to Health as distinguished from a Constitutional right

Ever since the formation of the League of Nations and the United Nations followed by the UDHR, the need for recognition and advancement of human rights has been acknowledged and conceded by all developed legal systems, culminating in the ICCPR and ICESCR besides other international conventions. Some countries have incorporated the provisions of these conventions into their constitutions and domestic laws, which has paved the way for a progressive body of human rights jurisprudence to evolve in its wake.[95] In so far as the

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[93] *Subramooney v Minister of Health, KwaZulu-Natal* (1998) 1 SA 765 (CC).

[94] Ibid.

[95] South Africa, Venezuela and Argentina serving as examples.

right to health is concerned, finding as it does its setting in the context of the ICESCR, it is only by an extended if not strained argument that certain constitutional provisions could be construed as being even tokenly suggestive of a recognition of a Constitutional right to health in Sri Lanka.[96] Nevertheless, a statutory right to health could easily be discerned from the numerous statutes that impact on health and health concerns.[97] The possibility of launching criminal prosecutions and filing applications under Article 140 of the Constitution for violations or breaches of that right was noted.[98] What is lacking presently is initiative to have the said right enforced or implemented.

8.2 The need for public awareness campaigns and good governance programmes and test actions regarding the statutory right to health – Role for Non-Governmental Organisations (NGOs) – a prescribed formula

Consequently, there is an imperative need not only to educate the public but also to make relevant statutory functionaries aware of the statutory existence of the right to health. A meaningful and necessary role of NGOs is identifiable in this context where both these demands could be addressed respectively through public awareness campaigns with the assistance of the media and good governance programmes in the first instance and through test actions where relevant statutory functionaries fail in the discharge of their duties.

9. The limits and scope for Supreme Court initiatives in the context of the Fundamental Rights Chapter

9.1 Need for express constitutional provisions regarding the right to health

The few decisions of the Supreme Court surveyed in this chapter show the limits and scope for Supreme Court initiatives in the context of the Constitution of Sri Lanka. Availability and quality of health care facilities, goods and services being recognised as essential elements of the right to health,[99] the establishment of links between the right to life

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[96] See notes 73 and 74 read with note 5.
[97] See notes 14–47 above.
[98] See notes 47-49 above.
[99] (1997) 3 SLR 220, see note 52 above.

and the right to quality of health,[100] the implied recognition of the principle that denial of medical services of a patient's choice could amount to a denial of accessibility to the right to health,[101] may lend strong support for the argument that the Supreme Court has elevated the right to health to a constitutional level within the framework of Article 12(1) and/or Article 11 of the Constitution. Yet, could it be seriously contended that the Sri Lankan Supreme Court would be in a position to respond similarly to the issues that come up for consideration in countries such as India,[102] Argentina,[103] Venezuela[104] and South Africa?[105]

More than any other factor, the budgetary constraints argument linked to the unreviewable policy factor coupled with the absence of an express provision relating to the right to health would stand in the way of such a contention, although the Supreme Court over the years has shown an inclination to recognise, adopt and apply international conventions as being part of the law in the country. This judicial approach has varied from interpreting statutory provisions[106] and constitutional provisions[107] in the light of international norms to the direct application of international norms.[108]

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100 (2003) 1 SLR 317, see note 56 above.

101 See note 59 above.

102 See notes 80-82 above.

103 See note 65 above.

104 See note 88 above.

105 See note 93 above.

106 *Sepala Ekanayake v Attorney-General* (1988) 1 SLR 46 where Articles 2 and 4(2) of the Hague Convention were referred to in interpreting the *Aircraft Act* No. 24 of 1982 (per Seneviratne, J.).

107 *Weerawansa v Attorney-General* (2000) 1 SLR 387 where Art. 27(15) of the Constitution was read in conjunction with Art. 9 of the ICCPR (per Justice MDH Fernando), *CPA and Dr. Saravanamuttu (and Rohan Edrisinha) v Dissanayake* SC Appeals 26 and 27/2002, CA Minutes 23.06.2003 where Art. 3 and 4(e) were read in conjunction with Art. 19 of the ICCPR (sic) (per Justice MDH Fernando)

108 *Silva v Iddamalgoda* (2003) 2 SLR 63 - (Art. 14.1 of the CAT Convention was applied in recognising a deceased torture victim's widow and minor child to sue and seek compensation) (per Justice MDH Fernando); *Sanjeewa v OIC Wattala* (2003) 1 SLR 317 where Art. 12 of the ICESCR was applied. (Per Justice MDH Fernando) and *Bulankulama v Secretary, Ministry of Industrial Development* (2000) 3 SLR 243.

10. Conclusion: the need for constitutional amendment and sensitising the judiciary

In conclusion, therefore, it is submitted that rather than the 'bottom-up' scenario that prevails at present, a 'top-down' framework would be preferable in regard to the recognition of the right to health. For this, objective express constitutional provisions must be incorporated in the Constitution,[109] perhaps with additional entrenched provisions providing that the health budget cannot be cut with further provision to increase the health share of the budget should such demands arise. Only then would there be a framework to make real the right to health with all its concomitant connotations. The other avenues in relation to the right that exist at present are only lesser options. One of the points made in this chapter has been that with regard to those lesser options, no initiatives have been taken either by civil society or the media in general or by even public interest groups or public spirited citizens in particular situations where such interventions might have been called for. Indeed unless such a social ethos soon emerges in the terms articulated above, Sri Lanka will surely earn the dubious reputation of a country that does not recognise and implement a constitutional right to health.

[109] See the Draft Constitution of 2000- clause 25(1).

IX

ANALYSIS OF THE PREVENTION OF DOMESTIC VIOLENCE BILL AND THE WOMEN'S RIGHTS BILL

*Ambika Satkunanathan**

1. Introduction

Today, international human rights law recognises gender inequality as a problem that needs to be tackled at both the national and international levels. In Sri Lanka, although the rights of women have been recognised to some extent, most women still experience discrimination and violence and occupy a disadvantaged position in society.

Sri Lanka as signatory to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) has a duty under

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international human rights law for actions that violate provisions of CEDAW. This Convention, which has been described as an international bill of rights for women, is a detailed and comprehensive document, which recognises that "a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women." Article 2 of CEDAW requires States to "pursue by all means and without delay a policy of eliminating discrimination against women," which includes the duty to "refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation." Further, CEDAW obligates States to "take all appropriate measures including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women." Hence, Sri Lanka as signatory to the CEDAW is obliged to ensure that the rights of women are protected and promoted.

This chapter will study two bills, the Prevention of Domestic Violence Bill and the Women's Rights Bill, which are aimed at strengthening the legal framework relating to women's rights in Sri Lanka.

2. Violence Against Women

Violence is a reality that many Sri Lankan women face daily. Statistics for the year 2003 state that in total there were 2,155 incidents of minor crimes against women. The category of minor crimes includes sexual harassment, assault and infliction of bodily harm amongst others.[1] In the case of 'serious crimes', such as rape, murder, attempted murder, severe bodily harm, severe sexual abuse and incest, the offences for the year 2003 total 1,506.[2] It should be noted there is no separate category for 'domestic violence' in these statistics.

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1 Police Department Statistics for 2003.
2 Ibid.

3. National Legal Framework Relating to Domestic Violence

Sri Lanka does not have specific legislation on domestic violence and the Penal Code does not criminalize domestic violence. Prosecution of domestic violence therefore has to be undertaken under other general sections such as Section 324 (assault) or Section 311 (causing grievous hurt). These provisions are, however, rarely used. Social conditions prevent women from reporting incidents of domestic violence and even when they do, the complaints are not taken seriously by the authorities or informal mediation mechanisms are utilised to settle cases.[3] Although the amendments to the Penal Code in 1995 expanded the definition of grievous hurt, it did not acknowledge violence against women as a crime. The amendments also did not take into account victims who may have suffered only minor physical injuries and those subject to psychological abuse.[4]

Divorce laws also impact upon the protection of victims of domestic violence in Sri Lanka. As the concept of 'no fault' divorce does not exist in Sri Lankan law, those seeking divorce have to do so on the grounds of constructive malicious desertion, adultery or incurable impotence.[5] This places a huge burden on a woman seeking divorce who, in addition to battling the social stigma attached to divorce, also has to deal with the gendered legal system. As the definition of constructive malicious desertion has been held to also include spousal abuse, it is possible to use this ground to apply for divorce, but once again, the woman carries a heavy burden of proof, as she will have to prove she was forced to leave the matrimonial home due to fear of harm to life and limb. Although judicial separation is available and can be converted to a divorce after two years,[6] case law illustrates that in this case too the party seeking the separation has to prove that further cohabitation with the plaintiff has become dangerous or intolerable

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3 Ameena Hussein, *Sometimes there is no Blood: Domestic Violence and Rape in Rural Sri Lanka* (Colombo: International Centre for Ethnic Studies, 2000), 11.

4 Ibid.

5 *Marriages (General) Ordinance No. 19 of 1907*, Section 19.

6 *Civil Procedure Code* as amended by Act No. 20 of 1977, Sec. 608.

and that this state of affairs was brought about by the unlawful conduct of the defendant.[7]

4. International Human Rights Standards and the Concept of Due Diligence

In 1992, the Committee on the Elimination of Discrimination Against Women adopted General Recommendation 19, in which it confirmed that violence against women constitutes a violation of human rights. It emphasises that "States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or investigate and punish acts of violence."[8] The Committee made recommendations on measures States should take to provide effective protection of women against gender-based violence, including:

- Effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including *inter alia*, violence and abuse in the family, sexual assault and sexual harassment in the workplace;
- Preventive measures, including public information and education programmes to change attitudes concerning the role and status of men and women;
- Protective measures, including refuges, counselling, rehabilitation action and support services for women who are the victims of violence or those who are at risk of violence.

The concept of due diligence has been advanced by the judgment of the Inter-American Court of Human Rights in the case of *Velasquez Rodriquez*.[9] This judgment, which represents an authoritative

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7 Hussein,op.cit., 13.

8 General Recommendation 19 (9), 11th session, 1992, accessed at http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19.

9 Inter-American Court of Human Rights, 1988, Ser. C No. 4, 9 Human Rights Law Journal. 212 (1988) quoted in Henry J. Steiner & Philip Alston, *International Human Rights in Context: Law, Politics, Morals* (Oxford: Oxford University Press, 2000), 881-887.

interpretation of an international standard on State duty, is one of the most significant assertions of State responsibility for acts by private actors. The due diligence requirement encompasses the obligation to both provide and enforce sufficient remedies to survivors of private violence. Thus, the existence of a legal system criminalizing and providing sanctions for acts of violence against women would not in itself be sufficient; the government would have to perform its functions to 'effectively ensure' that such incidents are investigated and punished. Indicators for measuring due diligence would be the existence of government programmes to protect victims of violence and the type of investigative and other actions taken by police and other State officials.

5. CEDAW Committee's Concluding Observations on Sri Lanka's 3rd and 4th Periodic Reports [10]

In its Concluding Observations on Sri Lanka's third and fourth Periodic Reports, the CEDAW Committee recognised violence against women as a serious problem facing Sri Lankan women. While urging the enactment of special legislation, the Committee points out issues which deserve special attention, such as the need to criminalize marital rape and the failure of the police to respond 'effectively and sensitively' to complaints of domestic violence. Violence perpetrated against women in the former conflict zones is highlighted with calls for State action, including making victims aware of their rights and increasing accessibility to means of redress.

6. Prevention of Domestic Violence Bill

6.1 Objectives, Definitions and Language

After continued lobbying by women's groups in Sri Lanka, the government presented the Prevention of Domestic Violence Bill on 19 November 2004. Although this is a welcome move by the government,

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[10] Accessed at http://www1.umn.edu/humanrts/cedaw/srilanka2002.html.

the Bill is inadequate, as it does not take a holistic approach to the issue of domestic violence. Although the long title of the Bill states it is "to provide for the prevention of any act of domestic violence and for matters connected therewith or incidental thereto," it focuses only on the issuance of protection orders. It has to be kept in mind that protection orders are often issued to prevent acts of domestic violence only after the first or first few acts of domestic violence have taken place. Hence, instead of criminalizing the act of domestic violence, this Bill appears to protect the victim only after an act of domestic violence has taken place. Hence, the Bill does not contain the message that domestic violence is a serious crime.

In addition, no plain language explanation of the Bill is provided which makes it inaccessible to the general public. As dissemination and public education activities are imperative if any Prevention of Domestic Violence legislation is to be effective, clear, accessible guidance should be issued alongside the Bill.

The United Nations Special Rapporteur on Violence Against Women has recommended the use of 'the broadest possible definition of acts of domestic violence.'[11] The definition of domestic violence in the Bill fails this test, as domestic violence is defined as an 'act which constitutes an offence in Schedule I' and 'any emotional abuse.'[12] Schedule I contains all offences contained in Chapter XVI of the Penal Code, which includes the offences of 'grievous hurt' and 'causing miscarriage,' while Section 327 covers 'extortion' and 'criminal intimidation.' The resort to a number of existing Penal Code offences instead of formulating a broad definition illustrates the reluctance to recognise domestic violence as a criminal offence in itself.

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[11] *Report of the UN Special Rapporteur on Violence Against Women,* Radhika Coomaraswamy, E/CN.4/1997/47, 12 February 1997, 18.

[12] *Prevention of Domestic Violence Bill*, Sec. 22.

6.2 Other measures required to prevent domestic violence

As stated above, as the Bill concentrates only on protection orders, it ignores other issues that contribute to preventing domestic violence and protecting victims of domestic violence. For example, the Bill does not make it compulsory for medical service providers to complain of incidents of domestic violence to the police; nor does it provide guidelines to police officers on how they should respond to complaints of domestic violence. In this regard, the United Nations Declaration on the Elimination of Violence Against Women should be followed. This Declaration calls upon States to take the following action in addition to enacting appropriate laws and procedures to provide redress to victims of violence:

- develop national plans to eradicate violence against women;
- train judges, lawyers and the police; and
- set up support services (shelters, legal and psychological counselling) for victims of violence.[13]

Even though the Bill states that it does not deprive the aggrieved person of the right to institute a separate civil action or criminal proceedings,[14] it is of concern that the legislation only deals with one aspect of domestic violence - i.e. the issuing of protection orders - instead of being comprehensive and providing both civil and criminal remedies. Ideally, the legislation should focus on the provision of:

- enhanced penalties for repeat offences, aggravated assault and use of weapons;
- clear sentencing guidelines;
- emergency services such as crisis-intervention centres and immediate medical care; and
- treatment for victims and offenders.

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[13] Article 4 , *Declaration on the Elimination of Violence Against Women*, accessed at http://www.un.org/documents/ga/res/48/a48r104.htm.

[14] *Prevention of Domestic Violence Bill*, Sec. 20.

6.3 Standing

According to the Bill, only the aggrieved person, i.e., the person who has been subjected to domestic violence, and a police officer on behalf of the aggrieved person can make an application for a protection order.[15] The Bill does not provide for any other person to make an application on behalf of a victim who may be unable to do so herself, due to fear of harm or violence. In the interest of victims of violence, it is imperative that provision is made to allow others to apply for a protection order on behalf of the victim.

6.4 Penalties and Prohibitions

The penalties in the enforcement provision of the Bill are weak and unlikely to deter the commission of acts of violence. For example, the Bill does not provide for a warrant of arrest upon the issuance of a protection order. Thus, whenever a court issues a protection order or an interim protection order, the court must make an order authorising the issue of a warrant for the arrest of the respondent and suspend the execution of such warrant subject to compliance with any prohibition, condition, obligation or order imposed. The warrant will remain in force unless the protection order is set aside or is cancelled after execution. A suspended warrant therefore saves the aggrieved person from initiating action once again in the Magistrate's Court to enforce the order in case a Protection Order or Interim Order is violated. If a suspended warrant of arrest is issued, the Police can immediately arrest the respondent when an Interim Protection Order or a Protection Order is violated. The aggrieved person will therefore have immediate relief. Although this might seem a draconian measure, in Sri Lanka where domestic violence is still thought to be a private act outside the purview of the law and where the victim has few legal remedies and has to deal with an insensitive and chauvinistic legal system, such a measure is the only means through which protection for the victim can be assured.

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[15] *Domestic Violence Bill*, Sec. 2.

6.5 General

The Bill does not have provisions that protect the privacy of the applicant and respondent. As victims might be reluctant to report crimes for fear of publicity or being shamed by their communities, it is important to include provisions to ensure that court proceedings are closed to the public and penalty provisions to deter individuals and media institutions from breaching the privacy of both the applicant and respondent.

As public education and awareness-raising play a pivotal role in preventing domestic violence and protecting the victims of violence, it is important for the Bill to contain provisions that make it mandatory for State institutions such as the Ministry of Health and Ministry of Women's Affairs to engage in public education programmes.

7. Women's Rights Bill

The Women's Charter, which was adopted in 1992, contains sections on political and civil rights, rights within the family, right to economic activity and benefits, right to education and training, right to health, right to protection from social discrimination and gender based violence. The focus of Part II is the establishment of a National Committee on Women. The Charter is not a legally binding document but one that sets out the action the State should take to protect and promote the rights of women. The National Committee on Women has amongst its functions the channelling of complaints of gender discrimination to appropriate and relevant authorities, monitoring action taken by relevant authorities and evaluating the impact of legislation development policies on the rights of women. The Women's Rights Bill is a move by the government to convert the National Committee into a National Commission on Women with more power.

In 2004, the Ministry of Women's Affairs made available to public scrutiny the Bill on Women's Rights (Sri Lanka) and called for

comments and suggestions from the public. As the Bill gave rise to certain concerns, the Ministry of Women's Affairs convened a meeting with several individuals and organisations where it was agreed that substantial amendments had to be made to the Bill. Accordingly, a technical committee was formed to revise the draft Bill. The National Committee on Women appointed Professor Savitri Goonesekere, Dr. Mario Gomez, Ms. Manouri Muttetuwegama, Ms. Kumudini Samuel, Ms. Cyrene Siriwardena and Dr. Deepika Udagama as members of the committee.[16] The amended version of the Bill was approved by the National Commission on Women at a meeting with the Committee on 10 November 2004.[17] This section of the chapter will begin with a short description of the Bill and proceed to a comparative analysis of the February 2004 draft and the current (November 2004) draft of the Bill.

7.1 Objectives of the Bill

Section 2 of the Bill sets out the objectives of the Act. Section 2 of the February draft provided more limited objectives of the Bill than the November draft. In the February draft, it was stated that the enforcement of the rights set out in the section and "the protection, promotion and advancement of women's rights in accordance with the framework of the Women's Charter of Sri Lanka as set out in the Schedule to the Act and the international treaties relating to women's rights to which Sri Lanka is a party" were the objectives of the Bill. The current draft, however, takes a much broader approach. Section 2 of the current draft states that the objectives of the Act are to:

i. reinforce and implement the right to equality and non-discrimination and other fundamental rights guaranteed by the Constitution to women;

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[16] *Report of the Technical Committee on the Women's Rights Bill February 2004*, 16 November 2004.

[17] Ibid.

ii. fulfil commitments and obligations recognised by international treaties on women's rights ratified by Sri Lanka and in other international standards;
iii. implement the rights guaranteed by the Women's Charter of 1993;
iv. ensure that all organs of government shall respect, promote, protect, advance and fulfil the rights recognised by this Act;
v. require that the judiciary shall respect, promote, protect and advance the rights recognised by this Act;
vi. ensure that all other institutions and actors shall respect, secure and advance the rights recognised by this Act;
vii. establish a National Commission on Women empowered to respect, promote, protect and advance women's rights and fulfil the rights recognised by this Act.

7.2 Members of the Commission

The Bill establishes a Commission on Women, consisting of 9 members[18] who shall be appointed by the President on the recommendation of the Constitutional Council.[19] In the February draft of the Bill, the Minister was given the power to appoint members 'with the approval of the Constitutional Council.'[20] As this had the potential to lead to politicisation, the section was amended to ensure a more transparent process and prevent arbitrary appointments. Further, to ensure that individual posts are always filled only on merit and that the composition of the Commission represents an appropriate mix of relevant skills and background, the current draft of the Bill in Section 4(b) clearly states that members should have 'distinguished themselves' in certain fields and should have a 'proven record of having worked to advance women's rights and gender equality.' The designated fields range from law and development economics to environment and media.

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18 Sec. 4 (a)
19 Ibid.
20 February Draft of the *Women's Rights Bill*, Sec.4 (2).

In the past, the effective and efficient functioning of other commissions, such as the Human Rights Commission and the Official Languages Commission, have been adversely affected by members who work only part-time for the Commission.[21] Keeping this in mind the Bill stipulates that at least three members shall be full-time.[22]

In the February draft of the Bill, the power of removal of members was given to the Minister who could remove a member from office on certain grounds.[23] After such removal, the Minister could appoint another member to succeed the removed member.[24] Realising that the vesting of power in one political figure would jeopardise the independence and impartiality of the Commission and leave it open to political manoeuvring, the present draft of the Bill contains safeguards to prevent such an eventuality. Section 5 of the Bill states that a member can be removed from office by the President for particular reasons such as being declared to be of unsound mind by a court [25] or 'convicted of an offence involving moral turpitude.'[26] In other circumstances, the process of removal would have to involve 'an order of the President made after an address of Parliament supported by a majority of the total number of members of Parliament (including those not present) has been presented to the President for such removal on the ground of proved misbehaviour or incapacity.'[27] The section further states that "no resolution for the presentation of such an address shall be entertained by the Speaker or placed on the Order Paper of Parliament, unless notice of such resolution is signed by not less than one-third of the total number of members of Parliament and sets out full particulars of the alleged misbehaviour or incapacity." It should be noted the section also states that the procedure to be followed in the removal of a member

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21 Ambika Satkunanathan, "The Human Rights Commission," in *Sri Lanka: State of Human Rights 2000* (Colombo: Law & Society Trust, 2000).
22 February draft, Sec. 4 (c).
23 Ibid., Sec. 6 (1)(a) – (d).
24 Ibid., Sec 6 (2).
25 Sec. 5(1)(a)(4).
26 Sec. 5(1)(a)(5).
27 Sec. 5(1)(b).

of the Commission has to be the same as that followed in the removal of a judge of the Supreme Court or Court of Appeal.[28]

7.3 Powers and Functions of the Commission

Under Section 8, the Commission has the power to:

(a) carry out investigations and call for reports regarding any infringement or imminent infringement of women's rights;
(b) conduct public inquiries in relation to women's rights;
(c) intervene in any proceedings relating to the infringement or imminent infringement of women's rights pending before any court with the permission of such court;
(d) conduct programmes for the empowerment of women and the advancement of women's rights;
(e) establish regional offices;
(f) take such steps as it may be directed to take by the Supreme Court or by any other court in respect of any matter referred to it by that court;
(g) award in its absolute discretion, to an aggrieved person such sum of money as is sufficient to meet the expenses that may have been reasonably incurred by her in making a complaint to the Commission;
(h) call for annual reports from relevant bodies on measures taken to implement the Women's Charter and other rights recognised by this Act in areas within their purview;
(i) forward a report to Parliament at least once in every year on its activities and the achievement of its objectives.

The Commission's functions include inquiring and investigating infringements or imminent infringements of women's rights and providing legal redress, conciliation or mediation,[29] monitoring and evaluating legislation and policies and practices of organs of the State and their impact on women's rights,[30] advising the government on

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[28] Sec. 5(2).
[29] Sec. 7(ii).
[30] Sec. 7(iii)(a).

issues relating respecting, promoting, protecting, advancing and fulfilling women's rights,[31] making recommendations to the government with regard to changes that need to be made to national laws and policies to bring them in accordance with international norms,[32] liasing and interacting with institutions, bodies or authorities to foster common policies and practices and promote co-operation in relation to the handling of complaints,[33] monitoring state compliance with international treaties[34] and monitoring and evaluating policies and practices of private business enterprises and other non-state institutions and actors, including the informal sector, in relation to women's rights.[35]

The powers of investigation of the Commission are bolstered by additional powers to summon witnesses[36] and take action against those who do not appear before the Commission[37] or fail to submit evidence.[38]

The many progressive amendments which were made to the February draft have created in the current draft of the Women's Rights Bill a piece of legislation that is designed to enhance the promotion and protection of women's rights. For example, the February draft did not allow the Commission to award an aggrieved person or a person acting on behalf of an aggrieved person a sum of money sufficient to meet the expenses that may have been reasonably incurred in making a complaint to the commission. This has been rectified in the current draft, which in Section 8 (g), makes it possible for the Commission to make such an award.

Section 8(2) of the current draft permits any person authorised by the Commission to enter any place of detention 'in which any woman is detained by a judicial order or otherwise,' and conduct an examination

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31 Sec. 7(iii)(b).
32 Sec. 7(iii)(e).
33 Sec. 7(iii)(d).
34 Sec. 7(iii)(g).
35 Sec. 7(iv).
36 *Women's Rights Bill*, Schedule II, Sec. 1(c).
37 Ibid., Schedule II, Sec.18.
38 Ibid., Schedule II, Sec.18(2)(d).

or make inquiries from the detained person 'as may be necessary to ascertain the conditions of detention of the woman detainee.' This power, which is similar to the power given to the Human Rights Commission, will greatly enhance the capacity of the Commission on Women to prevent custodial violence suffered by women detainees.

The powers of investigation vested in the Commission are considerable as it is able to investigate an infringement or imminent infringement of women's rights on its own motion or on a complaint made to it.[39] It should be noted the Commission is given the power to investigate complaints not only by those 'acting in their own interest'[40] but also by 'anyone acting on behalf of another person,'[41] 'anyone acting as a member of or in the interest of a group or class of persons,'[42] 'anyone acting in the public interest,'[43] or 'an association acting in the interests of its members.'[44] This section, which broadens the concept of standing, is welcome as it will encourage public interest litigation and provide civil society and rights groups with more effective means to protect and promote the rights of women.

Another section that pushes the existing boundaries of law is Section 10(2), which allows the Commission to investigate both State and non-State action. At present, the powers of existing Commissions are restricted to investigating infringements of fundamental rights by executive or administrative action, which precludes them from investigating non-state action. Section 10(2) is an important step in furthering the protection and promotion of human rights in Sri Lanka by making non-state actors liable for rights violations and will enable the Commission to investigate non-state action ranging from violence against women to the economic rights of women. When the Commission finds an infringement it can refer the matter to mediation,[45]

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39 Sec. 10(a)(1) & (2).
40 Sec. 10(2)(a).
41 Sec. 10(2)(b).
42 Sec. 10(2)(c).
43 Sec. 10(2)(d).
44 Sec. 10(2)(e).
45 Sec. 12(2).

make recommendations to the relevant authority or individual with the aim of preventing further rights violation,[46] or recommend that legal action be taken against the person violating the right.[47] In the case of practices or decisions that violate women's rights,[48] the Commission can recommend the decision be reconsidered or the practice altered[49] or reasons be given for the decision or act that violates women's rights.[50]

Section 12(7) requires that any authority or persons to whom a recommendation has been issued should submit a report to the Commission specifying the action which the body or person has taken to give effect to the recommendations of the Commission. Where non-implementation of the recommendations is concerned, the Bill is a bit unclear. Section 12(8) states that in cases where the Commission "directs the head of the body concerned to notify the Commission ... of the action ... it proposes to take to give effect to those recommendations, and the head of the body ... has not given effect to such recommendations," the Commission "after informing the Attorney-General in writing, may apply ... for a direction to the High Court.'[51] The High Court can then 'direct the implementation of the recommendations contained in the report of the Commission.'[52] It is not evident why the Commission is given the power to apply to the High Court only in instances where the head of the authority has not responded to the recommendations of the Commission. The Bill therefore does not set out the remedies available to the Commission in instances where individuals do not give effect to the recommendations of the Commission.

7.4 Finance of the Commission

In the February draft of the Bill, the financial independence of the Commission was put into question by section 41(2)(a) which through

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46 Sec. 12(3)(iii)(a).
47 Sec. 12(3)(iii)(b).
48 Sec. 12(4)(a) & (b).
49 Sec. 12(4)(c).
50 Sec. 12(4)(d).
51 Sec. 12(8)(1).
52 Sec. 12(8)(2).

the use of the word 'may', made it discretionary for the parliament to vote funds for the use of the Commission. Realising that the effectiveness and efficiency of the Commission would be adversely affected if the Commission suffered financial constraints, the section has been amended and 'may' has been replaced with 'shall,'[53] making it mandatory for parliament to vote funds for the Commission. This is in line with the Paris Principles, which state that the 'national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding.'[54]

7.5 Definition

The definition of 'women's rights' in the Bill is suitably broad and includes rights guaranteed by both national and international legal standards. These include:

(i) the right to equality and non-discrimination and other fundamental rights guaranteed by the Commission to a woman;

(ii) the rights contained in the Women's Charter of 1993;

(iii) rights contained in the Convention on the Elimination of all forms of Discrimination Against Women and other international treaties and instruments on women's rights ratified and endorsed by Sri Lanka.

8. Conclusion

While recent moves by the government to protect and promote the rights of women through law reform are welcome, they also illustrate the many factors that have to be taken into account to ensure the practical benefit of the laws to those they are intended to protect.

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53 Sec. 19(2)(a).

54 *Paris Principles Relating to the Status and Functioning of National Institutions for the Promotion and Protection of Human Rights*, accessed at http://www.unhchr.ch/html/menu6/2/fs19.htm#annex.

Although the Sri Lankan legal system has undergone much reform in the past, the position of women has not improved. Formal equality has been achieved, but how far are we from substantive equality? The improvement of the status of women is not solely dependent on law reform as other socio-economic factors also impact upon the implementation of the law. The law should therefore be crafted in a way to provide safeguards to the victims and contribute to transforming the socio-economic landscape. As such, the Bill on Women's Rights is an example of a genuine effort to protect and promote the rights of women. On the other hand, the Prevention of Domestic Violence Bill appears to be an instance of the government drafting legislation to merely fulfil international obligations without regard for the effect of the law or the socio-economic realities facing women. The Sri Lankan government should therefore focus on substantive equality rather than formal equality and take measures to effectively deal with violence against women in a manner which is not only concerned with equal treatment by the law but also with the actual effect of the law. Its approach should take into account historical, socio-economic and cultural realities and seek to eliminate systemic and institutional inequality.

X

RIGHTS OF THE CHILD

Manori Gunatilleke[*]

1. Introduction

This chapter follows up on the detailed review of child rights made in the year 2003 and highlights new developments over the year 2004. The key areas of focus are statistical data on child rights violations, state measures and the activities of monitoring bodies, issues in the legal arena, children in institutions, child labour and the latest on the child soldier issue. Overall, there have been significant changes in reporting of violations and in mechanisms aimed at understanding and preventing violations but only limited activity in terms of legal measures.

Key Issues in State of Child Rights:

Re-cap of 2003 issues[1]

- The State and the United Nations Children's Fund (UNICEF) initiated the National Plan of Action for Children 2004-2008.

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* The writer works as a Gender Co-ordinator for Oxfam GB.

1 Details of these issues can be found in the "Rights of the Child," in *Sri Lanka: State of Human Rights 2004* (Colombo: Law & Society Trust, 2004), 27-54.

- The Juvenile Justice Procedure Act (JJPA) draft in process to replace the provisions of the Children and Young Persons Ordinance that deals with children who come into contact with the justice system.
- Treatment of children in media and those who come into contact with the legal system is often poor and harmful to the health and well being of the child
- Inconsistency of personal laws with Convention on the Rights of the Child (CRC) requirements in relation to children with regard to age of marriage and status of children born out of wedlock.
- Recruitment of children by the Liberation Tigers of Tamil Eelam (LTTE) despite the ceasefire.

Issues in 2004

- Child recruitment continues despite measures to curb and monitor.
- 50 Hazardous forms of Child Labour list, as required under ILO Convention 182, Section 3d, has been approved and legislation pending.
- New state measures to deal with child abuse prevention, monitoring and case processing – the Police and the Ministry of Justice.
- JJPA follow up.
- National Child Protection Authority (NCPA) centres for street children and trafficking.

2. Statistical Breakdown of Child Rights Violations

Police Women & Children's Bureau statistics[2] reveal 2,242 cases of grave offences against children and 1,026 minor offences against children for the year 2004. This is up from a reported 1,579 offences in 2003, with the highest cases from the following districts: Anuradhapura (133), Halawatha (118), Kegalle (115), and Ratnapura (182). The lowest reported cases were from Gampola (22) and Hatton (11). An alarming 930 of the total 1,579 cases were rape of children (highest number in

[2] Police Women and Children's Bureau Report, 2004.

Ratnapura District with 83 cases) with grave sexual abuse ranking second at 424 cases (highest number in Anuradhapura District with 46 cases).

Each year, the Police Women and Children's Desk (W&C) targets areas reporting the highest number of cases and conducts awareness and prevention programmes involving both children and stakeholders like lawyers, police, probation and childcare services, medical services and educational staff.[3] This may have contributed to the decrease in the number of cases from towns like Nugegoda and Matara, which had higher numbers of cases in 2003. UNICEF provided structural support to Women and Children's desks by supplying much needed private space, office equipment and transport in some areas. A stronger role, however, needs to be played by the State in providing more efficient facilities for such departments.[4]

Newspaper reports of National Child Protection Authority (NCPA) statistics on child abuse incidents reveal a rise from 333 in 2003 to 867 in 2004. These cover child labour, physical, sexual and emotional abuse, kidnapping and neglect. Though emotional abuse is not a criminal offence, such incidents are dealt with by the Authority on a case by case basis. Emotional abuse at school includes scolding, harassment, verbal abuse, yelling and humiliation by teachers. It includes the child being deliberately ignored by the teacher. Complaints of emotional abuse by adults are not generally made against parents but are sometimes made against step-parents. The statistics also included complaints made against those in charge of children's homes, such as matrons. Peer abuse and bullying all fall under the category of emotional abuse. In the NCPA records, the highest number of cases reported in the newspapers involve sexual abuse (316 cases) and the province with the highest number of reported violations overall is Western Province (382 cases). Reports of cases directly reported to the NCPA were not available at the time of writing. However, the 2003 NCPA statistics reveal a higher proportion of female victims of abuse (277) cases than male victims (126 cases).[5]

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[3] Interview with Sub-Inspector Manoj Samarasekera, Police Women and Children's Bureau, April 2005.

[4] Interview with Geoffrey Keele, Communications Officer, UNICEF, May 2005.

[5] National Child Protection Authority Annual Report, 2003-2004.

3. State Action and Child Rights Monitoring and Protection Bodies

With the rising rate of child abuse, a police initiative to counter child abuse was launched, including a three year action plan to prevent all kinds of child abuse, child sexual abuse and child sexual harassment in the country under the supervision of the then Inspector General of Police (IGP) Indra De Silva. A new hotline was established and police units kept on standby to take immediate action upon complaints received.[6]

3.1 National Child Protection Authority

The NCPA has a mandate to enforce measures to protect children and continued its activities in 2004 in the areas of district protection committees, awareness raising programmes for the public, the judiciary and other actors. A police office was established at the NCPA to assist in investigations and criminal proceedings and to liase with Interpol and foreign embassies on child abuse cases involving foreigners.

Key Activities of the NCPA in 2004 included:[7]

- Establishment of two rehabilitation centres, in Negombo and Moratuwa (Western Province), to help re-integrate trafficked children back into communities, and providing vocational training and emotional support.
- Work in schools using child protection committees, which mobilize students and staff to ensure the protection of children and understanding rights of children. There has also been a strong attempt to discourage the use of corporal punishment, and media campaigns were initiated to raise public awareness of this issue.
- Working with Samurdhi (State Poverty Alleviation Programme) Officers in preventing and reporting child abuse cases.
- Assisted by the World Bank, the first Drop-in Centre for Street Children was opened in June 2004 in Colombo 11. It aims to improve the quality of life of street children through health and informal educational assistance. The health work is focused on

6 "Action Plan for Child Abuse Cases," *Sunday Leader*, 18 January 2004.
7 Ibid.

HIV/AIDS and sexually transmitted diseases (STDs). A total of six such centres have been proposed around the country.

4. Legal Issues

Many reviews of the legal system have highlighted the need for reform of the juvenile justice system. The Juvenile Justice Procedure Act (JJPA), drafted by the Legal Sub-committee of the NCPA, aims to replace the provisions of the Children and Young Persons Ordinance that deal with children who come into contact with the justice system. The draft has been sent to the Ministry of Social Welfare for further action. However, confusion surrounds the current status of this draft and the changes, if any, made to it since the last review made in 2004 of its contents. The Department of Probation and Childcare Services and the Justice Department stated that the Act was with the Ministry of Social Welfare for approval. The Ministry of Social Welfare, however, was unable to provide any detail of its status and referred inquiries to the Department of Probation and Childcare Services.

However, recommendations and comments on the Act had already been made by the Department of Probation and Childcare Services at a workshop held with Probation Officers and Child Rights Protection Officers. A report of this workshop was prepared by the legal consultant, Harshana Nanayakkara, and submitted to the Department of Probation and Childcare Services in November 2004; a copy was subsequently sent to the Ministry of Social Welfare. More recent follow-up queries by the NCPA as to status of the Act received the response that more time was needed for action.[8]

Since the Ceasefire Agreement of 2002, all cases involving children charged under the Prevention of Terrorism Act (PTA) have been withdrawn, except those involving grave crimes such as bombings and attacks that resulted in large-scale loss of life, for example, the Central Bank bombing.[9]

In 2004, the Additional Secretary to the Minister of Justice, Lalani Perera, initiated the setting up by the Attorney - General's Department,

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[8] Details from reports and letters in the files of the Commissioner of Probation and Childcare Services.

[9] Interview with Deputy Solicitor General, Palitha Fernando, May 2005.

of a special unit to deal with the many child abuse cases that have been piling up. The unit consists of four State Counsel and two Senior State Counsel as supervising officers. At the time of its establishment, an estimated 1,500 cases of child abuse had been registered, including statutory rape, grave sexual abuse, cruelty to children and sexual harassment.

In another development, the Cabinet approved an amendment to Section 360C of the Penal Code to deal with trafficking. This was designed to bring the definition of trafficking into line with the United Nations Protocol on Trafficking and includes provisions against the trafficking of children for child labour.

5. Children in Institutions

Last year's report highlighted the poor conditions of children in institutions, including in crowded homes.[10] A recent research project on children in institutions was commissioned by Save the Children in Sri Lanka, and is being carried out by the University of Colombo, the University of Jaffna and the Centre for Women's Research (CENWOR). It was conducted in the Western, Southern, Central and North-Eastern provinces of Sri Lanka and altogether mapped 325 institutions and conducted in-depth analysis of 84 institutions.

The research-in-progress, titled *Children in Institutional Care: The Rights and Protection of Children in Sri Lanka*, shows that out of 67 non-state institutions studied, only 6.5% of the children were orphans (both parents dead). 26.5% of the children had one parent living, and as many as 54% of the children had both parents living. Fifty percent of the children in non-state institutions were institutionalised because of poverty. Though the parents institutionalised the child for practical reasons, these were not valid from a child's point of view. Children felt the lack of emotional support, lacked privacy and confidentiality, suffered from lack of space for self-expression and resented the lack of respect accorded them in institutions. Some of these institutions, the study found, lacked even the most basic facilities such as water and sanitation facilities, and quite a few did not have transportation

[10] See "Rights of the Child," in *Sri Lanka: State of Human Rights 2004*, op. cit.

and sick room facilities. Problems of inadequate training of caregivers and poor understanding of child rights were also recurrently observed. Children's ties with families were also limited by institutions and letters were opened and read by caregivers.

The report points out that if proper support was given to families and communities to look after children, there could be a drastic reduction of the large number of children in institutions in Sri Lanka. Another recommendation is the urgent need to create awareness among parents and guardians about the implications of institutionalisation so that adults are properly informed before they make a decision to institutionalise a child.[11]

5.1 Human Rights Commission Projects

The Human Rights Commission (HRC) works on two projects involving state homes for children. One project conducts surprise visits to monitor state homes and is funded by UNICEF. The second project, funded by USAID, is aimed at empowering children in state homes and involves 36 training programmes for state home staff, Probation and Childcare Department officers, and Police Women and Children's Bureau officers on the rights of the child. This project also includes information sharing meetings with high court judges and magistrates. Prior to these consultations, meetings are held with the Chief Justice and the Judicial Service Commission on legal problems arising in cases of children in conflict with law.

The legal issues involved include such problems as: children detained without being charged for unlimited periods in remand and detention centres; children detained for periods beyond the specified time period; victims and offenders being kept together; children of all ages sharing the same dormitory, putting younger children at risk of sexual and other forms of exploitation; lack of staff and facilities; the protection of children who are involved in criminal cases; the vulnerability of girl children; and the lack of state homes for victims of sexual abuse (there are currently only two: one in Galle and one in Badulla). The project is also piloting a model from India to develop a co-management system between state and private providers of children's homes. In Sri Lanka, at present, there are no connections between voluntary

[11] Save the Children Press Release, 16 May 2005.

homes for children and state homes. The proposed model involves the State, international Non-Governmental Organisations (I/NGOs) and other voluntary groups in providing services to homes and will have one state monitoring committee for each province. The project will also make recommendations on policy and legal reforms relating to child rights.

6. Child Labour and ILO Convention No. 182

A Child Activity Survey, carried out in 1998 and 1999 by the Department of Census and Statistics, found almost 11,000 children between the ages of 5 and 14 working full time and another 15,000 engaged in both economic activity and housekeeping. The survey found 450,000 children employed by their families in seasonal agricultural work throughout the country.

The current child labour situation, according to statistics, continues to worsen. NCPA tracking of cases of child labour reported in newspapers in 2004 reveals that the number of cases has risen from 6 cases in 2003 to 47 cases in 2004. This increase could well be attributed to increased monitoring and detection efforts in the years since the Child Activity Survey of 1998-99.

The report of the Police Women and Children's Bureau for 2004 reveals 162 cases of minor offences related to the employment of children.

In April 2004, a review was made of the legislation concerned with child labour in Sri Lanka[12] by Ruana Rajapakse for the ILO-IPEC. The review made the following proposals, together with others already addressed in this chapter:

- Consolidate the law relating to children in employment into one Act.
- Repeal the Brothels Ordinance, the Domestic Servants Ordinance and the Vagrants Ordinance.
- Repeal or amend the following to de-criminalize children: Section 365A of the Penal Code (homosexual acts between men), Section 228(1) of the Penal Code as amended by Act No. 29 of

[12] Ruana Rajapakse, *National Legislation on Worst Forms of Child Labour including Hazardous Forms of Child Labour*, ILO-IPEC Report, May 2004.

1998 (criminalizing beggar families), Section 228A of the Penal Code as amended, read with Sections 360A and 360B (use of children as procurers), the Prevention of Terrorism Act (use of children under force or compulsion to commit preparatory acts).

- Consider mechanisms to facilitate the socio-economic advancement of needy children over 14 years of age who cannot continue education, targeting employers for job placement and training.
- Re-define trafficking to conform to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, that supplements the United Nations Convention against Trans-national Organized Crimes ("Palermo Convention") of 2000. Article 3 of the Protocol defines "trafficking" as follows: "Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons by means of threat to use force or other forms of coercion, of abduction, of fraud, of deception, of abuse of power or of a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of the person having control over another person, for the purpose of exploitation." Other features of the Protocol which need to be accommodated into Sri Lankan law are: when the person trafficked is a child, the question of consent is irrelevant; the child is defined as a person under 18 years of age; and trafficking may occur within State boundaries as well as across international boundaries.

In 2004, the National Labour Advisory Council approved draft legislation to empower the Minister of Labour to make regulations concerning children in hazardous forms of child labour. However, this process had not been finalized at the end of the year under review.

An NCPA study on youth domestic workers, aged 14 to 18 years of age, explored their working conditions, accommodation and vulnerability to abuse and neglect. It recommended legal reform to address the rights of this group, including the adoption of a Code of Conduct.[13]

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[13] Ibid., 5 .

The Minimum Age Convention was adopted in February 2000, setting the minimum working age at 14 years. This overrides all other legislation on minimum age of employment.

A new initiative by UNICEF begun in mid-2004 involved working with the tourism industry to combat the commercial sexual exploitation of children.

7. Child Soldiers

Reports of child recruitment by the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka continue to register in the media and in human rights and child rights organization reports. Some progress, however, was achieved with the July 2003 signing by the LTTE and the Government of Sri Lanka of the UNICEF initiated Action Plan for Children Affected by War, in which the armed group agreed to halt recruitment and release all children within its ranks. The Action Plan is carried out by UNICEF in partnership with Tamil Rehabilitation Organization (TRO), Save the Children, International Labour Organization, United Nations Development Programme, United Nations High Commissioner for Refugees and the Ministry of Social Welfare. It is one of only two other such agreements in the world signed with a non-state actor.

During 2004, more than 1,015 children were recruited by the LTTE and 650 were formally released by the organization. Re-recruitment was particularly high in the eastern part of the country. Altogether, there have been more than 4,700 cases of child recruitment, some involving children as young as 11, since April 2001. Of these children, more than 2,900 have returned or been released to their families, including approximately 1,230 who were formally released and over 1,660 who went home following fighting in eastern Sri Lanka in April 2004 and the fall of the Karuna faction of LTTE. In addition, at least 550 children ran away from LTTE during the reporting period.[14]

UNICEF has been working to support all of these children. A transit centre was opened in Killinochchi in late 2003 and during 2004, 118

[14] "Children and armed conflict," Report of the Secretary-General, A/59/695–S/2005/72, 9 February 2005. http://www.reliefweb.int/rw/RWB.NSF/db900SID/HMYT-69NQ9A?OpenDocument&rc=3&cc=uga.

children were released to the transit centre. As of March 2005, no children were being housed in the centre and a decision is being made on its future.[15]

The LTTE has often carried out recruitment by force, abducting children while on their way to school or during religious festivities, and beating families and teachers who resisted the seizure of the children.[16]

Gender-based statistics of child recruitment reveals a higher proportion of males being recruited (57%) than females (43%). In the Killinochchi and Vavuniya districts, females account for a higher proportion of children recruited. The 43% of females, however, remains a high proportion of combatants. Since the treatment of female combatants within the LTTE is not as derogatory as that of female combatants in other armed groups, the major concern remains the re-integration of female combatants returning to communities, particularly in the context of the conservative Tamil Hindu culture prevalent in the North and East of the country.

Criticism of the UNICEF transit home programme has been rampant and included, in the early days, UNICEF's lack of co-ordination with local organizations on monitoring, prevention of child recruitment and reintegration of children.[17] More recent criticism highlights the problem that UNICEF only quotes reported cases of child recruitment, which it presents as success with the LTTE, while many other cases go unreported and recruitment of children continues to rise alongside the LTTE's release of some child soldiers. UNICEF was also criticized for being slow to negotiate protection of child soldiers during the fighting between the Karuna and Prabakaran factions of the LTTE in April 2004 and for their limited involvement in offering protection on the day child soldiers began leaving Karuna's camps. The release by the LTTE in April of 269 child soldiers was also said to have been due to pressure from the parents of the children concerned rather than UNICEF interventions.[18]

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[15] Ibid.

[16] Ibid.

[17] "Living in Fear, Child Soldiers & the Tamil Tigers in Sri Lanka," *Human Rights Watch* (November 2004), http://www.hrw.org/english/docs/2004/11/10/slanka9651.htm.

[18] "The Batticaloa Fiasco and the Tragedy of Missed Opportunities," University Teachers for Human Rights Information Bulletin No. 36, *the Island*, 31 May 2004.

However, UNICEF's subsequent attempts to collaborate with I/NGOs were more successful, particularly in deterring child recruitment at temple festivals in 2004, where a strong presence of monitors had a positive deterrent effect.

Save the Children Fund (SCF), which has been involved in re-integrating former children soldiers, reports that 2,800 children have been reintegrated into their communities and provided with catch-up education from 2003-04.

XI

RECENT DEVELOPMENTS IN BIOTECHNOLOGY AND BIO-SAFETY IN SRI LANKA

Avanthi Weerasinghe*

1. Introduction

Biotechnology has immense potential to provide solutions to the growing demand for food and health required by the increasing world population. The commercialisation of biotechnology products, and the large profits involved, has led to a rapid increase in their manufacture and trade. However, the scientific community is divided on the impact that biotechnology may have on human health and the environment.

According to a report by the United States Office of Technology Assessment (1989), "Biotechnology broadly defined, includes any technique that uses living organisms (or parts of organisms) to make

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or modify products, to improve plants or animals, or to develop micro-organisms for specific uses."[1] This broad definition covers first, second and third generation biotechnologies in its ambit. The first generation includes traditional technologies like beer brewing and bread making, while the second begins with microbiological applications such as those developed by Louis Pasteur, which culminated in mass production by fermentation of antibiotics.[2] Tissue culture and modern plant and animal breeding also fall within this "second generation." The third generation biotechnologies, or the "new biotechnologies," include recombinant DNA ("gene splicing"), hybridoma technology, and genomics.[3]

It is the creation of genetically modified (GM) organisms and products including GM crops and GM food through the application of third generation biotechnologies that has given rise to considerable public controversy around the world due to their possible negative effects on human health and the environment.

In addition to risks posed to health and the environment by biotechnology, the patent regime of the World Trade Organization (WTO) as embodied in its Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS),[4] which permits patenting of life forms, poses ethical issues as well.

Hence, at present, the world is faced with the challenge of harnessing the benefits of biotechnology while minimizing its possible negative effects. In the broadest sense, bio-safety refers to the safe application of biotechnology[5] and it is imperative that countries adopt bio-safety measures in order to harness the positive results of biotechnology while minimizing its negative impacts. It was against this backdrop that the Cartegena[6] Protocol on Bio-safety (BSP) was drafted by the

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1 "New Technologies," *Intellectual Property Rights: Implications for D evelopment (Policy Discussion Paper)* (ICTSD and UNCTAD, 2003), 75.

2 Ibid.

3 Ibid.

4 Article 27 (3) (b).

5 *Draft National Policy on Biotechnology and Bio-safety*, 5.

6 Cartegena is the name of a city in Columbia where the Bio-safety Protocol (BSP) was originally was originally scheduled to be concluded and adopted although it was finally adopted in Montreal, Canada in 2000.

international community in order to address issues emanating from the trans-boundary movement, transit, handling and use of all living modified organisms (LMOs) that could have adverse effects on conservation and sustainable use of biological diversity, taking also into account risks to human health.[7] Sri Lanka ratified the BSP in 2004 and is obliged to develop its own national regulatory framework for the safe transfer, handling, use and release of genetically modified organisms (GMOs) and products resulting from modern biotechnology. Thus in 2004, Sri Lanka could come up with a National Bio-safety Framework under the auspices of the Ministry of Environment and Natural Resources. Under this framework, Sri Lanka has also drafted a regulatory framework aimed at regulating the entry of GMOs into the country.

This chapter discusses the legal framework proposed by the National Sub-Committee on Legal Issues appointed under the National Bio-safety Framework project and the compatibility of such a proposed legal framework with international obligations imposed on Sri Lanka by different international agreements such as the BSP and relevant agreements of the WTO. The first part of the chapter discusses the global scenario relating to GMOs and LMOs as propounded by the BSP and the WTO. The next part discusses the legal framework proposed by the National Sub-Committee on Legal Issues while briefly discussing the components of the National Policy on Biotechnology and Bio-safety. The last section considers whether the draft legal framework is in conflict with the agreements of the WTO, which deal with international trade in GMOs.

2. Global Scenario

2.1 Cartagena Protocol on Bio-safety

The BSP ensures bio-safety by providing for rules and procedures for the safe transfer, handling and use of LMOs, with specific focus on the trans-boundary movement of LMOs. The BSP has two separate approval procedures; one is for LMOs that are to be intentionally introduced into the environment, the other is for LMOs that are intended to be used directly as food, feed or for processing. The parties to the Protocol have to adopt the Advanced Informed Agreement procedure[8]

7 *Bio-safety Protocol*, Art. 1.
8 Ibid., Art. 7.

in relation to LMOs that are to be intentionally introduced into the environment. Under Advanced Informed Agreement procedures, the Protocol makes it mandatory for the party of export or the exporter to notify in writing, the competent national authority of the party of import, at a minimum, certain information as mentioned in its Annexure II[9] which would enable the party of import to give its consent to the entry of LMOs intentionally introduced to the environment. Article 11 of the BSP lays down the procedure regarding LMOs that are intended to be used directly as food, feed or for processing. Accordingly, a party that makes a final decision regarding domestic use, including placing a living modified organism on the market that may be subject to trans-boundary movement for direct use as food or feed or for processing shall inform the Parties through the Bio-safety Clearing House,[10] giving at a minimum, details as mentioned in Annexure II of the Protocol. Article 17 of the BSP dealing with unintentional trans-boundary movement of LMOs, makes it mandatory for state parties to notify other parties and specifies that amongst other things, it should include relevant information of the LMO, possible adverse effects and point of contact for further information. Article 18 deals with intentional trans-boundary movement of LMOs and requires state parties to ensure that LMOs are handled, packaged and transported under conditions of safety. Furthermore, the shipment of LMOs subject to trans-boundary movement must be accompanied by appropriate documentation specifying amongst other things, the identity of LMOs and contact point for further information. These procedures and requirements are designed to provide importing parties with the information needed to make informed decisions about whether or not to accept LMO imports and to handle them in a safe manner. The party of import has to make its decisions based on scientifically sound risk assessments and the Protocol has laid down the methodology for conducting such risk assessment.[11] The BSP provides for the adoption of measures to

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9 The BSP requires the party of export to give, amongst other things, details of the name and contact details of the applicant and authority responsible for the decision, name and identity of the living modified organism, description of gene modification, characteristics of the recipient organism, its centre of origin, approved uses of the living modified organism, a risk assessment report consistent with Annexure III and suggested methods for the safe handling, storage, transport and use, including packaging, labelling, documentation, disposal and contingency procedure.

10 *Bio-safety Protocol*, Art. 20.

11 Ibid., Annexure III.

regulate the import of LMOs on the basis of the precautionary principle in instances of insufficient relevant scientific information and knowledge.

In addition to the BSP, two other international agreements propounded under the auspices of the WTO, are also aimed at regulating trade in GMOs at international level. These are:

(a) Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) and;

(b) Agreement on Technical Barriers to Trade (TBT Agreement)

The scope of SPS and TBT Agreements;[12]

SPS Agreement	TBT Agreement
The SPS Agreement covers all measures, whether or not they are technical regula tions, whose purpose is to protect· • Human or animal health from food born risks:- • Human health from animal- or plant-carried diseases;· • Animals & plants from pests or diseases.	The TBT Agreement covers all· • Technical regulations;· • Voluntary standards;· • The procedures to ensure that the above are met.
• Under the SPS Agreement, the purpose of the measure is relevant in determining whether a measure is covered under SPS;	• The type of the measure determines whether it is covered in the TBT Agreement.

2.2 SPS Agreement

The preamble of the SPS Agreement clearly states that it does not prevent any member state from adopting or enforcing measures necessary to protect human, animal or plant life or health provided that:

[12] Gothami Indikadahena, "Whether the WTO Agreement on Sanitary & Phytosanitary Measures (SPS) and the Cartagena Protocol on Biosafety are in conflict or they are mutually supportive," *Briefing Paper No. 12* (Law & Society Trust) (November 2003), 11.

- The measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between members; or
- A disguised restriction on international trade.

Under the SPS agreement, member states must ensure that any sanitary or phytosanitary measure is applied under the following conditions:

- Only to the extent necessary to protect human, animal or plant life;[13]
- Is based on scientific principles and is not maintained without sufficient scientific evidence;[14]
- In cases where relevant scientific evidence is insufficient, a member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information.[15] In such circumstances, members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.

The SPS Agreement applies to all sanitary and phytosanitary measures which may directly or indirectly affect international trade and the definition of such measures covers measures;

(a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, diseases carrying organisms or diseases causing organisms;
(b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;
(c) to protect human life or health within the territory of the Member from risks arising from diseases carried by

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13 *SPS Agreement*, Art. 2(2).
14 Ibid.
15 *SPS Agreement*, Art. 5(7).

animals, plants or products thereof, or from the entry, establishment or spread of pests; or

(d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.

The significant differences between the SPS agreement and the Bio-safety Protocol;[16]

Bio-safety Protocol	SPS Agreement
• Risk assessment to be made by the exporting country	• Risk assessment to be made by the importing country
• Allows import bans·	• Allows import bans under very special circumstances
• Import ban can last until the importing country has reached a conclusion about the effects	• Import ban is allowed provisionally, therefore measure is provisional
• No limit on the measure·	• There are limits on the measure
• There is no obligation to seek additional information	• There is an obligation to seek additional information and review the measure within a reasonable time

[16] The analysis is based on the analysis in "Whether the WTO Agreement on Sanitary & Phytosanitary Measures (SPS) and the Cartagena Protocol on Bio-safety are in conflict or they are mutually supportive; the Sri Lankan perspective," op. cit., 17.

2.3 TBT Agreement

Under the TBT Agreement, member countries are required to formulate and apply their technical regulations, including packaging, marking and labelling requirements, and procedures for assessment of conformity with technical regulations and standards in a way that does not create unnecessary obstacles to international trade. Hence, for this purpose, technical regulations shall not be more trade restrictive than necessary to fulfil a legitimate objective. Amongst other things, such legitimate objectives include national security requirements, the prevention of deceptive practices, protection of human health or safety, animal or plant life or health, or the environment. The TBT Agreement does not allow for discrimination between like products. The WTO's Committee on TBT has discussed GMOs mostly in relation to labelling requirements.[17]

3. The Sri Lankan Bio-safety Policy

The benefits Sri Lanka could gain from biotechnology are immense in terms of assuring food security for her growing population.

In Sri Lanka, the National Agricultural Research Policy for the period 2003-2010, formulated by the Ministry of Agriculture and Livestock, has identified biotechnology as a major thrust area in priority setting and strategic planning. It is praiseworthy to note that this Policy, while recognizing the importance of biotechnology has also recognized the need for a regulatory mechanism in areas of bio-safety, plant breeders' rights and intellectual property rights.

In 2003, Sri Lanka initiated the preparation of a National Bio-safety Framework under the auspices of the Ministry of Environment and Natural Resources. Sri Lanka has also come up with a National Policy on Bio-safety as part of this framework, which ensures that products of modern biotechnology do not create any adverse effects on conservation and sustainable use of biological diversity in the country and on human health and the environment.

The draft National Policy on Bio-safety has the following objectives;

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[17] Ibid., 13.

- Implementation of bio-safety measures in order to prevent adverse effects on human health, the environment and biodiversity.
- Effective regulation and management of GMO / food, feed and processed products (FFP) that are to be imported to Sri Lanka based on the Advanced Informed Agreement.
- Regulation and management of any locally produced GMO/ FFP.
- Dissemination of knowledge about the safe use and possible hazards of modern biotechnology.
- Emphasizing bio-safety and in the development and application of modern biotechnology.
- Provision of an institutional framework for national decision-making, networking, monitoring research and development, and international cooperation in matters relating to bio-safety.

The National Policy on Bio-safety is based on salutary principles which state, amongst other things, that Sri Lanka should ensure that bio-safety regulations are based on the precautionary principle and the Advanced Informed Agreement. The manufacture, use, import, export, sale or trans-boundary movement of modern biotechnology applications, practices and products must conform fully to all relevant national legislation. Further, it mentions that as a matter of public health protection and democratic governance, the industries involved in the use of modern biotechnology shall reveal information on organisms used and all other relevant data in order that consumers can be aware of the substances they are exposed to. Another important principle is the assertion that the WTO is structurally biased in favour of commercial considerations over public health and environment and the necessity to take decisions relating to bio-safety in a forum that is not biased towards such commercial considerations.

Furthermore, the Policy recommends that the Ministry of Environment and Natural Resources establishes an apex body termed "The National Council for Bio-safety" which would become the focal point for bio-safety.

3.1 Recommendations of the Policy

Sri Lanka has not yet passed any laws to specifically deal with the issue of GMOs.

A National Sub-Committee on Legal Issues was set up under the National Bio-safety Framework to look into the legal aspects of biotechnology and related issues. In its analysis and recommendations, the Sub-Committee[18] did not restrict itself to LMOs as required by the BSP, but covered all other GMOs and products. This Sub-Committee reviewed the provisions of 18 different enactments of which 10 had relevant provisions to deal with different types of GMOs. Further, it reviewed the Intellectual Property Act of No. 36 of 2003, since under this Act, all biotechnologies and their resultant products could be patented and also because this Act provides for the patenting of GM microbes.[19] Further, the Sub-Committee also considered relevant international agreements in the WTO.

The Sub-Committee made the following recommendations:

The enactment of a new law to regulate and monitor the following applications of modern biotechnologies, including all GMOs, LMOs and products;

(a) All applications and uses, including applications and uses on human beings;
(b) All development, research, production and manufacture for commercial, research and other purposes;
(c) Deliberate release;
(d) All marketing and other commercial applications;
(e) All imports and exports;
(f) All methods of disposal.

Further it was proposed that this new enactment should cover the following areas within its scope:

1. An approving authority with relevant powers and duties.

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[18] *Report of the National Sub-Committee on Legal Issues: June 2004* (unpublished), 1. (This Sub-Committee was established under the National Bio-safety Framework Project in Sri Lanka.

[19] Ibid.

2. The procedure for granting approval.
3. Monitoring mechanism and powers vested in it.
4. Enforcement powers.
5. Emergency powers.
6. Offences.
7. Powers to make relevant regulations.

Approval procedure

The Sub-Committee recommended that the approving authority should grant approval with the concurrence of the line government body and that the approval procedure should give concurrent powers to both. Such a system would help more balanced decisions to be achieved and help prevent abuses or political interference. Further, in order to ensure transparency and public participation in decision-making, the Sub-Committee recommended that the material forwarded for approval should be made available for public inspection and comment and that a mandatory period for public comment should be provided by law. Further, it recommended that a right of appeal be included for both the applicant and those who have made comments and observations, in line with the principles of natural justice.

Precautionary Principle

The Sub-Committee recommended the application of the precautionary principle in the law and regulation, especially in areas of uncertainty.

Confidential information

Although the Bio-safety Protocol allows certain information to be treated as confidential,[20] under the proposed legal framework, there is no scope for such confidentiality as it could result in non-disclosure of material information vital for decision-making. This accords with the Sub-Committee's assertion that it has used the BSP as a reference tool, but not limited its recommendations to those of the BSP. However, this recommendation may conflict with the Intellectual Property Rights Act of Sri Lanka, which provides for the protection of undisclosed information,[21] including technical information related to the

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20 *Bio-safety Protocol* , Art. 21.

21 *Intellectual Property Act* No. 36 of 2003, Section 160 (6).

manufacturing of goods. However, the counter-argument is that while confidential information could be protected under the Intellectual Property Act, it cannot be used to justify withholding information when approval for products is sought.

Labelling of products

The Sub-Committee recommended that all genetically modified organisms, their products and those products made by processes involving the use of GMOs and LMOs be, labelled mandatorily. Further, it pointed out that the provisions of the Consumer Affairs Authority Act No. 9 of 2003 could be used to make regulations for the compulsory labelling of all GMOs and products.

Further, the Sub-Committee was of the view that the draft regulations made by the Ministry of Health under the Food Act[22] could be used as a basis in bringing a new set of regulations dealing with granting approval to all food items containing GMOs.

The Sub-Committee further proposed use of discretionary powers embodied in the Fauna and Flora Protection Ordinance[23] and the Animal Diseases Act[24] to control, regulate and prohibit the entry of all genetically modified animals and animal products.

Furthermore the Sub-Committee proposed the bringing in of regulations to the Plant Protection Act,[25] Food Act, Consumer Affairs Authority Act, Control of Pesticides Act,[26] Fisheries and Aquatic Resources Act[27] in order to regulate, control and prohibit the entry of GMOs in sectors governed by each Act.

Intellectual Property Rights and Plant Breeders Rights

The Sub-Committee further stated that the proposed Plant Breeders' Rights Act of 2001 of Sri Lanka which facilitates providing plant breeders' rights to Genetically Modified Plants, has to be changed in order to

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22 Act No. 26 of 1980.
23 Vol. VI, Chapter 469, (LESL) 1980 (Revised).
24 Act No. 59 of 1992.
25 Act No. 35 of 1999.
26 Act No. 33 of 1980.
27 Act No. 2 of 1996.

require an applicant to first seek approval under the provisions of the new law proposed under the Bio-safety Framework before it is given plant breeders' rights.

Under the present Intellectual Property Act of Sri Lanka, the Intellectual Property Office can refuse to grant patents to inventions that are detrimental to public order and morality.[28] The Intellectual Property Office could thus have a role in protecting human, animal or plant life and health, and avoiding serious prejudice to the environment. It was recommended by the Sub-Committee that such provisions could be used to refuse granting of patent protection to biotechnologies such as Genetic Use Restriction Technologies (GURTS), which could on the one hand, prevent farmers from saving seeds for the next season and on the other hand, make Sri Lankan agriculture dependant on chemicals recommended by corporate giants.

Damages/Redress

Further the Sub-Committee recommended that the issue of liability and redress for damages resulting from the release of GMOs into the environment has to be carefully considered and that an appropriate legal regime should be introduced to address the potential problems.

4. The compatibility of labelling and other monitoring mechanisms with the WTO

In the opinion of the writer, the proposed approving authority of Sri Lanka would be able either to grant approval for LMOs and GMOs or to prevent them from entering Sri Lanka. Further, it would be empowered to impose labelling requirements on LMOs and GMOs. Such measures could affect other exporting WTO member countries, and they could challenge such measures on the basis of the SPS agreement. For instance, they could argue that the measures are maintained without sufficient scientific evidence (Article 2.2) or that such measures are not based on a risk assessment (Article 5.1) or that such measures are more trade restrictive than required (Article 5.6). It is submitted that lack of sufficient scientific evidence to support imposition of certain measures on the ground that certain LMOs and GMOs are harmful to

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[28] Sec. 79(1).

human health and environment could be a huge barrier. Nobody is in a position to fully evaluate the risks of products developed through the use of biotechnology, and a developing country such as Sri Lanka certainly lacks the resources to do so. However, as both the BSP and the SPS include the use of the precautionary principle as a basis for decision making, it could be argued in defence that where relevant scientific evidence is inadequate, measures have been taken on the basis of the precautionary principle.

There are differences in the scope of the precautionary principle in the SPS Agreement and the BSP. These can be summarized as follows;[29]

Bio-safety Protocol (Article 11.8)	**SPS Agreement (Article 5.7)**
Lack of scientific certainty due to insufficient relevant scientific information and knowledge regarding the extent of the potential adverse effects of a LMO on the conservation and sustainable use of biological diversity in the Party of import, taking also into account risks to human health, shall not prevent that party from taking a decision, as appropriate with regard to the import of that LMO intended for direct use as food or feed or processing, in order to avoid or minimize such potential adverse effects.	In cases where relevant scientific evidence is insufficient, a member may *provisionally* adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from other international organizations as well as from sanitary and phytosanitary measures applied by other members. In such circumstances, members shall seek to obtain *additional information* necessary for a more objective assessment of risks and *review the sanitary and phytosanitary measure accordingly within a reasonable period of time.* [emphasis added]

[29] " Whether the WTO Agreement on Sanitary & Phytosanitary Measures (SPS) and the Cartagena Protocol on Bio-safety are in conflict or they are mutually supportive; the Sri Lankan perspective," op. cit., 17.

This shows that the SPS Agreement has restricted the application of the precautionary principle by specifying that only provisional measures can be taken on the basis of the precautionary principle and that such provisional measures have to be reviewed within a reasonable time. Under the proposed legal framework of Sri Lanka, the proposed approving authority could ban GMOs on the basis of the precautionary principle. However, it could be argued that this could be done only as a provisional measure and would have to be reviewed within a reasonable period of time. However, the Bio-safety Protocol does not impose such restrictions in taking measures based on the precautionary principle. Hence, if another WTO member state raises a complaint against Sri Lanka for adopting measures to regulate or ban importation of LMOs, Sri Lanka could defend itself by resorting to Article 11.8 BSP. However, the Bio-safety Protocol applies only to LMOs, including those that will be used in food, feed and in processing, and does not include processed products or genetically modified products. Hence, the restrictions imposed by the Article 5.7 of the SPS Agreement in the application of the precautionary principle would continue to apply in relation to measures taken to regulate genetically modified food. Accordingly, if the proposed approving authority imposes any restriction on GM food, other WTO member states who would get adversely affected by such restrictions could argue that the measures were too trade restrictive, contravening Article 5.6 of the SPS agreement. Similarly, measures that are covered by the BSP could be challenged by other WTO member on the basis that the measures are more trade restrictive than allowed under Article 5.6 of the SPS agreement.

Such inconsistencies between provisions of the WTO Agreements and those of the BSP would have to be resolved by the application of public international law. The WTO is not a closed system and as the Appellate Body of the WTO observed in the first WTO dispute (US – Gasoline), GATT provisions should not be interpreted in "clinical isolation" from public international law.[30] In its preamble, the Vienna Convention on the Law of Treaties states that *disputes concerning treaties like other international disputes should be settled by peaceful means and in conformity with the principles of justice and international*

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30 "Whether the WTO Agreement on Sanitary & Phytosanitary Measures (SPS) and the Cartagena Protocol on Bio-safety are in conflict or they are mutually supportive; the Sri Lankan perspective," op. cit., 18.

law. Further the preamble to the BSP states that *trade and environment agreements should be mutually supportive with a view to achieving sustainable development.* It is submitted that the international community could apply the above principles in interpreting seemingly conflicting provisions in BSP and relevant agreements of the WTO in arriving at a harmonious interpretation which serves the interests of the public at large.

Schedule I

UN Conventions on Human Rights and International Conventions on Terrorism Signed, Ratified or Acceded to by Sri Lanka as at 31 December 2004*

- *Additional Protocol to the Convention on Prohibitions or Restrictions on the use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Protocol IV, entitled Protocol on Blinding Laser Weapons)*
  Acceded on 24 September 2004.

- *Convention Against Corruption*
  Acceded on 11 May 2004.

- *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*
  Acceded on 3 January 1994.

- *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*
  Acceded on 15 April 1958.

- *Convention on the Elimination of All Forms of Discrimination against Women*
  Ratified on 5 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 responsibilities under the treaty irrespective of whether it became a party by signature and ratification or accession.

- *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*
  Acceded on 27 February 1991.

- *Convention on the Prevention and Punishment of the Crime of Genocide*
  Acceded on 12 October 1950.

- *Convention on Prohibitions or Restrictions on the use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (with Protocols I, II and III)*
  Acceded on 24 September 2004.

- *Convention on the Rights of the Child*
  Ratified on 12 July 1991.

- *Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation*
  Acceded on 6 September 2000.

- *International Convention against the Taking of Hostages*
  Acceded on 6 September 2000.

- *International Convention for the Suppression of Financing of Terrorism*
  Ratified on 6 September 2000.

- *International Convention for the Suppression of Terrorist Bombings*
  Ratified on 23 March 1999.

- *International Convention on the Elimination of All Forms of Racial Discrimination*
  Acceded on 18 February 1982.

- *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*
  Acceded on 11 March 1996.

- *International Covenant on Civil and Political Rights*
  Acceded on 11 June 1980.

- *International Covenant on Economic, Social and Cultural Rights*
  Acceded on 11 June 1980.

- *International Covenant on the Suppression and Punishment of the Crime of Apartheid*
  Acceded on 18 February 1982.

- *Optional Protocol 1 to the International Covenant on Civil and Political Rights*
  Acceded on 3 October 1997.

- *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*
  Ratified on 15 January 2003.

- *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*
  Ratified on 6 September 2000.

- *Optional Protocol to the Convention on the Rights of the Child on the sale of Children, Child Prostitution, and Pornography*
  Ratified on 9 May 2002.

- *Protocol against the Smuggling of Migrants by Land, Sea and Air - supplementing the United Nations Convention against Transnational Organised Crime*
  Signed on 15 December 2000.

- *Protocol on Prohibitions and Restrictions on the use of Mines, Booby-traps and Other Devices (Protocol II as amended on 03rd May 1996) annexed to the Convention on Prohibitions or Restrictions on Use of certain Conventional Weapons*
  Acceded on 24 September 2004.

- *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children – supplementing the United Nations Convention against Transnational Organised Crime*
  Signed on 15 December 2000.

- *United Nations Convention against Transnational Organised Crime*
  Signed on 15 December 2000.

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	

Con. No.	Name of the Convention	Date of ratification	Present Status
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	denounced
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	

Con. No.	Name of the Convention	Date of ratification	Present Status
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	
C105	*Abolition of Forced Labour Convention, 1957*	07.01.2003	
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	

Con. No.	Name of the Convention	Date of ratification	Present Status
C131	*Minimum Wage Fixing Convention, 1970*	17.03.1975	
C135	*Worker's 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	
C182	*Worst Forms of Child Labour Convention, 1999*	01.03.2001	

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 28 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 28 February 1959.

- *Geneva Convention Relating to the Treatment of Prisoners of War, 1949*
  Ratified on 28 February 1959.

- *Geneva Convention Relating to the Protection of Civilian Persons in Time of War, 1949*
  Ratified on 28 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*
- *Convention on the Political Rights of Women*
- *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. 154 concerning the Promotion of Collective Bargaining*
- *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 Organize and Procedures for Determining Conditions of Employment in the Public Service*
- *ILO Convention No. 168 concerning Employment Promotion and Protection against Unemployment*
- *Convention relating to the Status of Refugees, 1954*
- *Protocol to the Convention relating to the Status of Refugees, 1967*
- *Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*
- *Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*

Schedule III

Fundamental Rights cases decided in 2004

Article 11

A M Vijitha Alagiyawanne v L P G Lalith Prema, SC (FR) Application No. 433/2003, SC Minutes 30.11.2004.

Pathiranage Erandaka and Another v Gamani Halwela, OIC, Police Station, Hakmana and Others, SC (Special) No. 63/2001, SC Minutes 27.02.2004.

Shahul Hameed Mohammed Nilam and Others v K Udugampola and Others, SC (FR) Applications Nos. 68/2002, 73/202, 74/2002, 75/2002, 76/2002, SC Minutes 29.01.2004.

Udeni Renuka Gunawardena v Dr. Guruge L Wimalasiri and Others, SC (Special) No. 69/1999(FR), SC Minutes 26.01.2004.

Wewalage Rani Fernando (wife of deceased Lama Hewage Lal) and Others v OIC, Minor Offences, Seeduwa Police Station, Seeduwa and Others, SC (FR) Application No. 700/2002, SC Minutes 26.07.2004.

Article 12

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