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INTERNATIONAL AND COMPARATIVE ISSUES

Preface

This volume of Mootpoint continues in the tradition of previous editions, in discussing a range of legal issues of contemporary interest and importance. In addition to articles touching on legal aspects of governance, the legislative process, constitutionalism and human rights, Mootpoint also contains accounts of recent cases of public interest which CPA has litigated.

In keeping with CPA's sustained involvement in the area of franchise rights, this volume has two articles relating to different aspects of electoral law. This branch of the law has unfortunately become particularly significant in this country, where elections have come be held unusually frequently. The first seeks to analyse recent decisions of the courts in election challenges. The Supreme Court has maintained its approach, highlighted and commented on in previous volumes, of interpreting legal and constitutional provisions relating to the conduct of elections, in a manner which both amplifies the voting rights of the people and also subjects to a high level of scrutiny arguments by government for restricting these rights. The second article critiques the government's failure to appoint an Election Commission as guaranteed by a recent Amendment to the Constitution. The article explores the reasons for this failure, illustrating the practical problems in the system of appointments to the independent commissions established under the Amendment. The concept of independent commissions is an attractive one, with the introduction of the Constitutional Council as a key element in the appointment process. It is however clear that even this scheme will fail to deliver in the absence of executive co-operation.

The independence of the judiciary and the ways in which judges at all levels could be held accountable, are matters which have gained increasing attention in Sri Lanka over the past few years. One contributor reflects on these, while another focuses on the tussle between the executive and legislative branches of government, as dramatically illustrated in the President's take-over of defence and other key powers prior to the last parliamentary election. Lessons from Canada on constitutional governance, a value which cuts across all of the above, form the basis of yet another article.

The recent experience of the Women's Rights Bill serves as an illustration of the law-making process when it is working relatively well. The government published the Bill in 2004 and called for submissions on it. CPA initiated a meeting of women's groups and interested individuals to discuss the Bill. The submissions made by CPA were taken up along with other responses at a meeting called by the Ministry of Women's Empowerment, following which a technical committee consisting of those from NGOs and academia was appointed to revise the Bill along the lines submitted. The article on the Women's Rights Bill in this volume reflects and expands on CPA's submissions, which it is hoped will be incorporated in the Bill as presented to Parliament.

We also include a legal perspective on the often highly-charged issue of religious intolerance. In a complex area, where competing claims of Christian evangelism and Buddhist nationalism clash, this article takes a fresh approach in analysing the situation through the lense of legal liability for inaction in the face of violence targeted against particular religious groups. The power of multinational corporations and how to channel that power into compliance with labour codes; national enforcement of health rights supported by the application of international standards; and international law approaches to state-sponsored violence in territorial claims are the subject matter of other articles. We are also pleased to include in this publication the text of a Sri Lankan Fulbright Commission lecture on human rights and HIV, an area on which CPA continues to focus.

An editorial committee consisting of Chatura Randeniya, Karen Whiting, Shahina Zahir, Megan Bremer, Lilanka Botejue and Cyrene Siriwardhana was responsible for the preparation of the volume. We wish to thank the Canadian International Development Agency for financial assistance in producing this publication.

Cyrene Siriwardhana
Director, Centre for Policy Alternatives

SRI LANKA:
CURRENT LEGAL ISSUES

Recent Developments in Elections Law

Araliya Senapathi

> "The citizen's right to vote includes the right to freely choose his representatives, through a genuine election which guarantees the free expression of the will of the electors: not just his own. Therefore not only is a citizen entitled himself to vote at a free, equal and secret poll, but he also has a right to a genuine election guaranteeing the free expression of the will of the entire electorate to which he belongs..."[1]

In light of several recent elections witnessed by the citizens of Sri Lanka, the law relating to elections and the electoral process in the country has been given unprecedented prominence. Within the last decade the democratic cycle of government has brought four General Elections, two Presidential Elections, several Provincial Council Elections and the Local Government Elections. Unfortunately, election-related violence, stuffing of ballot boxes, election rigging and various forms of discrepancies have tainted nearly all of these elections. Violation of electoral law is on the increase. The Parliamentary General Election in 2001 is considered to have been the most violent in the recent past.[2] The incidents which have occurred in the last decade or so with relation to elections demonstrate lack of regard and respect for the law, not only by candidates and their supporters, but also by officials and those in the hierarchy of power. There have been instances where elections were not held as scheduled as well as instances where the Commissioner of Elections has neglected to order a re-poll in divisions where heavy election malpractice has taken place.

These events have been brought before the courts in an attempt to restore the integrity of elections. In a series of recent cases, the Supreme Court has affirmed the value of free choice and articulated the processes necessary to protect the nation's fragile mechanisms of democracy.

The Supreme Court of Sri Lanka Expounds on the Importance of Free Elections to the Survival of Democracy

In the case of *Karunathilaka & Deshapriya vs. Dayananda Dissanayake, Commissioner of Elections and Others,* the Supreme Court held that the freedom of speech and expression guaranteed by the Constitution should be broadly construed to include the right of an elector to vote in an election. Justice Fernando declared that "...the silent and secret expression of a citizen's preference 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 public platform."[3] The importance of this statement lies in the fact that freedom of speech and expression as ensured by Article 14(1)(a) of the Constitution is held to encompass a citizen's right to cast his vote in an election.

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1 *Mediwaka & Others vs. Dayananda Dissanayake, Commissioner of Elections and Others (Egodawela case)* [2001] 1 SLR 177.

2 *Final Report on Election-Related Violence, General Election 2001, Centre for Monitoring Election Violence (CMEV)*, p. 1; Centre for Policy Alternatives (CPA), 32/3, Flower Road, Colombo 7, July 2002.

3 [1999] 1 SLR 157.

Mediwaka & Others v. Dayananda Dissanayake, Commissioner of Elections and Others (Egodawela case)[4] affirmed that the failure of the Elections Commissioner to ensure a genuine, free, equal and secret poll – a poll which gave true expression to the will of *all* the electors – and following upon that, his failure thereafter to annul the poll, and to order a re-poll at all the polling stations, infringed the right of the Petitioners to freedom of expression under Article 14 (1) (a), and to equality and equal protection under Article 12 (1). The Petitioners were registered voters of the Kandy District, one of the three Districts in the Central Province. The Petitioners were all members of the United National Party (UNP), and the first Petitioner was also a candidate for the Kandy District. The Petitioners alleged that various incidents had occurred on election day, June 4, 1999, at twenty-five polling stations in Kandy District, including the premature closure of one polling station as well as ballot stuffing, driving away of polling agents and intimidation at several others. The Petitioners further alleged that the Elections Commissioner, by his failure to declare the poll at such polling stations void and order a re-poll, infringed their rights of equal protection of freedom of expression under Articles 12(1) and 14(1) (a) of the Constitution.

Fernando J. defined a poll as follows:

> "In my view, a 'poll' is a process of voting that enables a genuine choice between rival contenders: necessarily one that is *free* of any improper influence or pressure; *equal*, where all those entitled to vote (and no others) are allowed express their choice as between parties and candidates who compete on level terms; and where the secrecy of the ballot is respected ... I must hasten to add that a genuine, free, equal and secret poll is not confined to what happens within the polling station, between 7.00 am and 4.00 pm on polling day. A genuine democratic election by universal and equal suffrage demands many other safeguards: including, but not limited to (a) proper and timely registration procedures, which ensure the speedy inclusion of all citizens entitled to vote and the exclusion of all those disentitled, as well as the prevention of dual registration and the impersonation of the dead and the absent; (b) ensuring that during the pre-election period all candidates are allowed the freedom to campaign on equal terms and without unreasonable restrictions, with election laws being enforced, and uniformly enforced, and without any misuse or abuse of State media, resources and facilities; and (c) the prevention of electoral wrongdoing, and whenever that is not possible, the prompt investigation and prosecution of election offences."[5]

This judgment is significant as it elaborated on the importance of holding a genuinely free, equal and secret poll, uninterrupted from beginning to end. It further emphasized that a citizen's right to vote includes the right to freely choose not only his political party but also the candidates of his choice, thus recognizing the positive features of the system of Proportional Representation, which system has come under heavy criticism from political groups and constitutional pundits since its inception. In this

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4 [2001] 1 SLR 177.

5 Ibid.

case the Supreme Court pointed out the features of democratic importance embedded in the Proportional Representation system which enabled the public to choose between not only the political parties but also between different candidates, to elect those they consider qualified and competent to represent them in the country's law making process.

Access to Information to Empower the People

There are two cases that bring the issue of transparency to light. In *Rohan Edirisinha & Others vs. Dayananda Dissanayake, Commissioner of Elections and Others,*[6] the Petitioners foresaw an imminent infringement of their fundamental right to vote at the forthcoming elections for the Western Provincial Council, given the gross election malpractice in the Wayamba Provincial Council elections. The Petitioners sought the Court's intervention to order the Commissioner of Elections, Inspector General of Police and the Attorney General's Department to take the necessary steps to ensure that the forthcoming election was free and fair. This matter was withdrawn after the State agreed to file in Court and make available to the Petitioners, a series of letters, circulars and instructions issued by the Commissioner of Elections and the Inspector General of Police referring to a whole range of matters relating to the conduct of a free, equal and secret ballot. It was also stated that any member of the public would be entitled to obtain certified copies thereof. These documents included Circulars issued by the Commissioner of Elections to Returning Officers and the *Manual of Instructions to Police Officers.*[7]

Similarly, the case of *Arjuna Parakrama vs. Commissioner of Elections*[8] led to guidelines and criteria in respect of the conduct of free and fair elections. These were formulated by the Elections Commissioner, in discussion with the secretaries of recognized political parties.

These two judgments made publicly available, certain important election-related documents, and confirmed the State's responsibility and its acceptance of this responsibility for the conduct of free and fair elections, even though such acceptance appears to be limited to words rather than extend to actions. The availability of these election-related documents is a significant development in view of the fact that Sri Lanka lacks legislation requiring the release of information in the interest of the public.

The Responsibilities of the Commissioner of Elections

Karunathilaka & Deshapriya v. Dayananda Dissanayake, Commissioner of Elections and Others[9] is a fundamental rights application made following the failure to hold elections for the Provincial Councils of the Central, Uva, North Central, Western and Sabaragamuwa Provinces. The five year periods of office of the said Provincial Councils lapsed in June 1998. After the receipt of nominations was concluded, each returning officer fixed August 28, 1998 as the date of the poll. The issue of postal ballots was fixed for August 4, 1998. By telegram dated August 3, 1998, each of the returning officers suspended the postal voting without adducing any reason therefor.

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6 SC Application FR No. 265/99.

7 *Parliamentary Elections, 10th October 2000, Manual of Instructions to Police Officers.*

8 SCFR 640/2000.

9 [1999] 1 SLR 157.

On August 4, 1998, the President issued a proclamation under section 2 of the Public Security Ordinance bringing the provisions of Part II of the Ordinance into operation throughout Sri Lanka and made an Emergency Regulation under section 5 which had the legal effect of cancelling the date of the poll.[10]

Thereafter, the Commissioner of Elections took no steps to fix a fresh date for the poll in terms of section 22(6) of the Provincial Councils Elections Act even after August 28, 1998, which was the date originally fixed for the poll. Section 22(6) provided that where at a Provincial Councils election, due to any emergency or unforeseen circumstances, a poll in an administrative district cannot be taken on the day specified in the notice of poll, the Commissioner of Elections may, by notice published in the Gazette, appoint another day for the poll. However, this provision was overlooked by the Elections Commissioner.

In pronouncing the judgment, Fernando J. observed:

> "... It must be noted that the impugned Regulation did not purport to cancel the five elections altogether, but only to "deem to be of no effect" – in effect to cancel – the particular date of poll (namely, August 28, 1998) already fixed by notices under section 22. It invalidated or suspended those notices, but did not purport to override, amend or suspend any provision of the Act or of the Regulations, and it left untouched the provisions of section 22(6)... Article 103 of the Constitution guarantees to the Commissioner of Elections a high degree of independence in order to ensure that he may duly exercise – efficiently, impartially and without interference – the important functions entrusted to him by Article 104 in regard to the conduct of elections, including Provincial Council Elections. But the constitutional guarantee of independence does not authorize arbitrariness... While I appreciate the difficult situation in which he was nevertheless it is necessary to remember that the Constitution assures him independence, so that he may fearlessly insist on due compliance with the law in regard to all aspects of elections – even, if necessary, by instituting appropriate legal proceedings in order to obtain judicial orders. But the material available to this Court indicates that he made no effort to ascertain the legal position, or to have recourse to legal remedies."[11]

Thus the Court was critical of the acts of omission of the Elections Commissioner and his lack of enthusiasm and energy to get the machinery working for the conduct of a free and fair election. The Court also observed that even though speedy elections were a matter of paramount importance to the national interests, the Commissioner of

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[10] This "impugned regulation", as it has been referred by the Supreme Court, was as follows: "For so long, and so long only, as Part II of the Public Security Ordinance is in operation in a Province for which a Provincial Council specified in Column I of the Schedule hereto has been established, such part of the notice under section 22 of the Provincial Councils Elections Act, No. 2 of 1988, published in the Gazette specified in the corresponding entry in Column II of the Schedule hereto, as relates to the date of poll for the holding of elections to such Provincial Council shall be deemed, for all purposes, to be of no effect." Proclamation dated 04.08.98.

[11] *Karunathilaka*, [1999] 1 SLR 157.

Elections neglected to perform his duties in order to ensure that such interests were looked after.

This judgment describes the responsibilities and duties cast upon the Commissioner of Elections by the Constitution, and further elaborated on the powers of the Commissioner as guaranteed by the Constitution. The judgment emphasized the independence of the Elections Commissioner guaranteed by the Constitution which includes the power to institute legal proceedings and obtain legal opinions where necessary.

Transparency as a Guarantor of Free Choice

In *Centre for Policy Alternatives & Rohan Edirisinha v. Dayananda Dissanayake, Commissioner of Elections and Others (The Chief Ministers' Case)*[12] the petitioners challenged the interpretation given by the Commissioner of Elections to section 65 of the Provincial Councils Election Act. The section provides that when a vacancy occurs in a Provincial Council, the Secretary of the party to which the said member belonged is entitled to nominate "*a* person eligible for election" to fill the vacancy. The question arose whether the Secretary could nominate *any* person to fill the vacancy or whether he could nominate only persons who contested the election and therefore had their names on the nomination list.

Several Members of Parliament who had been requested by their respective parties to contest the Provincial Council elections as Chief Ministerial candidates, being reluctant to resign their seats in Parliament, had nominated "dummy candidates" for purposes of fulfilling the legal requirements with respect to nominations, campaigning, etc. The Members of Parliament, despite not being candidates, campaigned as their parties' nominees as Chief Ministers. After the election, when it was evident that their parties would be in power within the relevant Province, they ordered the "dummy candidates" elected to resign from the Provincial Council. Then they themselves resigned from their parliamentary seats and were nominated by the secretary of the party to fill the Provincial Council vacancy. A non-candidate, someone who was not necessarily subject to the scrutiny of the voters of the Province was thus parachuted in ahead of other candidates who received preferential votes from the voters of the Province.

The Court of Appeal, relying on the literal rule of interpretation, held that since section 65(2) of the said Act allowed the Secretary of the party to fill vacancies by nominating "a person," such person could be *any* person.

The Supreme Court overturned the decision of the Court of Appeal, stating:

> "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,

[12] SC 26/27/2002.

whether in the Constitution or another statute, which appear to be undemocratic."[13]

The Court observed that the ability to nominate an outsider to fill vacancies in Provincial Councils was an anomaly:

> "Can such an anomaly be justified on the basis of the 'supremacy of the party' (or its Secretary) over members and candidates? In my view it cannot, for this is not a domestic question pertaining to the party, party discipline, and/or party officials, members and candidates. What is involved is the right of the electorate to be represented by persons who have faced the voters and obtained their support, and that in my view, is the general scheme of the Act..."[14]

The significance lies in the fact that the judgment affirmed the right of the electorate to be represented by persons who have faced the voters and obtained their support. It further challenged the widely held myth that under the Sri Lankan Constitution and the system of proportional representation, the party is supreme and that this principle could overrule the will of the people.

A similar case was brought to the Court of Appeal after the April 2004 elections: *Centre for Policy Alternatives and Paikiasothy Saravanamuttu v. Commissioner General of Elections & Others.*[15] Article 99A of the Constitution was introduced by the Fourteenth Amendment, and requires every recognized political party or independent group contesting a General Election to submit to the Commissioner of Elections within the nomination period specified for such election, a list of persons qualified to be elected as Members of Parliament, from which it may nominate persons to fill the seats such party or group is allocated through the National List.[16] Political parties and independent groups contesting the April 2004 General Election delivered such lists to the Elections Commissioner during the specified period.

Prior to the election, local newspapers suggested that certain parties planned to appoint persons whose names were not included in the lists submitted to the Elections Commissioner as per Article 99A to the seats allocated through the National List. Following the conclusion of the election, the United Peoples' Freedom Alliance (UPFA), headed by President Chandrika Bandaranaike Kumaratunga, sought to nominate persons who were not included in the list of nominees submitted to the Elections Commissioner to fill the seats apportioned to the UPFA by way of the National List. These nominees included former Prime Minister Ratnasiri Wickremanayake and former Deputy Defence Minister Anuruddha Ratwatte.[17] In order to accommodate these outsiders, certain UPFA Members of Parliament elected through the National List were expected to step down.

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13 Ibid.

14 Ibid.

15 C.A. (Writ) Application No: 798/2004.

16 See Article 99A of The Constitution of the Democratic Socialist Republic of Sri Lanka.

17 Former Minister Anuruddha Ratwatte is an accused in the infamous Udathalawinna massacre which took place on the day of the 2001 December General Election at which he was a candidate. Eleven people were allegedly brutally murdered by two sons of Anuruddha Ratwatte and his supporters traveling in vehicles belonging to Ministries falling under Mr. Ratwatte.

The Petitioner stated that he cast his vote at the General Election held on April 2, 2004 only after a careful study of three criteria, namely,

> "(a) the different policies expressed by the several registered political parties, independent groups and their candidates;
>
> (b) the calibre, qualifications, reputation, known prior conduct, record and stature of the candidates nominated by the Registered Political Parties and Independent Groups; and
>
> (c) the calibre, qualifications, reputation, known prior conduct, record and stature of the persons set out in the respective lists of persons qualified to be elected as Members of Parliament, submitted by the respective Registered Political Parties and Independent Groups, out of which the said parties and groups would be entitled to nominate some to fill seats as 'National List' Members of Parliament, the number to be nominated by each such party/ group on its overall (national) performance at the General Election."[18]

The Petitioner drew the attention of the Court to Article 99A of the Constitution which he stated "...prevented the voters from being misled as to the possible composition of Parliament..."[19]. The Petitioner submitted that he had a legitimate expectation that the seats to be allocated through the National Lists would be filled only with those individuals who had been listed and presented to the public on said National Lists.

Section 64 (3) and (4) of the Parliamentary Elections Act, No: 1of 1981 (as amended) must also be also be considered in this context. These subsections provide that in the event a Parliamentary seat falls vacant, the Elections Commissioner shall require the secretary of the political party or the leader of the independent group to which the Member who vacated the seat belonged, to nominate *a* member of such party or group to fill the vacancy. It should be emphasized that in the *Chief Minister's case* the Supreme Court referred to the ability to nominate an outsider as "*an anomaly.*"[20] In interpreting whether "*a member*" as set out in section 65 of the Provincial Councils Election Act meant *any* person or only persons who had contested the election, the Supreme Court held that the interpretation more consistent with democratic principles must be adopted.

This judgment in the *Chief Minister's case* is therefore clearly applicable in *Centre for Policy Alternatives and Paikiasothy Saravanamuttu v. Commissioner General of Elections & Others*[21] presently pending in the Court of Appeal. In interpreting section 64(4) of the Parliamentary Elections Act, the precedent set in the *Chief Minister's case* must be followed. This will ensure that the first principles of representative democracy are enforced such that the public is not misled as to the persons representing them in the legislature, and will also prevent situations where persons

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18 C.A. (Writ) Application No: 798/2004.
19 Ibid.
20 SC 26/27/2002.
21 C.A. (Writ) Application No: 798/2004.

rejected by the people at a legitimate election are not brought in to the legislature through deception of the public.[22]

The Petitioner in *Centre for Policy Alternatives and Paikiasothy Saravanamuttu v. Commissioner General of Elections & Others*[23] submitted that the matters set out in his application are "...of great importance to all registered voters and to the very efficacy and credibility of the electoral process in Sri Lanka."[24] The application requested, *inter alia*, an Interim Order staying the Commissioner of Elections, until the final determination of the application, from entertaining or acting upon any nominations from any political party for appointment from its National List, any person or persons not named in the National Lists submitted to the Elections Commissioner and thus published in the Government Gazette.

At the time of writing, the case is being heard in the Court of Appeal and sadly, the UPFA has proceeded to nominate and swear in Ratnasiri Wickremanayake and Mervyn Silva as Members of Parliament, and even bestowed Ministerial privileges on one of these individuals. The matter pending in Court therefore gains further importance as it is only Court that can remedy the undemocratic precedent set after the April 2004 elections which, if upheld, could have grave and far reaching negative consequences.

Conclusion

Amidst the violence, intimidation, and hoodwinking of contemporary politics, the recent decisions of the Supreme Court offers a ray of hope that the law will result in order and democracy. Decision after decision has upheld the primacy of free elections as the cornerstone of the Sri Lankan political process. It has held fast to the mechanisms and responsibilities that contribute to democratic behavior while refusing to interpret ambiguities in a way that restrains democracy. In short, if democracy is not alive at the polls, perhaps it can be revived in court.

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22 One may, at this point, draw the argument that a person who has lost an election still maintains his name in the lists submitted to the Elections Commissioner. However, this argument fails on the very basis of the principles of democracy as a candidate loses at an election as a result of the public rejection of such candidate, his qualifications, reputation and what he stands for. It seems that the paramount duty of the Temples of Justice is to uphold the principles of democracy, even where the law has neglected to do so.

23 Ibid.

24 Ibid.

A Long Wait for the Election Commission

Sundari De Alwis

Sri Lanka is at a juncture where the notion of democracy is challenged as never before. Transparency, accountability and a strong representative government remain mere rhetoric. The general public has lost confidence in the institutions and processes of governance in the country. Civil society reacted to this situation by bringing pressure to bear on the government, calling for transparency and accountability in the conduct of state institutions, in particular the behavior of the police and public officials. The passing of the Seventeenth Amendment to the Constitution was the result of such public pressure, and it came about with considerable cross party support for better governance.

The Seventeenth Amendment

The Seventeenth Amendment was enacted by Parliament in October 2001. Its objective was to alter the constitutional process for the appointment, regulation of service and disciplinary control of public officers forming part of the Executive. These public officers include Police Officers, Judicial Officers and those officials appointed to the Commissions formed under the said Amendment. These Commissions are the:

- Election Commission
- Public Service Commission
- National Police Commission
- Human Rights Commission of Sri Lanka
- Permanent Commission to Investigate Allegations of Bribery or Corruption
- Finance Commission
- Delimitation Commission
- Parliamentary Scholarships Board.

The Seventeenth Amendment was aimed at guaranteeing the independence of the commissions, institutions and public officers of high democratic importance from political interference.

The objective of forming these Commissions was, among other things, to oversee and control the conduct of Elections, Policing and the Public and Judicial Services. Prior to the Seventeenth Amendment, the power of appointing members to the Commissions and the public officers supervised by such Commissions was exercised by the President and the Cabinet of Ministers. The Seventeenth Amendment placed restrictions on the discretion that was vested in the President and the Cabinet of Ministers in relation to these appointments, and subjected the exercise of that discretion to the recommendation and approval of the **Constitutional Council**.

The provisions relating to the establishment and the functions of the Constitutional Council are contained in the new Chapter VIIA of the Constitution, which includes Articles 41A to 41H.

The First Report of the Constitutional Council[1]

The following general principles were adopted by the Constitutional Council to be followed when making recommendations to the President for appointments under Article 41B and other Laws:

> "...the council shall in good faith and to the best of its ability, endure to give effect to:
>
> - the directions set out in the Constitution and Legislation;
> - the principle of equity enshrined in Article 12 and 41 B (3) of the Constitution that equity means more than treating persons in the same way but also requires special measures and the accommodation of differences;
> - principle-based guidelines that allow for a flexible practical approach to selection that achieves meritorious outcomes, other than permitting the selection process to be complex and overly concerned with process, although process has received due consideration."

The general criterion, upon which the Council bases its discretion when making recommendations for appointment, are that that no person shall be recommended or approved for appointment if such person is biased or prejudiced or has improper motives, and that such appointment shall be made without discrimination and shall be made from persons of integrity and ability.

These guidelines, when properly followed, will ensure that recommendations by the Council are made responsibly.

Election Commission

This article focuses on the new Chapter XIVA to the Constitution, which deals with the Election Commission. A properly functioning Election Commission is a constitutional requirement in the present context to oversee the proper conduct of elections. Unfortunately however, despite the fact that several elections have been held since the Seventeenth Amendment, the Election Commission is yet to be appointed.[2]

Under Article 41B, the Constitutional Council recommends names of persons to be appointed to the Election Commission by the President. The Commission and its members enjoy a considerable degree of legal immunity and exercises powers with regard to the conduct of free and fair elections and election campaigns. The Commission has a mandate to secure the enforcement of all laws relating to an election, and all arms of the state charged with the enforcement of such laws are placed under a duty to co-operate with the Commission to ensure its effectiveness. The Election Commission is empowered to prohibit the use of state property for election purposes. It can also issue guidelines to media agencies to ensure a free and

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1 *Parliamentary Series* No. 14 of 20th November 2002.

2 The Commissioner of Elections holding office at the time of the passing of the Seventeenth Amendment is however vested with the powers of the Election Commission, until such time as the Commission is constituted as per Section 27(2) of the Seventeenth Amendment. See further below.

fair election. State media agencies such as Sri Lanka Broadcasting Corporation and Sri Lanka Rupavahini Corporation are placed under a special duty to comply with such guidelines. Failure to comply empowers the Election Commission to place the management of these two state media agencies under a Competent Authority for the duration of the election. The Commission also has wide powers in respect of deploying police and armed personnel in order to ensure security. It is manifest that the Elections Commission was formed with the objective of restricting the abuse of the electoral process.

Non-Constitution of the Election Commission

The First Report of the Constitutional Council documents the decision to recommend persons for appointment under Article 41B of the Constitution as Chairpersons and Members to the various Commissions including the Election Commission. These recommendations were submitted to the President on 31st October 2002. The Council recommended that the following appointments be made to the Election Commission: R.N.M. Dheeraratne (Chairman),A.N.V. Chandrahasan, M Nilaweera, Elmore Perera and S.A.C.M. Zuhyle.

At her first meeting with the members of the Council on 25th November 2002, the President expressed reservations about the appointment of R.N.M. Dheeraratne, a retired Judge of the Supreme Court, stating that she had received several protests against the appointment. The President reiterated this position in a letter addressed to the then Speaker, opining that she "strongly and firmly believe that Mr. Dheeraratne is not capable of acting independently and impartially in this important office, in view of his active involvement in activities of one political party." On this basis, the President requested that the Constitutional Council reconsider their recommendation.

Following the President's request, the Constitutional Council examined her objections, but proceeded to recommend the same names they had recommended previously. In making the same recommendations for the second time, the Council's announcement went though the due process of examining the objections raised by the President. This decision must be viewed from the standpoint that the President's own nominee in the Council approved the decision of the Council on both occasions.

The recommendations of the Council were made under Article 41 B, which deals with the duties of the Constitutional Council and the President with regard to appointments to the Election Commission. This provision does not give the President any discretion in the exercise of her duties in relation to recommendations to the Council. The Article is structured in a way so as to restrict a presumed 'right of discretion'. The positive duty imposed by the Article is for the Constitutional Council to make recommendations regarding appointments. The President is under a duty to comply with such recommendations. The Article precludes the President from acting in any other way.

Supreme Court Determination No. 6/2001

At the time of introducing the Seventeenth Amendment, the President made a written reference to the Chief Justice in terms of Article 122(1) (b) of the Constitution requiring the special determination of Court as to the constitutionality of the Bill. This Bill bore an endorsement under the hand of the Secretary to the Cabinet of Ministers in terms of Article 122(1) that it was, in the view of the Cabinet of Ministers, considered 'urgent', and in the national interest.

In its determination, the Supreme Court stated that the Seventeenth Amendment and Article 41B thereof seeks to place a restriction on the discretion vested in the President and the Cabinet of Ministers in relation to certain matters including the appointment, regulation of service, and disciplinary control of public officers, and the formation of certain Commissions, and subjects the exercise of that discretion to the recommendation or approval of the Constitutional Council.

The Dilemma of the Commissioner of Elections

As a result of the delay in appointing the Election Commission, the incumbent Election Commissioner, Dayananda Dissanayake, is compelled to continue in office notwithstanding the fact that he is past retirement age and in poor health. Dissanayake petitioned (SC Application No. 271/2003) the Supreme Court claiming a violation of his fundamental rights under Article 126 of the Constitution.

However, in his judgment, Chief Justice Sarath Silva, with Bandaranayake, J. and Edussuriya, J. concurring, stated that Mr. Dissanayake continuing to be in office was a legal requirement flowing directly from Section 27(2) of the Seventeenth Amendment. He further held that this situation does not attract the provisions of Articles 17 & 126 of the Constitution.

Section 27(2) provides that the "...person holding the Office of Commissioner of Elections on the day immediately preceding the date of commencement of the Act, shall continue to exercise and perform powers of the office of the Commissioner of Elections vested in him immediately prior to the commencement of the Act, and of the Election Commission, until an Election Commission is constituted in terms of Article 103, ..."

A plain reading of Section 27(2) clearly shows that this particular provision of the law was meant to be an aid to tide over a temporary crisis, and was merely an interim provision. A further consideration is the fact that the Seventeenth Amendment was brought before the Court in order to pass it in Parliament as an 'urgent' Bill so as to urgently redress a situation. There was a justified sense of urgency on the part of the government to constitute the Election Commission as a matter of priority.

The Supreme Court judgment, by necessary implication, can only be taken to mean that the incumbent Election Commissioner has to continue in office if he does not wish to do so, and even if he is incapable of carrying out his functions!

The absurdity of this situation was highlighted during the last Provincial Council Election. A day prior to the Provincial Council Elections of July 2004, the Commissioner was hospitalized due to a heart attack. This left the Provincial Council Elections in a crisis.

The powers of the Election Commission were given to the Commissioner of Elections by the interim provision contained in section 27(2). The Seventeenth Amendment was an important legislative enactment for the country as it would serve to achieve transparency, accountability and good governance. Therefore applying the interim provision in Section 27(2) to legitimize the failure of the Executive to carry out its duty in terms of the Constitution undermines all of these values.

Action against the Non-Constitution of the Election Commission

The unhealthy state of affairs that led to the failure to constitute the Election Commission motivated public interest groups into taking legal action[3].

The Petitioners in the writ application filed in the Court of Appeal were the Public Interest Law Foundation and an Attorney-at-Law. The Respondents were the Attorney General and the President. The Petitioners sought to invoke the jurisdiction of the Court of Appeal to issue a Writ of Mandamus against the President to discharge an important constitutional duty, namely to appoint the Chairperson and the other members of the Election Commission.

The Petitioners argued that the process of appointing the Election Commissioner was completely changed by the introduction of the Seventeenth Amendment. The Petitioners argued that with the enactment of the Seventeenth Amendment, the President no longer enjoyed the discretion allowed to her previously, and that consequent to the Amendment, the President had no option other than to appoint the persons recommended by the Constitutional Council. The gist of the Petitioners' submission was that the purpose of the Seventeenth Amendment was to remove the discretion the President enjoyed previously, whilst preventing arbitrary appointments to positions of great democratic importance.

The Petitioners cited the cases of *Visuvalingam vs. Liyanage,*[4] *William Silva vs. Bandaranayaka,*[5] *and Karunathilaka vs. Dissanayaka*[6] as relevant to the issue of the immunity afforded to the President by Article 35(1) of the Constitution[7]. The Petitioners also submitted that it is a recognized principle of law that all executive authorities, including the President, are subject to judicial review, in spite of the immunity provided for in Article 35(1).

The Petitioners argued that the Constitution required the appointment of the Election Commission, that the Constitution did not intend to give the President the right NOT

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3 C.A. Writ Application No. 1396/2003.

4 [1983] 1 SLR 203 at 241-242.

5 [1997] 1 SLR 92 at 95.

6 [1999] 1 SLR 157 at 177.

7 Article 35(1) While any person holds office as President, no proceedings shall be instituted or continued against him in any court or tribunal in respect of anything done or omitted to be done by him either in his official or private capacity.

to appoint the Election Commission. If that were the case, the Constitution itself would become redundant. This could never have been the intention of the legislature!

However, the Court dismissed the application of the Petitioners on the basis that Article 35 of the Constitution gave "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 the circumstances specified in Article 35(3)".[8]

The subsequent appeal[9] to the Supreme Court against the aforesaid Order of the Court of Appeal also failed.

Immunity a Shield for the Doer, not for the Act

But how appropriate is this interpretation? It is particularly interesting to consider whether this decision is consistent with the rule of law.

In *Karunathilaka and another vs. Dayananda Dissanayake, Commissioner of Elections and others*, it was observed that the immunity conferred by Article 35 is neither absolute nor perpetual. Fernando J made the following observation:

> "I hold that Article 35 only prohibits the institution (or continuation) of legal proceedings against the President while in office; it imposes no bar whatsoever on proceedings (a) against him when he is no longer in office, and (b) other persons at any time. That is a consequence of the very nature of immunity; immunity is a shield for the doer, not for the act. Very different language is used when it is intended to exclude legal proceedings, which seek to impugn the act. Article 35, therefore, neither transforms an unlawful act into a lawful one, nor renders it one, which shall not be questioned in any Court. It does not exclude judicial review of the lawfulness or propriety of an impugned act or omission, in appropriate proceedings against some other person who does not enjoy immunity from suit...."[10]

The judgment of the seven-judge bench headed by the Chief Justice in relation to the 18th Amendment to the Constitution gives a more progressive interpretation of Article 35 of the Constitution. In this case, the Supreme Court, on the issue of immunity of the executive states that:

> "...in terms of Article 3 and 4 of the Constitution, fundamental rights and franchise constitute the sovereignty of the people, and is inalienable. The Constitution does not attribute any unfettered discretion or authority to any organ or body established under the Constitution. Even the immunity given to the President under Article 35, has been limited in relation to Court proceedings specified in Article 35(3). Moreover the Supreme Court has entertained and decided the questions in relation to Emergency Regulations made by the President (*Joseph Perera* v. AG – [1992] 1 Sri L.R. 199) and Presidential Appointments (*Silva v. Bandaranayake* – [1997] 1 Sri L.R. 92)."[11]

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8 *Vide* Order of the Court of Appeal dated 17th December 2003.
9 S.C. Spl. L.A. No. 34/2004.
10 Supra note 5 at 177.
11 [2002] 3 SLR 71 at page 78.

The Supreme Court further stated that the,

> "...concept of judicial review of administrative action, being a predominant feature of constitutional jurisprudence, prevents total immunity being given to anybody created under the Constitution, as such restriction of judicial scrutiny would impair the very foundation of the Constitution and the Rule of Law. The total immunity contemplated by the amendment, taking away the judicial review of the actions of the Constitutional Council out of the fundamental rights jurisdiction, in effect would alienate the judicial power from the people in contravention of Articles 3 and 4 of the Constitution"

Justice and the Rule of Law

The establishment of the Constitutional Council and the Independent Commissions raise fundamental issues of governance. The Constitutional Council and the Commissions have been proposed as a means by which appropriate practices in institutions and processes of good governance may be established. However, the predicament of the Election Commission is a glaring example of the scant regard that the Executive and the Judiciary have for the due process of the law.

It is pertinent that the whole issue of the non-constitution of the Election Commission be seen for what it really is - an act of sabotage of best practice in governance and a willful undermining of the sovereignty of the people.

A Constitutional Crisis: Cohabitation and Defence

Rohan Edrisinha

Attempts to resolve the constitutional crisis which arose in late 2004 seem to have floundered due to disagreement on the question of defence. The President, after agreeing to appoint a defence minister nominated by Prime Minister Wickremasinghe, soon after the UNF's victory at the parliamentary elections of 2001, removed the defence minister in November 2003 and seemed determined to retain the portfolio herself. The Prime Minister's position seemed to be that he needed to have control of defence since it is an integral part of a peace process which includes the maintenance of a ceasefire agreement as well as complex constitutional and political negotiations.

There is considerable confusion about the Supreme Court's intervention on the issue. Various claims have been made as to the import of the Supreme Court's opinion, the nature of its jurisdiction and its consequences.

The President sought an opinion on two matters. One was the general question as to whether the powers vested in the Minister of Defence were subject to the overriding control of the President. The second was the more specific question relating to some amendments made by the Minister of Defence to regulations made under the Army, Navy and Air Force Acts.

Constitutional Provisions

The President invoked the consultative jurisdiction of the Supreme Court through Article 129 of the Constitution which is itself a controversial provision. Several commentators, including the Constitution's admirers, such as H.M. Zafrullah, in his early commentary on the Constitution of 1978, *Sri Lanka's Hybrid Presidential and Parliamentary System and the Separation of Powers Doctrine(1981)* have expressed concerns about the Constitution requiring the Supreme Court to exercise non-judicial functions. Since the Supreme Court is the final authority for constitutional interpretation, it is undesirable that that court should be required to provide advisory opinions for the President. The Supreme Court should deliver judgments, determinations and orders which are decisions of a binding nature rather than mere opinions which are non-binding in character. Since the President can have access to a wide array of legal advice from the Attorney General to other legal counsel, there is no need for the highest apex court of the country to also have to function as a legal adviser to the President, who, notwithstanding the strange assertion of the Supreme Court to the contrary in its determination on the Nineteenth Amendment to the Constitution, under the Constitution of 1978 is a partisan political actor. Zafrullah, in fact, refers to the fact that the Article provides that the Court "may" report to the President, to suggest that the Court should decline to express its opinion when it considered it inappropriate to do so.

Apart from the criticism of Article 129 in terms of principle from the perspective of a functional separation of powers, the Article itself, is undesirable from a perspective of constitutionalism. The relevant parts of the Article read as follows:

"Article 129

(1) If at any time it appears to the President of the Republic that a question of law or fact has arisen or is likely to arise which is of such nature and of such public importance that it is expedient to obtain the opinion of the supreme court upon it, he may refer that question to that court for consideration and the court may, after such hearing as it thinks fit, within the period specified in such reference or within such time as may be extended by the President, report to the President its opinion thereon.

(2) .....

(3) Such opinion, determination and report shall be expressed after consideration by at least five judges of the Supreme Court, of whom, unless he otherwise directs, the Chief Justice shall be one.

(4) Every proceeding under paragraph 1 of this article shall be held in private unless the Court for special reasons otherwise directs."

a) The Article refers to the Supreme Court expressing an opinion on a question of PUBLIC importance. Yet many parts of the Article shut the public out of the process, contrary to basic principles of the Rule of Law which require transparency and public scrutiny of judicial proceedings. Article 129 (4) provides for proceedings to be held in private unless the Court for special reasons directs otherwise.

b) The procedure for the exercise of such consultative jurisdiction is not clear. Who is entitled to make submissions to the Court? Do relevant stakeholders who may be affected by the opinion have a right to be heard? Do members of the public have a right to be heard, or is it a matter solely at the discretion of the Court?

Article 134 (1) provides for the Attorney General to be heard in consultative jurisdiction hearings while Article 134 (3) provides generally, that in all matters involving the jurisdiction of the Supreme Court, the court has the discretion to grant to any other person or his legal representative such hearing as may appear to the Court to be necessary in the exercise of its jurisdiction.

c) The procedure with respect to the time frame involved for the exercise of consultative jurisdiction which entitles the President to specify time limits is unsatisfactory as it undermines the autonomy of the courts. The same criticism can be made of Article 122 (1) (c). Such provisions are similar to Section 65 of the Constitution of 1972 which resulted in the fiasco in relation to the Constitutional Court's hearing on the Press Council Bill in 1972 and the resignation of several of its most distinguished members.

d) Article 129 (1) provides that the Supreme Court shall "report to the President its opinion thereon." Articles 121 and 122 of the Constitution contain similar provisions with respect to the Supreme Court's pre-enactment constitutional review jurisdiction. (The Speaker is sent a copy of the determination as well). Unfortunately, the Court has interpreted these provisions legalistically and not made such determinations available to even the petitioners in such cases, let alone members of the public. Similarly, even though the Court's opinion on defence was considered a matter of public importance, the opinion is not available to the public!

The Opinion and Due Process

In S.C. Reference No. 2/2003, *Reference under Article 129(1) of the Constitution of the Democratic Republic of Sri Lanka by Her Excellency the President,* Article 129 was invoked by President Kumaratunga probably for the first time ever. The Chief Justice and the Supreme Court should be commended for conducting the proceedings in open court and not "in private." With regard to the process, however, perhaps the Court should have done more to make it inclusive and representative. Furthermore, the opinion of the Court should have been widely disseminated by the Court itself, at least after it was communicated to the President, as it involves a matter of public importance.

The opinion states that the Attorney General Mr. Kamalasabayson and Mr. Egalahewa appeared "for the State," while Messrs. H.L. de Silva, R.K.W. Goonesekere and Nigel Hatch were "granted permission to appear under article 134 (3) of the Constitution." Page 4 of the opinion rather curiously refers to "Mr. H.L. de Silva P.C. who appeared for an applicant granted a hearing in terms of Article 134 (3) of the Constitution." In the interests of transparency and, indeed, history it would be important to know the identity of the applicant as a reading of 134 (2) and (3), and the fact that the opinion refers specifically to the President, suggest that Mr. de Silva could not have been appearing for the President.

The Supreme Court would certainly have benefited from hearing a more diverse range of legal submissions on a difficult yet important issue that could well have far reaching constitutional and political ramifications including the future of co-habitation in the country. A perusal of the Supreme Court's opinion does not make clear what the Attorney General's submissions on behalf of the State were, while Messrs H.L. de Silva's and R.K.W. Goonesekere's submissions seemed to support the view that the President wields extensive powers with respect to the subject of defence.

The Supreme Court relied extensively on its determination on the Nineteenth Amendment to the Constitution. The Court in that determination quite rightly declared that a badly drafted and partisan constitutional amendment that was also ad hoc and ad hominem, violated several basic features of the constitution, and therefore could not be passed without the approval of the People at a Referendum, in addition to a two-thirds majority vote in Parliament. While the conclusion reached by the Court was welcome, some of the reasoning adopted by the Court and several 'principles' it declared were retrogressive.

A Critique of the Reasoning of the Nineteenth Amendment Determination

a) The Supreme Court's view that Article 4 is entrenched by implication, is not only contrary to i) the intention of the framers of the Constitution, ii) a text based, literal interpretation of the Constitution, and iii) precedent, in the form of the determination of, literally, a Full Bench of the Supreme Court in the Thirteenth Amendment Case, but also the values of constitutionalism and a teleological approach to interpretation. Constitutionalism highlights the underlying assumptions of a Constitution, its rationale and objectives. Constitutionalism is concerned about limits and restraints on power, is counter–majoritarian, and seeks to empower people and protect the people from the wielders of political power.

   While the author believes that constitutional interpretation is required to go beyond both text and original intent of the framers, like constitutional courts in India, the United States, Canada, South Africa, and indeed most constitutional democracies have done, the Sri Lankan Supreme Court has generally adopted a far more conservative approach to constitutional interpretation. It was, therefore, out of character and unnecessary for the Court to engage in creative interpretation or the judicial activism it embarked upon in the Nineteenth Amendment judgement.

b) The manner in which the Court extrapolated from the principle declared in Article 3, that sovereignty was in the People and was inalienable, the fact that the division of power spelled out in Article 4 in terms of legislative, executive and judicial power was each in itself, inalienable, was unconvincing, a logical non sequitur and also contrary to the values of Constitutionalism. Such an interpretation, not only introduced an unacceptable degree of rigidity into the Constitution, but also exalted the powers of an already overmighty executive. Accepting that the sovereignty of the **people** is inalienable does not necessarily mean that **each organ** of government which is part of the concept of sovereignty, together with fundamental rights and the franchise, exercises inalienable power. There are several other constitutional provisions that spell out how the legislative, executive and judicial power of the People and the fundamental rights of the people are to be exercised. The nature and scope of the three organs of government must be determined in the light of those constitutional provisions as well.

The Nature of the Constitution

For example, the rigid and simplistic approach of declaring that the executive power of the people vests solely in the President and is inalienable is inconsistent with a fundamental rule of interpretation that the Constitution should be read as a whole. Chapter VIII of the Constitution is titled "The Executive". Article 43, which is part of that chapter, provides that a collectively responsible Cabinet of Ministers is charged with the direction and control of the government.

The Second Republican Constitution of 1978 has, since its inception, been described, by both its defenders and detractors, as providing for a hybrid Presidential-Parliamentary system of government. Therefore, it would be more accurate to state that Executive power is vested **both** in the President and the Cabinet of Ministers in

terms of Article 4 (b), Article 43 (1) and other provisions of Chapter VIII and IX of the Constitution.

As Zafrullah observes in *Sri Lanka's Hybrid Presidential and Parliamentary System and the Separation of Powers Doctrine*,

> "The resulting structure is that the present Constitution of Sri Lanka, whilst preserving the republican character of the 1972 Constitution, did not found the new system of government entirely on the Westminster model which had characterised Sri Lanka's governmental structure until the adoption of the new constitution. Instead it represents a hybrid constitutional structure of a presidential and a parliamentary system."

Another feature of the hybrid Presidential-Parliamentary system is that members of the Cabinet other than the President must be Members of Parliament, unlike in the United States or France. The fact that Ministers are not only responsible but also **answerable** to Parliament is an important mechanism by which the sovereign people through their elected representatives exercise scrutiny and control over the Cabinet of Ministers which, together with the President, exercise the executive power of the Republic.

As Prime Minister J.R. Jayewardene, MP as he then was, speaking on the Second Amendment to the Constitution of 1972 which introduced the Presidential system, observed on 22nd September 1977:

> "The new departure we are making from the extant Constitution, from the Constitution of the United Kingdom, from the Constitution of the United States of America, even from the Constitution of France because under the French Constitution the Ministers are not chosen from the legislature but from outside. We say they must be from the legislature because I personally believe that a Minister being in the House, subject to questions, subject to adjournment time, subject to control of the House, is one of the essential features of the house being representative of the sovereignty of the People."

The fact that Sri Lanka has a mixed system in which the President, the Cabinet of Ministers and the Parliament each has indispensable roles and functions to perform, has been recognized by the Supreme Court of Sri Lanka.

In Re the Thirteenth Amendment to the Constitution (1987) 2 SLR 312 at 341 Wanasundera, J. made the following important observation:

> "...the Constitution in Chapter VIII requires that 'there shall be a Cabinet of Ministers charged with the direction and control of the Government of the Republic, which shall be collectively responsible and answerable to Parliament' (Article 43 (1)). Article 43 (2) states that 'the President shall be a member of the Cabinet of Ministers, and shall be the Head of the Cabinet of Ministers'...
>
> It is quite clear from the above provisions that the Cabinet of Ministers of which the President is a component is an integral part of the mechanism of

government and the distribution of Executive power and any attempt to by-pass it and exercise Executive powers without the valve and conduit of the Cabinet would be contrary to the fundamental mechanism and design of the Constitution. It could even be said that the exercise of Executive power by the President is subject to this condition. The People have also decreed in the Constitution that the Executive power can be distributed to the other public officers only via the medium and mechanism of the Cabinet system. This follows from the pattern of our Constitution modelled on the previous Constitution, which is a Parliamentary democracy with a Cabinet system. The provisions of the Constitution amply indicate that there cannot be a government without a Cabinet. The Cabinet continues to function even during the interregnum after Parliament is dissolved, until a new Parliament is summoned. To take any other view is to sanction the possibility of establishing a dictatorship in our country, with a one man rule."

Justice Wanasundera's approach is to be commended as it includes a consideration of the consequences of interpretation and promotes an interpretation that limits and restrains power rather than one which exalts or enhances power. It is in marked contrast to the approach to the Supreme Court in the Nineteenth Amendment determination where the court seems oblivious to the consequences of its strict and rigid interpretation:

> Therefore the statement in Article 3 that sovereignty is in the people and is "inalienable", being an essential element which pertains to the sovereignty of the people should necessarily be read into each of the sub paragraphs in Article 4.The
> Relevant sub paragraphs would then read as follows:
> (a) the legislative power of the people is inalienable and shall be exercised by parliament;
> (b) the executive power of the people is inalienable and shall be exercised by the president; and
> (c) the judicial power of the people is inalienable and shall be exercised by parliament through Courts.

The Court then proceeded to explain the word "alienate". It stated:

> "The meaning of the word 'alienate' as a legal term, is to transfer anything from one who has it for the time being to another, or to relinquish or remove anything from where it already lies. Inalienability of sovereignty, in relation to each organ of government shall not be transferred to another organ of government, or relinquished or removed from that organ of government to which it is attributed by the Constitution.....It necessarily follows that the balance that has been struck between the three organs of government in relation to the power that is attributed to each such organ has to be preserved if the constitution itself is to be sustained."

If the rigid Presidential interpretation of executive power and the notion of inalienability had been applied to the Seventeenth Amendment to the Constitution, how could the Supreme Court in that determination have held that the reduction and dilution of the President's powers of appointment and dismissal of several important

constitutional actors and, the establishment of a Constitutional Council with significant powers did not amount to a constitutional amendment that warranted a referendum? The establishment of the Constitutional Council was welcomed across the political spectrum mainly because it significantly reduced the powers of the Executive President.

The power to appoint and dismiss persons to and from important institutions is certainly more inextricably linked with executive power than, for example, the power to prorogue and dissolve the legislature. No Executive President in established presidential systems has such a power. It is, therefore, difficult to reconcile the approach of the Supreme Court in its two determinations on the Seventeenth and Nineteenth Amendments to the Constitution. The Supreme Court, in their judgement on the Seventeenth Amendment to Constitution, stated:

> "It [the Seventeenth Amendment] places a restriction on the discretion now vested in the President and the Cabinet of Ministers in relation to these matters and subjects the exercise of that discretion to the recommendations or approval of the new body to be established, known as the "The Constitutional Council".
> The power of making appointments to the respective Commissions and the appointment of the officers referred to in Article 41 B of the Bill is now exercised by the President. In relation to the public service the power is vested in terms of Article 55 (1) of the Constitution in the Cabinet of Ministers, which too is headed by the president. As noted above the amendment seeks to subject the exercise of this discretion to recommendations and approval of the Constitutional Council.
> This power is exercised through public officers and commissions that have been referred to above. It is in this context that the President is vested with the power of appointment, in relation to these officers and bodies.
>
> The question that has to be considered is whether the subjection of the discretion of the President to the recommendation and approval of the Constitutional Council as envisaged by the Bill would amount to an effective removal of the President's executive power in this respect.
> ..... the amendment does not remove the executive power of the President in relation to the subjects coming within the purview of the Bill.
>
> **Although, there is a restriction in the exercise of discretion hitherto vested in the President, this restriction per se would not be an erosion of the executive power by the President, so as to be inconsistent with Article 3 read with Article 4(b) of the Constitution.**(Emphasis added)."

The above dicta demonstrates a markedly different approach to that adopted in the Nineteenth Amendment determination, is more flexible and allows for readjustments in the balance of power between the key organs of government so as to promote accountability, checks and balances and more importantly an interpretation that promotes the values of Constitutionalism.

Another weakness in the opinion of the Supreme Court on defence issues is that it attaches too much significance to the Second Amendment to the Constitution of 1972

which introduced the Executive Presidential system to that Constitution, presumably because Prime Minister Jayawardene could not wait until the new Constitution was drafted in its entirety to wield executive presidential power. Jayawardene's conduct in this regard was unfortunate. While the Supreme Court is entitled to take note of this historical fact, the powers and functions of the Executive President elected under the provisions of the Second Republican Constitution of 1978, over two decades after its adoption, should be determined in the context of the Constitution read as a whole. The Second Amendment to the Constitution of 1972 certainly does not provide an accurate indication of the balance of powers and the strange hybrid nature of the Presidential-Parliamentary system that was introduced by the Constitution of 1978. Focusing on the Second Amendment to the previous Constitution presents a distorted picture of the relationship between the executive and the legislature as it ignores the role of the Cabinet of Ministers in the exercise of executive power and suggests that the President wields more power than the Constitution of 1978 permits. This approach to constitutional interpretation lacks legitimacy and ignores the fact that the Constitution of 1978 repealed and replaced the Constitution of 1972 as amended, and includes a comprehensive delineation of the powers of the Executive within its four corners.

The cumulative effect of the Supreme Court's reasoning is to give a kind of primacy to the powers of the Executive President at the expense of other constitutionally recognised organs of government such as the Cabinet of Ministers and Parliament. For those of us who have from its very adoption been critics of the Constitution of 1978, primarily on the basis of the overmighty executive (Prof. C.R. de Silva's well known comment in relation to the powers of the Executive President), the Supreme Court has made a bad constitution worse by making an overmighty Executive President mightier! Supreme/Constitutional Courts in most constitutional democracies do precisely the opposite invoking principles of constitutionalism and constitutional interpretation.

Even the framers of the constitution and commentators who were generally supportive of the new constitution envisaged a more important role for the legislature and a less dominant role for the President. Discussing a political context (August to December 1994) such as the present one where the President belongs a party different to that of the party with a parliamentary majority, J.A.L.. Cooray said, "If some form of 'consensus government' is not possible, the President could agree to act, like the President of the 1972 Constitution, on the advice of the Prime Minister."[1]

Writing almost contemporaneously to the promulgation of the Constitution, Prof. Wilson claims that President Jayawardene told him that if there were to be a conflict or direct confrontation between a Parliament with a hostile majority and the Presidency, President Jayawardene would adopt the course of reverting to prime ministerial government with the President functioning as a constitutional head[2].

The Supreme Court's exaltation of presidential executive power by holding that such power is plenary and inalienable, probably rules out Cooray's and Wilson's and indeed Jayawardene's options for the resolution of intractable co-habitation problems. Furthermore, as stated earlier, it promotes a concentration of power in a single individual.

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[1] J. A. L. Cooray (1995), *Constitutional and Administrative Law of Sri Lanka* (Sumathi), p.177.
[2] See A. J. Wilson (1980) *The Gaullist System in Asia* (Macmillan), pp.46 and 208, note 8.

The Opinion and Defence

Various spokespersons and associates of the President have claimed that the Supreme Court opinion on the defence issues declares that the President must retain the defence portfolio herself. This is incorrect. The opinion does not state so. The confusion may have been caused by the fact that, during the hearing, the Chief Justice made a injudicious observation from the bench that in his view the President should be impeached for appointing a Minister of Defence after the last parliamentary elections. It is important to note that this view was, fortunately, not reflected in the opinion. The relevant part of the opinion is as follows:

> "It is in this background that we state the opinion of this Court in terms of article 129 (1)of the constitution in respect of the first question in the reference. That, in terms of the several Articles of the constitution analysed in this opinion and upon interpreting its content in the context of the constitution read as a whole, the plenary executive power including the defence of Sri Lanka is vested and reposed in the President of the Republic of Sri Lanka. The Minister appointed in respect of the subject of defence has to function within the purview of the plenary power thus vested and reposed in the President."

The Supreme Court opinion, indeed, contemplates a Minister of Defence, but states that the Minister exercises his/her powers within the purview of the overarching powers of the President who by virtue of his/her office exercises such power.

There are, however, several problems with this dicta. Firstly, the constitution read as a whole does suggest as Zafrullah, Justice Wanasundera, and commentators such as J. A. L Cooray, A.J. Wilson have done, that the Constitution's mixed or hybrid nature does NOT repose plenary executive power in the President. Article 4 (b) read in isolation might support the Supreme Court's position, but not the Constitution read as a whole. To declare that the president has **plenary** executive power is therefore inconsistent with the hybrid/mixed nature of the constitution.

The opinion's conclusion that Presidents Jayawardene and Premadasa who also retained the Defence portfolios under their respective terms as President made regulations under the Army, Navy and Air Force Acts in their capacities as President rather than as Ministers of Defence, is plausible but not entirely convincing. The question of the amendments to regulations was perhaps the catalyst for the reference, but is not as important as the opinion's reasoning on the nature and scope of the powers of the Executive President.

Constitutional Interpretation

The approach of the Supreme Court in the Nineteenth Amendment Determination and the Opinion on Defence, with their emphasis on inalienability and plenary power, do not facilitate co-habitation and the development of a working arrangement between the executive and legislative organs of government. It is submitted that the Supreme Court has the responsibility of ensuring that a Constitution, however flawed it may be, is given an interpretation that promotes the working of the Constitution in a manner that is consistent with constitutionalism.

N.S. Bindra in his treatise on *Interpretation of Statutes* (8th Ed, 1997) emphasises the *sui generis* character of constitutional interpretation. He cites Dhavan, J. in *Moinuddin v. State of Uttar Pradesh* (1960) AIR 484 at 491 where His Lordship declares:

> "The choice between two alternative constructions should be made in accordance with well recognised canons of interpretation –
>
> Firstly, if two constructions are possible the court must adopt the one which will ensure smooth and harmonious working of the Constitution and eschew the other that will lead to absurdity or gives rise to practical inconvenience or make well established provisions of existing law nugatory.
> Secondly, constitutional provisions are not to be interpreted and applied by narrow technicalities but as embodying the working principles for practical government.
> Thirdly, the provisions of the constitution are not to be regarded as mathematical formulae and that their significance is not formal but vital. Hence practical considerations rather than formal logic must govern the interpretation of those parts of a Constitution that are obscure.
> Fourthly, in a choice between two alternative constructions, the one which avoids a result unjust or injurious to the nation is to be preferred.
> Fifthly, before making its choice between two alternative meanings, the Court must read the constitution as a whole, take into consideration its different parts and try to harmonise them.
> Sixthly, above all the court should proceed on the assumption that no conflict or repugnancy between different parts was intended by the framers of the constitution."

Bindra goes on to say at p. 871:

> "[a] democratic constitution cannot be interpreted in a narrow and pedantic (in the sense of strictly literal) sense. It is the basic and cardinal principle of interpretation of a democratic constitution that it is interpreted to foster, develop and enrich democratic institutions. To interpret a democratic constitution so as to squeeze the democratic institutions of their life giving essence is to deny to the people or a section thereof the full benefit of the institutions which they have established for their benefit."

It is submitted that the Sri Lankan Supreme Court failed to approach the issues raised in the opinion on defence in a manner consistent with the principles of constitutional interpretation described by Bindra above and which are accepted by Constitutional Courts in most constitutional democracies. Former Chief Justice Bhagwathi of India has often referred to a Constitution as an organic instrument defining and regulating the power structure and power relationship. He has argued, therefore, that it must be interpreted creatively and imaginatively with a view to advancing constitutional values and spelling out and strengthening the basic human rights of the large masses of the people.

Conclusion

The Supreme Court's opinion on defence has followed the trend begun with its determination on the Nineteenth Amendment, of enhancing the powers of the Executive President at the expense of the power of rival organs of democratic government. While the *conclusion* reached in the Nineteenth Amendment determination was justified, some of the *reasoning* adopted by the Court in reaching its conclusion was, in my view, retrogressive and unnecessary. There are major flaws in the constitutional provisions which entitle a President to seek an advisory opinion from the Supreme Court which impact adversely upon the independence of the judiciary and the rule of law.

The opinion of the Supreme Court does not preclude the President from appointing a Minister of Defence. However, the Minister has to exercise such powers within the purview of the powers relating to defence which are reposed in the President *ex officio*. While this approach is acceptable, the problem lies in the fact that the Supreme Court has gone much further, in my view unjustifiably, and held that such power is plenary and inalienable. Such an interpretation violates principles of Constitutionalism, makes co-habitation and the working of the Constitution more difficult if not impossible, and most dangerous of all, makes an already authoritarian Constitution even more authoritarian.

Matters of Principle - A Reflection on the Judicial Conscience: Judicial Independence v Judicial Accountability

Soundarie David

Perhaps the foremost challenge for judicial administration today is to ensure that contemporary expectations of accountability and efficiency remain consistent with the imperatives of judicial independence and the maintenance of the quality of justice. The integrity of the judicial system is central to the maintenance of a democratic society. Through the judicial system the rule of law is applied and human rights protected. In order to maintain the integrity of the judicial system it is vital that the judiciary remains not only independent but also impartial. It has been noted judicial corruption occurs when, instead of procedures being determined on the basis of evidence and the law, they are decided on improper influences, inducements, pressures, threats or interference.

The general public's dissatisfaction with the notion of independence of the judiciary and with the almost non-existent disciplinary machinery is most often disregarded today by the Bench and the Bar. Judges and lawyers maintain their stronghold on the legal system based on the myth that they are the guardians of the constitutional rights of the people and that the lawyers champion these rights in a court of law that is right and fair. Even if there are some judges and lawyers dedicated to the proper administration of justice, unfortunately there are many who are not. Many judges acting in conjunction with attorneys, abuse the judicial independence given to them in trust and confidence by the people. The good that proper adjudication can do for the justice and stability of a country is only attainable if judges decide by the law and are perceived by everyone around them to be deciding according to law, rather than according to their own whim or in compliance with the will of powerful political actors.

What is the 'Law'?

Justice Oliver Wendell Holmes in 1894 stated that the "the prophecies of what the court will do in fact, and nothing more pretentious is what is meant by the law" Similarly Karl Llewellyn stated in reference to the judiciary that "what these officials do about disputes is, to my mind the law itself". The law is therefore perceived by some commentators as what the judges make of it. It is hence of crucial importance that the function of the judiciary, especially in a democratic state, be subject to the highest standards of clarity and transparency as well as conforming to the procedural requirements as set out in the constitution. Holmes also stated that "the life of the law has not been logic: it has been experience." His protest was to secure a conscious recognition by lawyers of the legislative powers of the courts so that judicial re-adjustment of the law should be made after an explicit weighing of what he termed 'considerations of social advantage'.

John Chipman Gray in his *The Nature and Source of the Law* (which first appeared in 1909), invokes the words of the Bishop Hoadly of the 18th century – "whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the

law giver, to all intents and purposes and not the person who wrote and spoke them." There is also the belief that, if a particular rule proves indeterminate in a given case, so that the court is unable to justify its decision as a strict deductive conclusion of a syllogism in which it appears as a major premise, then the decision that the court gives can only be the judges legally uncontrolled voice. Llewellyn attacked this belief.[1] Ronald Dworkin's contemporary version of this, is marked by stress on many new distinctions, such as that between arguments of principle about existing entitlements or rights, which he thinks is the proper business of the judges to use in support of decisions, as contrasted with arguments of policy about welfare or collective goals, which are not the judge's business but the legislators[2]. According to this view, there is no space for a judge to make law by choosing between alternatives as to what the law shall be.

Conditions for Judicial Independence

The judicial system in every country is unique, because the history, political development and culture of every country are unique. But there are some attributes that are essential to an independent judiciary. There are a number of preconditions to a fully independent judiciary, the most rudimentary of which are enunciated in the UN Basic Principles on the Independence of the Judiciary[3]. The United Nations Basic Principles on the Role of Lawyers (1990), the Guidelines on the Role of Prosecutors (1990) and at the regional level, the Council of Europe Standards on Independence, Impartiality and Competence of Judges, notably Recommendation No R (94) 12 on the Independence, Efficiency and the Role of Judges of the Committee of Ministers, and the Beijing Statement of Principles of the Judiciary in the LAWASIA Region (1995) have been applied as minimum benchmarks to measure the state of independence of judges and lawyers among member states.[4] A recent example of a prescriptive model for judicial conduct is "The Bangalore Principles of Judicial Conduct 2002" published in January 2002. The ubiquity of the issues that arise is reflected in the thirty-two different instruments, upon which the authors of the Principles say they drew, ranging from the Codes of Conduct of Idaho, Kenya, Pakistan and Texas, to Principles of Judicial Independence of the International Bar Association and the Beijing Statement. This document had the general support of eminent Chief Justices of several states. This document proposes to secure judicial accountability whilst strengthening judicial independence.

Judicial independence is, of course, of critical importance to the proper functioning of the judiciary. For Madison and Hamilton at least, judicial independence was an essential aspect of the separation of powers, central to what Rakove has termed "a substantive conception of the judiciary as the third branch of government. Political scientists have usually deployed a robust sense of judicial independence, requiring virtual immunity from the influence of the other branches, or at least only minimal

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1 K.Llewellyn- *The Common Law Tradition, Deciding Appeals,* 4 1960.

2 See Dworkin, 'Hard Cases', 88 *Harv. Law Rev.* 1057 (1975).

3 Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders (1985).

4 Report of the Special Rapporteur on the Independence of Judges and Lawyers E/CN.4/2003/65.

influence[5]. This approach is quite unforgiving when evidence emerges that a court has decided a case or otherwise changed its view of the import of legal doctrine in response to the views of another branch. The modern doctrine of the independence of the judiciary historically has two important sources. The first is the doctrine of the separation of powers. That doctrine has roots going back into classical philosophy[6]. It received its classic modern statement in the 18th century in Montesquieu's *The Spirit of Laws* where, concerning judicial power, it is said[7]:

> "Again, there is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined to the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor."

Judicial independence is significant to the extent that it provides the citizens with certain values they might not enjoy but for such independence [8]. Judicial independence protects values held by citizens. Neither justice nor human rights guaranteed by the constitution become secure for the people without a free and independent judiciary. Judicial Independence also means that judges are free to rule against the government, should the law so dictate, without fear of reprisal. The fear of reprisal may also occur if political figures are corruptible to the extent that they will attempt to intervene on behalf of powerful members of their constituencies.

It is important to understand the predicament of judges who do not enjoy independence from other branches of government. In some countries judges may rule against the government's position without fear of reprisal, but in countries such as ours most often judges do not share that autonomy. In many countries judges are threatened with political, financial and even physical harm if they do not follow the directives of powerful political and social groups[9]. In extreme cases a judicial process predicated on standards of conduct, elementary principles and rules of evidence simply ceases to exist.

Political Pressure and Judicial Independence

Although judicial appointments are often made by political figures, the independence of judges after appointment to the bench, should be protected to ensure that the right of the litigants are not comprised by illegitimate or illegal considerations. Political considerations often impose limitations on the substantive decisions of the court. When political interference is left unaddressed, it is likely to impinge on the ability of the judiciary to arrive at justice under the law in a confident and convincing manner. The existence of any unchecked political pressure, casts a long shadow over the independence of the courts, causing them to be aware of political considerations extraneous to the cases at hand. The dual goals of judicial independence - to enable the judiciary to make impartial decisions and to keep the political branches in check,

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5 Gerald N. Rosenberg, 'Judicial Independence and the Reality of Political Power', 54 *Rev. Pol.* 369, 380 (1992).

6 King pp 3-4.

7 Montesquieu Vol 1 pp 185-6.

8 J. Clifford Wallace, *An Essay on Independence of the Judiciary: Independent from What and Why.*

9 Keith. S. Rosenn, *The Protection of Judicial Independence in Latin America.*

were put to an early test in the landmark case of *Marbury v Madison*[10] in 1803. In this case the Secretary of State James Madison, acting on President Jefferson's instructions refused to award Marbury a commission he had received from outgoing President John Adams to serve as a Justice of the Peace in the district of Columbia. Marbury challenged Madison and Jeeffson's action in an original mandamus petition to the Supreme Court. This was a land mark decision because it was the first case in the United States in which the judiciary's powers to review and void the acts of another branch of the federal government was asserted. In the USA although Marbury set the precedent for the proposition that the federal courts could and should serve as a check on the political branches and majoritarianism, without jeopardizing their independence, such a proposition has never implied immunity from criticism[11].

Political interference with the process of justice is insidious and only the strongest of judges will be able to act unconcerned about its possible use. As argued by Hamilton, once again:

> "There is no liberty, if the power of judging be not separated from the legislative and executive powers. And it proves in the last place that as liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with other departments"[12]

In this context the ability of the courts to perform their task may lie initially in the extent to which the concept of judicial review is developed and accepted. In order to resolve disputes effectively it is necessary that courts establish a recognized means of reviewing decisions of political sensitivity and significance. When judicial review is established, the time may come when the possibility of averting a governmental crisis will lie in the hands of the judiciary. The question would then be whether the government would follow a judicial decision that is inconsistent with its position. For this, the courts will be unable to have the political trust necessary to resolve important issues in crisis situations without first establishing a history of fairly and judiciously solving similar situations.

The basic institutional design for the protection of judicial independence has been developed in much the same way in different systems of law over many years. Security of tenure is universally regarded as an essential part of any such institutional structure.

The Supreme Court of Canada has referred to the main or core principles of the independence of the judiciary. Namely, security of tenure, financial stability and institutional security. In Sri Lanka, extensive constitutional provisions are intended to safeguard the independence of the judiciary, including Articles regarding selection, conditions of tenure and removal of judges at both Supreme and Appeal Court and the High Court level. In order to maintain the independence of the judiciary, the Constitution guarantees that although the Chief Justice, Judges of the Supreme Court and Court of Appeal are appointed by the President, they can be removed from office only upon an address of Parliament supported by a majority of members on the

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10 5.U.S 137 (1803).

11 An Independent Judiciary-Report of the ABA Commission on Separation of Powers and Judicial Independence.

12 Alexander Hamilton; *The Federalist Papers*, No 79.

ground of 'proved misbehavior and incapacity'[13]. In reality however, in relation to appointments in Sri Lanka, it has been observed that judicial appointments are subject to executive preferences. 'Appointments of judges by the President, without the prescribed requirement of an independent process of assessment by an independent body or representative was seen as lacking objectivity and transparency'[14].

Judicial Misconduct and Accountability

Judicial independence was not intended to be a shield from public scrutiny. We cannot think of judicial independence in isolation. It has to be considered in relation to judicial accountability. They are different sides of the same coin. There is an inevitable tension between the requirements of judicial independence and any mechanism for dealing with judicial misconduct. A constant problem is that of reconciling the conflicting demands of independence and tenure with the demands of accountability and essential levels of judicial competence. It is important to note that judicial independence does not mean however, that the judiciary is free from the requirement to be held accountable. If one considers judicial misconduct and judicial incompetence from a rule of law perspective, then the rule of law requires that laws are administered fairly, rationally, predictably, consistently and impartially. Judicial misconduct and incompetence are incompatible with each of these objectives. The preservation of the rule of law is the basic reason for establishing mechanisms for dealing with judicial misconduct, whether it takes form of corruption or less serious forms of misbehavior. The rule of law consists of numerous interlocking principles. One such principle is the right to a fair trial. Judicial misconduct in the context of litigation denies that right.

The International Covenant on Civil and Political Rights(ICCPR) states the fundamental rights that belong to human beings everywhere. Article 14.1 says relevantly:

> "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

This cardinal provision is derived from the historical experience of many lands. It is impossible to ensure the rule of law, upon which other human rights depend, without providing independent courts and tribunals to resolve competently, independently and impartially, disputes both of a criminal and civil character. Without the rule of law and the assurance that comes from independent decision makers, it is obvious that equality before the law will not exist. Consistency and certainty in decisions will be accidental.

The threat to judicial independence does not merely come from the State. The judiciary also needs to be concerned about corrupt judges. When the judiciary is either corrupt or subject to influence or intimidation by corrupt officials, groups or

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13 Art 107, Constitution of the Democratic Socialist Republic of Sri Lanka.

14 Report of the Fact Finding Mission by the International Bar Association to Sri Lanka, 2001.

individuals, the citizens will lack confidence that resort to judicial process will achieve a just solution of their conflicts. Hence it is critical to have a truly independent judiciary, which is in turn necessary for the people to legitimise the judiciary as a respected dispute resolving body. The State needs to find a way to protect judicial independence whilst dealing with the problem of corruption. We need to strike a balance between judicial independence and accountability. Therefore the issue would be that notwithstanding security of tenure, judges behave with the competence and integrity that is required of them.

Accountability

The term 'accountability' covers a broad range of issues. It encompasses a wide range of forms of supervision, control, reporting and responsiveness which can impinge in different ways on judicial independence. The most frequently cited statement of this principle is that justice must not only be done, but in open court it must manifestly be seen to be done and eventually appear to have been done. Otherwise public confidence in the judiciary is likely to be questioned. This leads to the delicate issue of how judicial conduct should be monitored and corrected. In many countries this duty falls to the Executive[15]. However we face the problem of the Executive itself being a threat, in the sense that the judicial correction process may be used by the government to silence judges with whose views it disagrees. Therefore one needs to look at a model to locate the judicial correction machinery within the judicial branch itself. This process must be fair, effective and sufficiently transparent that citizens can be assured that misconduct is identified and appropriate action taken.

In 1973 the United States of America passed a code of conduct for the US judges because the judges have life tenure protection and because the only power of removal open to congress is the impeachment process. Under this act any person may file a complaint that a federal judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts. In 1980, the US Congress passed a law conferring power on a judicial body to take such action against a Federal Judge "as is appropriate, short of removal". Under this law, all complaints go to the Chief Judge of the Federal Judge Circuit where the judge serves. The Chief Judge can dismiss frivolous complaints and the other complaints are referred to a Special Investigative Committee of Judges - the judge concerned can appeal to the Federal Judicial Policy Making Body[16]. In the case of Judge McBryde[17] who argued that the 1980 law that gave the committees of judges the authority to take such action violated the judicial independence which the constitution guaranteed to the life-tenured judges, the Supreme Court held that the judicial independence protected by Article 111 of the U.S. Constitution was meant to "insulate judges from interference from other branches of government - not from oversight by other judges." Therefore, there are still ways in which we could rid ourselves of the corruption that occurs within the judiciary, and yet maintain and preserve the judicial independence of the judiciary guaranteed by the constitution.

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15 J.Clifford Wallace, *An Essay on Independence of the Judiciary: Independence from What and Why.*

16 Fali. S.Nariman, "Getting Rid of the 'Black Sheep' and Maintaining Judicial Independence", *The Hindu*, December 10, 2002.

17 Ibid., *McBryde v Committee to Review Circuit Council Conduct and Disability Orders of the Judicial Conference of the U.S, et. al.*

The issue of judicial accountability has come in for serious deliberation. There is an obvious need for greater judicial accountability. Although judicial commissions exist for the removal and discipline of judges, in practice the function of these agencies appears to be, to inform the complaining parties that the commission has no jurisdiction over the complaint. India is currently looking into mechanisms to hold accountable Supreme Court and High Court judges. Recommendations were submitted by a commission led by Justice M.N. Venkatachaliah, India's former Chief Justice in the wake of calls for greater judicial accountability. The commission recommended that a committee comprising of the Chief Justice and two senior most Supreme Court judges be exclusively empowered "to examine complaints of deviant behavior of all kinds and complaints of misbehavior and incapacity against judges of the Supreme Court and High Court."

Contempt of Court

Another area that warrants for accountability is the misuse of powers of contempt by the judiciary. The primary purpose of contempt of court is to preserve the effectiveness and sustain the powers of the judiciary. Courts must exercise the power of contempt with restraint. " The power to punish for contempt is awesome and carries with it the equally great responsibility to apply it judiciously and only when contempt is clearly and unequivocally shown.[18]" For the sake of the independent functioning of the judiciary the right to freedom of expression is often limited by the offence of contempt of court. In *S v Van Niekerk*[19], the South African Court of Appeal stated 'first it is important to bear in mind that the true basis for punishment for contempt of court lies in the interest of the public, as distinct from the protection of any injured Judge or Judges...Secondly, unless those last mentioned interests clearly so require, genuine criticism, even though it be somewhat emphatically or unhappily expressed, preferably should be regarded as an exercise of the right to free speech rather than a *scandalous comment* falling within the ambit of the crime of contempt of court'. With the increasing allegations of corruption in the judiciary, there has also been an increasing resort to contempt of court powers by judges. The law of contempt seems to operate as a cover for a corrupt judge. In Sri Lanka the existing disciplinary measures for all judges must be subject to improvement and that to generate trust in the judiciary, disciplinary procedures must be accountable, fair and free from interference by the executive and the legislature. The Venkatachaliah Commission in India has recommended that in matters of contempt, it shall be open to court to permit defense of justification by truth, on satisfaction as to the bonafides of the plea and it being in the public interest.

Conclusion

One needs to locate a judicial correction machinery within the judicial branch itself. This process should be fair, effective and sufficiently transparent so that citizens may be assured that misconduct is identified and appropriate action taken. These monitoring systems can effectively police judicial behavior, while maintaining judicial independence. In order to demonstrate that the country's laws apply fairly and

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18 *People v Matish,* 384 Mich 568, 572 (1971).

19 1972 3SA 706 (720-721).

equally to all, publicity should be extended to increasing awareness of the process of rooting out corrupt judges or those who otherwise violate the law. Today, many litigants have come to realize that judicial independence is often illusory. Many judges are not the ideal arbiters willing to listen to arguments from both sides before making a decision. Therefore in many cases judicial interpretation of the law is not carried out in a legitimate, responsible and reasonable manner.

There have been different approaches to the issue of judicial accountability versus maintaining the independence of the judiciary, but most jurisdictions have come to accept that some form of authoritative compilation of expectations of judicial conduct can also play an important role in meeting contemporary expectations of what is referred to as 'accountability' and 'transparency'. The hallmark of a judiciary, operating under the rule of law, would be that it not only be independent but also ensure that its competency, authority and integrity is not open to question. Judicial officials are quick to assert the need for independence but slow and reluctant advocates of any form of accountability. The challenge therefore is to balance the need for independence and accountability.

Women's Rights Bill 2004 – a Commentary[1]

Bhavani Fonseka

Introduction

The Women's Rights Bill (hereafter referred to as the 'Bill') that is presently before the public was introduced after many years of lobbying government to introduce a mechanism that will be legally effective in ensuring women's rights are promoted, protected and advanced. Following the ratification of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[2] in 1981, Sri Lanka adopted a Women's Charter and established a National Women's Committee to oversee compliance with the Charter. The Charter was seen as a framework of rights, with similar standing to a declaration in that it did not have legal force and therefore could not be enforced. The Charter envisaged the enacting of legislation to "ensure the full development and advancement of women", and the present Bill is considered a step forward in this direction

This article will focus on the important characteristics of the Bill and how it can be improved. Not all provisions of the Bill are discussed but attention is drawn to provisions that seem unclear, ambiguous, unduly bureaucratic or unfair. Further, the Women's Commissions in India and South Africa are examined to see what can be learnt from their experiences.

Rights Protected by the Bill

The Bill has several components, including provisions relating to the setting up of the Women's Commission and the Advisory Council, procedures for the conduct of investigations, and provisions relating to women's rights. The Bill specifically mentions several rights as being enforceable. Part I of the Bill states that

- women shall be assured the right to equality.[3]
- all executive, administrative and judicial actions shall ensure that women are not subject to any discrimination, disability, marginalization, restriction or degrading treatment on account of gender.[4]
- women shall enjoy equal rights in all areas of private life.[5]
- women shall have the freedom to enjoy life without being subjected to gender specific forms of violence.[6]
- both the public and private sector shall take steps to prevent sexual harassment at the work place.[7]
- persons/bodies providing transport to the public shall take steps to prevent sexual harassment within public transport facilities.[8]

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1 This article was written in early 2004. The Ministry of Women's Affairs has since then, in consultation with interested NGO's, formulated new changes to the Bill.
2 Adopted by the UN on 18 December 1979, and entered into force on 3 September 1981.
3 Section 2(1).
4 Section 2(2).
5 Section 2(3).
6 Section 2(4).
7 Section 2(5).
8 Section 2(6).

- there shall be a prohibition of discrimination against women in employment.[9]
- women's right to participate jointly as equal parties in the society is protected.[10]
- women shall have equal access to training opportunities.[11]
- state executive organs shall take appropriate measures to discourage sexual and other types of stereotyping.[12]
- women possess a right of equal ownership to land.[13]

Section 2(12) goes on to state that women's rights will be 'protected, promoted and advanced' in accordance with the framework of the Women's Charter and international treaties relating to women's rights to which the government of Sri Lanka is a party. The Charter, which is comprehensive in its coverage of rights, has been annexed to the Bill. It is not clear why certain rights, already in the Charter, were chosen to be specified in the body of the Bill, while others are incorporated only by reference to the Schedule. The rights in Part I of the Bill echo many of those in the Charter.

Women's Commission

The Women's Commission will consist of seven members appointed by the Minister in charge of Women's Affairs with the approval of the Constitutional Council. The commissioners shall be *all women* according to section 4(1). This is a change from the Bill proposed under the PA government in 1999/2000 which provided for ten commissioners appointed by the President in consultation with the Minister in charge of Women's Affairs. The earlier Bill did not limit the commissioners by sex, and left membership open to both males and females. This proposal was similar to the National Commission for Women (NCW) in India and the South African Commission on Gender Equality (CGE). The South African CGE at present has two commissioners who are male. The Indian NCW further states that at least one member shall be from amongst persons belonging to the Scheduled Castes and Scheduled Tribes of India. This ensures that there is proper representation of the many castes and tribes of India. In the Bill, there is no mention of representation on the lines of ethnicity, caste, religion or geographic location. Section 9 of the Bill further states that the Director of the Commission will be a woman appointed by the Minister in consultation with the Commission. While it is likely that a woman would be appointed to this post, it is unclear why this should be made a requirement.

Section 26(1) states that the Commission *may* make a complaint to the Human Rights Commission (HRC) regarding an infringement of a person's right. This means that the Commission can refer matters to the HRC if they feel the need to do so. What is unclear is whether these complaints would be related to women. If they are women-specific violations, why cannot the Commission itself take action? If women-specific issues come before the Women's Commission, then it should deal with them rather than refer them to other mechanisms. Such a procedure would reduce the number of

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9 Section 2(7).
10 Section 2(8).
11 Section 2(9).
12 Section 2(10).
13 Section 2(11).

people being forced seek many mechanisms of redress, when there is one clear cut institution that can deal with rights violations.

A positive provision introduced by the Bill is section 46, which enables any person authorized by the Commission to enter any place of detention, police station, prison or any other place in which women are detained, in order to make examinations or inquiries to ascertain the detention conditions of female detainees. This is similar to the NCW in India, which also allows the NCW to inspect institutions where women are detained and to bring up issues with the relevant authorities. This provision is far reaching in that the Women's Commission has the mandate to ensure that women who are detained are treated humanely and that the authorities adhere to universal standards. It further ensures that women are not held arbitrarily, and that redress is available for any human rights violations.

It is essential that the Commission is not seen as a government-controlled body, but one that is autonomous and independent. The possibility of the Commission being independent is questionable within the present framework since the commissioners will be appointed by the Minister on approval of the Constitutional Council. Will this result in the government being able to appoint persons who are seen as favourable to the administration? Should there be a provision which enables civil society and interested bodies to nominate persons so that the Constitutional Council and the Minister could appoint a certain number of commissioners from such a list of nominees? Should there be a set quota within the Commission for representatives who are appointed from such nominations? In South Africa, the Minister can invite interested persons to propose candidates to the CGE. This enables a broader group of people to be involved in the process of choosing members to the Commission. It is important that there is some system of checks and balances in the present framework to ensure that the Commission is an independent and autonomous body.

Connected to the question of autonomy is the issue of the resources to be allocated to the Commission. Section 41 creates the National Fund for Women. The Fund will contain money that will be allocated by Parliament, and will also include grants, donations, bequests, and money that is received from the proceeds of the sale of any movable or immovable property of the Commission. This ensures some autonomy, but the Commission will be dependent on the government for most of its funds. There should be sufficient money allocated by Parliament to ensure that the Commission can function efficiently and not be strained for cash. Insufficient funding can impact the effectiveness and consistency of the Commission.

Women's Advisory Council

The Women's Advisory Council is created under Part III of the Bill. Nineteen members will be appointed by the Minister of Women's Affairs on the recommendation of the Constitutional Council. There is no mention of the members having to be women. Section 19 sets out the composition of the Council. There will be ten members from women's organizations recognized by the Commission, five members nominated from among women professionals and four members selected by the Minister. The four members selected by the Minister will be elected on a rotational basis among the districts. It is unclear under what criteria a women's organization will be 'recognized' by the Commission, and this could lead to arbitrary

decisions. Further, section 19(3) states that when there is a vacancy, the Constitutional Council shall 'appoint' a successor This differs from the initial appointment process where the Constitutional Council is limited to recommending members. In contrast, members of the Women's Commission are appointed on approval of the Constitutional Council. Should this not be consistent?

The relationship between the Advisory Council and the Commission is unclear. The Commission is empowered to give directions to the Council and the Council must give effect to such directions (section 19((7)). This does not suggest a body, which guides the strategies of the Commission, but rather one that is subordinate to it. At the same time, the Council must, after consultation with the Commission, submit reports to Parliament on measures to promote the participation of women in politics and decision-making (section 20(1)). This and other provisions (see section 25, "Functions of the Council") indicate a more independent role for the Council.

The functions of the Advisory Council are set forth in section 25 of the Bill. The functions include: advising the Commission on policies, plans, programmes and projects to be included in the National Plan and on the need for legislation in relation to the same; responding to women's issues and referral of such matters to the Commission; interacting with Provincial Councils and bodies connected with women's issues; promoting women's rights and summoning officers and obtaining information relating to matters connected with women's rights. The functions set out are ones that can be conducted by the Women's Commission or its office or by committees that can be set up at various times when the need arises. Is it necessary to have a separate body, which includes nineteen members, to perform the above-mentioned functions? The functions mentioned are not so specialized or complicated that a separate permanent body of nineteen members is necessary. In the South African context there is mention of committees to be set up when the need arises, thereby reducing the levels of bureaucracy.[14] A similar characteristic is seen in the NCW of India, where it says that the commission may appoint such committees as may be necessary for dealing with issues as may be taken up by the Commission from time to time.[15]

Gender Impact Committee

Another mechanism that is set up under the Bill is the Gender Impact Committee, which was established to "appraise the manner in which prevailing policies, plans and programmes of the Government and other agencies, affect women." Parallel to this, the Advisory Council is given the responsibility of monitoring legislation for consistency with women's rights and of reporting to Parliament legislation which is in conflict with such rights.

The idea of vetting state policies and legislation for compatibility with women's rights is a positive one. However, questions could be raised over the process by which the Bill seeks to do so. Firstly, as the functions of the two bodies are similar, it appears more sensible to entrust the examining of policies and legislation to one body. Secondly, the Committee will consist of ten members appointed by the Minister. Does

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14 Section 6, Commission on Gender Equality Act 1996.

15 Section 8, National Commission for Women Act 1990.

the Committee have to be that large? Is the task not one which can be done by the office of the Commission? This highlights a general point: the Bill should aim at rationalising the layers of bodies that are incorporated into the Women's Commission, thereby reducing the level of bureaucracy and duplication of functions.

Further, section 14(1) which sets out the composition of the Gender Impact Committee states that the Committee members will be appointed by the Women's Commission in consultation with the *Minister in charge of Policy Development*. In section 14(2) it states that the *Minister in charge of Women's Affairs* shall appoint members of the Gender Impact Committee. This is confusing since two separate sections dealing with the same committee state that Ministers holding different portfolios will be involved in the appointment of said committee. The Bill further states that both the Commission and the Minister in charge of Women's Affairs will be 'appointing' the members. This needs to be clarified.

Concerns over Implementation

Section 17 deals with the National Plan, which will set out "schemes to protect, promote and advance the rights of women as enshrined in this Act and any other matter which may be prescribed." It speaks of protecting, promoting and advancing the rights of women at both the national and provincial levels, including governmental departments and agencies, non-governmental organizations and other institutions. It is hoped that there will be consultations with civil society and other relevant stakeholders during the pre and post legislation stages at all levels, including the provincial and district levels. Consultations are a necessary component of any planning process so as to ensure that there is participation and transparency in the system. It also helps identify the areas that need the most attention. Without proper consultations, how can one ensure that minority views are heard? A commission that is set up to ensure that equality prevails must take all measures to do away with any form of discrimination at all levels.

Section 17(6) states that provincial authorities and local authorities shall prepare their own plan and programs according to the National Plan, and submit such plans and programs for the approval of the Commission and Council. These plans and programs will be subsequent to the development of the National Plan. There is therefore no room for participation, and leaves the planning to the centre. Consultations and planning should include all relevant parties and institutions at the provincial, district and local levels. Section 17(7) states that the Commission may consider proposals by the National Board of Community Centers and Divisional Community Council Conferences. This again is insufficient and the Bill should go the full mile and include civil society and other relevant stakeholders into the category of groups whose proposals will be considered.

The Bill makes limited reference to the roles played by provincial councils and local governments. With the implementation of the 13th Amendment, and devolution of powers to the Provincial Council, governance has been taken closer to the people. Any new legislation should keep this principle in mind and encourage participation of the people. The Bill should ensure that the provincial and local authorities play a larger role. The needs of the diverse areas of the country are different. For example, the needs of the war-torn North East are very different to those of the South. This

should be considered when implementing policies and programs. Section 38 mentions the establishment of regional or provincial offices and the delegation of duties. This should be elaborated upon in greater detail. It is essential that attention be given to the ethnic, geographic, religious and gender differences when planning and implementing policies and programs to ensure that there are no discrepancies, and that it is a democratic, transparent and participatory process.

There should also be a commitment to accessibility so that the Commission is not seen as aloof or inaccessible. The CGE of South Africa has been seen as accessible as they have had public hearings on a number of issues where women from previously marginalized communities were able to speak out. The public hearings have brought the issues on to the public agenda, resulting in discussion and debate. Further, the CGE has three provincial offices, making it easier for people to access the offices. Similar to the CGE, the NCW of India also has a public hearing mechanism, which has encouraged women to speak out. The issues covered by the NCW are crime against women, women in agriculture and women of minority groups. In Sri Lanka, transparent government has been a norm that has been aspired to, but remains to be achieved in many senses. The public has been left out of the loop when it comes to the working of governmental organizations. These institutions have been clouded many a time with secrecy. By ensuring more participation and involvement of the public, this can be gradually improved.

The Bill states that the Women's Commission shall within two years of the Act coming into operation, ensure that women's representation in the decision-making bodies of all recognized political parties be not less that 25%[16], and that women delegates of the Party Conference of political parties be not less that 25%.[17] This reflects Section 2 of the Women's Charter, which dwells on political and civil rights. The Bill does not state how the Commission would achieve such an ambitious goal or what methods would be used to reach such a goal. It is important to encourage women's participation in public life, but it could be disastrous if the goal is unrealistic.

Section 52 states that the Minister "may make regulations in respect of matters required by this Act to be prescribed or in respect of which regulations are authorized to be made". These include measures to prevent sexual harassment in work places and in public transport; measures to prohibit discrimination against women in employment and all matters required or authorized to be prescribed by the Act. With the creation of the Women's Commission, it appears more than justified the Commission to be consulted in the process.

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[16] Section 51(a).
[17] Section 51(b).

Comparative Examples

Recently, Women's Commissions have been created in several countries, including India, South Africa, Thailand, and the United Kingdom to name a few. In this section, the commissions in India and South Africa are examined.

South Africa

On attainment of full democracy in 1994, South Africa embarked on a movement towards a non-racist, non-sexist society. Taking account of regional and international experiences, South Africa developed a structural framework to facilitate and promote the goal of gender equality. Established in 1996, the CGE is one of the key components of the national gender machinery. The CGE has a national office, three provincial offices and a parliamentary office. Chapter 9 of the Constitution establishes the CGE. Section 187 of the Constitution sets out its functions:

> "187(1) The Commission for Gender Equality must promote respect for gender equality and the protection, development and attainment of gender equality.
>
> (2) The Commission for Gender Equality has the power, as regulated by national legislation, necessary to perform its functions, including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality..."

As envisaged by the Constitution, the composition, powers, and functioning of the CGE are set out in the Commission on Gender Equality Act 1996. Section 10 of this Act states that the CGE shall be independent and the commissioners shall act independently and in good faith.

The functions of the CGE are set forth in Section 11 and include: researching; following, monitoring and evaluating policies and practices of government and businesses in order to promote gender equality and making any recommendations on them that the Commission deems necessary; running public information and education programs on gender equality and the role and activities of the Commission; evaluating and making recommendations about existing or proposed laws and customs, including indigenous law and practices affecting or likely to affect gender equality or the status of women; recommending new legislation to promote gender equality and the status of women; liaising with other institutions, bodies or authorities with similar objectives to the Commission and with any organization which actively promotes gender equality and other sectors of civil society; and monitoring and reporting on South Africa's compliance with relevant international instruments.

In addition to the above functions, the Commission has the power to investigate any gender-related issues of its own accord or on receipt of a complaint. Subsection 11(1)(e) of the Act requires the Commission to resolve any dispute or rectify any act or omission by mediation, conciliation or negotiation. However, the Commission may at any stage refer any matter to the South African Human Rights Commission, the Public Protector (established under Chapter 9 of the Constitution) or any other authority. The Commission is required to liaise with other bodies about the handling

of complaints in cases of overlapping jurisdiction. A person required to appear before the Commission or who gives evidence under oath may be legally represented.[18] Section 6 of the Act further states that the CGE can establish one or more committees consisting of one or more members of the Commission to perform functions that the CGE assigns it.

India

In 1992, the NCW was set up as a statutory body under the National Commission for Women Act 1990 to review the constitutional and legal safeguards for women, recommend remedial legislative measures, facilitate the redress of grievances and advise the Government on all policy matters affecting women. The Committee on the Status of Women in India (CSWI) recommended the setting up of a National Commission. Section III of the Act deals with the composition of the NCW, and provides that there will be a chairperson and five Members who will be nominated by the Central Government.[19] There is a provision which states that at least one Member shall be from amongst persons belonging to the Scheduled Castes and Scheduled Tribes respectively.[20]

The mandate of the NCW includes the following: investigating and examining all matters relating to the safeguards provided for women under the Constitution and other laws; making recommendations for the effective implementation of those safeguards for the improving the conditions of women by the Union or any state; reviewing the existing provisions of the Constitution and other laws affecting women and recommending amendments; taking up cases of violation of the provisions of the Constitution and of other laws relating to women with the appropriate authorities; looking into complaints; undertaking research so as to suggest ways of ensuring due representation of women in all spheres and identifying factors responsible for impeding their advancement; evaluating the progress of the development of women under the Union and any State; inspecting various institutions where women are kept as prisoners or otherwise detained and taking up relevant issues with the relevant authorities for remedial action, if found necessary, and the funding of litigation involving issues affecting a large body of women. Further, the NCW holds public hearings on issues affecting large sections of women such as crime against women, women in the unorganized labour sector, women in agriculture and women of minority groups. The NCW also constitutes Expert Committees for dealing with such special issues as may be taken up by the Commission from time to time. Some important issues taken up by the NCW include sexual harassment at the workplace, women in detention, the anti-arrack movement, and issues concerning prostitution and political and technological empowerment of women in agriculture.

From time to time, the Commission conducts seminars, workshops and conferences, and sponsors such events by providing financial assistance to research organisations and NGOs. The important areas covered to date include women in detention, violence against women, sexual harassment in the work place, educational, health and employment issues, women in agriculture, custodial justice and mental health institutions.

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18 Section 11(6) Commission on Gender Equality Act 1996.
19 Section 3(2) National Commission for Women Act 1990.
20 Section 3(2) National Commission for Women Act 1990.

Lost Opportunity?

In a society which is considered very patriarchal, the notion of equal treatment is sometimes hard to come by. Article 12(1) of the Constitution ensures equal treatment and Article 12(2) states that no citizen shall be discriminated against on the grounds of sex. This and other legislative measures have clearly not been adequate to combat the widespread discrimination and victimisation of women. Therefore, having a separate mechanism that concentrates solely on women's rights would be a positive step forward. At the same time, it is important to ensure that legislation that is meant to protect and promote women's rights will be comprehensive and thorough. It is vital that there is participation at all levels and that there is a democratic and transparent process. A just piece of legislation must ensure that the principles of equality and fairness are respected.

A basic question asked when new legislation is introduced is, "what are the issues to be addressed and what lacuna will the new law be filling?" More particularly, one might also ask whether it is necessary to have a Women's Commission at this juncture. In my opinion, the establishment of a Women's Commission similar to those in India and South Africa is a welcome addition to the existing mechanism, since it concentrates solely on women's issues and rights. The commission should not be seen as a political tool for personal or party gain. It is fundamental however that the process used for setting up a Women's Commission is a democratic, participatory and transparent one.

There are additional questions raised by the Bill. For example: is it necessary to have an Advisory Council? What functions would it fulfil? Can one body not do the functions that both bodies will be given? The Bill also introduces a Gender Impact Committee which is discussed above. Is this not something the Commission can undertake? Looking at the Bill, one feels that though the heading of the Bill claims to be "Women's Rights" it is in fact primarily designed to set up a commission and several other mechanisms. The Bill should not be used as a political tool to set up several layers of bureaucracy, in which the administrative bodies established by the Bill will potentially be duplicative and therefore inefficient. For an efficient system of governance, institutions should work in a clear, methodical manner. One should know which body is responsible for which functions.

During all stages of legislation, there should be transparency and participation of relevant persons. An inclusive process is vital to ensure democracy and good governance. Persons that are knowledgeable and experienced in the relevant fields should be consulted and asked to be involved in the planning and implementation of programmes and policies. There should also be consultations on a geographic basis whereby there is interaction with the districts and provinces. The Women's Commission or similar bodies should work within the present framework set out in the 13th Amendment, and ensure that the people are involved in the process.

The Constitution of Sri Lanka ensures that there should not be any discrimination on the basis of sex and that all persons should be treated equally. There are several mechanisms that deal with human rights violations, including the Human Rights Commission, the Supreme Court, and the Ombudsman. There are however, no specific legislative enactments or institutions that deals exclusively or predominantly with women's rights. Accordingly, the establishment of a Women's Commission

similar to those in India and South Africa is a welcome development. In order to ensure that the Women's Commission is perceived as effective and legitimate, it is of paramount importance that women are confident that the Commission will ensure the protection of their rights. The Women's Commission should exercise its powers, duties and functions to promote people's access to their rights. In doing so, the entrenched structural inequalities between men and women, as well as the systemic patterns of discrimination faced by women in gaining access to their rights, must be recognised, challenged and addressed.

Of Churches 'Ablaze' and Police Liability

Suren Fernando

Sri Lanka, like many other 'developing' or 'third world' countries, has an unenviable record of State-sponsored and politically motivated torture and harassment; election malpractices, including the violation of election laws pertaining to publicity and the display of posters; failure to investigate offences committed by privileged classes;[1] failure to investigate domestic violence; ethnic-based violence and persecution; and more recently, a new dimension of violence and persecution based on religion.

The following analysis seeks to identify the principles of Sri Lankan law relating to the delictual liability of public authorities for wilful and negligent omissions causing physical injury, as well as the corresponding public law remedies. While the principles are generally applicable to all public authorities, this analysis will focus specifically on the liability of one such authority, the Sri Lankan Police,[2] with special reference to their duties in instances of attacks (and imminent attacks) on Christian ministers and places of worship.

The Legal Basis for Police Powers

The responsibilities of the Police include: preventing crimes, offences and public nuisances [Section 56(a)]; preserving the peace [Section 56(b)]; apprehending disorderly and suspicious characters [Section 56(c)]; detecting and bringing offenders to justice [Section 56(d)]; and collecting and communicating intelligence affecting the public peace [Section 56(e)].

The Police are empowered to act in fulfillment of the above mentioned responsibilities, where any such breach (or imminent breach), under any statute is brought to the notice of the Police, or by any other means known or foreseen by the Police (except in instances where the relevant statute confers power on a distinct authority with regard to specific offences; for example the Commission to Investigate Allegations of Bribery or Corruption Act No. 19 of 1994, empowers the Commission to investigate violations). In addition many other statutes impose responsibilities on the Police with regard to the preservation of law and order in specific circumstances, such as the laws prohibiting certain forms of publicity during election campaigns (the use of posters, flyers etc during election campaigns is regulated by Section 74(1) of the Parliamentary Elections Act No. 1 of 1981, contravention is an offence [74(2)], thus imposing on the Police a duty to investigate violations, and remove offending material).

In addition to the above duties, services are also provided by recording of statements (under distinct statutory powers/regulations), which, while used for the detection and prevention of offences, for the apprehension of offenders, the recovery of stolen property etc, are also required as evidence in civil proceedings (e.g. statements used in motor vehicle insurance claims, divorce/maintenance proceedings, defamation suits

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1 For example, assaults and mischief committed by Members of Parliament and their children.

2 Established by the Police Ordinance, LEC 1980 (unofficial) Cap. 65, as amended.

etc). In cases of threats to person or property, the Police also provide personal protection etc.

Delictual Remedies

The Sri Lankan legal system has not used the available delictual remedies to as great an extent as its South African counterpart,[3] preferring rather to rely on the Fundamental Rights jurisdiction of the Supreme Court.[4] The fact that delictual actions are more time-consuming and expensive appears to be the primary consideration weighing in favour of Fundamental Rights applications. However, given that the damages awarded in Fundamental Rights claims are seen as being meagre,[5] the delictual remedy warrants greater consideration.[6] In order to determine the legal position with regard to loss caused by the negligent omissions of public authorities, analogies will be drawn to a great extent with the South African position.[7]

Damage Caused by Omissions – the Concept and its Evolution

Originally, in order to establish delictual liability, the plaintiff had to prove that the defendant, by an **act** which was wrongful (either intentionally[8] or negligently[9]), caused physical damage to the plaintiff or his property.[10]

While the law[11] continues, in general, to refrain from imposing liability for the failure to act where there is a purely moral duty to act (i.e. 'pure omissions'),[12] this is subject to certain exceptions where the law recognizes a legal duty to act – the failure to act in such instances, consistent with the objectives of the law of delict, will attract liability. The English law recognizes the existence of a legal duty in several situations,

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3 Unfortunately, even the few cases in which attempts were made to impose delictual liability on public authorities did not reach the appellate courts, being usually settled in the trial courts, and as such are of no precedent value.

4 Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka 1978.

5 However, this is mainly due to the fact that little evidence is placed before the Court to establish the nature and extent of the damage suffered. See for example *W.R. Sanjeewa, on behalf of W.M.G. Mervin Perera* v. *Sena Suraweera (OIC) et. al.* S.C. Application 328/2002 S.C.M. 4th April 2003, where, in addition to awarding the full (proven) hospitalization costs of a torture victim, the Supreme Court awarded a sum of eight hundred thousand rupees as compensation and costs. Thus, the problem of inadequate damages can be said to be one created mainly by the aggrieved parties themselves, and/or their legal advisors.

6 The one month time limit for filing Fundamental Rights actions is another reason why the delictual action should be given greater consideration.

7 While the English Law will also be analysed for comparative purposes, it is the South African law, stemming from the Roman-Dutch law, which may be regarded as more authoritative in the Sri Lankan courts.

8 *Dolus.*

9 *Culpa.*

10 The early English authorities also (generally) required wrongful 'acts' in order to establish liability in tort.

11 Both the English law as well as the Roman-Dutch law (in South Africa and Sri Lanka).

12 Article 63 of the French Penal Code however recognizes pure (moral) omissions as giving rise to liability.

including where the omission is connected to a prior act,[13] where the defendant acts negligently and then fails to act to remedy the situation created thereby, where the omission occurs after the defendant has assumed responsibility for a particular task, and where there is a failure to control another in a relationship of control.[14]

Similarly the Roman-Dutch law also recognizes several exceptions to the 'pure omissions' rule: thus liability will exist if the omission is connected to prior conduct which would have imposed on the defendant a duty to act;[15] where the defendant is under a duty to act in order to prevent damage from a potentially dangerous thing/animal within his control;[16] where a special or protective relationship exists;[17] where a **duty is imposed by virtue of holding public office**,[18] or by virtue of **obligations created/implied by statute**.[19] More recently recognition has also been given to the fact that, even apart from the 'prior conduct' (and other exceptions), the "legal convictions of the community" may impose certain legal obligations on public authorities.[20]

Thus it is clear that, where there is a **duty to act**, the failure to do so will be treated as a 'wrongful' omission as opposed to a 'pure omission', and so long as the requirements of fault and physical injury or damage are also established, will be recognized by the Sri Lankan legal system as giving rise to delictual liability.

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13 *Johnson* v. *Rea Ltd* (1961) 3 All E.R. 816.

14 *Home Office* v. *Dorset Yacht Co.* (1970) 2 All E.R. 492. One may also be under a duty to prevent damage being caused by the escape of a potentially mischief-causing object/substance from one's land, see *Rylands* v. *Fletcher* (1866) LR 1 Exch 265.

15 *Silva's Fishing Corporation* v. *Maweza* 1957 (2) SA 256, *Halliwell* v. *Johannesburg Municipal Council* 1912 AD 659.

16 Such as the duty to prevent the spread of fire from one's land to another's, recognized in *Ministry of Forestry* v. *Quathlamba (Pty) Ltd* 1973 (3) SA 69.

17 Examples include the protection of prisoners in police custody as in *Mtati* v. *Minister of Justice* 1958 (1) SA 221, the duty to provide prompt medical attention to prisoners as in *Minister of Police* v. *Skosana* 1977 (1) SA 31, and the duty to prevent assaults on citizens as in the landmark case of *Minister van Polisie* v. *Ewels* 1975 (3) SA 590. For the corresponding Sri Lankan position see *K.D. Sriyani Silva* v. *Chanaka Iddamalgoda, OIC Paiyagala Police Station et. al.*, S.C. Application 471/2000 S.C.M. 8th August 2003, where the Court held that the Officer-in-Charge was liable, *inter alia*, because he, having '*knowledge of the deceased's condition, neglected to provide him medical treatment, and failed to have him produced in Court...*' (p. 10).

18 See *Skosana supra*, and *Ewels supra.*

19 See *Ewels supra.*

20 See *Minister van Polisie* v. *Ewels* 1975 (3) SA 590 (see text at note 34); *Van der Merwe Burger* v. *Munisipaliteit van Warrenton* 1987 (1) SA 899.
However a recent judgment of the Appellate Division, *Minister of Law and Order* v. *Kadir* 1995 (1) SA 303 (reversing the Trial Court) held that the Police were **not** under a duty to act, in circumstances where the victim was injured in a motor accident, and the Police failed to record information regarding the offending driver, although they had ample opportunity to do so (and had the information been recorded, the victim could have claimed compensation). However it is submitted that the decision must be regarded as a one-off decision, and that the *Ewels* principle, followed in *Mtati* and *Skosana* should stand. It must also be noted that *Kadir* has been subjected to strong criticism on its reasoning, and departure from *Ewels*. See specially Jonathan Burchell, 'The Role of the Police: Public Protector or Criminal Investigator?', 1995 (112) *South African Law Journal* 211.

Thus in the context of the increasing numbers of attacks on Christian ministers and places of worship,[21] if a responsible officer of the Church concerned had informed the police of threats of violence against a minister or a place of worship, or if the police had constructive or actual knowledge of the imminent danger of such attacks, and (either for political, personal or other reasons, or due to negligence) failed to record such information, to ensure adequate protection and to conduct investigations, the victim would be able (relying upon the duty of the Police to act under the Police Ordinance[22] as well as the general conviction of society that the Police should have acted) to claim that the negligent omission[23] of the Police made them liable in delict for the physical injuries caused in the event such an attack took place, as well as for consequential economic losses.[24]

Public Authorities and Delictual Liability

Public authorities do not, as of right, enjoy any general immunity from delictual liability.[25] However, the English courts have been reluctant to impose liability for damage arising out of a failure to act, albeit that they were under a duty to act. While

in some instances liability has been recognized,[26] in many others 'public policy' considerations have weighted the scales of justice heavily against the imposition of

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21 During the period 1st January to 31st December 2003 approximately 90 incidents of violence against Christian places of worship, Ministers and adherents of the Christian faith were reported. Of this number approximately 80 were during the period 1st August 2003 to 31st December 2003 (the 1st of August being of significance as it was around this period that the intention of Minister W J M Lokubandara to introduce anti-conversion laws was made public). Approximately 52 of the said incidents occurred during the last two months of the year 2003.
Of the total number of reported incidents at least 18 concerned serious attacks on places of worship, several being attempts to burn or otherwise destroy places of worship. Several places of worship were completely destroyed in the attacks. The incidents included the use of a petrol bomb and in one incident a hand grenade was flung into a place of worship, while worshippers were praying inside the premises.
The number also includes several extremely serious incidents of violence against the person, such as abduction and assault with a dangerous weapon (stabbing), a hand grenade being thrown into a place of worship while it was occupied by worshippers, and attempted rape.
The numbers cited above include only the incidents reported to the National Christian Evangelical Alliance of Sri Lanka (NCEASL).
Source: National Christian Evangelical Alliance of Sri Lanka (NCEASL).
Further information regarding attacks against Christian places of worship, Ministers and laity during the year 2004 can obtained from the website of the NCEASL:
http://nceaslanka.com/ReligiousLibertyViolations.asp?month_name=01&Submit=Submit
(Last accessed Thursday, 5th August 2004).

22 *supra.*

23 However, where reasonable steps are taken, the fact that the danger was not averted alone would not make the Police liable.

24 The only *limited* grounds where the State may be able to claim immunity would be for example where the Police resources were entirely utilized in the prevention and suppression of a riot etc., where the State could show that it could not *reasonably* have avoided the failure to act. Such grounds however must be extremely carefully scrutinized. The existence of such grounds would negative the element of negligence.

25 *Mersey Docks and Harbour Board Trustees* v. *Gibbs* (1866), nor do public officers enjoy such general immunity, see *Knightley* v. *Johns* (1982) 1 All ER 851 and *Rigby* v. *Chief Constable of Northamptonshire* (1985) 2 All ER 985.

liability.[27] No general principle as to when a public authority (in the UK) will be liable in tort for the negligent failure to act can be derived from the case law, and the law in this area can at best be described as confusing.

The English Law attempts to distinguish between private and public entities, on the basis that imposing liability on public authorities would not serve a deterrent purpose; that it is unreasonable to force such an authority to provide services; that the public at large would then be forced not only to pay for the provision of the service but also to compensate the victims where there is a failure to provide the service; and that the authority may then consider the possibility of tort actions as the basis of decision-making rather than actual need (e.g. to allocate funds to policing rather than education).

However, what the English Courts in general have failed to consider is that in respect of most services (i.e. policing, fire-fighting etc) the State enjoys a statutory monopoly, and that the tax payer as a contributor to the relevant State authorities has a right to such services. Further, it would be more equitable to require a public authority to act rather than requiring positive acts by private entities, the State being in a better position to provide such services.[28]

Thus it is submitted that, even in the English system, where the State fails to provide such services, wilfully or due to negligence, and the victim, having a right to the provision of such services fails to receive such services and consequently suffers injury, he must then be compensated for such loss.[29]

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[26] Examples include the cases of *Kirkham* v. *Chief Constable of Greater Manchester* (1990) 3 All E.R. 246 where the police failed to inform prison authorities that the plaintiff's husband was a suicide risk; *Kent* v. *Griffiths & Others* (2000) 2 All ER 474 where the London Ambulance Service negligently delayed in ensuring the arrival of an ambulance. Both cases distinguish themselves from the cases which do not recognize liability on the basis that in these two cases the *specific victim* and the *possibility of loss to the victim* was *foreseeable*, and there was a specific duty to the plaintiff (as opposed to a general duty to the public).

[27] Examples include *Hill* v. *Chief Constable of West Yorkshire* (1988) 2 All E.R. where the plaintiff sued the police for the failure to conduct proper investigations regarding a serial killer, who subsequently murdered the plaintiff's daughter. The plaintiff claimed damages on the basis that, *if not for the negligence of the police*, the serial killer would have been apprehended and the daughter would still be alive; similarly in *Capital and Counties plc* v. *Hampshire County Council* (1997) 2 All E.R. 865 while the authority was held liable in one case for a negligent act which caused a rapid spread of fire, in the other two cases the authorities were held not liable for the negligent omission in failing to examine the inside premises and leaving a site having performed an external examination only, the internal fire subsequently destroying the premises, and for the negligent omission in failing to maintain water in the fire hydrants, which if maintained would have ensured that the fire could have been extinguished. Similarly in *Stovin* v. *Wise* (1996) 3 All E.R. 801 the failure of a public authority, charged with the duty of maintaining roads, to maintain the roads properly, that resulted in a serious accident, was held not actionable, although such maintenance was undertaken by the authority.
However, the European Court of Human Rights in *Osman* v. *United Kingdom* (1999) 1 FLR 193 expressed the view that it would be in very exceptional circumstances that public authorities should be granted immunity where they fail to fulfill their duties (in the instant case, the investigation of possible danger to a child).

[28] See Nicholls LJ (dissenting) in *Stovin* v. *Wise* (1996) 3 All E.R. 801, 811.

[29] Further, if the State was to compensate for such loss the loss would be borne out by the public in general, rather than imposing the entire burden of the loss on the individual victim.

The position in Sri Lanka would be different to the UK position for two reasons. On one hand the Sri Lankan position, like the South African, would be determined by the Roman-Dutch law. While the UK position would depend upon whether the public authority was under a 'duty of care' which compelled it to act (the existence of such duty being heavily influenced by subjective, 'public policy' considerations), the Sri Lankan courts, however, would merely have to ask the question as to whether the authority was under a duty to act (imposed by statute or otherwise) and whether a failure to do so was wrongful. Where there is a wrongful failure to act, there appears no basis on which a distinction should be drawn between private entities or public authorities, in imposing liability. The failure to act in situations where an authority is bound to do so has been recognized as 'wrongful' under both the Sri Lankan[30] and South African[31] legal systems,[32] and as such it must necessarily be concluded that where such authorities '*wrongfully*' fail to fulfill their duties, they must be held liable. In the leading case of *Minister van Polisie* v. *Ewels*[33] Rumpff CJ stated that the Roman-Dutch law "...has developed to a stage wherein an omission is regarded as unlawful conduct when the circumstances of the case are of such a nature that the omission *not only incites moral indignation* but *also that the legal convictions of the community demand that the omission ought to be regarded as unlawful* and that the damage suffered ought to be made good by the person who neglected to do a positive act. In order to determine whether there is unlawfulness the question, in a given case of an omission, is thus not whether there was the usual 'negligence' of the *bonus paterfamilias* but whether, regard being had to all the facts, there was a duty to act reasonably" (emphasis added).[34] His Lordship did not draw any distinctions in the application of this principle to public and private entities. Further, some South African jurists express the view that the mere fact of holding public office would be a category which gives rise to a duty to act in certain instances, and that failure to do so would be actionable.[35] A similar position has also been expressed with regard to statutorily granted powers.[36]

A further expansion can be made in the Sri Lankan legal system where, if the failure to act denied the affected person the equal protection of the law,[37] that in itself may be treated as a ground creating liability.[38]

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30 *Faiz* v. *AG* (1995) 1 Sri L.R. 372.

31 *Minister Van Polisie* v. *Ewels* 1975 (3) SA 590, see also *Skosana supra*, and *Mtati supra.*

32 The fact that such a failure to act would be 'wrongful' was recognized in the Sri Lankan Supreme Court, in the context of a petition alleging the violation of Fundamental Rights (*Faiz* v. *AG supra*). However, having established that such conduct would be wrongful, it should necessarily be considered wrongful in the context of delictual actions.

33 1975 (3) SA 590.

34 p.590 (headnote, in translation).

35 Jonathan Burchell, *Principles of Delict*, (Cape Town: Juta & Co, 1993) 44, See also Jonathan Burchell, 'The Role of the Police: Public Protector or Criminal Investigator?', 1995 (112) South African Law Journal 211; and *Van der Merwe Burger* v. *Munisipaliteit van Warrenton* 1987 (1) SA 899, and *Rabie* v. *Kimberley Munisipaliteit en 'n ander* 1991 (4) SA 243 which broke away from the long line of 'municipality cases' and recognized, in line with *Ewels*, the liability of municipalities arising where they were in breach of their duty to repair roads, pavements and drains. See also Mervyn Dendy, 'Municipal Immunity for non-repair of Streets: Overruling the Appellate Division', 1988 (105) *South African Law Journal* 177.

36 Jonathan Burchell, *Principles of Delict*, (Cape Town: Juta & Co, 1993) 44.

37 Guaranteed by Article 12 of the Constitution.

38 This has been discussed as a separate section in this analysis – see section titled 'Attacks on Christian Ministers and Places of Worship'.

Thus the modern Roman-Dutch law can in no way afford to public authorities any special immunity in respect of negligent (or willful) acts or omissions.

Secondly, and perhaps more important, even if the South African legal system was to recognize, at a future point in time, that 'public policy' required that the State should be generally immune from liability, the Sri Lankan system would continue to recognize the liability of the State, as the liability of the State for delictual acts (and omissions) is recognized statutorily.[39]

Negligent Omissions Causing Physical Injury – the Liability of the State in Public Law

The Sri Lankan Supreme Court in the 1990s showed a great willingness to uphold the rights of the people, and has, in several cases given liberal interpretations to Constitutional provisions in order to secure such rights. Thus in the landmark judgment in *Faiz* v. *Attorney General*[40] the Supreme Court recognized that, where there was a legal duty to act, the failure to do so would be actionable.[41] The concept was further elaborated in the *Bindunuwewa case,*[42] *K.D. Sriyani Silva* v. *Chanaka Iddamalgoda, OIC Paiyagala Police Station et. al.*,[43] and in *W.R. Sanjeewa, on behalf*

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39 *Crown (Liability in Delict) Act* No. 22 of 1969, which recognizes that the State would be equally liable in delict as a private person [Section 2(1)]. Similarly liability would lie with respect to the performance or non-performance of statutory duties [Section 2(2)]. The only exception to State liability is where immunity for specific tasks is granted to the State or its agents by statute, and where immunity is granted to State agents, that immunity would also be applicable to the State [Section 2(4)].

40 (1995) 1 Sri L.R. 372.
For the corresponding international law position see *Hajrizi Dzemajl et al.* v. *Serbia and Montenegro* CAT/C/29/D/161/2000 (judgment of 21st November 2002). The case dealt with a complaint under the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, where members of one ethnic group were responsible for the burning and destruction of a settlement of members of another ethnic group. The Committee Against Torture having considered that such violence amounted to acts of cruel, inhuman or degrading treatment or punishment, held *inter alia* that the failure of the State (Police) to prevent such acts, having adequate knowledge of the imminence of such danger, amounted to 'acquiesence' by the State (thus incurring liability under Article 16(1) of the Convention).

41 This was in the context of a Fundamental Rights claim where the petitioner was assaulted in the presence of police officers, within the premises of a police station. While the police officers were held to have infringed the petitioner's right to equal treatment, and the freedom from arbitrary arrest and detention, they were also held to have violated his right to freedom from torture, by their inaction.

42 *Abeyratne Banda* v. *Gajanayake, Director, Criminal Investigation Department & Others* (2002) 1 Sri L.R. 365, 373 where Fernando J. expressed the view that if the petitioner (the civilian commander of the camp) had control over the police, and if his exercise of power could have prevented the massacre, then a failure to exercise that power would have been wrongful (although in the circumstances it was held that in fact the petitioner did not have such control over the police and that he had done all in his power to try to avoid the tragedy).

43 S.C. Application 471/2000 S.C.M. 8th August 2003, ('Right to Life' Case) where the Supreme Court recognized (at p.10) the liability of an Officer-in-Charge of a police station for *inaction* in the form of a failure to ensure that his subordinates did not assault a person in custody. In this landmark judgment, the right of a deceased's next of kin to file an application, notwithstanding Article 126 of the Constitution, was also recognized.

of W.M.G. Mervin Perera v. *Sena Suraweera (OIC) et. al.*[44] Thus, not only was 'Executive and Administrative Action' actionable, but henceforth 'Executive and Administrative Inaction' would also be actionable.[45]

More recently in *Mundy et. al.* v. *Central Environmental Authority et. al.*[46] recognition was given to the fact that, where it appears in a writ application that Fundamental Rights may have been violated, such matter should be referred to the Supreme Court,[47] which could then exercise its 'just and equitable' jurisdiction.[48] In the context of the 'public trust' doctrine[49] this would mean that, where a public authority acted or failed to act,[50] inconsistently with its duties as *trustee,*[51] in addition to the relief that can be sought by way of writ,[52] damages could also be awarded on the basis of the violation of Fundamental Rights.[53] It could be argued further, that even in the absence of a violation of Fundamental Rights, and where mandamus would not serve to remedy the situation, the Court would be competent to grant compensation that since writs are equitable remedies and *equity regards as done that which ought to be done*[54]. If not, the petitioner would be without remedy.

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44 S.C. Application 328/2002 S.C.M. 4th April 2003, where the ***failure*** to obtain prompt medical treatment for a suspect in custody, (who had been subject to severe torture) was held, in itself, to be *cruel and inhuman* (at p.9). The judgment took the *duty to act* to a whole new dimension by recognizing the *command theory*, that where the IGP had failed to investigate into allegations of torture, or take preventive action, such as surprise visits to Police stations, the IGP would be liable for torture, by his inaction (a high degree of liability on public officers to ensure the protection of rights.)

45 Thus in *Jayantha Adhikari Egodawela & Others* v. *Dayananda Dissanayake, Commissioner of Elections & Others* (reported as *Mediwake & Others* v. *Dayananda Dissanayake, Commissioner of Elections & Others*) (2001) 1 Sri L.R. 177, the Court held that where a discretionary power to annul a flawed poll was granted (by the use of the word 'may'), that discretion must be reasonably exercised, and the failure to exercise such discretion in appropriate circumstances, would make the Commissioner liable for the infringement of the Petitioners' Fundamental Right of the Freedom of Speech and Expression.

46 S.C. Appeal Nos. 58-60/2003, S.C. Minutes 20th January 2004.

47 Article 126(3) of the Constitution.

48 pp. 13-14.

49 See *Bandara* v. *Premachandra* (1994) 1 Sri L.R. 301.

50 *Mediwake & Others* v. *Dayananda Dissanayake, Commissioner of Elections & Others supra.*

51 The judgment in *Mediwake ibid.* shows that not only are public officers liable for a failure to exercise their discretion reasonably, but that they may be liable for a failure to exercise their discretion at all.

52 Such as mandamus – see for example *De Silva* v. *Atukorale* (1993) 2 Sri L.R. 283

53 Thus even where a petitioner finds himself out of time to file a Fundamental Rights application, he may file a writ application, within which he may claim the infringement of his Fundamental Rights, in which instance the Court of Appeal will be bound to refer such matter to the Supreme Court. Fernando J's reasoning also hints that the Court of Appeal may have the discretion not only to grant or deny remedy by way of writ, but also the discretion to grant relief by way of compensation in appropriate cases. His Lordship suggested that, since the Court of Appeal had recognized that there was an infringement of the Petitioners' rights, but that public interest outweighed it, the Court should have awarded damages so that the decision would have been *equitable* (p. 15); on this inter-relationship between the Writ and the Fundamental Rights jurisdiction see also *W K C Perera* v. *Daya Edirisinghe & Others* (1995) 1Sri L.R. 148

54 See the reasoning of Fernando J. in *Dhanu Contractors (Pvt) Ltd* v. *Matale Municipal Council et. al.* S.C. Application 461/2001, S.C. Minutes 13th October 2003 at p.11 (though it must be noted that the dicta of Fernando J. was in the context of a Fundamental Rights application and not a Writ application).

Attacks on Christian Ministers and Places of Worship

In light of the above, if the Police were informed of threats against a Christian minister or place of worship, and the Police failed to record such complaint and ensure adequate protection, or conduct investigations, the minister would be able to claim that the Police had failed to afford him the equal protection of the law,[55] and that thus they were, by inaction, liable for damages suffered.[56]

Similarly, where the Police (in addition to other responsible State officials such as the Minister of Interior etc), had actual knowledge[57] or constructive knowledge, that there was an imminent danger of attacks on a particular group of persons or structures (used as a place of worship or other religious activity), which would result in the inability of such persons to exercise their freedom of thought, conscience and religion,[58] or to exercise their freedom to manifest their religion or belief in worship, observance, practice or teaching,[59] the Police would have a duty imposed both by the Constitution and statute, as well as by the 'legal convictions of the community', to take reasonable steps to ensure the protection of such persons or structures. The failure to afford such protection would also constitute a violation of the equal protection of the law.[60]

If the Police (and other responsible officials) failed to take reasonable steps to ensure such protection, there being a legal duty to act, the failure to do so would attract liability. In other words, in addition to the liability of the wrongdoers in civil law for the damage caused, and penal liability, the Police would by their inaction have infringed the Fundamental Rights of such affected persons,[61] and would be subject to the Fundamental Rights jurisdiction of the Supreme Court.

Subsequent to an attack taking place, (even if there was no reasonable foresight thereof), the police would be under a duty to properly investigate such attacks. The failure to do so would incur liability in a like manner. The Supreme Court, in *Victor Ivan* v. *Attorney General*,[62] noted that "a citizen is entitled to a proper investigation – one which is fair, competent, timely and appropriate – of a criminal complaint... The criminal law exists for the protection of his rights – of person, property and reputation – and lack of a due investigation will deprive him of the protection of the law."[63]

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55 Constitutionally guaranteed vide Article 12 of the Constitution.

56 Since the State is under a duty to provide such protection, it would be open to a party having sufficient interest, to apply for a Writ of Mandamus compelling the Police to provide such protection. However, due to the fact that there is usually limited prior knowledge (if at all) of such attacks, it is unlikely that an application to Court prior to an attack would be feasible. Where an attack has already taken place, Mandamus would be denied on the basis of futility.

57 By being directly informed by affected persons or otherwise.

58 Guaranteed by Article 10 of the Constitution.

59 Guaranteed by Article 14(1)(e) of the Constitution.

60 Guaranteed by Article 12 of the Constitution.

61 Especially Articles 10 and 14(1)(e), as well as 12, of the Constitution.

62 (1998) 1 Sri L.R. 340.

63 Ibid at p. 349.

Conclusion

While the English law, on policy considerations, may refuse to recognize the liability of public authorities with respect to wilful or negligent omissions causing physical injury, the Roman-Dutch law clearly recognizes the liability of public authorities in respect of physical injury caused by their negligent failure to act.

With respect to physical injuries/damage caused by willful or negligent omissions, liability would be recognized by the Sri Lankan legal system.

Subsequent to *Mundy*, where there is an apparent infringement of Fundamental Rights[64] (in a writ application in the Court of Appeal)[65] compensation may be obtained by the matter being referred to the Supreme Court, or perhaps by the Court of Appeal ***itself***, considering the *equitable* nature of the writ.[66]

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64 In the case of omissions, on the basis of *Faiz*, the petitioner may argue that the violation was by the State.
In all other cases where such a direct link is not apparent the petitioner may still argue that through *inaction* he had been denied the equal protection of the law and thus show the link necessary to claim compensation in a public law claim.

65 For example, an application for a writ of mandamus, compelling the Police to take necessary preventive measures.

66 See the reasoning of Fernando J. in *Mundy supra.* note 54 and the *Dhanu Contractors* case *supra.* note 62.

Codes of Conduct of Transnational Corporations and Sri Lanka's Labour Laws

Eranthi Premaratne

Introduction

In the new world order, transnational corporations (TNCs) are becoming stronger economically and increasingly powerful politically. It is estimated that that more than half of goods traded in the world market are produced by TNCs and more than one third of world trade is composed of transfers of goods within different branches of the same TNC. Two thirds of all international transactions in goods and services combined are dependent on TNC operations. The immunity TNCs enjoy from controls that limit national governments and the ability to freely move capital to reap maximum benefits have made them the powerful monster they are today. Together with the processes of globalization, TNCs have the power to challenge the ability of governments to protect the economic and social well being of their people. Hence, it is commonly alleged that TNCs are challenging the capacity of domestic labour law to safeguard workers' rights.

Amidst such allegations, and in an effort to do their as part as socially responsible corporations, TNCs have introduced codes of conduct to govern industrial relations, look after worker welfare and ensure environmental protection. These codes of conduct are establishing relatively firm footholds in international law. In August 2003, the United Nations passed a resolution on "*Transnational corporations and their human rights responsibilities*"[1] and the European Parliament in 1999 voted to support a new *European code of conduct for ethical business*.[2] These codes cannot be ignored and must be taken seriously.

Given the growing importance of such codes of conduct and the importance of the garment industry to the Sri Lankan economy, this article will focus specifically on the codes of conduct of TNCs dealing in garment production. The article examines the nature of the codes of conduct applicable in the garment industry; their relation to the labour laws in Sri Lanka, the compliance mechanisms involved; and the conflict between purchasing practices and the codes before looking at the influence TNCs wield over the government of Sri Lanka to change labour law. The article concludes with recommendations on ways to improve the codes of conduct and the compliance mechanisms.

Brands Produced in Sri Lanka

The garment industry is the single largest foreign exchange earner of the Sri Lankan economy. In 2002, garment exports comprised 53% of the country's total export earnings.[3] It is estimated that the apparel industry employs about 330,000, 85% of whom are women. These factories manufacture for many of the big brand names such as Nike and Gap, for middle level buyers such as Colombia Sportswear and other

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1 UN Sub Commission on the Promotion and Protection of Human Rights, Resolution 2003 / 16.
2 15th January 1999.
3 *Central Bank of Sri Lanka, "Annual Report 2002"* .

smaller buyers selling in the US and European markets. There are currently approximately 150 different brand names being produced in Sri Lanka.[4] Some of the other brands Sri Lanka produces for are: Abercrombie & Fitch, FCUK, Marks and Spencer (M&S), Levi-Strauss, Reebok, Tommy Hilfiger, Victoria's Secret and Wal-Mart. While most of these brands have their own code of conduct, others subscribe to accepted codes.

Codes of Conduct

A corporate code of conduct is a written statement of policy adopted voluntarily by a company, stating that the entire supply chain with whom they do business must comply with certain legal and ethical standards. They are non-legally binding commitments undertaken by individual brands, dependent on the brands themselves for implementation. Nike introduces their Code of Conduct as a "straightforward statement of values, intentions and expectations and is meant to guide decisions in product facilities."[5] Issues commonly addressed by codes of conduct are: industrial relations, work conditions health and safety standards and environment protection. "Though standards may vary from company to company, all codes of conduct profess a basic commitment to at least uphold all of the applicable laws and regulations of the individual countries in which they source their products."[6]

However, critics argue that that these codes are nothing more than tools in a public relations strategy, are not meant to be implemented and that the workers for whose benefit they have been formulated, are not even aware of the contents. Contrary to such allegations, during the course of the research for this paper, [7] Sinhala copies of the codes were seen on the factory walls and many of the women interviewed were aware of their existence. Critics also question the use of certain words in the codes. Some of the words they warn against are "must", "shall", "encourages", "favours" and "reasonable". Examination of some codes shows that some of the smart codes refrain from using words that compel when referring to important standards. Take for example the Ethical Trading Initiative (ETI) Base Code, when referring to freedom of association it says "Workers (...) have the right to join or form trade unions... "[8]. On the other hand, when laying standards for less contentious issues, words of compulsion are used. For example, "a safe and hygienic working environment **shall** be provided...".

Codes of Conduct Compared to Sri Lankan Domestic Law

As mentioned above, some of the codes specify that the minimum standard should be as stipulated by labour laws, while others have set standards of their own. The ETI Base Code states that "the provisions of this code constitute minimum and not maximum standards, and this code should not be used to prevent companies from exceeding these standards. Companies applying this code are expected to comply with national and other applicable law and, where the provisions of law and this Base Code

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4 Clean Clothes Campaign, Newsletter No. 16 (February 2003), online: <http://www.cleanclothes.org/news/newsletter16.htm>.

5 www.nike.com.

6 *Women Workers and the Garment Industry in Sri Lanka*, The Centre for Policy Alternatives, 2003, pg 52 (unpublished).

7 For the project on Women Workers and the Garment Industry in Sri Lanka, April – July 2003

8 http://www.ethicaltrade.org.

address the same subject, to apply that provision which affords the greater protection." Therefore it is appropriate to compare some of the key standards set by the TNCs with the corresponding provisions in the Sri Lankan domestic law.

Issue	Sri Lankan law	What the codes say[9]
Child labour	The minimum age of employment is 14 years.[10] Those above the age of 14 may be employed, subject to certain conditions.	Contractor shall not employ any person below the age of 16 to produce apparel, accessories or equipment, nor shall they hire any person who is younger than the Nike or legal age limit (whichever is higher).– Nike Every worker employed in the factory is at least 14 years of age. - GAP There shall be no new recruitment of child labour. Children and young persons under 18 shall not be employed at night or in hazardous conditions. – ETI
Wages	Apprentices – SLR 2300 Grade 1A employee with 5 years experience – SLR 3165 - Minimum wage according to Wages Board Decisions (Per Month) Trainees – SLR 3400 Skilled employees SLR 3700 - Minimum wage according to BOI Regulations (Per month)	Wages and benefits paid shall meet, at a minimum national legal standards or industry benchmark standards, whichever is higher.- ETI Reebok will not select business partners that pay less than the minimum wage required by local law or that pay less than prevailing local industry practices (whichever is higher). – Reebok

9 The codes used in this study are Nike, Reebok, Gap and ETI Base Code which has been adopted by M&S.

10 Gazette Notification 1116/5 of January 26, 2009, amending the regulations to the Employment of Women, Young Persons, and Children Act, prohibits the employment of children below 14 years.

Work hours and over time	For factory workers - A normal working day from Monday to Friday is 9 hours and on a Saturday 6 ½ hours. This is inclusive of a 1 hour meal or rest break. Total hours worked shall not exceed 9 hours a day and 48 hours a week (excluding intervals for meals and rest).[11] Employees below 16 years shall not work in excess of 12 hours a day. Those below 18 years shall not work after 8 pm.[12] Overtime – There are no over time restrictions for men. Total hours of overtime worked for a month for a woman shall not exceed 60 hours a month and for a person between 16 – 18 years, 50 hours a month. Total number of hours worked including overtime shall not exceed 60 hours a week (excluding intervals). Payment for working overtime is at 1 ½ times the normal hourly rate[13].	Complies with legally mandated work hours. Uses overtime only when employees are fully compensated according to local law; informs employees at the time of hiring if mandatory overtime is a condition of employment; and, on a regularly scheduled basis, provides one day off in seven. Work hours should be no more than 60 hours of work per week on a regularly scheduled basis, or comply with local limits if they are lower. - Nike Workers shall not work more than 60 hours per week, including overtime, except in extraordinary business circumstances. In countries where the maximum work week is less, that standard shall apply. Workers shall be entitled to at least one day off in every seven day period. - Reebok Factories shall set working hours and overtime pay in compliance with all applicable laws. Workers may refuse overtime without any threat of penalty, punishment or dismissal – Gap
Freedom of association	Freedom of association is a Fundamental Right[14] The following unfair labour practices are punishable offences[15]: require a workman to join, refrain from joining, or withdraw	Partners are expected to share Nike commitment to best practices and continuous improvement in management practices that respect the rights of all employees, including the right to free association and collective bargaining. – Nike

11 Factories Ordinance, Section 67.
12 Factories Ordinance, Section 67(b).
13 Section 68 of the Factories Ordinance as amended by Act No. 19 of 2002
14 Article 14 of the Constitution.
15 Section 32A of the Industrial Disputes (Amendment) Act, No. 56 of 1999.

	from a TU as a condition of employment, dismissing a workman only because he is a member of a TU, preventing a worker from joining a TU or continuing in a TU, interfering with TU activities, refusing to bargain with a TU which has in its membership at least 40% of the workmen on whose behalf such trade union is set up.	Workers have the right to join or form trade unions of their own choosing and to bargain collectively and the employer adopts an open attitude towards the activities of trade unions and their organisational activities. - ETI

A perusal of the above table shows that in some instances the national laws are far more comprehensive and strict than the corresponding provisions in the codes of conduct. For example freedom of association is not addressed as a core standard in the Nike code[16], while the ETI Base Code states that "there shall be no new recruitment of child labour". On certain other issues like the ceiling on overtime hours per week, codes and the law take a similar stand. On the issues of minimum wage, the codes support the law by stating that their contractors should pay at least the minimum wage required by law.

The Private "Legal" System

Moreover, similar to the national labour laws the codes of conduct can be monitored and implemented, perhaps even more efficiently and effectively. TNCs have a complete system in which the implementation of the codes are monitored both internally and externally and compliance ensured through punitive action. "Currently, Nike has more than 80 people located around the globe focusing exclusively on compliance issues in the supply chain...."[17] and at Gap "more than 90 people working to improve factories and protect workers' rights."[18] Where factories are non-compliant, new orders are not placed and existing orders are cancelled or withdrawn. Gap threatens: "work with us to improve conditions, or we won't work with you."[19] On the other hand many of the brands are accused of washing their hands off a non-compliant company rather than helping them to be compliant. Therefore TNCs have to realize the role they need to play in improving labour standards in factories. Further, they should understand the importance of continued support and favouritism to compliant factories.

A glance at history books shows that the TNCs, rather than adopting the codes on their own, were pressured into doing so through the many high profile international campaigns launched against them. As Neil Kearney, the General Secretary of the International Textile, Garment and Leather Worker's Federation (ITGLWF) explains: "The process of globalisation has been accompanied by an increase in violations of

16 The old Nike code posted on the website is completely silent on freedom of association.
17 http://www.nike.com/nikebiz/nikebiz.jhtml?page=25&cat=compliance&subcat=code
18 http://www.gapinc.com/social_resp/ifpr/challenges.htm
19 http://www.gapinc.com/social_resp/ifpr/challenges.htm

worker rights. But fortunately, it has also been accompanied by a revolution in communications, with abuses which in the past might never have come to light now being reported in the news soon after they occur. Multinationals are very vulnerable, and reports of abuses can destroy in one stroke the image multinationals have spent millions to promote."[20] Thus "the more ambitious a company has been in branding the cultural landscape, and the more careless it has been in abandoning the workers, the more likely it is to have generated silent battalion of critics waiting to pounce"[21] The reactionary compliance to labour standards will continue to result in the questioning of the TNCs' motives and their commitment to compliance. However, as the case study below shows, brands are increasingly showing interest and commitment to improving and maintaining labour standards.

Case Study - The Jaqalanka Ltd – Free Trade Zone Workers Union[22] (FTZWU) Dispute

In April 2003, when employees of Jaqalanka Ltd agitated over the non-payment of a bonus, the FTZWU tried to intervene on behalf of the employees. The dispute, that ensued between the company and the trade union on the refusal by the former to recognize the latter, became one of the most high profile labour rights campaigns in Sri Lanka. Nike, a buyer of the Jaqalanka group of companies, was taken to task by labour activists. In the midst of unwanted publicity, two Fair Labour Association (FLA) participants, Nike and Vanity Fair, who source from Jaqalanka Ltd requested the FLA to help resolve the dispute.[23] After many rounds of discussions at meetings convened by CPA on behalf of FLA in October 2003, a settlement was reached whereby Jaqalanka Ltd "accepted" the FTZWU as representing the concerns of its members, in return for which the FTZWU agreed to call off the international solidarity campaign. After eight months of working together with the assistance of CPA/ FLA, and with the support of Nike, the parties have built a strong partnership they hope to continue in the future. At the meeting held to review the process in June 2004, Nike's support and commitment to the process was repeatedly appreciated and highlighted by both parties and FLA.

This case study can also be used to demonstrate the power of TNCs in ensuring compliance. The settlement, which was negotiated completely outside of the national legal system, was made possible to a large extent by the pressure exerted by Nike on the company to abide by the law and accept the trade union. Furthermore this is an excellent example to demonstrate Nike's commitment to compliance by placing continued orders with Jaqalanka Ltd. Having observed the buyers' reaction to the dispute and their commitment to the process, Anton Marcus, Joint General Secretary of the Free Trade Zones and General Services Employees Union, emphasized the crucial role buyers have to play in ensuring that workers' rights are respected[24]. By using success stories such as this example, buyers could communicate to other contractors the importance of compliance and its associated rewards. Brands have a

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20 http://www.itglwf.org/displaydocument.asp?DocType=Press&Index=35&Language=EN.

21 No Logo, Naomi Klein,. Vintage Canada, 2000, pg 345.

22 The name was changed to Free Trade Zones and General Services Employees Union in February 2004.

23 Press release on Jaqalanka Ltd – FTZWU Dispute Settlement Process, www.cpalanka.org

24 Jaqalanka Ltd–FTZAGSU Dispute Settlement Review Meeting, June 2004, Jaic Hilton, Colombo.

responsibility to use these lessons learnt and use the best practices identified to ensure compliance.

Purchasing Practices vs. Codes of Conduct

The purchasing practices of TNCs continue to call into question their commitment to compliance. To keep up with the new trends in the fashion world, which models 6-8 different fashion seasons as opposed to the 2-4 in the past, manufacturers are pressured by the brands to meet tight delivery deadlines. The Sri Lanka Apparel Exporters' Association reports that the average manufacturing lead-time (the period from order entry to order delivery) in Sri Lanka is 90 days.[25] However lead times vary from as low as 45 to as high as 120 days. To meet such tight deadlines, factories are forced to increase overtime and night shifts in contravention of both the national laws and the codes. The pressure on the work force to meet unrealistic targets sets off a vicious cycle resulting in more errors, more abuse by the supervisors and subsequently more hours, all in violation of the standards set by the codes of conduct. When confronted with the issue, buyers often abdicate their responsibility by blaming factories for poor planning. The factories however are forced to abandon their plans when attempting to meet strict specifications required by the brands on accessories and material.

The monetary practices employed by buyers apply additional pressure on manufacturers. The decreased prices paid per garment, the discounts demanded or penalties imposed for failure to meet deadlines and the use of air – freight to meet deadlines, place a heavy financial burden on the manufacturers, who in turn pass the burden onto the workers. While a worker is paid a bare minimum wage as low as SLR 2300 per month, brands earn more than that for the cheapest single branded item. Moreover, the employers claim that the financial pressures put on them by the TNCs make it difficult to meet health and safety standards, environmental protection standards and provide benefits to employees as required by the codes. Further more the single most important goal of TNCs is to increase profits which often leads them to disregard compliant factories and countries, turning instead to more profitable outfits which blatantly violate labour laws and codes. In this regard, Sri Lanka, with its strict labour laws and better compliance standards, is at a disadvantage against neighbouring giants, India and China.

Playing a Double Game

In addition to being insensitive to their own codes of conduct, TNCs are also accused of influencing national governments to weaken their labour laws and their implementation. Kearney alleges that TNCs "frequently play off governments against each other. They will offer to invest and create jobs but only if the government concerned offers considerable incentives and frees them from the obligation to respect local labour laws." [26] Although evidence of TNCs' direct influence on the weakening of labour laws is difficult to find, judging by the influence TNCs wield over the most powerful government in the world – the US – it can be reasonably assumed that they

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[25] "Sri Lankan Apparels – An Overview", *The Apparel Digest: Journal and Directory of the Sri Lanka Apparel Exporters Association,* Iss. 80 at 13-21.

[26] Privatisation, Globalisation and the Growing Power of the TNCs, Cairo 19th March 1997, www.itcilo.it

have more power over the Sri Lankan government. Bala Tampoe, General Secretary of the Ceylon Mercantile Union, justifies the assumption on the basis that since "TNCs cannot survive without extracting every possible ounce from the whole world they would therefore recommend policies that weaken labour laws to increase their profits." [27]

According to labour rights activists and government officials, TNCs do influence successive governments to make legal changes, but in a discreet manner. Accordingly, pressure is applied on the manufacturers who in turn pressurise the government to make necessary legal changes. In Sri Lanka, the amendment regarding overtime hours introduced in 2002 is suspected to be a result of such covert pressure. The law was amended to allow a woman worker 60 hours of overtime a month (in accordance with the standards set by the codes of conduct), an increase from 100 hours per year.[28]

In addition to the labour law reform, the regulations of the BOI are also directly influenced by corporate codes of conduct. These changes are not always negative. For example, TNCs' codes of conduct have pressured the Sri Lankan government to comply with higher safety and health standards. Further, a senior labour department official claims that the proposed Health and Safety Act was drafted to comply with the requirements of the codes of conduct.[29]

Conclusion

The improvements in health and safety standards discussed above are models of what the codes of conduct should aim to achieve: to make positive changes to national policies and laws thereby improving conditions for the workforce and meeting the higher standards set by the codes. Unfortunately, as detailed in this paper, the reality is that TNCs publicly announce that they require factories to comply with the codes of conduct, while simultaneously making it impossible for the factories to do so due to TNC purchasing practices. Moreover, the codes themselves could be improved in a number of areas. For example, all codes should deal with issues like harassment and abuse everyday occurrences in the garment factories. Another area the codes should look at is the concept of a living wage. If nothing else, these huge multinationals have a moral obligation to provide a decent living to their workforce. With regard to enforcement, TNCs have an obligation to raise awareness and train contractors and workers with respect to employee rights. Further in this regard, without running away at the first sign of trouble, TNCs should demonstrate their continued commitment to compliance. Moreover, TNCs should avoid applying double standards as they so often do, and instead, encourage and support their compliance "partners".

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27 Interview with Bala Tampoe as quoted in *Women Workers and the Garment Industry in Sri Lanka*, The Centre for Policy Alternatives, 2003, pg 46.

28 Section 68 of the Factories Ordinance as amended by Act No. 19 of 2002.

29 *Women Workers and the Garment Industry in Sri Lanka*, The Centre for Policy Alternatives, 2003, pg 46.

CPA CASES

The Legal Challenge to the Intellectual Property Bill of 2003: Patent Rights and the Public Interest

Nishara Mendis

"That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density at any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation. Inventions then cannot, in nature, be a subject of property."[1]

Thomas Jefferson, 13th August 1813

"Creativity is an infinite resource, native to all peoples and relevant to all times and cultures. Let us forge our common future today by embracing intellectual property as a way to use that creativity for the betterment of humankind."[2]

Excerpt from the World Intellectual Property Day Message 2003 by Dr. Kamil Idris, Director General, World Intellectual Property Organization

Introduction

On 26th April 2003, World Intellectual Property Day was held with the theme "Make Intellectual Property Your Business." On the same day, a Sri Lankan newspaper reported that the then Minister of Commerce and Consumer Affairs, Ravi Karunanayake had stated a draft Intellectual Property Bill (IP Bill) was being gazetted and would be presented for debate in Parliament soon.[3]

The IP Bill was published as a supplement to part two of the Gazette of April 25, 2003 but according to the Bill itself, it is stated clearly that it was issued on 28th April. The Bill was not made available to the public for another month. The Bill was included on the order paper of Parliament on May 21, 2003 but was only available for sale to the public on May 26, 2003.

This meant that any challenge to the constitutionality of the Bill had to be filed within two days. As most people are now aware, there is no judicial review of legislation under the present Sri Lankan Constitution, and thus Acts legally passed by Parliament cannot be struck down by the Courts for inconsistency with the Constitution. The only "window of opportunity" for any interested member of the public to raise an objection to a Bill on constitutional grounds is within *one week* of the Bill being

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1 Thomas Jefferson to Isaac McPherson 13 Aug. 1813, *Writings 13:333--35* The Founders' Constitution Volume 3, Article 1, Section 8, Clause 8, Document 12. Available at: http://press-pubs.uchicago.edu/founders/documents/a1_8_3s12.htm

2 http://www.wipo.int/about-ip/en/world_ip/2003/dg_message.htm

3 www.dailynews.lk/2003/05/23/bus05.html

placed on the order paper and tabled in Parliament. The Bill that was to repeal the Intellectual Property Act No. 52 of 1979 had 214 sections, and given that there was only a very short period to read the Bill, check for unconstitutionality, draft a petition and file it, it was obviously impossible to consider the entire Bill in detail.

There were however, several persons involved in public interest issues and who were determined enough to go before the Supreme Court on the matter of the IP Bill. Three petitions were filed, by the Centre for Policy Alternatives (CPA) and by two individual petitioners, Nihal Fernando and Dr. Kamalika Abeyratne. The challenge to the Bill was a combined effort of these three parties.

Considering the time constraints, the petitions, including CPA's, focused on some key issues relating to patent rights. CPA first checked the draft to see whether Parallel Imports and Compulsory Licensing, two of the main limitations on patent rights, had been included in the Bill. These safeguards are particularly important in the context of access to pharmaceutical drugs and are of direct consequence to the right to health. Other potentially unconstitutional areas were identified after the petitions were submitted, but before the date of hearing, and thus were later included in the written submissions. For the purposes of this article, it is the above mentioned area that will be discussed in greater detail. Before discussing the petitions, judgment and outcome of the challenge to the IP Bill, it is important to understand why this topic is identified as being of extreme importance.

Intellectual Property Defined

Intellectual property refers to a kind of property that has no physical existence, but actually refers to the intellectual creativity that goes into the making of some other thing. Intellectual property law grants creators of such property legal rights over its usage. "Intellectual property" is defined in Article 2(viii) of the Convention which established the World Intellectual Property Organization, to include rights relating to:

1. literary, artistic and scientific works;
2. performances of performing artists, sound recordings, and broadcasts;
3. inventions in all fields of human endeavor;
4. scientific discoveries;
5. industrial designs;
6. trademarks, service marks, and commercial names and designations;
7. protection against unfair competition; and
8. all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.

The definition is open ended and thus it can be seen that the areas covered by intellectual property law would be quite wide and new areas may be added, e.g. with the advent of more advanced technology. Accordingly, this article cannot cover, even

briefly, a basic outline of all of these areas. The former Sri Lankan Code of Intellectual Property[4] covered the areas of copyright, patents, industrial design rights, trade marks and trade names, and unfair competition. The new Bill amended some aspects of these areas, and introduced protection of geographical indicators, layout designs of integrated circuits, trade secrets and patenting of micro-organisms. As explained earlier, the focus of the IP Bill case was on patents – therefore this article will discuss the patent regime, with an overview of the main issues and controversies relating to this area. Some of the more controversial issues relating to patents today include genetic-engineering, bio-diversity loss/genetic erosion, food security issues, and bio-piracy, but the issue focused on in the IP Bill case was pharmaceutical patents and access to medicine.

Patent Rights

A patent can be generally described as a document that creates a legal situation that grants an exclusive right to the creator of an invention, to manufacture, use, sell or distribute it. This document is issued by a government's national patent office or a regional or international office.[5] An invention is defined as a product or a process, or offers a solution to a specific problem in the field of technology. It is generally accepted that in order for this invention to become patentable or capable of receiving a patent, it must fulfill the substantive conditions of being novel (new), involve a non-obvious inventive step and be industrially applicable. In addition, the patentability of the invention can be subject to the legal procedure of the filing of a patent application, the availability of patents in that particular field[6] and whether it is contrary to public order or morality.

A patent owner's rights over the idea in a patented invention include the right to decide who may or may not use it, effectively granting a monopoly to the owner.[7] The owner can exploit the invention himself or give permission or a licence for it to others on mutually agreed terms of contract. Both the owner's rights to pursue a violator of his exclusive rights and challenges to the validity of the patent itself may be pursued in the courts.

The protection given to the intellectual property of the patent owner is different from that of the idea we normally have of property rights, because although it can be bought, sold and licensed for use like other types of property, the rights are limited to a specific time period after which the patent expires. This limited-term monopoly right is given in return for the full disclosure of the details of the invention and its availability to the public. This is to make it possible for another to manufacture it once

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4 Act No. 52 of 1975, as amended.

5 E.g. Regional - European Patent Office and the African Regional Industrial Property Organization. International – under the World Intellectual Property Organization's Patent Cooperation Treaty a single international patent application can be filed which has the same effect as national applications filed in the designated countries under the treaty. http://www.wipo.int/about-ip/en/about_patents.html#why_patents

6 In the legal systems of many countries, scientific theories, mathematical methods, plant or animal varieties, discoveries of natural substances, commercial methods, or methods for medical treatment are not patentable.

7 It is defined in economics as a market situation where there is only one provider of a product or service. Monopolies are characterized by a lack of economic competition for the good or service that they provide (and a lack of viable substitute goods), as well as high barriers to entry for potential competitors in the market.

the patent expires. Once the patent expires, it becomes part of the "public domain", which means the information relating to the invention is publicly available for commercial (or non-commercial) exploitation.

Challenging the Rationale for Patent Protection

The original underlying rationale thus would seem to be to enable the inventor to recoup their research and development costs, in addition to making substantial profits without any competition. It is said that patent laws encourage and stimulate new inventions and innovations because they create an environment where innovation and creativity are rewarded, and investing in new research and industries becomes economically attractive. It is also argued that the system has the benefits of encouraging investment, creating and maintaining the generation of wealth and employment, and making information on inventions more widely accessible in the long term.

The question is whether this continues to be true in an age when technology has made the availability of information so much quicker and easier than a few decades ago. In light of technological advances like the World Wide Web, it could be argued that the availability of this same information in the public domain would make these benefits more widespread and create wealth and aid development far more than if the patent monopoly is held by one or a few with licenses. The question also arises whether extending the period of patent protection is not also detrimental for overall sharing of benefits and economic development. The present international standard is 20 years. The new Sri Lankan Intellectual Property Act is in compliance with this standard. This means that the owner of a patented invention can control the use of it for an entire generation. This is a serious matter, and we should consider the ideology and justification behind granting such a lengthy monopoly.

The International Legal Framework – WTO TRIPS

It is important to understand that Sri Lanka has international obligations to fulfill as a member of the World Trade Organization (WTO), and must give effect to the minimum levels of intellectual property protection included in the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement. This Agreement is part of the Marrakech Agreement, the final result of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT), which established the WTO. The TRIPS Agreement has its foundations in the Paris and Berne Conventions of 1883 and 1886.[8] Under Part III, TRIPS can be enforced against non-compliant states through the WTO dispute settlement proceedings.

The WTO

As the central international organization that deals with the global rules of trade between nations, the WTO is the main multilateral forum for trade negotiations. Its

[8] Paris Convention for the Protection of Industrial Property; Berne Convention for the Protection of Literary and Artistic Works.

primary functions are administering WTO trade agreements, handling trade disputes and monitoring national trade policies. In the words of a WTO publication: "it's an organization for liberalizing trade". [9]

The WTO officially came into being on 1st January 1995, but the foundation for the system had been laid decades earlier in 1948 when GATT was contracted by 23 states, after a failed attempt to set up the International Trade Organization (ITO). The ITO was originally intended to be the third of the Bretton Woods organizations, together with the World Bank and the International Monetary Fund (IMF), under the United Nations. The draft ITO Charter extended beyond rules on trade in goods to include rules on employment, investment and services. Interestingly, the most serious opposition to the ITO Charter was the United States Congress, despite the fact that it had been one of the driving forces behind the ITO, and is the most ardent supporter of the WTO today. US opposition to the ITO meant that the system for GATT (and subsequently, the WTO) came into being instead.

Unlike the WTO, GATT was originally only a treaty and never legally recognized as an international organization under international law. But it has at times played a similar role and is sometimes referred to as a *de facto* international organization. Over the course of several decades, GATT developed trade rules (mostly on tariffs and anti-dumping measures) and evolved into the fully-fledged international organization that is the WTO. The final round of GATT negotiations that created the WTO, known as the Uruguay Round, went on from 1986 to 1994 with 123 countries participating in the final stages and resulted in 60 agreements, annexes, decisions and understandings. The range of subject areas also expanded – so while GATT dealt mainly with trade in goods, the agreements under the WTO cover trade in 3 broad areas of goods, services, and intellectual property (this is where TRIPS comes in). It is important to remember that there is now also the enforceable dispute settlement mechanism of the WTO Tribunal and reviews of national trade policies which can result in trade sanctions.

It is argued that the WTO is a member - driven and consensus - based organization run by negotiations of the 147 countries that comprise it and is thus very different from other organizations like the World Bank and IMF, where power is delegated to directors and bureaucracies. Major decisions are made by the ministers of the member countries who meet every two years, or by the ambassadors and delegates that meet regularly at the WTO headquarters in Geneva. Given the global political reality, it is certainly doubtful whether each of the WTO member countries have the same status, bargaining power, and most importantly, whether they reap the same benefits from membership in the WTO. To take the practical results of implementing the TRIPS Agreement as an example, it has been calculated that the full implementation of TRIPS will involve $8.3 billion accruing from the rest of the world to just 6 developed countries, of which amount, the United States would receive $5.8 billion. [10]

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[9] Understanding the WTO (3rd edition) Previously published as "Trading into the Future", September 2003 – also available on www.wto.org

[10] T.N. Srinivasan (Samual C. Park Jr. Professor of Economics, Yale University) - quoting K. Maskus, "IPR in the Global Economy" (Table 6.1) Washington DC Institute for International Economics (2000) - in "TRIPS Agreement: A Comment Inspired by Frederick Abbots Presentation" http://www.econ.yale.edu/~srinivas/TRIPS.pdf

It is therefore important to question whether this system can really protect Sri Lanka's national interests. As a developing country, we are anxious to attract the foreign investors who can provide the capital that we sorely need, and stricter protection of intellectual property of foreign companies may encourage those who have so far been wary of investing in Sri Lanka to do so. The WTO and the World Bank have reiterated that weak IP regimes will have a substantial negative effect on both the level of foreign direct investment (FDI) and the kinds of technology that firms are willing to transfer. IP laws are being promoted as an essential part of global free trade, and by implication, global development. On the other hand, it is argued that the role of IP regimes in increasing FDI is not supported by enough evidence, and that strong IP regimes could inhibit diffusion of knowledge and stifle technology transfer rather than facilitate it, because poor countries will have to pay more for new technology.

Another issue is whether IP regimes assist the development of local industries. This was something the Supreme Court of Sri Lanka was concerned about in the IP Bill case, especially with regard to pharmaceutical industries. The rapid growth of India's pharmaceutical industry is said to have been facilitated by the 1970 Patents Act which changed the British colonial law (Patents and Designs Act of 1911) and reduced patents to processes, not products, with only a 7-year patent for food, drug and chemical processes and 14 years for others. Within a very short period of time, India became a competitive supplier with a large share of the global generic pharmaceutical drug market. The reaction to this is exemplified by the fact that the very first adjudication, according to the WTO dispute settlement procedures under which TRIPS is administered, was an application by the U.S. against India with regard to patent violations by the Indian pharmaceutical and agro-chemical industries.

In assessing the allegedly positive role of patents in promoting economic growth in the developing world, it is pertinent to keep in mind that a critical component of the rapid economic growth in East and South East Asia was due to imitation and absorption of foreign innovations through reverse engineering. For example, Taiwan introduced the concept of patents in limited areas only in 1994, after intense pressure from the U.S. The U.S. itself had refused to be part of the Berne Convention of 1886 on the basis that it was an agro-industrial nation and net importer of IP, and the Berne Convention protections were of no benefit to them. However, one hundred years later, the situation had changed, and U.S. industries were losing billions of dollars they would have received if not for inadequate IP protection abroad. The Uruguay round of GATT was launched with this backdrop. TRIPS can therefore be seen as "a model case of knocking the away the ladder industrialized countries themselves used to develop."[11]

Specific WTO TRIPS Issues: Compulsory Licenses and Parallel Imports

There are strongly negative views on TRIPS, but there are also those who would say that TRIPS balances the interests of the patent owners and the public good, and that the real problems are not due to the law per se, but the inefficient use of safeguards

[11] "TRIPS; a more sinister case of ladder knocking" – Ellen Hoen & Pierre Chirac, www.southcenter.org

and mitigation measures included in TRIPS such as parallel imports, compulsory licensing, licensing against anti-trust practices and *sui generis* systems.

Indeed, the areas that were at the heart of the IP Bill case were compulsory licensing and parallel importing. Compulsory licences are used in public interest situations, such as national health crises, where governments or third parties with government authorization manufacture the protected intellectual property without the consent of the patent owner to supply the local market. This occurs in situations where efforts to get consent on reasonable commercial terms have failed and the patent owner will get some kind of remuneration. Additionally, since Sri Lanka may not at present have the technological capability to produce some modern drugs, the provisions for compulsory licensing should allow for the possibility of offshore compulsory licensing to a foreign (e.g. Indian) manufacturer that has the capacity to produce the required product and the importation of patented goods in addition to manufacture.

Parallel importing is the importing of a patented (or trademarked or copyrighted) product from a market in another country without the consent of the patent owner. This is based on the principle that once the patent owner has put his goods on the market, he has no further rights to control the use or resale of the goods. It usually occurs where there are marked price differences for the same goods in different markets and importing the product from the cheaper market will thus cut the cost of its selling price. These are methods not limited only to poor nations but also used by developed industrialized countries. In conforming to TRIPS, Sri Lankan legislators should have used the system for the maximum benefit of the country and the people and included such public interest safeguards. The problem with the IP Bill was that this was not done.

Specific WTO TRIPS Issues: Patented Pharmaceuticals

The adverse impacts of TRIPS are felt mostly in the area of patents. The issue of patented pharmaceutical drugs is the area that the IP Bill petitions were most concerned about. Compulsory licencing and parallel imports are ways of making pharmaceutical drugs more widely available by creating more competition and thus reducing the prices. Patented medicines can sometimes cost more than 10 times the price of generics.[12] The cost of HIV AIDS medicines for example, range from tens of thousands of dollars per year to a couple of hundred dollars for the generic version, with 500% increases in certain patented drug prices in recent months.[13] The safeguards referred to above are especially important in times of public health emergencies, either to provide sufficient amounts of necessary medicines or to get them at a more affordable price. When the U.S. faced the suspected anthrax bio-terrorism threat in 2002, the U.S. government said that it would use the Indian-

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12 Generics are prescription drugs that are chemically the same as an IP protected version. When an company develops a new drug, it gives the drug two names. One is its generic name- the name of the chemical compound that makes up the drug. The other is the brand name, which is what the company decided to name the product. If the drug is in fact new and unique the company will obtain a patent. Once the patent expires, the drug may be manufactured and sold by other companies under a different brand name, or under its generic (chemical compound) name.
The variation in price can also be aggravated by inequitable pricing policies of companies, that have created situations where some drugs actually cost more in poor countries than rich countries, even without taking income disparities into account.

13 Norvir (Ritonavir) by Abbot Laboratories.

manufactured generic ciprofloxacin antibiotic, although the patent was owned by Bayer.[14] Compulsory licenses were not issued however, since Bayer was persuaded to sell the drug at a far lower price. The U.S. and other developed countries reacted differently to the issue of access to AIDS medicines – a problem of far greater magnitude and impact.

When Brazil began producing generic substitutes for anti-retroviral drugs for HIV-positive patients, including drugs needed to prevent mother to child transmission, the public health services managed to provide free treatment to over 90,000 people and cheaper medicines to half a million patients, drastically reducing mortality rates.[15] The Brazilian government used the WTO national health emergency loophole, but it was still seen by some only as a protectionist measure for local industries. The reaction by international pharmaceutical companies and the U.S. government was an attempt to take legal action against the Brazilian government at the WTO, and apply diplomatic and trade measures to press for changes in the policy.

South Africa, in the face of an AIDS pandemic affecting several million citizens, also amended their law in 1997 for the government to issue compulsory licenses and allow parallel imports, basically to override pharma patents on public health grounds. Here again, 41 pharmaceutical companies brought a lawsuit against the government of South Africa in the Transvaal Division of the High Court in 1998, and the U.S. Government temporarily cut off aid and denied special tariff breaks on South African exports to the U.S., while also filing a complaint in the WTO. The petitioners in the IP Bill case were aware of these issues, including that of access to AIDS drugs – Dr. Kamalika Abeyratne, the Chairman of the AIDS Coalition was one of the petitioners - and were concerned that the Sri Lankan government ensure that it is able to protect the health rights of the public.

Sri Lanka and other countries like Cuba, India and Nigeria, have proposed that a WHO list of essential drugs be excluded from patentability in the 1999 WTO Ministerial conference in Seattle, and it is still hoped this will be implemented. The Declaration on Public Health at the WTO Doha Ministerial in November 2001[16] recognized for the first time that public health should have primacy over trade, and that medicines cannot be treated like other commercial products. While the Declaration was seen as a political win for those countries who campaigned for it, it did not however affect any commitments under IP protection under TRIPS. The important statement from a public health perspective is that HIV/AIDS, tuberculosis, and malaria (among other epidemics) were given special importance as public health problems. Article 4 of the Declaration stated that:

> "We agree that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that **the Agreement can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to**

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14 Op. cit.footnote 20

15 Avina Sarna "A Profile of the AIDS Epidemic in Brazil: the impact of the new AIDS drug policy", ww.gwu.edu/~cih/sarna.pdf

16 At the Fourth WTO Ministerial Conference (9-14 November 2001) held in Doha, Qatar. Document available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm

medicines for all. In this connection, we reaffirm the right of WTO members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose.".

Article 5 goes on to list the following principles that may be used by developing countries to permit them some flexibility for compliance purposes:

1. purposive interpretation of the Agreement as a whole,
2. the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted,
3. the right to determine what constitutes a national emergency or other circumstances of extreme urgency, and
4. each member being free to establish its own regime for such exhaustion without challenge, subject to the Most Favoured Nation and National treatment[17] provisions of Articles 3 and 4.

Paragraph 6 of the Declaration also recognized that WTO countries with "insufficient or no manufacturing capacities in the pharmaceutical sector", who would have difficulty using the compulsory licencing provisions of TRIPS, need to be considered and "expeditious solutions" provided for. The deadline, December 2002, has passed without further breakthroughs. Article 7 reaffirms the right of developing countries to provide incentives to their enterprises and institutions and grants least developed countries a reprieve until 2016 in implementing patent rights relating to pharmaceutical products.

Approximately 14 million people in developing countries die from infectious diseases each year, many of whom could be saved if they could have afforded basic medicines.[18] Patents on pharmaceutical drugs grant monopolies that increase prices. These drugs are literally a matter of life and death for millions of people around the world – and an extremely serious human rights issue. Dr. Kamalika Abeyratne's petition (SC 14/2003) annexed a copy of the Doha Declaration to the petition. The right to health as stated in Article 12 of the International Covenant on Economic, Social and Cultural Rights was also cited by two of the petitioners ("the right to the highest attainable standard of physical and mental health"). Intellectual property rights are included in the Universal Declaration on Human Rights, but as we can see, patent law, especially in the case of patents on medicines, can be incompatible with greater human rights concerns (the right to health being just one of these concerns). The UN Sub Commission on Human Rights' Resolution 2001/21 reiterated that "actual or potential conflict exists between the implementation of the TRIPS Agreement and the realization of economic, social and cultural rights, in particular the rights to self-determination, food, housing, work, health and education and in relation to the transfers of technology to developing countries."

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17 The same treatment for the different countries one trades with (no special privileges for one country over another) and non-discrimination between foreigners and ones own nationals (no special privileges/protection for locals) – basic pillars of the WTO system.

18 Oxfam Briefing Paper 9 (Oct.01) – "8 Broken Promises: Why the WTO isn't working for the Worlds Poor" – Kevin Watkins – www.oxfaminternational.org

The Supreme Court Decision in the IP Bill Case: S.C. Special Determination 14/2003, 15/2003 and 16/2003

A three-judge bench of the Supreme Court comprised of Chief Justice Sarath N. Silva and Justices Shirani Bandaranayake and J.A.N. de Silva assembled on June 6th and 9th 2003 to hear the case. The unanimous judgment released on 17 June 2003 declared that clauses 62, 83, 84, 87, 90,91,92,93 and 94 of the Bill were inconsistent with Article 12(1) of the Constitution. The Court determined that pursuant to Article 84(2) of the Constitution, a special majority of Parliament would be required for the Bill to be passed.

In the judgement, the Court first considered clauses 83 and 84 of the IP Bill, which provided for the duration of patent rights and the rights of patent holder. The Court focussed on the following issues:

1. the state is not able to accord its own citizens and companies protection and privileges not granted to foreign individuals or entities;
2. the possibility that foreign patent holders may control the Sri Lankan drug market – this may mean that the people of Sri Lanka may not be able to buy medicines from the source of their choice or at the cheapest available prices; and
3. even the mitigating features of the TRIPS agreement have not been included in the IP Bill, including:
   - the right of the state to grant compulsory licences for national use in the case of national emergencies or legitimate interests of third parties (Articles 30 and 31 of TRIPS);
   - other mitigatory measures allowed by TRIPS (not described in the judgement)[19]

Attention was also drawn to the Doha Declaration (on the TRIPS Agreement and Public Health) which supports compulsory licensing and parallel importing of drugs for national health emergencies/public health crises.

The Court accepted the petitioners' view that none of the available mitigatory measures have been included in the Bill. It was further stated that the WTO had recognized the economic inequality of nations and given allowance for this in the agreements and that Article 12(1) of the Constitution of Sri Lanka guarantees both equality before the law and equal protection of the law. The Court stated that: "It is well settled law that just as much as equals should not be placed unequally, at the same time unequals should not be treated as equals". The Court went on to cite Article 7 of the Universal Declaration of Human Rights in this regard and stressed that under the right to equal protection, discriminatory laws are similarly unconstitutional. Following this line of reasoning, clauses 83 and 84 were declared inconsistent with Article 12(1) of the Constitution.

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[19] These could cover 1) Using the patented invention for research purposes e.g. reverse engineering, for the purpose of putting a generic product on to the market as soon as the patent protection period expires. This is known as the "Regulatory Exception" or Bolar Exception (from the 1984 U.S. case Ruche Products v Bolar Pharmaceuticals) 2) Regulation of anti - competitive practices 3) Exhaustion of rights.

However, the final revised IP Act did not change these provisions. In fact, the same result was seen in relation to other provisions in the IP Bill, declared unconstitutional. In the case of clause 84, the changes were brought in by extending the subsections in section 86 and adding further limitations on the rights of patent owners. Clause 84 itself was left unchanged, and must be read in conjunction with section 86.

In the IP Bill judgment, the Additional Solicitor General is cited as having contended that "a patent is the ownership of intellectual property rights necessary in order to meaningfully exercise ones fundamental rights, especially those guaranteed under Article 14(1)g."[20] His submissions focussed on the rights of the intellectual property owner, but also draws attention to the restrictions on the exercise of Article 14 by Article 15(7) of the Constitution and 14(1)g in particular, by 15(5) in the interests of "securing due recognition and respect for the rights and freedoms of others..."[21] and the "interests of national economy or of meeting the just requirements of the general welfare of a democratic society."[22] The Court agreed, stating that this would be the basis upon which the legislature would attempt to balance the rights of the individual and society in general. The Court stressed however, that "this does not mean that such provision could override the safeguard and protection given to persons in terms of Article 12(1) of the Constitution."[23] The Court also reiterated the guarantee of equal protection, the different levels of economic development between countries, industries, and the availability of mitigatory provisions in TRIPS.[24] The judgment concluded by questioning why the mitigatory provisions of the TRIPS Agreement were not considered in the enactment of the Bill.[25] This remains a matter of speculation.

Impact of the Supreme Court's Decision on the IP Act

The IP Bill Case clearly illustrates the situation caused when the obligations of a state under globalized international trade law conflicts with the obligations of the state to protect its citizens under the supreme law of the land. It is unfortunate that the law-makers of Sri Lanka did not even attempt to protect its citizens as best they could under the controversial TRIPS Agreement, but went even further than envisaged under that "Agreement". However, while failure to adhere to TRIPS is something that would be dealt with at the international level,[26] the issue of inconsistency with the standards set down under the national constitution at the domestic level may still be contested in the Supreme Court. Although the situation is not entirely satisfactory, efforts at the international level with regard to the negative effects of TRIPS continue. Moreover, the fact that the Supreme Court took serious notice of these issues is a victory in itself.

The Court decided that nine contested clauses of the IP Bill would need a special majority of 2/3 in parliament to be passed in a manner consistent with the Constitution. Unfortunately, all this actually means is that according to the

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20 Page 11 and 12 of the judgement.
21 Page 12 of the judgement.
22 Ibid.
23 Ibid.
24 Ibid.
25 Page 13 of the judgement.
26 At the WTO tribunal and also at the bilateral diplomatic and trade level.

constitution, a 2/3 vote in parliament makes it possible for unconstitutional provisions to become law. In such a situation these provisions, if not amended so as to be consistent with the constitution, will be in substance inconsistent but passed in a procedurally consistent manner. This is just another of the many absurdities of the 1978 constitution.

What happened to the IP Bill subsequent to the judgment is also illustrative of the unsatisfactory manner in which the law-making process in this country is carried out. As a result of the Supreme Court decision, the Minister in charge only introduced a few committee-stage amendments to the IP Bill, which were not gazetted. This meant that there was no opportunity for the public to read, and if necessary, object to the new amendments. This also meant that there was no opportunity for the committee-stage amendments to be considered by the Supreme Court. Furthermore, there was no real debate on the details of the substantive issues in the Bill, another unfortunate flaw in our law-making process. Only one member of Parliament, Sunil Handunetti, raised objections in Parliament concerning the committee-stage amendments being placed on the order paper and the manner in which the unconstitutional provisions were said to be amended. The debate was postponed for a couple of days on this issue.

The final Act was satisfactory only so far as it had included the provisions on compulsory licensing, but the whole process and manner of including the relevant provisions was extremely unsatisfactory. All of the contentious clauses of the IP Bill declared unconstitutional by the Supreme Court were not amended in the final Act passed by Parliament. The Intellectual Property Act No. 36 of 2003 was certified only on 12th November 2003 and was not available to the public until mid-February 2004!

For a detailed comparison between the provisions of the IP Bill declared unconstitutional by the Supreme Court in the IP Bill Case and the final version of the corresponding provisions in the final IP Act, see Table at the end of this article.

Further Considerations

Certain points not addressed by the judgment warrant further attention. Even the limitations referred to by the Additional Solicitor General would restrict the rights of patent holders in the interests of society in general, and would surely demand the inclusion of the mitigatory provisions. But it is interesting that another restriction on fundamental rights in Articles 12, 13(1), 13(2) and 14 of the Constitution, the specific mention of "the protection of public health" in Article 15(7), was ignored by the Additional Solicitor General. It was also not referred to by the Supreme Court in response to the argument raised about the rights of patent owners and balancing these individual rights with the interests of other individuals or society in general. This oversight is interesting since one of the main arguments made against the IP Bill was the non-inclusion of compulsory licencing and parallel imports and its impact on the rights and responsibilities regarding public health.

In Sri Lanka, Article 12 of the Constitution provides for equality and equal protection, and has been used at times in place of the rights to life, health, or basic standards of living that are not stated as fundamental rights under the present Sri Lankan Constitution. This is due to the activism of a few in the legal profession, but the instances are still too rare. Other than the substantive issues raised in this paper, the IP

Bill Case represents the serious flaws in our system, both in terms of the substantive and procedural shortcomings in the Constitution and in the practical aspect of the Sri Lankan law-making process. This case certainly prevented the draft IP Bill without the compulsory licencing provisions from being passed, which was a big victory in itself. But it remains a tragedy that such an important piece of legislation was passed without free and open debate with the public or within Parliament.

Conclusion

Lack of due process was seen throughout the legislative phase. Firstly, the original Bill was not released to the public until the eleventh hour. In the end, the final amendments to the Bill were moved at the committee-stage, were not gazetted, did not provide an opportunity for the public to raise a challenge, or provide an opportunity for the Supreme Court to consider it. It is said that every right must have a remedy - but the one week time limit, reduced to a couple of days in the circumstances of this case, raises again the issue of the difficulty of obtaining redress in situations of unconstitutional bills that violate fundamental rights. It is not only this law that citizens must contend with, but the fact that more often than not, practical obstacles such as the unavailability of copies of the Bill for the public further impede the possibility of obtaining redress. It is also unfortunate in this particular situation that in spite of overcoming these obstacles and convincing the Court, the Attorney General's Department was not willing to agree on most of the amendments to the Bill suggested by the petitioners and approved by the Supreme Court. Furthermore, as shown in the course of this paper, the unconstitutionality of the provisions did not prevent many of these provisions being passed in the same form without further consideration of the human rights issues that were raised.

Finally, it should be mentioned that the challenge to the IP Bill occurred in a situation where few members of the public are aware of most of the issues, and still fewer are spurred to action. The Bill received a fair amount of early publicity from the Ministry of Commerce and Consumer Affairs, the legal practitioners and the media, as being a positive step in terms of attracting investment and spurring economic growth. However, the possible negative impacts were insufficiently discussed, and the issue of patents was largely ignored. The failure of the people's representatives in Parliament and the flaws in the system of checks and balances in the Constitution are serious problems that we have been grappling with for many years. The law-making process can be seen to be undemocratic and lacking in transparency, but it remains the responsibility of civil society to struggle for the right to participation and inclusion in the law-making process. Citizens need to inform themselves and each other and take action when it is necessary to protect democratic rights and freedoms. The lack of sufficient general public awareness, interest and civil society activism on matters like intellectual property rights is extremely unfortunate, but it is hoped that the IP Bill case has done its part to help push the issues to the forefront.

Table 1

Provisions of the Bill declared unconstitutional by the Supreme Court	Final version of the same provisions in the Intellectual Property Act
62 - Definition of invention[27] (1) For the purposes of this Part "invention" means an idea of an inventor which permits in practice the solution to a specific problem in the field of technology (2) An invention may be, or may relate to, a product or process. (3) The following, notwithstanding they are inventions within the meaning of subsection (1), shall not be patentable- (a) discoveries, scientific theories and mathematical methods (b) plants and animals, other than micro organisms and an essentially biological process for the production of plants and animals other than non-biological and micro-biological processes. (c) Schemes, rules, or methods for doing business, performing purely mental acts or playing games. (d) Methods for the treatment of the human or animal body for surgery or therapy, and diagnostic methods practiced on the human or animal. Provided however: any product used in any such method shall be patentable (e) Any invention, the prevention within Sri Lanka of the commercial exploitation of which is necessary to protect the public order, morality including the protection of human, animal or plant life or health or	**62 – Definition of invention** (1) For the purposes of this Part, 'invention" means an idea of an inventor which permits in practice the solution to a specific problem in the field of technology. (2) An invention may be or may relate to , a product or process. (3) The following, notwithstanding they are inventions within the meaning of subsection(1), shall not be patentable – (a) discoveries, scientific theories and mathematical methods (b) plants, animals and other micro-organism **other than transgenic micro organism** and an essentially biological process for the production of plants and animals other than non-biological and micro-biological processes. **Provided however, that a patent granted in respect of micro-organisms shall be subject to the provisions of this Act;** (c) Schemes rules, or methods for

[27] In clause 62(1), the term micro-organism is not precisely defined, and thus is capable of being interpreted in an over-broad way that is detrimental to our national interests. The Supreme Court's judgment cited one such example of patenting presented by the petitioners: the pure culture of a micro-organism found in a paddy field in the village of Anaikota in the Northern Province of Sri Lanka being patented abroad because of its antibiotic qualities. In this case, a foreign patent holder obtained the right to an autochthonous organism, while the right to benefit from the use of that organism or profit from it is denied to Sri Lanka. The Court also accepted the argument that patenting of micro-organisms may allow for patenting of pathogens, thereby increasing the cost of diagnosis and cures. Clause 62 was thus declared inconsistent with Article 12(1) and it was suggested that the words **"and micro-organisms other than transgenic micro-organisms"**[27](bold in original) should be added after the word animals in clause 62(3)b to correct this. A proviso was added in the final Act that any patent already granted with regard to a micro-organism is subject to the provisions of this Act. That is, an organism already under patent will cease to be recognized as patented in Sri Lanka if the organism does not conform to the provisions of the Act.

The Court also stated that the following paragraph should be added to Clause 213 (the interpretation clause): "'Transgenic' means an organism that expresses a characteristic, not attainable normally by the species under natural circumstances, but which has been added by means of direct human intervention in its genetic composition.". This section is one that has been included in the final Act in the manner recommended by the Supreme Court.

the avoidence of serious prejudice to the environment.	doing business, performing purely mental acts or playing games (d) Methods for the treatment of the human or animal body for surgery or therapy, and diagnostic methods practiced on the human or animal. Provided however: any product used in any such method shall be patentable (e) **An invention which is useful in the utilization of special nuclear material or atomic energy in an atomic weapon** (f) **Any** invention, the prevention within Sri Lanka of the commercial exploitation of which is necessary to protect the public order, morality including the protection of human, animal or plant life or health or the avoidance of serious prejudice to the environment
83 – Duration of Patents (1) Subject and without prejudice to the other provisions of this part a patent shall expire twenty years after the filing date of application for its registration (2) Where a patentee intends at the expiration of the second year from the date of grant of the patent to keep the same in force he shall, twelve months prior to the date of expiration of the second and each succeeding year during the term of the patent, pay the prescribed annual fee. Provided, however, that a period of grace of six months shall be allowed after the date of such expiration, upon payment of such surcharge as may be prescribed: Provided further that the patentee may pay in advance the whole or portion of the aggregate of the prescribed annual fees.	**83 – Duration of Patents** unchanged
84 – Rights of Owner of Patent (1) Subject and without prejudice to the other provisions of this Part, the owner of the patent shall have the following exclusive rights in relation to a patented invention :- (a) to exploit the patented invention; (b) to assign or transmit the patent; (c) to conclude licence contracts (2) No person shall do any of the acts referred to in subsection (1) without the consent of the owner of the patent (3) For the purposes of this Part "exploitation" of a patented invention means any of the following acts in relation to a patent :-	**84 – Rights of Owner of Patent** Unchanged **Instead of amending Section 84, Section 86, limitation of patent owners rights, was extended.** This section allows for limitation of patent owners' rights by compulsory licencing, parallel importing and prevention of anti-competitive practices. 86(2)c states that **compulsory licences** can be granted even without

(a) When the patent has been granted in respect of a product – (i) making, importing, offering for sale, selling, exporting or using the product (ii) stocking such product for the purpose of offering for sale, selling, exporting or using (b) When the patent has been granted in respect of a process – (i) using of the process; (ii) doing any of the acts referred to in paragraph (a), in respect of a product obtained directly by means of the process; (iii) preventing any person using that process or using, selling or importing any product obtained directly by means of that process unless that person is authorised to do so.	making efforts to obtain approval from the right holder on reasonable commercial terms where there is **"...a national emergency or any other circumstances of extreme urgency or in case of public non-commercial use for the purposes such as national security, nutrition, health or for the development of other vital section of the national economy."**
87 - Rights derived from prior manufacture or use[28] (1) Where a person at the filing date or, where applicable, the priority date, of the patented application – (a) was in good faith making the product or using the process in Sri Lanka which is the subject of the invention claimed in such application; (b) had in good faith made serious preparations in sri Lanka towards the making of the product or using the process referred to in paragraph (a), He shall have the right despite the grant of the patent, to exploit the patented invention: Provided that the product in question is made, or the process in question is used by the said person in Sri Lanka: Provided further, if the invention was disclosed under circumstances referred to in paragraph (a) or (b) of subsection (3) of section 64, he may prove, that his knowledge of the invention was not as result of such disclosure. **(2)** The right referred to in subsection (1) shall not be assigned or transmitted except as part of the business of the person concerned.	**87 - Rights derived from prior manufacture or use** Section 87(3) was added: (3) The provisions of this section shall not affect the rights of any person to object to the grant of a patent on the grounds that such invention is not patentable under sections 63, 64, 65 and 66 of the act, or to seek relief under sections 68 and 99 of the Act.
90 – Interpretation of Licence Contracts[29] For the purpose of this Part licence contract means any contract by which the owner of the patent (hereinafter referred to as "the licensor") grants to another person or	**90 – Interpretation of Licence Contracts** unchanged

[28] With regard to clause 87, the provision relating to rights derived from prior manufacture or use, the Court stated that it also was inconsistent with Article 12(1) of the Constitution. Inconsistency with Article 14(1)g was not explicitly stated by the Court. The Court, in considering Clause 87(1) read in conjunction with Clause 64 (novelty), said that: "If the purpose of the inclusion of clause 87 was to protect the Sri Lankan who is already making a product or using a process, where another party had applied for a patent, then the Sri Lankan should be entitled to it and the application made by the other party for the patent should be refused on the ground that the invention has already been anticipated by prior art." Prior art is anything already disclosed to the public in whatever form, and therefore if something is already being made or used ("anticipated by prior art"), it cannot be a new invention and cannot therefore be patentable in the first instance. The inclusion of this section and the subsequent decision not to remove it is therefore questionable even in terms of patent law.

enterprise (hereinafter referred to as " the licensee") a licence to do all or any of the acts referred to in paragraph (a) of subsection (1) and subsection (3) of section 84.	
91 - Form and record of licence contract (1) A licence contract shall be in writing signed by or on behalf of the contracting parties (2) Upon a request in writing signed by or on behalf of the contracting parties, the director-General shall, on payment of the prescribed fee, record in the register such particulars relating to the contract as the aprties thereto might wish to have so recorded: Provided that the parties shall not be required to disclose or have recorded any other particulars relating to the said contract.	**91 - Form and record of licence contract** unchanged
92 - Rights of Licensee In the absence of any provision to the contrary in the licence contract, the licensee shall – (a) be entitled to do all or any of the acts referred to in paragraph (a) of subsection (1) and subsection (3) of section 84 within the territory of Sri Lanka, without limitation as to time and through application of the patented invention; (b) not be entitled to assign or transmit his rights under the licence contract or grant sub-licences to third parties.	**92 - Rights of Licensee** unchanged
94 - Invalid Clauses in Licence Contracts Any term or condition in a licence contract shall be null and void in so far as it imposes upon the licensee, in the industrial or commercial field, restrictions not derived from the rights conferred by this Part on the owner of the patent, or unnecessary for the safeguarding of such rights : provided that – (a) restrictions concerning the scope, extent or duration of exploitation of the patented invention, or the geographical area in or the quality or quantity of the products in connection with, which the patented invention may be exploited; and **(b) obligations imposed upon the licensee to abstain from all acts capable of prejudicing the validity of the patent shall not be deemed to constitute such restrictions.**	**94 - Invalid Clauses in Licence Contracts** unchanged

[29] The constitutionality of clauses 90, 91, 92, 93 and 94 (on licence contracts) were examined together, and the Court decided that these clauses were also violative of Article 12(1) of the Constitution. The Court agreed with the contention of the petitioners that the monopoly granted to the patent owner would be a disincentive and obstacle to the local pharmaceutical industry and violative of equal protection for persons engaged in that industry.

A Note on the Chief Minister's Case

Asanga Welikala

The Sri Lankan electoral law with regard to the filling of vacancies in both levels of legislative competence, Parliament and Provincial Councils, is unsatisfactory for want of clarity and precision. For that reason, the law has been the fertile ground for the cultivation of insidious undemocratic practices. The practice of nominating persons who have not submitted to election by the people to hold legislative office – called 'parachutists' by Sri Lankans with a mixture of humour, mockery and resignation – continues to this day. The Supreme Court has, in cases such as the one that concerns this discussion, attempted to reverse this practice, but the durability of the Court's pronouncement will depend in large measure on the willingness of the political class to submit to the authority of the Supreme Court. More often than not in Sri Lanka, we see that high judicial decisions are disregarded particularly in relation to public law and constitutional conduct, either through ignorance or disdain. Enforcement and compliance with judicial authority in such cases is more a political question than a judicial matter, which in turn both defines our constitutional culture and reveals its ichorous nature.

In this case,[1] the Centre for Policy Alternatives (CPA), Dr. Paikiasothy Saravanamuttu and Mr. Rohan Edrisinha applied to the Court of Appeal for writs of *certiorari* and *quo warranto* against the Commissioner of Elections for declaring elected Mr. Samaraweera Weerawanni to the Uva Provincial Council in 1999. Mr. Weerawanni was also appointed Chief Minister of the Uva Province.

The circumstances surrounding the dissolution and elections for five Provincial Councils including Uva were the subject of much political controversy during the relevant period and also gave rise to significant litigation discussed below.

The Court of Appeal dismissed the applications, and the petitioners appealed to the Supreme Court. The appeals[2] were taken up together, as the same question of law arose as to the nature and extent of the right of a secretary of a political party conferred under s.65 of the Provincial Councils Elections Act No. 2 of 1988 (hereinafter 'the Act'). The specific question was as to whether the secretary was entitled to nominate a person to fill a vacancy in a Provincial Council whose name was not on the original nomination paper.

Facts

The five - year term of the Uva Provincial Council (along with four other Councils) ended in June 1998. Under s. 22 of the Act, the Returning Officers gave notice fixing the poll for 28th August 1998, and nominations were duly submitted.

Mr. Samaraweera Weerawanni, by virtue of being a Member of Parliament at the time of nomination, was not qualified for election as a member of a Provincial Council. His

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1 *Centre for Policy Alternatives (Guarantee) Ltd and Another v. Dayananda Dissanayake, Commissioner of Elections and Others* (2003) 1 SLR 277.

2 i.e. the appeal of CPA and Dr Saravanamuttu, and the appeal of Rohan Edrisinha.

wife's name was included in the nomination paper of the People's Alliance for election to the Uva Provincial Council.

On 4th August 2004, the President proclaimed a state of emergency and issued a regulation cancelling notices issued under s. 22 of the Act. While no fresh date for the poll was fixed, the Commissioner of Elections also did not take steps under the powers conferred on him by s. 22 (6) to fix a new date. This inaction of the part of the Commissioner was challenged successfully in *Karunathilaka v. Dissanayake (No.1)*, [3] where the Supreme Court on 27th January 1999, directed the Commissioner to fix a new date.

The date fixed by the Commissioner was objected to on several grounds, and consequent to *Karunathilaka v. Dissanayake (No.2)*,[4] the Commissioner fixed the new date of poll for 6th April 1999.

At the elections to the Uva Provincial Council held on 6th April 1999, Mr. Weerawanni's wife was elected, and was subsequently appointed Chief Minister. On 19th May 1999, Mr. Weerawani resigned his seat in Parliament. On 21st May 1999, a People's Alliance member of the Uva Provincial Council resigned his seat on the Council, and the Elections Commissioner called upon the Secretary of the People's Alliance to nominate a person to fill the vacancy. The Secretary nominated Mr. Weerawanni, and the Commissioner declared him elected to the Uva Provincial Council on 24th May 1999; and on the same day, Mr. Weerawanni's wife resigned from the office of Chief Minister. On 27th May 1999, Mr. Weerawanni was appointed Chief Minister of the Uva Province.

The petitioners filed applications in the Court of Appeal on 1st June 1999, praying for writs of *certiorari* to quash the Commissioner's declaration of the election of Mr. Weerawanni, and for *quo warranto* to declare Mr. Weerawanni as not entitled to the office of Chief Minister.

On 6th November 2001 the Court of Appeal held that under s. 65 (2) of the Act, when a vacancy arises due to the resignation of a member, the Secretary can nominate any eligible person to fill such vacancy. The Court Appeal held that this was so even though the nominee's name was not on the original nomination paper and even though the nominee was ineligible at the time the original nomination papers were filed.

Special leave to appeal was granted by the Supreme Court to the petitioners on 28th May 2002, on the following questions:

1. Did the Court of Appeal err in holding that a person, whose name did not appear on the nomination list submitted by the relevant political party at the Provincial Council election, could thereafter be nominated by the secretary of the relevant political party to fill a vacancy which arises in the said Council?
2. Did the Court fail to consider the implications of s. 65 (3) of the Act for the interpretation of s. 65 (2)?

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3 *Karunathilaka v. Dissanayake (No. 1)* (1999) 1 SLR 157.
4 *Karunathilaka v. Dissanayake (No. 2)* (1999) 1 SLR 183.

Statutory Provisions

A Provincial Council consists of two or more administrative districts to which elections are held on a proportional representation basis. Political parties and independent groups contesting elections to Provincial Councils must submit nomination papers in respect of each administrative district of the Province. Each nomination paper must contain a list of candidates corresponding to the number of members returnable from each district, increased by three (s.13 (1) of the Act).

No person is qualified to stand for election to a Provincial Council under s. 9 of the Act, if he is subject to the disqualifications stipulated in s. 3 of the Provincial Councils Act No. 42 of 1987. The written consent of each candidate to be nominated is a mandatory requirement under s. 17 (1) (b) and (d). The Act also makes no provision for the substitution of candidates even in the event of death or withdrawal (s. 23 and s. 116).

At the election, the voter must vote for a party or group on the ballot paper; otherwise such vote is invalid (s.51 of the Act). Thereafter, the voter may at his discretion, mark three preferential votes for candidates among the list put forward by that party or group. The number of candidates elected on behalf of a party is proportional to the number of votes polled by such party (s. 58 (10)), and the particular candidates from among the party list that are elected depends on the number of preferences such candidate has secured (s.58 (1) (e) and (f)). There is a departure from the proportionality principle whereby under s. 61A (2), the party securing the highest number of votes in the Province as a whole is entitled to have two more of its candidates declared elected as members ('bonus seats'). These two bonus seats are filled by way of the Elections Commissioner calling upon the Secretary of the pertinent party to nominate two members from among any two of its unsuccessful candidates. That is, from among the candidates nominated for any district in that Province.

In *CPA v Dissanayake*[5], the Court of Appeal interpreted the bonus seat provisions as follows:

> "[These] provisions relating to the result of the election, including the bonus seats, establish that the only persons who can be declared elected *immediately after the poll* are persons who were candidates whose names appeared on a nomination paper, on the basis of which the voters cast their votes and expressed their preferences."

The petitioners relied heavily on s. 65 (3), to which the Court of Appeal made no reference. Section 65 of the Act provides as follows:

> "s. 65 (1) - Where the office of a member of a Provincial Council becomes vacant the Secretary of the Provincial Council shall inform the Commissioner of the fact of the occurrence of such vacancy. The Commissioner shall fill such vacancy in the manner hereinafter provided.

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5 *Centre for Policy Alternatives (Guarantee) Ltd and Another v. Dayananda Dissanayake, Commissioner of Elections and Others* (2003) 1 SLR 277 at 284 .

s. 65 (2) - If the office of a member falls vacant due to death, resignation or for any other cause, the Commissioner shall call upon the secretary of the political party to which the member vacating office belonged, to nominate within a period specified by the Commissioner, a person eligible under this Act for election as a member of that Provincial Council, to fill such vacancy. If such secretary nominates within the specified period an eligible person to fill such vacancy and such nomination is accompanied by an oath or affirmation [by him in the prescribed form] the Commissioner shall declare such person elected.

If on the other hand such secretary fails to make a nomination within the specified period, the Commissioner shall declare elected as member, from the nomination paper submitted by that party for the administrative district in respect of which the vacancy occurred, the candidate who has secured the highest number of preferences at the election of members to that Provincial Council, next to the last of the members declared elected to that Provincial Council from that party.

s. 65 (3) - Where all the candidates whose names were on such nomination paper have been declared elected or where none of the candidates whose names remain on such nomination paper have secured any preferences, or where the member vacating office was not elected from an administrative district, the Commissioner shall forthwith inform the President who may, on receipt by of such information and at any stage when he considers it expedient to do so, by Order direct the Commissioner to hold an election to fill such vacancy."

Judgment of the Court of Appeal

The Court of Appeal noted that s. 65 (2) has two limbs. The first limb authorises nomination by the Secretary when called upon by the Elections Commissioner. The second limb relates to nomination by the Commissioner himself when the Secretary has failed to do so.

Furthermore, under the first limb the Secretary is to nominate '*a person eligible*' under the Act, whom the Commissioner is obliged to declare elected. Under the second limb, the Commissioner must declare elected the candidate with the highest number of preference votes next to the last of the members already declared elected, i.e., the 'best loser' '*from the nomination paper*' of the party to which the member vacating belonged.

The Court [of Appeal] observed that "if it had been the intention of Parliament that the secretary's choice should be confined to candidates whose names were on the nomination paper, the first limb would have made reference to the nomination paper in the same way as the second limb did. Parliament had deliberately used different and wider language, manifesting an intention not to restrict the secretary's choice in that way. Likewise, Parliament did not restrict the secretary's choice to persons who

had been eligible at the time of nomination, and it was not open to add such a restriction by way of interpretation."[6]

Further, the first limb requires the nomination to be accompanied by an oath or affirmation by the candidate, whereas the second limb does not. Under the Act, original nomination papers prior to the election must be accompanied by candidates' oaths or affirmations. Due to the fact that persons nominated under the first limb may be from outside the nomination paper, the first limb requires an oath or affirmation. However, since the Commissioner's declaration of election of persons under the second limb must be from among persons on the nomination paper, there is no necessity for a further oath or affirmation.

The petitioners contended that there were at least two possible interpretations to s. 65 (2) and that, therefore, the interpretation harmonious with Articles 12 (1) (equality before the law), 4 (c) (judicial power of the State) and 14 (1) (a) (freedom of expression), as well as the ideals of representative democracy, must be adopted by the Court. The Court of Appeal however held that s. 65 (2) had a plain, clear and unambiguous meaning and that it could not "put its own gloss on the plain words of the section to squeeze out a meaning not borne out by the language of the section."[7]

The Court of Appeal went on to observe that with regard to parliamentary vacancies, Article 99 (13) (b) of the Constitution stipulated that vacancies must be filled by reference to losing candidates in order of individual preferential votes obtained by such candidates. The Court felt that in relation to Provincial Councils, s. 65 (2) represented a departure from that procedure.

Moreover, in the Court's view, there was no requirement in nominating Members of Parliament from the National List, that a secretary of a political party must nominate candidates from the National List submitted to the Commissioner by the party, or indeed from the nomination paper (*vide* s. 64 (5) of the Parliamentary Elections Act No. 1 of 1981). That is, the party secretary was empowered to nominate any person qualified to be a Member of Parliament, a discretion not restricted by the lists of names appearing on the National List or a district nomination paper. Similarly, the Court concluded, s. 65 (2) of the Act recognises "the supremacy of the party above the individual candidates."[8]

However, the Supreme Court was of the view that, "unfortunately, the carefully reasoned judgment of the Court of Appeal made no reference to s. 65 (3) and submissions made by the petitioners in relation to that provision."[9]

Interpretation of Section 65

Having concluded that the Court of Appeal erred in the manner it interpreted s. 65 of the Act, the Supreme Court proceeded to give the provision its proper meaning in the context of the statutory and constitutional framework. The Court observed that s. 65

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6 Ibid., pp.285-6.
7 Ibid., p.286.
8 Ibid., p.286.
9 Ibid., p.287.

(1) requires the Commissioner to fill vacancies "in the manner *hereinafter* provided", and "...that confirms that sub-section (3) cannot be ignored."[10]

Counsel for the respondents submitted that s. 65 (2) and s. 65 (3) taken together provide for three alternative methods of filling a vacancy in a Provincial Council. That is, (a) the first limb of s. 65 (2); (b) the second limb of s. 65 (2); and (c) s. 65 (3). Counsel further submitted that these three methods are set out in 'a logical and sequential order.' Counsel argued also that s. 65 (3) became applicable *only when* the secretary has failed to make a nomination under s. 65 (2). The argument was that under s. 65 (2), the secretary may nominate a candidate who has not obtained a single preference vote; if a candidate so decisively rejected by the electorate can be nominated, it is futile to argue that a person who did not contest cannot be nominated, because in Counsel's view, "such a person has, at least, not been expressly rejected by the people."[11]

It was further contended on behalf of the respondents that the reference to eligibility in s. 65 (2) of the Act refers to s. 3 of the Provincial Councils Act, and is not restricted to unsuccessful candidates on the nomination paper. In this sense, the phrase "a person eligible under this Act for election" in s. 65 (2) denoted a wider category of persons.

The Supreme Court recapitulated the submissions of the respondents in the following way:

1. A vacancy should be filled initially by the nomination of the secretary of the political party.
2. The secretary is empowered to nominate *any* person qualified to be elected a member of a Provincial Council under the Act (and is not restricted by the remaining names on the nomination paper, i.e., unsuccessful candidates)
3. Failing such nomination by the secretary, the vacancy is to filled by the Commissioner by reference to the nomination paper.
4. If the Commissioner is unable to nominate a candidate, then recourse must be had to s. 65 (3), resulting, at the discretion of the President, in a by-election.

The Court profoundly disagreed with this construction, observing that "that interpretation reduces sub-section (3) to a proviso to the second limb of section 65 (2) – although it is certainly not drafted as a proviso."[12]

There is no express definition of 'eligibility' in the Act. However, s. 9 states that a person is *qualified* to be elected, if such person is not *disqualified* under s. 3 of the Provincial Councils Act. Therefore, the question arose that if s. 65 (2) sought to empower the secretary to nominate any person *qualified* to be elected or *not disqualified* under the Act, then it would have contained the term 'qualified' instead of 'eligible'.

In this regard, the petitioners contended that different language was used because different results were intended, and that a person *qualified* to be elected becomes *eligible* under the provision only if and when such person is duly nominated. However, upon perusal of the Sinhala text of the statute the Supreme Court found that

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10 Ibid., p.286; emphasis in original.
11 Ibid., p.287.
12 Ibid., p.287.

the same word is used in ss. 9 and 65 (2). "Accordingly, s. 65 (2) must be interpreted on the basis that, *ex facie*, it authorises the secretary to nominate a person *qualified* under s. 9 at the time of such nomination."[13]

The question remained, nevertheless, as to why the first limb of s. 65 (2) referred to a 'person eligible' while the second limb alluded to a candidate 'from the nomination list'. The Court thought there was "a good reason for the difference in language."[14] It was obviously desirable that a vacancy be filled by a person eligible, i.e., qualified, at the time of nomination; otherwise litigation would inevitably arise.

The Court held that the Elections Commissioner is required to make his nomination from the nomination paper alone because he has no means of knowing, and cannot reasonably be expected to discover, if a candidate on a nomination paper has become disqualified during the period between when nomination papers are submitted prior to the election and the occurrence of the vacancy. However, in the Court's view, it was not reasonable to allow the same latitude to a secretary of the political party, who would know, or reasonably be expected to easily ascertain, a subsequent disqualification of one of his candidates. Therefore, the burden of verifying eligibility is cast on the secretary alone. The Court held that, for this reason, s. 65 (2) permits the secretary to nominate *only* a person who is 'eligible', i.e., continues to be 'qualified'.

Furthermore, if a 'person eligible' includes a candidate whose name was not on the original nomination paper, then that would allow the secretary to nominate a person who has not consented to be nominated, and the Commissioner would be obliged to declare such person elected. The Court held that:

> "As a matter of principle, a statutory provision should not generally be interpreted as requiring a person to be declared elected to an office without his prior consent. However, if the first limb is restrictively interpreted to include only candidates, their written consent and signatures will be found on the original nomination paper. There is thus some basis for the contention that the secretary's power of nomination is restricted to qualified candidates from the original nomination paper whose consent had been expressed therein."[15]

However, the Court observed that the first limb of s. 65 (2) requires the secretary to submit an oath or affirmation from his nominee. Since that would be superfluous if the secretary's choice is restricted to persons whose names appear on the original nomination paper, the Court conceded that this was a circumstance that supported the respondents' contention that the secretary may nominated *any qualified* person to fill a vacancy. The Court allowed that "undoubtedly, s. 65 (2) is not without ambiguity."[16]

It was from this standpoint that the Court deemed it necessary to examine s. 65 as a whole in the context of the entire Act, in departing from the reasoning of the Court of Appeal which, focussing only on s. 65 (2), found the provision to be plain, clear and unambiguous.

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13 Ibid., p.288.
14 Ibid., p.288.
15 Ibid., p.288-9.
16 Ibid., p.289.

The respondents had argued that s. 65 (3) comes into operation only if the secretary had failed to nominate a candidate in terms of the first limb of s. 65 (2). However, the Court declared that, s. 65 (3) imposed an 'imperative duty' on the Commissioner to *forthwith* inform the President of a vacancy in three distinct situations:

1. where all candidates in the original nomination paper have been declared elected
2. where none of the remaining candidates have obtained preferences
3. where the member vacating the seat was not elected from a district, i.e., one of the two holders of the bonus seats

Asserting that the correctness of the respondents' position can be tested by reference to these three situations, the Court asked "In any of those situations, what is the Commissioner's duty?"[17] Should the Commissioner follow, in the respondents' terms a 'sequential and logical order', or 'forthwith' inform the President? The Court acknowledged that sub-sections (2) and (3) of s. 65 "appear to create irreconcilable contemporaneous obligations – to call upon the secretary to nominate a successor, and also to *forthwith* inform the President, who may or may not decide to order a by-election..."[18]

In spite of this, the Court took the view that "...that conflict can be resolved without much difficulty."[19] The first limb of s. 65 (2) was general provision applicable to *all* vacancies, whereas s. 65 (3) was a special provision applicable in *three* specific situations.

As a matter of statutory interpretation, the Court held that, first, as a rule, a special provision prevails over a general provision – the general provision to the extent of the special provision being reduced in scope. Secondly, with regard to the Commissioner's choice of 'calling upon' the secretary or 'forthwith informing' the President, the Court was of the opinion that the use of the term 'forthwith' – generally meaning 'at once', 'without delay' or 'immediately', was a strong indication that s. 65 (3) takes precedence over s. 65 (2). Thirdly, the Court held that a proper construction of a statutory provision, in this case s. 65 of the Act, must give effect to every part of the provision, and not have the effect of rendering one part nugatory. Therefore, in the three situations set out in s. 65 (3), if the secretary could nominate a successor before the President is informed, then the latter's discretionary power under the Act to call a by-election is nullified.

The Court therefore held that "sub-section (3) takes precedence over sub-section (2), and that the three methods of filling vacancies are not sequential. Where any of the three situations referred to in sub-section (3) arise, the Commissioner must inform the President, 'who may *at any stage* when he considers it expedient to do so' order the holding of a by-election. There is no provision that if the President does not order a by-election, the Commissioner shall call upon the secretary to nominate a successor. Thus the President may decide to wait until several vacancies have occurred before

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17 Ibid., p.289.
18 Ibid., p.289.
19 Ibid., p.289.

ordering a by-election. This provision ensures that vacancies will be filled, if at all, by persons *elected* by the people."[20]

Having construed s. 65, the Court was left to consider the case of a vacancy arising when there is at least one candidate remaining on the list with some preferences (in the words of the Court, a 'qualified candidate'). It was clear to the Court that s. 65 (3) would not apply in such a situation, because the Commissioner must ask the secretary to nominate a person to fill the vacancy. But does the first limb of s. 65 (2) empower the secretary to nominate a person from outside the original nomination list (in the words of the Court, 'an outsider')?

Pronouncing on what was the crux of the principle in issue in this case, the Supreme Court held:

> "If [the secretary] can nominate an outsider, an anomaly immediately arises. Where there is *no* qualified candidate remaining on the nomination paper, sub-section (3) applies, and there is no possibility of an outsider being nominated; and the vacancy will be filled, if at all, by a person *elected* by the people. If so, where there *is* a qualified candidate it would be illogical and inconsistent for an outsider to be nominated. Can such an anomaly be justified on the basis of 'the supremacy of the party' (or its secretary) over members and candidates? In [the Court's] view it cannot, for this is not a domestic question pertaining to the party, party discipline, and/or party officials, members and candidates. What is involved is the right of the electorate to be represented by persons who have faced the voters and obtained their support, and that in [the Court's] view is the general scheme of the Act. That is wholly consistent with Article 25 of the International Covenant on Economic, Social and Cultural Rights[21], 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*."[22]

In response to the petitioners' submissions that s. 65 should be interpreted in consonance with democratic ideals, constitutional norms and the overriding principles of representative democracy, Counsel for respondents contended that some of the constitutional norms prevalent at the time the Act was enacted were undemocratic and unprincipled.

The Supreme Court met Counsel's argument in inspirational fashion:

> "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. Indeed, in the three

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20 Ibid., p.290; emphasis in original.

21 It appears that an inadvertent reference has been made to the ICESCR, where in fact rights of political participation are to be found in Article 25 of the International Covenant on Civil and Political Rights (ICCPR).

22 Ibid., p.291; emphasis in original.

previous decisions relating to the Uva Provincial Council election, this Court upheld the effective exercise of the right to vote at a fair election. In the first decision, this Court held in favour of the contention that the election should be held, rather than postponed; in the second, that there should be no statutory interference with the Commissioner's power to fix the date of election and with the contents of nomination papers already accepted; and finally, that the date of the election should be fixed so as to facilitate, rather than hinder, the exercise of the right to vote. Now that that election has been held...this Court should [not] – in the absence of plain and compelling language – stray into a different path, by preferring an interpretation which allows the expressed wishes of the electorate at that election to be superseded. The Judiciary is part of the 'State', and as such is pledged to play its part in establishing a democratic...society, the objectives of which include the full realisation of fundamental rights and freedoms of all people; and it is mandated to strengthen and broaden the democratic structure of government (see Articles 27 (2) (a) and 27 (4) read with Article 4 (d)).''[23]

Finally, the Supreme Court dismissed the argument of futility submitted by Counsel for respondents on the basis that Mr. Weerawanni had long ceased to hold the office of Chief Minister. The Court held that it could not allow the decision of the Court of Appeal to remain as authority:

"the Court of Appeal erred in law in its interpretation of Section 65, and this Court would not be acting in vain in setting aside the judgment of the of the Court of appeal, as it is in the public interest that the Commissioner, political parties, independent groups, candidates and voters should know with certainty the procedure for the filling of vacancies in Provincial Councils."[24]

Conclusion

The Supreme Court's decision in the Chief Minister's Case was a welcome one, declaring illegal a pernicious practice that served to negate representative democracy and the franchise in Sri Lanka. In doing so, the Court strove to give s. 65 of the Act an interpretation which reflected the basic and intuitive expectation that legislative representation originates essentially from the consent and will of the people.

At the time of writing, the same principle regarding the filling of vacancies in Parliament is being canvassed before the Supreme Court, consequent to the nomination of Mr. Ratnasiri Wickremamnayake as a UPFA National List Member of Parliament following the General Elections of 4th April 2004, even though his name did not appear either on the UPFA National List nor on the nomination paper for any district submitted to the Elections Commissioner on nomination day.

It is hoped that the Supreme Court will extend the principle established in the Chief Minister's Case, to the law relating to parliamentary elections as well.

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23 Ibid., p.292.
24 Ibid., p.294

Tax Amnesty Law – President's Reference to the Supreme Court

Cyrene Siriwardhana

Background

The Inland Revenue (Special Provisions) Act No 10 of 2003, commonly referred to as the Tax Amnesty Law, was passed by Parliament in March 2003. It provided for very wide-ranging amnesties and immunity from prosecution for tax evaders, and was vociferously criticised by some. They expressed outrage that tax defaulters should be given such favourable treatment denied to law-abiding citizens who regularly pay tax. They also protested that the scheme resulted in whitewashing black money, in that by declaring tax under the Act, the past defaulter could avoid investigation into any offence under a number of laws brought within the purview of the Act, such as the laws relating to customs and excise, exchange control and finance.

The rationale put forward by the government for introducing the law was that it would bring within the tax net a significant number of persons who have been evading tax for decades. Given the weak state of tax law enforcement, these people would otherwise have no incentive to declare tax in the future, and the national economy would continue to be deprived of a large amount of revenue. Previous amnesties had not had the effect of ameliorating the situation, so it was necessary to give far-reaching protection to tax evaders in order to ensure future compliance.

After the Act was passed it was challenged as unconstitutional by a number of petitioners.[1] While the Constitution stipulates that an Act of Parliament may only be challenged at the Bill stage, i.e, within one week of being placed on the order paper of Parliament, the petitioners argued that the Bill was not available in print and it was therefore not possible to keep to the time-limit specified. The Supreme Court however applied the one-week time limit strictly and dismissed the application.

Subsequent to this challenge, the government introduced a Bill[2] to amend the above Act for the purpose of extending the time limit for declaring tax under the Act. Opponents of the Act saw this as an opportunity to mount a fresh challenge against it. They argued that the amending Bill was an attempt to indirectly re-enact the Act, which had effectively lapsed after the date for declarations set in it. The Supreme Court held that the Bill did not have the alleged effect, and dismissed the application.

What was in effect a third challenge to the tax amnesty law came via the President's reference to the Supreme Court seeking the Court's opinion on whether the Act was constitutional or not. It is this challenge that is the focus of the present article. The President's reference was made in March 2004, a year after the law was enacted. It was made under Article 129(1) of the Constitution which provides for the

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1 SC(SD) 8–11/ 2003.

2 Inland Revenue (Special Provisions) (Amendment) Bill.

"consultative jurisdiction" of the Supreme Court, whereby the President is granted the power to refer matters of fact or law of public importance to the Supreme Court for its opinion. The President invoked this jurisdiction, seeking the Court's opinion on a number of issues relating to the Inland Revenue (Special Provisions) Act No. 10 of 2003, including the constitutionality of certain of its provisions.

One of the main arguments presented by the President was that the Act violated the right to equality enshrined in Article 12 of the Constitution. The Act was claimed to be unlawfully discriminatory, in establishing a system which unfairly favours tax evaders by granting them immense benefits denied to law-abiding citizens. The Court delivered its opinion that the provisions of the Act infringed Article 12. Having made its finding on Article 12 the Court stated that it would be unnecessary to go on to consider other aspects in which the Bill was claimed to be unconstitutional.

Consultative Jurisdiction of the Supreme Court – a Preliminary Issue

Article 129(1) of the Constitution deals with the "consultative jurisdiction" of the Supreme Court. It states:

> "If at any time it appears to the President ... that a question of law or fact has arisen or is likely to arise which is of such nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer that question to that Court for consideration and the Court may, after such hearing as it thinks fit, within the period specified in such reference or within such time as may be extended by the President, report to the President its opinion thereon."

CPA intervened to argue that it would be inappropriate for the Supreme Court to entertain the President's reference in the present case. Its intervention was **not** on the issue of whether the Act or any of its provisions was constitutional or not, but rather on the preliminary issue of whether it is appropriate for the consultative jurisdiction mechanism to be used to question the constitutionality of legislation, in the face of an express bar against doing so in the Constitution itself.

Discretionary Nature of the Supreme Court's Consultative Role

Article 143(1) of the Indian Constitution is couched in identical terms to Article 129(1) (except for the difference - immaterial in this context, mentioned below). *In re Kerala Education Bill* the Indian Supreme Court highlighted the discretionary nature of the Supreme Court's role under Article 143(1), which uses the word "may" (as distinguished from Article 143(2) which uses the wording "...the Supreme Court ... shall... report to the President its opinion" – this latter provision has no counterpart in the Sri Lankan Constitution and relates principally to issues which originate prior to the commencement of the Indian Constitution.)

CPA submitted that the consultative jurisdiction of the Supreme Court should be exercised cautiously **by the Court**. The wording of the provision clearly indicates that the Court has the discretion to refrain from considering a reference sent by the President, since Article 129 provides that " the Court *may* after hearing as it thinks

fit... report to the President its opinion thereon" [emphasis added]. If the Court was bound to entertain and provide its opinion on a reference under this section, it would have used a mandatory form of words such as "the Court *shall* report...".

CPA's submission was that it is precisely in the kind of context of political controversy which surrounded this law, that the Court would be expected to exercise its discretion and refuse to entertain/decide on a reference. Moreover, apart from the distinguishing features of this reference, in any event CPA submitted that given the particular constitutional context of Sri Lanka this jurisdiction should be exercised only with great caution, for the reasons elaborated on below.

Reasons for Not Exercising Consultative Jurisdiction

Separation of Powers

CPA submitted that the conferring of a consultative or advisory jurisdiction on the courts has itself been subject to debate. It has been pointed out that permitting the executive to seek an opinion from the Supreme Court as provided for in Article 129(1) of the Constitution, violates the principle of separation of powers. The function of providing legal advice to the President, which is a non-judicial function in the sense that it determines no dispute, does not sit comfortably with the role of the Supreme Court as the final authority for constitutional interpretation.

Zafrullah discusses Article 129(1) in *Sri Lanka's Hybrid Presidential and Parliamentary System and the Separation of Powers Doctrine* at pp 120 – 123. He comments at p 120:

> "The attitude of the courts has been that advisory opinions expressed by the judiciary at the instance of the executive is not a judiciary [sic] pronouncement nor is it a performance of a strictly judicial function [*A-G for Ontario v Hamilton* (1903) AC 524; *A-G for British Columbia v A-G for Canada* (1914) AC 153]. If one of the implications read into the separation of powers doctrine which is that functions alien to the judiciary cannot be vested in the judicial branch of government is accepted, then the vesting of the advisory jurisdiction in the Supreme Court of Sri Lanka means that the separation of powers is observed in the breach."

Indian and Other Jurisdictions

The above position is supported by Seervai[3], who states:

> "... [an] advisory opinion involves no *lis*, binds nobody because it affects nobody's rights, and therefore lacks all the essential characteristics of a judicial function."

In the case of *In re the Kerala Education Bill 1957* (1959) SCR p1018 the Supreme Court of India highlighted the infirmities of the President's power of reference under

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3 *Constitutional Law of India*, 4th edition, vol 3, p 2684.

the corresponding provision of the Indian Constitution, Article 143(1). The court may only inquire into the specific questions referred by the President, not any others which are not before the Court but which may also give rise to constitutional objections, with the result that the reference and resulting opinion may be incomplete. As stated by Sarkar J, "We have, however, to answer the question on the facts as stated in the reference, and have no concern with the correct facts."

Seervai comments in this regard, vol 2, p 2167:

> "The Opinions of the Sup. Ct. [sic] on a President's reference have been compared to the Opinions of Law Officers. But the Opinions of Law Officers have a much higher value. No law officer who does his duty to give a correct opinion would leave out relevant facts, or misstate them. Nor would he fail to consider all the relevant provisions of an Act which have a bearing on the correct interpretation of the impugned section, or sections. It is obvious that even an unanimous Opinion of the Sup. Ct. [sic] on questions of fact must be valueless since the judges giving the Opinion 'have no concern with the correct facts."

In *In re the Special Courts Bill 1978* (1979) 2 SCR 476, the Indian Supreme Court dismissed many of the objections raised to the exercise of the Court's consultative jurisdiction. However, as discussed below, the relevance of that judgment to the question in the tax amnesty law reference is limited by the differences between the constitutional contexts of Sri Lanka and India.

The only difference between the wording in the Indian and Sri Lankan provisions is that the latter permits the President to specify the period within which the Supreme Court should report its opinion. This further undermines the Supreme Court's high constitutional role in giving the executive an unprecedented power to control the timing of court proceedings.

The House of Lords, the Supreme Court of the United States and the High Court of Australia have all refused to give advisory opinions. For example the United States Supreme Court states in *United Public Workers* v. *Mitchell* 330 U.S. 75 (1947): "As is well known the federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues 'concrete legal issues, presented in actual cases, not abstractions' are requisite". Further in *Alabama State Federation of Labor v. McAdory* 325 U.S. 450, 461 it was stated "It has long been this Court's considered practice not to decide abstract, hypothetical or contingent questions, ... or to decide any constitutional question in advance of the necessity for its decision, ... or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, ... or to decide any constitutional question except with reference to the particular facts to which it is to be applied."

Difference Between Indian and Sri Lankan Constitutional Context

The Supreme Court in its judgment mentioned the corresponding Indian cases, but made no attempt to deal with the crucial difference between the structure of the Indian and the Sri Lankan Constitutions, which was highlighted in the submissions made by CPA. The difference is that the former permits review of enacted legislation, whereas the latter, unusually for a democratic Constitution, does not. Therefore this type of

situation, i.e. the attempted use of the consultative jurisdiction of the courts to indirectly challenge legislation, need not arise in the Indian context where legislation can be directly challenged and struck down.

In re the Special Courts Bill 1978 is cited as a champion for the consultative jurisdiction of the Indian Supreme Court. But this case dealt with the constitutionality of a *Bill*, not legislation. In the case of a Bill there is always the possibility that an opinion of the Supreme Court would have some effect, as the Indian Supreme Court recognised in that case, so that its final form as legislation would take account of the Court's findings on constitutionality. This contrasts with the present reference, where no pronouncement by the Supreme Court could impact on the legislation already passed.

In its opinion the Supreme Court cites *In re the Delhi Laws Act 1912* [1951] SCR 747 to demonstrate that in India the President has invoked the consultative jurisdiction to seek an opinion on an existing law. This reference can however be readily distinguished from the present reference. The reference in the Indian case was necessitated by a Federal Court decision on the powers of the state legislature, which created serious doubts regarding the validity of certain laws.[4] As a result, the President requested the Supreme Court's opinion on whether several specific laws were ultra vires the legislatures which passed them. This is in fact a good example of the consultative jurisdiction being invoked to address a concrete situation, where the opinion of the Court would affect the future position, and potentially guide the actions, of the government. There are no such consequential possibilities in the Sri Lankan context.

Other Sources of Legal Opinion

The Executive has available to it a variety of sources of legal advice other than reference to the Supreme Court. Pre-eminent among them is the Attorney General.

In terms of Article 77 of the Constitution the Attorney General is under a **duty** to **examine** Bills for constitutionality, and to **communicate** any lack of constitutionality to the President. In the presence of strong alternative systems for addressing unconstitutionality in Bills, CPA submitted that it would be inappropriate for the Supreme Court to entertain the reference, since this would in effect involve the Court in trying to make up for inadequacies in legal advice given prior to the enactment of legislation.

Restrictions on Challenging Constitutionality of Legislation

Article 80(3) of the Constitution provides as follows:

> "Where a Bill becomes law upon the certificate of the President or the Speaker, as the case may be, being endorsed thereon, no court or tribunal shall *inquire into, pronounce upon or in any manner call in question*, the validity of such Act *on any ground whatsoever*." [emphasis added]

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4 Op cit, p 2275.

Article 124 provides that:

> "Save as otherwise provided in Articles 120, 121 and 122, no court or tribunal ... or other institution, person or body of persons shall in relation to any Bill, have power or jurisdiction to inquire into, or pronounce upon, the constitutionality of such Bill or its due compliance with the legislative process, on any ground whatsoever."

At first sight this Article may appear to be of limited relevance since it refers to Bills while the present case concerns an Act. It is however relevant for two reasons. Firstly, the reference raises issues which relate to the pre-enactment stages of the Act. Secondly, the Supreme Court relied heavily on Article 124 in refusing to entertain a set of previous applications challenging the constitutionality of the current "Bill" as well as another Bill after they had passed into law.

The case law

In a previous judgment which concerned the constitutionality of the Voluntary Service Organisations (Registration and Supervision) (Amendment) Bill, the Supreme Court held that the time limit imposed for challenging a Bill under Article 121(1) of the Constitution is to be strictly interpreted and a petition would be entertained thereafter only in the case of impossibility in presenting a petition within that time.[5]

In a later case regarding the Monetary Law (Amendment) "Bill" and the same Inland Revenue (Special Provisions) "Bill" (both of which had been enacted by Parliament by the time the challenges were brought), the Supreme Court went further. It held that the provisions of Articles 120 – 122 "are not merely procedural in nature but form the conditions upon which the constitutional jurisdiction of the Court could be exercised in respect of the validity of any Bill or the due compliance with the legislative process."[6]

The Court said of Article 124:

> "It is seen from this provision that the jurisdiction of this Court to determine the question as to whether any Bill or any provision thereof is inconsistent with the Constitution is *strictly limited* to what is provided for in Articles 120, 121 and 122." (emphasis added)

It would thus be incorrect to argue that any court inquiring into the constitutionality of the Inland Revenue (Special Provisions) Act would not be going into the question of the validity of the Act. Validity includes the issue of whether the Bill was validly passed. An unconstitutional Act can only be passed with a two thirds majority in Parliament. If a court holds that any provisions of an Act are unconstitutional it is in effect stating that such Act was not validly passed, in that it was passed with a simple majority when it should have been passed with a two thirds majority. Article 80(3) appears to categorically debar any court from going into such matters.

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5 SC Applications Nos 1 -5 of 1998.

6 SC (SD) Nos 8 – 11 of 2003.

In the Monetary Law case (above) the Supreme Court cites the following observation of Samarawickrema J in *Bandaranayake v Weeraratne* (1981) 1 SLR 10:

> "There is a general rule in the construction of Statutes that what a court or person is prohibited from doing directly, it may not be done indirectly or in circuitououanner."

Conclusion

The scheme of the 1978 Constitution is not to permit anyone to call into question any Bill or Act except to the extent provided for by Article 121. Article 121 clearly prescribes the methods by which both the President and a citizen can refer a Bill to the Supreme Court to be examined for constitutionality. On the other hand, Articles 124 and 80(3) contain a clear general prohibition on the Court against questioning the validity of a Bill or an Act once passed, respectively. There is nothing to suggest that Article 129(1) was intended to subvert this scheme or to derogate from the general prohibition on examining the validity of legislation. Therefore in taking up and providing its opinion in the present reference, the Supreme Court appears to be doing indirectly (i.e. through the route of Article 129(1)) what it is prohibited from doing directly, as warned against in *Bandaranayake*, above.

There is also a question of equality here. If the consultative jurisdiction is used in this way, the President is given an opportunity to challenge the constitutionality of a law when no other person is able to do so. This is not an issue in which the executive needs to have a special privilege or right which is denied the rest of the population (unlike some other areas of special privilege such as, arguably, immunity from suit). Indeed the constitutionality of legislation, potential or enacted, is a matter of predominant importance and impact for the citizen. There is no countervailing reason why the President should be able to have such a matter examined by the Supreme Court when no one else can.

The Supreme Court asserts that its consultative jurisdiction is "distinct and different from the ordinary jurisdiction of this Court and that the ouster clause contained in Article 80(3) is not a bar to the Court expressing an opinion on a question of law referred to it by the President." The Court does not go on to explain why this jurisdiction is different, and more importantly, how the difference overrides the express bar to reviewing legislation in Article 80(3). In other words, there is no discussion of how Article 80(3) relates to Article 129(1), and no serious attempt to exempt, as it were, the consultative jurisdiction from the prohibition in Article 80(3) (and in Article 124, see above). It is difficult to understand how such a strong injunction as contained in Article 80(3), and consistently reiterated in previous cases, can be lightly cast aside – specially in the absence of a clear legislative intention to that effect.

The Court also points out that the President's view as to the questions referred being of public importance cannot be questioned. This is however distinct from the issue whether, the President having referred matters which he or she considers to be of public importance, the Court should then proceed to entertain the reference and report its opinion on them. The **President's power to refer** may be unchallengeable. But

the **Court's discretion to entertain and/or deliver an opinion on the reference** is quite a different issue which needs to be examined separately.

It would appear that the only other occasion on which the consultative jurisdiction of the Supreme Court was invoked by the President was in the controversial instance of *SC Reference No 2/2003*, more commonly known as the Defence Powers Opinion. The use of Article 129(1) therefore, is not entirely without precedent, although that instance too has been critiqued.[7] There the President sought the opinion of the Supreme Court on two matters. The more interesting question was the general one, whether the President's control over defence was such that it could override the powers vested in the Minister of Defence. The other question related more specifically to certain amendments made by the Minister of Defence to regulations made under legislation governing the army, navy and air force. However undesirable and politically motivated that reference may have been, it was more justifiable than the present one. It did not question the constitutionality or validity of legislation. And it was forward-looking in that the Supreme Court's opinion could, and in fact did, guide the future actions of the President in relation to defence. In that sense the defence powers reference is comparable to *In re the Delhi Laws Act* (above). The tax amnesty law reference, on the other hand, had no such mitigating features.

It is submitted that the better view is that Article 129(1) should be read subject to both Articles 80(3) and 124. In other words, the questions of fact or law on which the President is permitted to seek the opinion of the Supreme Court, do not include matters already passed into law by Parliament.

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7 See Edrisinha, "The Constitutional Crisis: Cohabitation and Defence", in this issue.

INTERNATIONAL AND COMPARATIVE ISSUES

Canada's Unwritten Constitutional Principles and their Relevance to Sri Lanka

Andrew Pilliar

Abstract

Although the decision of the Supreme Court of Canada in the Quebec Secession Reference seems to create a novel tool in the cabinet of constitutional reform by identifying and utilizing "fundamental principles", the Court's ruling should be read narrowly, bearing in mind the exigencies of the Canadian situation. That is, fundamental constitutional principles must reflect and resonate with a country's constitutional text and constitutional history. In the Canadian context, the Court relied on the identified fundamental principles as a tool both to finesse a politically delicate question, and to elucidate principles in an area not specifically described in the provisions of extant constitutional documents. Many of the unwritten principles identified in the Canadian decision are fundamental in nature, and seem to be equally important in any constitutional democracy. In the context of Sri Lanka, this suggests that any recourse to underlying fundamental principles of constitutional governance could not be legitimately used to override existing constitutional provisions. However, in novel situations not covered by constitutional provisions, an analysis of the unwritten ideals that underpin the Sri Lankan constitutional order might prove helpful in finding common ground, as it was in Canada.

Introduction

The Canadian Supreme Court's 1998 decision in the *Reference re Secession of Quebec*[1] has been hailed by some as "the most important judgment in the Supreme Court's history".[2] Given the delicate political balance struck by the Court, the surprising reliance on "unwritten constitutional principles", and the inevitable international interest attached to cases dealing with the potential break-up of a state, it is small wonder that this decision has made waves far outside the local waters of Canadian constitutional jurisprudence. The Court found no right to unilateral secession in either domestic or international law. Yet, in the view of many Canadian commentators, the Reference is most notable for suggesting that the Canadian federal government would be obliged to negotiate with Quebec in the case of a clear demonstration of popular will to secede.[3] This duty to negotiate is founded largely on the Court's identification of four "unwritten constitutional principles" which animate the Canadian constitutional structure. Bearing in mind the caveat that domestic decisions should be considered in international fora only with careful cognizance of the relevant domestic context, the Court's novel consideration of the secession question seems particularly applicable to countries dealing with questions of ethnic nationalism and constitutional change.

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1 [1998] 2 S.C.R. 217. [Hereinafter Secession Reference].

2 Daniel Drache and Patrick J. Monahan, "In Search of Plan A", 7 *Canada Watch* 1 (1999)

3 This view has been widely endorsed. For an early and formative commentary on the decision, see especially Patrick J. Monahan, "The Public Policy Role of the Supreme Court of Canada in the Quebec Secession Reference", 11 *National Journal of Constitutional Law* 65 (1999).

One such state is Sri Lanka, so it is not surprising that the Canadian decision has received attention within the Lankan legal community.[4] The prospect of constitutional change in Sri Lanka was a constant of the political discourse in the country most recently from 1994 to 2000, and appears to have again captured the government's attention. At present, the issues that most stridently dominate the debate in Colombo are the abolition of the Executive Presidency and reform to the electoral system. At some point however, any meaningful constitutional reform must also consider the prospects for long-term peace in the North and East, and so issues of devolution, power-sharing and federalism are not far removed from the forefront of constitutional consciousness. Since constitutional change seems imminent, can anything be learned from the Canadian decision?

This paper will examine the origins of Canada's "unwritten constitutional principles", and compare their application in the Secession Reference to various proposals for constitutional change currently circulating in Sri Lanka. Extracted, as they are, from Canada's past history of democratic constitutional governance, these principles can only be used to reinforce existing constitutional structures and advance the broad outlines of democracy. If unwritten constitutional principles are viable in Sri Lanka, they must be similarly drawn from the country's constitutional history and present structures. However, given that Sri Lanka also has a history of democracy and constitutionalism, at least in principle, any underlying fundamental principles of constitutional governance could not be legitimately used to override existing constitutional provisions. However, in novel situations not covered by the constitution, an analysis of the unwritten ideals which under gird the Sri Lankan constitutional order might prove instructive in finding common ground between adversaries, as was experienced in Canada.

A Look at Canada

Before turning to Sri Lanka, it is important to appreciate the context within which the Canadian Court rendered its decision in the Secession Reference. A full exposition which delves into the relevant legal and historical issues is far beyond the scope of this paper, but there has been considerable academic literature devoted to the subject.[5] The purposes of this paper will be met by outlining the Court's reasons for recourse to "unwritten constitutional principles", and summarizing some academic commentary on these reasons.

The Court's opinion in the Secession Reference has been widely recognized as both a sound legal judgment and a "political masterstroke".[6] Even critics of the decision

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4 See Lakshman Marasinghe, "Access to Government: A Must for Tamils in New Constitution", *Daily Mirror*, April 16, 2003; also Lakshman Marasinghe, "Sustainable Peace Based on a Sustainable Constitution: Federalism", Sunday Observer, January 12, 2003; Errol P. Mendes, "Secession of Quebec Case: Four Foundational Principles for Peace in a Multiethnic Society", 4 *Mootpoint* 33 (2000); Tara Quinn, "The Clarity Debate in Canada: A Comparative Critique", 6 *Mootpoint* 38 (2002).

5 *Supra* note 2; (a) Sujit Choudhry and Robert Howse, "Secession: Constitutional Theory and the Quebec Secession Reference", 13 *Canadian Journal of Law and Jurisprudence* 143 (2000); (b) Mary Dawson, "Reflections on the Opinion of the Supreme Court of Canada in the Quebec Secession Reference", *National Journal of Constitutional Law* 5 (1999).

6 Margaret Moore, "The Ethics of Secession and a Normative Theory of Nationalism", 13 *Canadian Journal of Law & Jurisprudence* 225 (2000), at 246.

acknowledge the Court's adroit political tactics in dealing with such a potentially explosive case. Though many legal and political commentators feared that a decision on Quebec's right to secede rendered by the Canadian Supreme Court, a creature of federal statute, would throw fuel on the embers of separatist passion in Quebec, the decision was actually embraced by both federalists and sovereigntists.[7] At the end of the day, federalists pointed to the Court's refutation of a legal right to unilateral secession as a victory; sovereigntists found support in the Court's acknowledgement that the federal government could not ignore the democratically expressed will of the Quebec people to separate. The ruling elicited a positive reaction from both camps – an exceedingly rare feat in the separatism debate. The decision allowed each side to claim a partial victory, but also intimated that neither interpretation alone was entirely correct. The Court crafted its judgment to ensure that the decision would be read in its entirety and not be torn apart in a Bacchanalic fit of legal analysis. For example, although the Court was asked three specific questions, its answers were woven through the entire judgment, and were not specifically enumerated at the end of the ruling, as is the Court's usual custom.[8] Further, the decision was unanimous, which was significant considering that the Court contained judges from most regions of the country, including Quebec. Perhaps the strongest component of this strategy was the use of the unwritten constitutional principles, which allowed the Court to define the frame within which it rendered its decision. The Court recognized four inter-linked principles: democracy, constitutionalism and the rule of law, protection of minorities, and federalism, none of which can be understood without reference to the others. This is explicitly not an exhaustive list, and other cases have suggested further unwritten principles, such as the independence of the judiciary.[9]

The Court explained that democracy in Canadian law "has always informed the design of our constitutional structure, and continues to act as an essential interpretive consideration to this day."[10] Although there is some support for democratic elections in Canadian constitutional documents, the Court defined the underlying value of democracy in broader terms than mere recognition of elections. The Court stated that "democracy expresses the sovereign will of the people,"[11] but also that the democratic principle requires the legitimacy accorded by a solid legal framework, that institutions operate with the consent of the governed, and that dialogue among peoples is an essential component of a functioning democracy.[12] The Court recognized that constitutionalism and the rule of law are tied up in the democratic principle, but in their own right lie at "the root of our system of government".[13] Again, this principle takes some foothold in explicit provisions of the written Constitution which mandate that the Constitution shall be the supreme law of Canada, but the Court used this foothold to expound a deeper meaning. The deeper meaning includes the importance of ensuring that the majority cannot easily diminish the rights of minorities, that those minorities are provided with governmental support to help preserve their group identities, and that no level of government in a federal system can derogate from the

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7 *Supra* note 2, at 1; *supra* note 5(b), at 1.

8 *Supra* note 5(b), at 7.

9 (a) *Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice)*, [1997] 3 S.C.R. 3; see also (b) Mark D. Walters, "The Common Law Constitution in Canada: Return of Lex Non Scripta as Fundamental Law", *University of Toronto Law Journal* 91 (2001).

10 *Supra* note 1, para. 62.

11 Ibid., para. 66.

12 Ibid., paras. 67-68.

13 Ibid., para. 70.

powers of another level of government.[14] Protection of minorities is another fundamental basis of the Canadian governmental structure, dating at least from the time of Confederation, and finding recent expression in constitutional documents such as the Canadian Charter of Rights and Freedoms.[15] Finally, the Court called federalism "the lodestar by which the courts have been guided" in constitutional cases since the beginning of the country.[16] Though this style of government was laid out at the time of Confederation, the Court noted that the brand of federalism which has come to be identified with Canada – relatively strong provinces within a federal system – developed as much through judicial interpretation and customary practice as it did from the original document.

Even if the unwritten principles resonate as fair and just precepts, the question arises why the Court turned to this novel approach, and whether it is a legally cogent one. Arguably, these principles primarily afforded the Court an opportunity to finesse a politically delicate question by defining a frame on which to hew the opinion. However, the idea of unwritten organizing principles has surfaced in previous Court decisions,[17] and the emphasis placed on these principles by the Court strongly suggests that even though they served a political purpose in this case, they are no less legally valid concepts.

What Are "Unwritten Constitutional Principles"?

Having established that unwritten constitutional principles are part of the Canadian Constitutional landscape, the question becomes: where have these principles come from, and what can they be used for? Though the answers are found in Canadian legal history, they may have implications on an international level. The Court identified behind the written word of the Constitution "an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles. These principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based."[18] These principles are "clearly implicit in the very nature of a Constitution,"[19] and "dictate major elements of the architecture of the Constitution and are as such its lifeblood."[20] Further, the Court opined that the "principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments."[21] These principles "may in certain circumstances give rise to substantive legal obligations... which constitute substantive limitations on government action."[22] However, the Court cautioned that the principles "could not be taken as an invitation to dispense with the written text of the Constitution" and that "there are compelling reasons to insist on the primacy of our written Constitution."[23]

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14 Ibid., para. 74.
15 Ibid., paras. 79-80.
16 Ibid., para. 56.
17 *Supra* note 9(a); for a discussion of history of the unwritten principles in Canadian law, see (b) Jean Leclair, "Canada's Unfathomable Unwritten Constitutional Principles", 27 *Queen's L.J.* 389 (2002), at 443; also *supra* note 9(b).
18 *Supra* note 1, para. 49.
19 Ibid., para. 50.
20 Ibid., para. 51.
21 Ibid., para. 54.
22 Ibid., para. 54.
23 Ibid., para. 53.

In spite of (or perhaps because of) the Court's explanation of the origins and functions of the unwritten principles, there has been extensive academic consideration of how to read this aspect of the judgment. The principles have been interpreted as examples of the re-emergence of the influence of common law constitutional thinking in Canadian law,[24] they have been denigrated as problematic and perhaps unnecessary additions to the constitutional landscape,[25] and they have been described (tongue in cheek) as "vibes."[26] Some have criticized the Court's choice of four principles.[27] It appears clear however from this and other Court decisions that unwritten principles are part of Canadian constitutional jurisprudence, though their exact status may be somewhat hazy. After an extensive review of the historical and legal origins of unwritten constitutional rules in common law countries, Mark Walters concluded that "[a]lthough the Court's doctrinal explanation for the unwritten constitution needs strengthening, and its application in specific instances may be questioned, the unwritten constitution itself is not the product of revolutionary or illegitimate judicial activism."[28]

In describing the role of the principles, the Court referred to its previous decisions regarding the value of the preamble to the Constitution, which "incorporate[s] certain constitutional principles by reference" and "invites the courts to take those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text."[29] Perhaps an appropriate (if inelegant) conceptualization is of unwritten principles as load-bearing scaffolding: values which under gird the written constitution, but which can also form a structure on which to build constitutional decisions where the written constitution is not explicit. The utility of the "gap-filling" role of such principles must be clearly confined and kept separate from constitutional amendment. That is, unwritten principles should not be used to promulgate court-driven constitutional change where a legislative amendment process exists. Gap-filling must be used only to expand interpretation of the Constitution to the point that it becomes coherent on an issue. In the Secession Reference, the Court provided a ruling that described how Canadian constitutional law would treat an expressed desire to secede; this did not amount to a change in the Constitution or an insertion of a "Secession Amendment", but was an opinion on how the extant Constitution should be interpreted in light of hypothetical eventualities.

Sri Lanka

Constitutional developments in Canada and in Sri Lanka bear some surface similarities which belie deep differences. Both countries gained their independence from Britain, and both legal systems have been largely shaped around common law models. Both have also been influenced by civil law systems: French-based civil law is practiced in Quebec; Dutch colonists have left aspects of a Roman law tradition in Sri Lanka. Both are countries with a bifurcated population in terms of ethnic roots

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24 *Supra* note 9(b).

25 *Supra* note 15(b).

26 Dale Gibson, "Constitutional Vibes: Reflections on the Secession Reference and the Unwritten Constitution", *National Journal of Constitutional Law* 49 (1999).

27 Gregory Millard, "The Secession Reference and National Reconciliation: A Critical Note", *Canadian Journal of Law and Society* 1 (1999).

28 *Supra* note 9(b), at 94.

29 *Supra* note 1, at para. 53.

and cultural affiliations, but also with a wide variety of smaller minorities. Yet Canada's constitutional heritage has been markedly different from Sri Lanka's, which is currently governed under its third constitution since independence. Canada is a federal country, while Sri Lanka currently employs a unitary system of government with some devolution to Provincial Councils. Geographically, climatically, and economically, these countries are a world apart. Given this difference, it can be hazardous to suppose that legal developments in one country can (or should) be employed in the other. A thorough understanding of the Canadian decision, widely commended for how it engaged both parties in the dispute, might prove fruitful in the Sri Lankan context.

The objective of finding unwritten supports for constitutional provisions is said to lie in the desire to articulate basic legal assumptions that inhere in the human social condition itself and that therefore possess normative force independent of legislative enactment. The challenge for judges, however, is identifying for the legal system a theory of fundamental law that somehow fits within the matrix of doctrinal, institutional, and traditional assumptions that together define the character of the legal system; indeed, without this framework in law, the notion of fundamental law is liable to be consumed by its moral-political content, and any claim to its application as legal norm, as opposed to political sentiment, may collapse.[30]

This statement enunciates both the problematic and the promising aspects of reading the Canadian decision in a Sri Lankan context. Unwritten constitutional principles may derive from "the human social condition itself", but such reliance on the universality of law or constitutionalism is vague and problematic.[31] Fortunately, there are other, more tangible reasons to draw parallels between the two countries. These include the fact that both countries have some shared history as common law-influenced states. Further, both are constitutional states. In the *Reference Re Manitoba Language Rights,*[32] the Supreme Court of Canada concluded that the principle of the rule of law "is clearly implicit in the very nature of a constitution."[33] That is, "the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order."[34] The rule of law accordingly inheres in any constitutional order, and perhaps vice versa. If the rule of law is indeed an indispensable attribute of states governed under a constitution, it would seem to be a foundational principle in Sri Lanka. Similar arguments could be made to support recognition of some of the other identified unwritten principles in the Canadian Constitution – specifically democracy, constitutionalism, and protection of minorities. These seem to also underlie the ideal of democratic governance in Sri Lanka. Indeed, these values are actually expressed in

30 *Supra* note 9(b), at 93.

31 As a starting point on this issue, see Douglas J. Simsovic, "No Fixed Address: Universality and the Rule of Law", *Revue Juridique Themis*, 2001, 739

32 [1985] 1 S.C.R. 721. [Hereinafter Manitoba Language Rights].

33 Ibid., para. 68.

34 Ibid., para. 64.

the text of Sri Lanka's Constitution.[35] Perhaps the ideals that each country aspires to, and that are intimated in the constitutional documents of each, are not dissimilar. The difficulty of enunciating underlying principles of the Sri Lankan constitutional order in a manner that resembles that of the Canadian Court lies in the fact that such principles must derive from the constitution and constitutional history itself. Accordingly, this process must be autochthonous.

The reasons for articulating a series of unwritten principles is one of practical utility. Though the Canadian Court found justification for the principles in the country's constitutional history, it selected principles that both sides of the dispute could easily endorse. The importance of democracy, constitutionalism and the rule of law, and protection of minorities (as well as a federal structure) arguably represented the lowest common ideological denominator on which both federalists and separatists could agree. Had the Court enumerated too many of these principles, this unique feature would have disappeared. Yet because these principles were accepted after the judgment by both sides, the Court effectively brought both parties to a common vocabulary, and staked out some common ground from which to pronounce its judgment. In this sense, the Court affected a coup de grace by bringing opposed parties together.

The task of bringing opposed parties together remains a formidable one in Sri Lanka, in spite of the on-going ceasefire and unpredictable peace negotiations. Against the backdrop of the peace process, the possibility of constitutional change has re-emerged as a major political issue over the past year. The specifics which seem to drive this issue are reform of the electoral process and abolition of the Executive Presidency. At the same time, there is a general agreement that any long-term peace will likely require some reworking of the Constitution. Yet the process by which such change might occur is anything but clear. The dominant political wind seems to favour the creation of a "Constituent Assembly" to amend the Constitution with regard to the Presidency and the electoral system, while the peace process remains at a standstill, largely over the question of whether negotiations should resolve "core issues" or begin with settlement of an interim agreement.

The idea of convening a Constituent Assembly has been criticized by many commentators as a colourable attempt to change the Constitution without a sufficient

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[35] Constitution of the Democratic Socialist Republic of Sri Lanka, 1978. Notably, Article 1 refers to the state as "democratic"; Articles 4(a) and (b) provide for governance by elected representatives; Article 10 guarantees freedom of thought, conscience, and religion; Article 12 guarantees equality rights; and, Article 14 guarantees freedom of speech, assembly, and association, among others. Protection of these fundamental freedoms, if observed, inherently protect minorities against majoritarianism. Further, Chapter IV of the Constitution, which guarantees language rights, including the use of either Sinhala or Tamil in many public spheres can be seen as minority protection. That these provisions may be observed in the breach, or that there may be other constitutional provisions which are undemocratic or which encourage majoritarianism should not automatically defeat the fundamental status of the principles. In Canada, the enunciated principles were not constant elements of the Canadian social fabric, as attested by acts such as the internment of Japanese Canadians during the Second World War or the ongoing failure of government to meaningfully address many concerns of First Nations peoples. Also, there are articles of the Constitution, such as Article 33, the so-called "notwithstanding clause", which seem to fly in the face of principles such as minority protection. Nevertheless, these principles stand firm, as the Canadian Court seems to have determined the unwritten principles as ideals and best practices drawn from the constitutional past.

majority in Parliament.[36] Those in favour of the Constituent Assembly have relied on various arguments, such as Kelsen's Grundnorm theory and the doctrine of necessity, to bolster their position.[37] At first glance, it might seem that unwritten principles could also reinforce their arguments – suggesting that democracy is preserved by an assembly of the people to re-draft the law of the land. However, such a conception misinterprets the Canadian decision, as it selectively applies parts of that decision piece-meal. A Constituent Assembly designed to subvert an existing amendment process might seem democratic, but it actually represents an opportunity to subvert democracy by acting in contravention of fundamental principles of constitutionality and the rule of law, which the Canadian Supreme Court recognized as corollary principles without which democracy could not be understood. Recourse to the doctrine of necessity is both legally problematic and disingenuous, as the concept is one developed in criminal law (and with a dubious history of application, even there). A prospective constitutional doctrine of necessity was specifically rejected in the submissions of the Attorney General of Canada in the Secession Reference, which noted that such a doctrine "is manifestly not a constitutional option that may be looked to in advance by governmental authorities or the courts in assessing - much less in seeking to avoid - the requirements of the Constitution".[38] A constitutional doctrine of necessity was recognized by the Supreme Court in the Manitoba Language Rights case, but the Court noted that "[t]he doctrine of necessity is not used ... to support some law which is above the Constitution; it is, instead, used to ensure the unwritten but inherent principle of rule of law which must provide the foundation of any constitution."[39]

In contrast, the constitutional validity of interim agreements might find support from the Canadian decision. Though other courts in other countries have dealt more directly with the question of interim constitutional structures than has the Supreme Court of Canada, the conceptualization of unwritten principles as scaffolding for unforeseen situations presents an intriguing possibility. Perhaps such principles could be used to find common ground between the parties involved, allowing legitimate discussion to take place within a legally valid framework. This would not be to contravene or usurp the written process for Constitutional amendment, but to create a space within which the involved parties can work towards an agreement that can later be submitted for formal ratification. Because the Constitution does not anticipate a situation which would require interim discussions about constitutional change while implementing some tangible reform on a trial basis, proceeding in accordance with identified fundamental principles could be seen as filling a gap in the present Constitution. This proposal admittedly walks the line between gap-filling and implementing new constitutional structures, but might be worth further consideration. In the Secession Reference, the Canadian Court seemed to indicate that secession of Quebec *would* require an amendment to the Constitution by an existing process. The

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36 See U.D.M. Abeysekera, "Dismantling, Repealing and Amending a Constitution", *Daily Mirror*, Opinion Section, June 16, 2004; Piyasena Dissanayake, "No Need to Change Constitution Through Unconventional Methods", *The Island*, Features Section, June 13, 2004; Reeza Hameed, "Constituent Assembly a Recipe for Disaster", *The Island*, Midweek Review, June 16, 2004; Serath Perera, "The Constituent Assembly and Referendum Theory", *Daily Mirror*, Opinion Section, June 16, 2004.

37 For an overview of proposals (rested in a critique of their legality), see Reeza Hameed, "Constituent Assembly a Recipe for Disaster", *The Island*, Midweek Review, June 16, 2004.

38 "Written Response of the Attorney General of Canada to Questions from the Supreme Court of Canada", para. 41. Available online at http://canada.justice.gc.ca/en/ps/const/replyqa5.html.

39 *Supra* note 32 at 766.

unwritten principles in the decision merely represented a framework which would require both sides to come together and negotiate before such amendment was attempted.[40]

In short, though courts in Sri Lanka seem unlikely to face a case similar to that seen by the Canadian Court, recourse to unwritten constitutional principles might prove a valuable tool for political actors to encourage engagement, while acting within the law and the constitution. In order to achieve this result, these principles must not be abused or used incorrectly.

Conclusion

The Court's elucidation of the unwritten constitutional principles of the Canadian constitutional order was surprising, but has proved to be a deft move. The reason why this judicial maneuver was so striking and so effective was because it enunciated shared values that both parties could buy into politically, while clothing those values in legal garb. It was surprising that a national court made such a politically shrewd move, but there is no reason that the wisdom of the decision should only be practiced by judges. Though reliance on foreign judgments without a keen understanding of the context in which those judgements were rendered can be dangerous, understanding of developments in foreign courts can inspire new developments at a domestic level. I have tried to suggest that the principles elucidated in the Secession Reference might (in the case of three of the four principles) be so broad as to apply equally well to the Sri Lankan constitutional order. Although such principles would ultimately have to be anchored in Sri Lanka's constitutional history, they might present a foundation on which to construct greater agreement within the bounds of the law and the Constitution. Without analyzing the intricacies of the cases in too much detail, I suggest that Constitutional amendment via a Constituent Assembly would violate some of the values enunciated by the Canadian Court, while development of an interim agreement structure for the North and East to advance the peace process might be constitutionally viable. These opinions are not meant to state legal fact, but are meant as a challenge to the experts in Sri Lankan law to investigate these questions and decide for themselves.

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40 *Supra* note 3 at para. 68.

Flexing Constitutional Muscles to Enforce Health Rights: Case Studies from India, South Africa, and Venezuela

Megan Bremer

Introduction

The right to health in contemporary international law is primarily rooted in Article 12 of the International Covenant of Economic, Social and Cultural Rights (ICESCR)[1] which recognizes the right of everyone to enjoy the highest possible level of physical and mental health.[2] The Alma-Ata Declaration in 1978 reaffirmed that health "is a fundamental human right and that the attainment of highest possible level of health is a most important world-wide goal whose realization requires the action of many other social and economic sectors in addition to the health sector."[3] Since this declaration, the international community has debated how best to achieve this goal. The responses of individual nations vary, but inevitably, the economic burdens of national and local health systems have thwarted the realization of these rights. The current state of global health falls short of the ideals articulated in international treaties and declarations. Many government health systems fail to provide basic health services to its people. Despite the obvious and infamous failures, individual citizens are hard pressed to hold governments accountable.

Health rights are difficult to enforce when the state's obligations are defined by international law because there is no effective mechanism for enforcement. Many nations, particularly new nations with recently written constitutions, have attempted to remedy this problem by embedding health rights in their constitution. Whether the rights are defined internationally or nationally, they present unique challenges for the judicial system. Health rights fall under the category of socio-economic rights. They are positive rights that effect policy and budgets which may compel courts to make decisions historically delegated to legislators. Traditional judicial mechanisms may be inadequate to remedy government action or inaction that undermines realization of health rights. Innovative court orders have sometimes reshaped national policy when governments have failed to meet their duties to provide health services.

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1 G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess. Supp. No. 16, at 49, at art. 1(1), U.N. Doc. A/6316 (1966)

2 Article 12 of the ICESCR states:

(1) The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

(2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

3 Declaration of Alma-Ata from the "International Conference on Primary Health Care" in Alma-Ata, USSR, 6-12 September 1978.

India, South Africa, and Venezuela offer insight into the successes and obstacles to litigating health rights on the national level. Each of these countries recognizes the right to health in their constitution in some form ranging from the fundamental right to life to rights guaranteeing the specific determinants of health, e.g. housing, food, and education. While there have been numerous challenges to government health policies brought before the courts of these three nations, there are several cases that stand out in the global battle to enforce the right to health. These cases will be examined to illustrate current judicial trends.

India

India enforces the right to health through their right to life provision in Article 21 of the Constitution of India[4]. There are a few other places in the Constitution where health rights are addressed. However, at least two of these provisions in Chapter IV of the Constitution's Directive Principles of State Policy act as mere guidelines for the states and are not justiciable. Article 42 provides "for just and humane conditions of work and maternity relief - the State shall make provision for securing just and humane conditions of work and for maternity relief."[5] Article 47 affirms the "Duty of the State to raise the level of nutrition and the standard of living and to improve public health - the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavor to bring about prohibition of the consumption, except for medicinal purposes, of intoxicating drinks and of drugs which are injurious to health."[6] While these Articles are not enforceable as such, they do reveal the principles underlying the Constitution of India namely, that nutrition, conditions of work and maternity benefits are integral to the health of its citizens.

Health rights are primarily enforced through Article 21 of the Indian Constitution which guarantees the fundamental right to life. The Supreme Court has widely interpreted this fundamental right and has included in Article 21 the right to live with dignity and "all the necessities of life such as adequate nutrition, clothing..."[7] Article 21 has been used to evaluate the adequacy of health services provided by the state. This paper will examine four cases which illustrate the use of Article 21 to enforce emergency medical treatment, worker's health and safety, the establishment of primary care centers, and access to affordable drugs.

Paschim Banga Khet Mazoor Samiti v. State of West Bengal[8]: Emergency Medical Treatment

In the case of *Paschim Baga Khet Mazoor Samiti v. State of West Bengal*, Hakim Seikh was a member of Paschim Banga Khet Mazdoor Samity, an organisation of

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4 The Constitution of India, 1949.

5 CEHAT's *Legal Position Paper on Right to Health Care*, http://www.cehat.org/rthcindex.html. Accessed on September 7, 2004.

6 Ibid.

7 CEHAT's *Legal Position Paper on Right to Health Care*, http://www.cehat.org/rthcindex.html. Accessed on September 7, 2004.

8 1996 SOL Case No.543.

agricultural labourers. He fell off a train at Mathurapur Station in West Bengal. The fall caused serious head injuries, including a brain hemorrhage. Seikh was taken to the Primary Health Centre at Mathurapur. As the necessary treatment facilities were unavailable at the Mathurapur clinic. So Seikh was referred to another clinic. He was taken to other clinics eight times, only to be turned away for lack of necessary facilities or unavailable bed space.

The Court held that the state had violated Article 21, the fundamental right to life, by not providing adequate emergency care. The Court rejected the state's argument that their obligation to provide emergency medical treatment must be limited based on financial constraints. The Court analogized the case at hand to a case of free legal aid to poor citizens accused of a crime.[9] Legal aid and emergency medical care both require financial resources. Nonetheless, the state has a constitutional obligation regardless of budgetary woes. The Court made the following statement:

> "The Constitution envisages the establishment of a welfare state at the federal level as well as at the state level. In a welfare state the primary duty of the Government is to secure the welfare of the people. Providing adequate medical facilities for the people is an essential part of the obligations undertaken by the Government in a welfare state. The Government discharges this obligation by running hospitals and health centres which provide medical care to the persons seeking to avail those facilities. Article 21 imposes an obligation on the State to safeguard the right to life of every person. Preservation of human life is thus of paramount importance. The Government hospitals run by the State and the medical officers employed therein are duty bound to extend medical assistance for preserving human life. Failure on the part of a Government hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed under Article 21."[10]

The State appointed a committee to investigate the incident while the writ was pending. The Court reviewed the committee's findings, including suggested remedial measures, when drafting its decision.[11] The court order went beyond traditional parameters by outlining new policy objectives to ensure that proper medical facilities are available for dealing with emergency cases, including: upgrading primary health centres so as to enable them to stabilize emergency patients who need to be transferred; upgrading hospitals at the District level to enable them to treat more serious cases; increasing the number of specialists at District hospitals; creating a centralized communication system for referrals and immediate transfers; ensuring ambulance availability in all communities; and providing ambulances with proper equipment and medical personnel.[12]

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9 The judgment cited *Khatri (II) v. State of Bihar*, 1981(1) SCC 627 at 631, which held that legal aid must be provided regardless of its financial costs.

10 *Paschim Banga Khet Mazoor Samiti v. State of West Bengal.*

11 http://www.worldlii.org/int/cases/ICHRL/1996/31.html. Accessed September 2, 2004.

12 *Paschim Baga Khet Mazoor Samiti Vs State of West Bengal.*

Mahendra Pratap Singh v. State of Orissa[13]: The Availability of Primary Health Care Centres

In Mahendra Pratap Singh v. State of Orissa , the Court held that fulfilment of the right to life requires the state to provide primary health care. The petition was brought against the state due to its failure to provide a primary health centre in a village. The court said: "In a country like ours, it may not be possible to have sophisticated hospitals but definitely villagers within their limitations can aspire to have a Primary Health Centre."[14] In addition to reaffirming the state's obligation to assist people to get treatment and live a healthy life, the opinion turned the table on critics by emphasizing that a healthy society results in a collective gain. It also recalled the principles of Alma-Ata by insisting that primary health centres should be the primary concern of the state health system.

Consumer Education & Research Centre v. Union of India[15]: Workers' Health

The judgment in *Consumer Education & Research Centre v. Union of India*, written by Ramaswamy J., affirms the right to health in the workplace by connecting the worker's health with the right to life. It states that the right to life encompassing the health of the worker, is a minimum requirement to enable a person to live with the dignity guaranteed by Article 21. Ramasway J stated that: "Compelling economic necessity to work in an industry exposed to health hazards due to indigence to bread-winning to himself and his dependents should not be at the cost of the health and vigour of the workman."[16] The decision states that workers have a right to protection of health, provisions for medical tests and treatment. The Court points out that these provisions have the added benefit of increasing productivity while on the job: "Continued treatment, while in service or after retirement is a moral, legal and constitutional concomitant duty of the employer and the State... The State, be it Union or State Government or an industry, pubic or private, is enjoined to take all such actions which will promote health, strength and vigour of the workman during the period of employment and leisure and health even after retirement as basic essentials to live life with health and happiness."

The opinion reaches beyond Article 21 to base the workers' health rights in a body of unassailable human rights assured by the Charter of Human Rights and the Constitution of India. The Court stated: "we hold that right to health, medical aid to protect the health and vigour to a worker while in service or post retirement is a fundamental right under Article 21, read with Articles 39(e), 41, 43, 48A and all related Articles and fundamental human rights to make the life of the workman meaningful and purposeful with dignity of person."[17]

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13 1997 Ori 37

14 CEHAT's *Legal Position Paper on Right to Health Care* http://www.cehat.org/rthcindex.html. Accessed on September 7, 2004.

15 A.I.R. 1995 S.C.

16 *Consumer Edu. & Research Centre v Union of India*, 1995 SOL Case No. 266.

17 *Consumer Education & Research Centre v Union of India*, 1995 SOL Case No. 266.

People's Livelihood Trust: Amendment to the 2002 Patent Act

There is a patent case currently pending judicial review in India which is of particular relevance to Sri Lanka's recent debate over its own Intellectual Property Bill.[18] A new amendment to India's 2002 Patent Act has been proposed as a way to align India's legislation with the multilateral Trade-related Aspects of Intellectual Property Rights Agreement (TRIPS).[19] The amendment was proposed despite evidence that new patents for pharmaceuticals may be detrimental to welfare and pricing schemes in India.[20] Critics say that it will undermine India's supply of cheap drugs.[21] Up until now, largely due to the Patent Act of 1970, "the prices of essential and life saving medicines in India were 10 to 20 times cheaper as compared to other countries."[22] Price increases would undermine the accessibility of health care for vulnerable populations. The People's Livelihood Trust has petitioned the court to stop the amendment because they believe it will deny access to affordable curative drugs. They argue that "the right to life guaranteed under Article 21 of the Constitution was not a mere right to exist but it includes within itself, the right to a normal healthy life. This right to health must necessarily include access to curative drugs. It said that this access, which had until now been protected by the Patents Act of 1970, would be destroyed if product patents were introduced as contemplated in the amendments to this Act."[23] The Court has responded to the petition by ordering the Centre and Union Health Ministry to provide the court with an explanation of the amendments.[24]

These four cases highlight the long arm of Article 21. Lack of access to adequate health care undermines the right to life. Thus, the Court has held that the state is obligated to provide access, and often to increase access, despite unwieldy financial burdens. The decisions show that the Court is unafraid of wading through the murky waters of policy and challenging the wisdom of the Ministry of Health.

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18 See Nishara Mendis, "The Legal Challenge to the Intellectual Property Bill of 2003 – Patents rights and public interest," in *Moot Point* 2003-2004, for a discussion of the bill and the legal case in Sri Lanka. The case challenging the Sri Lankan bill was brought by the Center for Policy Alternatives.

19 See Lilani Kumaranayake and Sally Lake, *Regulation in the Context of Global Health Markets, in Health Policy in a Globalising World* 85-6 (Kelley Lee, Kent Buse and Suzanne Fustukian ed., Cambridge University Press 2002). Before TRIPS, only the process of the pharmaceutical process was patented, not the final product. Companies could use different processes to produce a generic (and much cheaper) version of the brand-name drug. India had particularly strong pharmaceutical manufacturers who could produce generic drugs at a fraction of the cost of the brand-names. However, since the creation of TRIPS, India has been pressured to stop manufacturing generic drugs that compete with patented brand-name drugs.

20 See M. Kent Ranson, Robert Beaglehole, Carlos M. Correa, Zafar Mirza, Kent Buse, and Nick Drager, "The Public Health Implications," in *Health Policy in a Globalising World*, ed. Kelley Lee, Kent Buse and Suzanne Fustukian ed., Cambridge University Press, 2002, p. 29-30. A 1995 multi-cultural study of South Asian nations, including India, revealed negative welfare and price effects of newly created patent systems for pharmaceuticals. Inflation-adjusted price increases, estimated as a result of TRIPS for patented drugs, ranged from 5 per cent to 67 per cent.

21 Just Do IP, NECG, http://www.necg.com.au/JustDoIPArchive/issue040730_237.shtml. Accessed on August 29, 2004.

22 The Hindu News Update Service, Monday, July 26, 2004: 1740 Hrs. http://www.hinduonnet.com/thehindu/holnus/002200407261721.htm

23 "Patents Act: Supreme Court Notice to Centre," in The Hindu, Tuesday, July 27, 2004. http://www.hindu.com/2004/07/27/stories/2004072704491400.htm

24 Just Do IP, op cit.

South Africa

The ICESCR, the South African Constitution[25], and several legislative enactments define the right to health for South Africans. The most prominent statement of health rights in South Africa is section 27 of its Constitution, which provides:.

> Section 27: Health care, food, water, and social security
>
> (1) Everyone has the right to have access to - (a) health care services, including reproductive health care; ...
>
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.
>
> (3) No one may be refused emergency medical treatment

While the Constitution reflects the rights established by Article 12 of the ICESCR in many ways, it is not a mirror image. "The ICESCR guarantees the right to health, including preventative measures such as the control of epidemics, and the right to the highest attainable standard of mental health. By contrast, South Africa's constitution only guarantees access to health care and mentions only the right of children to mental health."[26] Yet Section 39 under the South African Bill of Rights binds the Constitutional Court of South Africa to consider the full text of the ICESCR and any other international body of law.[27] In this way, the ICESCR has been influential in judicial decisions. The same section also enables the Court to review the laws of foreign nations when making a decision. In this way, a victory for health rights in another nation offers direct hope for health rights in South Africa.

The Inclusion of Socio-Economic Rights

Health rights are part of a series of socio-economic rights enshrined in the Constitution of South Africa.

The Constitutional Court of South Africa certified the inclusion of socio-economic rights in the Bill of Rights of the South African Constitution of 1996. Initially, there was debate about the inclusion of socio-economic rights, categorized as positive rights, because they present certain judicial and enforcement challenges. Positive rights are actualized through state action rather than mere policing. For example, whereas the right to freedom of religion prohibits certain discriminatory behavior and requires the state to protect the right by policing the forbidden behavior, the right to emergency medical treatment requires the state to take a more active role in providing services to fulfill the right. Judicial decisions must evaluate the quality and the level of action which draws upon judicial discretion in new contexts. Such decisions often involve court orders that direct the state to take specific action, potentially blurring the line between judicial rulings and policy making. The TAC case[28] offers an example of a judicial ruling that not only declared the state's conduct insufficient to meet its

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25 Constitution of the Republic of South Africa, Act No. 108 of 1996.

26 Roger Phillips, "South Africa's Right to Health Care: International and Constitutional Duties in Relation to the HIV/AIDS Epidemic," in 11 *Hum. Rts. Br.* 9, Winter 2004, at 10.

27 Ibid, p. 11.

28 *Minister of Health and Others v Treatment Action Campaign and Others*, CCT 8/02, 5 July 2002.

obligations under the Constitution, but used a structured judgment to announce the steps necessary to fulfill the rights as defined by the Court.[29] Critics claim that such judicial orders undermine the separation of powers by placing judges in legislative roles. The Constitutional Court of South Africa does not shy away from these criticisms as it strives to enforce the Constitution.

Budgetary Obstacles to the Realization of Health Rights

The progressive realization of rights has enflamed debate in many developing countries that lack sufficient resources to meet the needs of vulnerable populations. Section 27 (2) of the Constitution which provides that the state provide for the health of South Africans "within its available resources" is a clear acknowledgment of the pressing economic reality confronting the nation. It gives the government time to implement programs and locate funding while avoiding hastily established programs that only superficially meet obligations. Unfortunately, section 27(2) is used as a loophole for ministries to escape their legal duties. However, the South African Constitution contains tools which may minimize the loophole defense. The Constitution guarantees *access* to services. Thus, it does not suggest that the government provide services to those who can access the system on their own. Rather, the state is obliged to provide services only to those who would not otherwise have access. This may ease critics' fears that the rights set forth in the Constitution will become rights on demand that will drain the nation's resources. Rights of access account for relative need and capacity of the individual while recognizing that legal access is not true access for the poorest populations. Given that there are limited resources and changing local needs, Constitutional rights are broadly defined to allow room for legislatures to create policies in response to the needs of the people rather than the letter of the law. The provision 'within available resources' forces courts to take budgetary concerns seriously.

The minimum core model, developed by United Nations Committee on Economic and Social and Cultural Rights (CESCR), requires states to provide a minimum level of services to fulfill a set of rights[30]. If enforced, the result would be that the state would be providing services for all its citizens regardless of economic circumstances. The Constitutional Court of South Africa rejects minimum core requirements because scarce resources require the distribution of state resources to those who cannot otherwise access the goods or services. It is not practical to give everyone a certain minimum level due to financial constraints. Minimum core theories fail to account for the particular needs of the community at that time, e.g. one issue or region may need certain services more than another.[31] Thus, rather than an absolute right, the South African Constitution provides for the right to access, thereby freeing the state from the burden of providing for those who can already provide for themselves.[32]

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29 Gerhard Eramus, "Socio-Economic Rights and Their Implementation: The Impact of Domestic and International Instruments," in *32 Int'l J. Legal Info.* 243, Summer 2004, p. 250.

30 See Phillips, op cit, p. 11. The CESCR authors General Comments to clarify articles of the ICESCR in an effort to guide states in defining their obligations according to the ICESCR. The CESCR developed the concept of "minimum core" rights to ensure that essential levels of ICESCR rights, such as access to foodstuffs and primary health care, were prioritized by governments and implemented immediately irrespective of the availability of resources of the country concerned.

31 Paul Nolette, "Lessons Learned from the South African Constitutional Court: Toward a Third Way of Judicial Enforcement of Socio-Economic Rights," in 12 *Mich. St. J. Int'l* L 91, 2003.

32 Ibid.

Judging the Reasonableness of Policies

Given the emphasis on access and the rejection of minimum core services, the fulfillment of health rights hinges on policy-makers' prioritization of needs and services. Conflict often arises when the state envisions a set of priorities that undermine the needs of one or more sectors of the population. The Court must grant the state a considerable margin of discretion to decide how to fulfill its socio-economic obligations. The burden then lies on the state to argue the reasonableness of its decisions:

> A court considering reasonableness will not inquire whether other more desirable or favorable measures could have been adopted, or whether public money could have been better spent. The question would be whether measures that have been adopted are reasonable. It is necessary to recognize that a wide range of possible measures could be adopted by the state to meet its obligations... Once it is shown that the measures do so, this requirement is met.[33]

When the court decides that a policy is unreasonable, it makes itself vulnerable to critics who fear that the judiciary is encroaching on the powers of the legislature. These critics argue that the Court, by ruling against the state, fails to show deference to the legislature's decisions of how best to fulfill its duties within the available resources.

These debates arise in the following two case studies. In the first case, *Soobramoney v. Minister of Health*[34], deals with the issue of emergency medical treatment, and rules in favor of the state. The second case, *TAC*, confronts the issue of access to pharmaceuticals, and rules against the state's HIV/AIDS treatment policies.

Thiagraj Soobramoney v. Minister of Health (Kwazulu-Natal): Emergency Medical Treatment

In *Soobramoney v Minister of Health*, the petitioner, Mr. Soobramoney, was a diabetic with ischemic heart disease and cerebro-vascular disease who suffered a stroke in 1996. The stroke resulted in kidney failure. At the time of the case, he was suffering from the final stages of chronic renal failure. He was receiving dialysis at a private hospital, but his finances had been depleted and he could no longer afford the costs. Although his life could be prolonged by regular dialysis, he was denied treatment at Addington State Hospital in Durban. The hospital was equipped with only 20 dialysis machines, and it takes a total of six hours for one patient to receive treatment on a machine. Budgetary constraints have resulted in a shortage of dialysis machines. Accordingly, the hospital has a system established to select the patients who should receive treatment. The prioritization system follows two prongs: (i) the patient must be in acute renal failure and the condition must be treatable or remedied by dialysis; and (ii) a certain number chronic renal failure patients are selected for dialysis only if they are eligible for a kidney transplant. In the second group cases, patients will receive dialysis only while waiting for the transplant. As such, people like Mr. Soobramoney, who suffer from vascular or cardiac disease, are not eligible

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[33] Eramus, op cit, p. 248-9.

[34] 27 November 1997, CCT 32/97 at 8-9

for a transplant. Thus, he was not selected for treatment at Addington. Mr. Soobramoney claims that the state violated the constitutional guarantee of emergency medical treatment by failing to provide him with dialysis.

The petitioner's arguments relied upon on Section 27(3) of the Constitution which states that "no one may be refused emergency medical treatment" and Section 11 which guarantees the right to life. The right to life was used to bolster the petitioner's interpretation of emergency medical treatment to include all life-saving interventions.

The Court reviewed the relevant clauses of the Constitution in the context in which they were written. It acknowledged that the authors of the Constitution envisioned a state that would heal the divisions of the past and improve the quality of life of all people by providing access to the fundamentals of adequate living such as housing, health care and food.[35] The Court cited the *Paschim Banga* case from India which defined a welfare state's primary duty as the duty to secure the welfare of its people by providing adequate medical facilities and timely medical treatment sufficient to preserve human life.[36] The court distinguished the *Paschim Banga* case from *Soobramoney* by recalling the facts of both cases. The two petitioners needed life-saving interventions but, unlike the injured man in *Paschim*, Soobramoney's ailments required constant treatment. The Court ruled that section 27(3) did not apply because Soobramoney required ongoing as opposed to emergency treatment. Thus, the case must be governed by 27(1) and 27(2) which are qualified by the available resources.

The judgment of the Court stated that it was not possible to have an unqualified obligation to meet these needs given the current lack of resources.[37] It suggested that if the petitioner's interpretation of emergency treatment in section 27(3) were accepted, it would undermine the state's capacity to fulfill provisions 27(1) and 27(2) which guarantee access for everyone. The Court also stated that: "It would also have the consequence of prioritizing the treatment of terminal illnesses over the other forms of medical care and would reduce the resources available to the state for purposes such as preventative health care and medical treatment for persons suffering from illnesses or bodily infirmities which are not life-threatening."[38]

The system of prioritization was upheld as reasonable because it was geared towards curing patients rather than "maintaining them in a chronically ill condition."[39] The opinion highlighted the fact that the hospital was already stretching its limits by accommodating 85 patients on machines only intended to handle 60 patients.[40] The judgement referred to an English decision which cautioned courts against ordering resources to be used for a particular patient because such orders will have the consequences of taking resources away from other patients.[41] The opinion illuminated the harsh reality that while a wealthy man could afford to prolong his life, this must be balanced by the need to focus on the good of the larger society over the needs of a particular individual:[42]

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35 *Thiagraj Soobramoney v. Minister of Health (Kwazulu-Natal)*, 27 November 1997, CCT 32/97 at 8-9.

36 Ibid, at 18.

37 Ibid, at 11.

38 Ibid, at 19.

39 Ibid, at 25.

40 Ibid, at 26.

41 *Re J (a minor)* [1992] 4 All ER 614 (CA) at 625g; *Airedale NHS Trust v Bland* [1993] 1 All ER 821 (CA) at 857b, in *Thiagraj Soobramoney v. Minister of Health (Kwazulu-Natal)*, op cit.

42 *Soobramoney*, op cit, p. 31.

> These cases involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.[43]

The state's failure to provide dialysis for all patients suffering from chronic renal failure is not a violation of any part of Section 27 or Section 11 in the Constitution so long as the standards by which patients are selected are reasonable.

Treatment Action Campaign and Others (TAC) v. Minister of Health and Others: Access to Drugs

The Minister of Health in South Africa developed a national policy in response to the rising problem of HIV/AIDS. One of the programs under this national policy was a pilot programme for the prevention of mother-to-child transmission of HIV/AIDS. The program included HIV counseling and testing of pregnant women, a single dose of the drug Nevirapine (NVP) to mothers during childbirth, and formula for mothers who chose not to breastfeed. The program was implemented in two sites in each province - one rural and one urban. Distribution of the drug NVP beyond the pilot sites was forbidden. The petitioners contend that the exclusion of NVP in the majority of public hospitals and clinics is a violation of constitutional health rights. They argue that on the flip-side of the positive right to access lies the negative which forbids the state from preventing or impairing the right to access.[44]

The petitioners argued that the state was obliged to provide a minimum core of health services. The court rejected this claim. With some irony, the Court referred to the allowance of progressive realization and the clause in Section 27(2) that qualified government action based on available resources. The petitioners responded by a textual analysis showing that health rights, unlike land and environmental rights, articulate the rights and obligations separately. Thus, clearly establishing the right in and of itself, separate from the limited resource qualification, suggests that a minimum core must be fulfilled before the state can argue limited resources. Petitioners claimed that the minimum core was to be enforced immediately while broader coverage of services was to be a gradual process reflective of the nation's resource capacity. Given that it is impossible to grant everyone access to even a core service immediately, the Court rejected the minimum core standard. The Court interpreted the text of the Constitution as linking these two subsections and cited prior case law, including *Soobramoney*, which interpreted these two provisions as interdependent.[45] The judgment suggested that the model may be relevant to reasonableness under the progressive realization clause but not as a self-standing right conferred on everyone.

The Minister of Health responded that it had a plan to treat HIV+ mothers but that it was in the early stages of developing a safe and comprehensive package. Accordingly, the Minister argued that the court should show deference to the

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43 Ibid, p. 29.

44 *Minister of Health and Others v Treatment Action Campaign and Others*, CCT 8/02, 5 July 2002 at 30.

45 Ibid, at 20-21.

executive branch's decisions in regards to the program.[46] The Minister of Health and judicial critics anticipated possible court orders and extending the separation of powers argument to limit judicial decisions to declaratory judgments. The judgment in this case did not show complete deference to the Minister of Health. Rather, the Court attempted to balance the tension between the different arms of the government while upholding the Constitution:

> "Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets."[47]

The Court went on to say that: "this does not mean, however, that courts cannot or should not make orders that have an impact on policy ... In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself."[48]

The task of the judiciary was to discern the reasonableness of the program. If the program's shortcomings were reasonable, then the government would have fulfilled its obligations despite the lack of access. *Soobramoney* was cited as an example of the limits of health rights: the state has an obligation to fulfill positive rights, such as those established in Section 27, but the fulfillment and enforcement of these rights may be subject to the qualifications in Section 27(2).[49]

Given that the drug was being supplied to the respondents free of charge for a period of five years, the petitioners contended that the government could not use budget constraints as a defense.[50] The Minister of Health noted that the other parts of the programme such as counseling, testing and bottle feed are still a cost/limiting factor. The Court found this argument irrelevant to the issue of whether it was reasonable to exclude the use of NVP from all public hospitals.[51] In fact, throughout its judgment, the Court narrowed the issue of reasonableness to the failure to distribute NVP. In regards to the other elements of the comprehensive state package, the Minister of Health clung to the idea of progressive realization, saying that it would take time to implement the package but that pilot sites are steps in that direction.

The Court implied its credulity at the government's slow progress and delay in NVP distribution. In order to decide whether policies were reasonable and who should bear the burden of fulfilling socio-economic rights, the Court considered the complaint in the context of the HIV/AIDS epidemic – in particular the social, economic, and historical context.[52] There are several underlying facts that may have influenced the

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46 Ibid, at 16.
47 Ibid, at 26.
48 Ibid, at 55-6.
49 Ibid, at 17.
50 Ibid, at 31.
51 Ibid, at. 32.
52 Nolette, op cit.

Court's decision.[53] At the time of trial, South Africa had more people living with HIV/AIDS than any other nation. One in nine South Africans were believed to be HIV+ and between 70,000 and 100,000 babies were being born HIV-positive every year.[54] Yet the government was slow to act, in part because President Mbeki questioned basic presumptions about HIV. For example, Mbeki challenged the scientific community's premise that HIV caused AIDS. Even before this case, there was growing international criticism of the South African government's policies towards HIV/AIDS.[55] The Court appeared distressed by the current situation. Although the judgment acknowledged that resources throughout the health system are overextended, it emphasized that HIV/AIDS was the greatest threat to public health in South Africa and speed was of the essence.[56]

The government gave four responses: (i) it questioned the efficacy of distributing NVP in hospitals where the comprehensive package was unavailable; (ii) it expressed concern that possible development of resistance to NVP would decrease its efficacy in the long-term; (iii) it raised the fear that NVP was unsafe; and, (iv) it reiterated the impossibility of implementing the full package at all public health centers due to a lack of human and financial resources and the cultural objections to bottle feeding.[57]

Data showed that NVP did significantly reduce the risk of transmission at birth. The question of reducing transmission through breastfeeding by providing substitute bottle feed is a separate challenge which is not directly at issue in this case. The question of resistance is only a possible concern for the future and not relevant at present. The current medical consensus, including approval by the South African Medicines Control Council and an endorsement by the World Health Organization, validates NVP as a safe drug when given to the mother at the time of birth.[58] Furthermore, since the test sites account for about 10% of the births in South Africa, it does not appear that the government would risk endangering thousands of babies if it believed the drug was not safe. Rather, the government suggests that the use of the pilot sites is to train staff and study the operational problems of the programme. Finally, the capacity of the state to provide everyone access to the comprehensive program is irrelevant to the distribution of NVP itself.

The government's goals of monitoring the efficacy of the full package and of avoiding the use of dangerous drugs were valid from a public health standpoint. However, the court did not see how the distribution of NVP beyond the test sites would undermine these goals. The court distinguished between "the evaluation of programmes for reducing mother-to-child transmission and the need to provide access

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53 *Reuters NewMedia,* Wednesday, December 19, 2001. http://www.aegis.com/news/re/2001/RE011229.html

54 Ibid.

55 Ibid.

56 *Minister of Health and Others v Treatment Action Campaign and Others*, op cit.

57 Ibid, at. 32-34.

58 See Phillips, op cit, at 11. A joint US/Ugandan study showed an 80-90% reduction of mother-to-child infection if a single dose of Nevirapine is administered to the mother before childbirth, and it has not been shown to cause serious side effects.

to health care services required by those who do not have access to the sites."[59] The court found it unreasonable for NVP to be withheld until the ideal program is created and the necessary financial resources and infrastructure are in place to implement it:[60]

> "Where counseling and testing facilities exist, the administration of NVP is well within the available resources of the state and, in such circumstances, the provision of a single dose of NVP to mother and child where medically indicated is a simple, cheap and potentially life-saving medical intervention."[61]

The judgment ordered the government to remove restrictions that prevent access to NVP at public hospitals and clinics that are not at one of the pilot sites; permit and facilitate the use of NVP; make provisions for training the counselors at non-pilot sites; take reasonable measures to extend the testing and counseling facilities at all public hospitals and clinics.

There has been public criticism of this court order. Critics were resolute that setting of priorities should be done by the legislature not the judiciary. Two amicus briefs in the TAC case made this argument but were rejected by the court. The debate raised two defenses of the order: (i) First, the government had already limited distribution, and therefore the court order was simply increasing the scale of an established program rather than inventing new policy, and (ii) the order did not preclude the government from using its discretion on how best to fulfill the judgment.

The judgment in TAC was not the first order to impact policy and budgets. Declaratory judgments can impact policy decisions and budgets, and governments are bound to follow court orders and find the resources to fulfill them. The judgment bolstered support for its order by citing case law in foreign nations, i.e. Canada, Germany, India, and the United States, where courts issued orders beyond declaratory judgments.[62] Yet the most compelling statement regarding the substance of the court order came from another South African judgment, *Fose v Minister of Safety and Security*[63], where the Court found that:

> "Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus, or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies... Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those

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59 *Minister of Health and Others v Treatment Action Campaign and Others*, op cit, p. 40.

60 Ibid, p. 41.

61 Ibid, p. 43.

62 See *Brown v. Board of Education of Topeka et al* 347 US 483 (1954) and *Brown v. Board of Education of Topeka et al* 349 US 294 (1955), where the United States Supreme Court ordered a structural injunction which infused courts with a supervisory power over public school system restructuring policies in order to end school segregation; *M.C. Mehta v. State of Tamil Nadu and Others* [1996] 6 SCC 756, where the Supreme Court of India granted mandatory and structural injunctions regarding child labour; *Second Abortion Case*, BVerfGE 88, 208 where the German courts held several provisions of the criminal code unconstitutional and replaced them with interim law pending new legislation; and *Marchand v Simcoa County Board of Education et al* (1986) 29 DLR (4th) 596, where a Canadian court orders injunctive relief against a state organ.

63 1997 (3)SA 786 (CC).

> occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to forge new tools and shape innovative remedies, if needs be, to achieve this goal."[64]

The Sunday Times reported that the Director-General of Health, lamented that the Court's order in TAC amounted to the prioritization of one treatment at the expense of all others, which is bound to have a negative impact on the functioning of national and provincial departments of health.[65] Yet most public health advocates and the international community see the TAC judgment as a beacon of hope in the fight against HIV/AIDS and the struggle for access to affordable pharmaceuticals.

The pressure placed on the executive to increase health services to HIV/AIDS patients, especially the Court's decision in TAC to compel nationwide distribution of NVP, has led to a series of policy changes. President Mbeki's cabinet assigned a committee to investigate treatment options for HIV/AIDS, and; in November 2003 Finance Minister Trevor Manuel announced a new budget for HIV/AIDS programs, particularly for the purchase of antiretroviral medicines. These new policies are based on the premise that HIV causes AIDS.[66] "The antiretroviral distribution promises to treat at least 1.2 million persons living with AIDS by 2005 by allocating progressively increasing funds (a lower estimate of 200,000 people is given by TAC)."[67] This marks a step beyond the former government programs which focused only on the dissemination of prevention messages.

A new and controversial National Health Bill was approved by the South African Parliament in November 2003.[68] The Bill proposed to create national and provincial boards to address equity issues by tackling the problem of disparate distribution of resources. It would mandate free health care for all those who are not covered under the current health system. While the Minister of Health would have the discretion to define primary health care, the assumption underlying the Bill's provisions is that any primary health care system established via this Bill would provide for basic health needs and target the socio-economic causes of poor health. The most prevalent criticism of the Bill revolves around provisions that seek to expand access to health services in rural areas. It is argued that executive decisions to shift resources, including human resources, to rural areas that cannot afford to finance adequate health services will interfere with market forces.[69] However, this contention falls flat when scrutinized under the state's obligation to provide everyone with access to health services.

The political environment in South Africa is more open to action against HIV/AIDS. Activists attribute this mood swing to the public interest litigation to enforce the health rights of people living with HIV/AIDS. In particular, they credit the court's order in TAC with issuing a new era of empowerment. It marks a significant step in the enforcement of health rights in South Africa.

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64 *Minister of Health and Others v. Treatment Action Campaign and Others*, op cit ,at 58.

65 Carmel Rickard, "State fears flurry of drugs claims after ruling," in *Sunday Times*, Sunday 13 Jan 2002.

66 Phillips, op cit,at. 12.

67 Ibid.

68 Ibid, at 10.

69 Ibid, at 12.

Venezuela

As a party to the ICESCR, Venezuela is bound to fulfill the obligations set out in Article 12. Unlike many states, Venezuelan law allows citizens to invoke international treaty obligations directly in state courts without intervening national legislation.[70] "The Venezuelan Constitution incorporates international legal norms directly into the national legal system, thus producing a seamless legal commitment to the right to health for purposes of the *Bermudez* case." The right to health is also established separately in the Venezuelan Constitution in Article 76. The partnership between international and domestic constitutional law has strongly shaped the litigation of health rights in Venezuela.

Acción Ciudadana Contra el SIDA (ACCSI), an organization addressing issues of HIV/AIDS and human rights in Venezuela, filed several high profile petitions in the late 1990s against the Ministry of Health on behalf of people living with HIV/AIDS. They said that the state's failure to ensure health care represented violations of "the rights to life, health, personal liberty and security and nondiscrimination, and of the right to benefit from science and technology, all stemming from the systematic failure to provide the persons bringing the action with health care."[71] Some of the grounds articulated were that the distribution of essential drugs is one of the obligations of the state in relation to the right to health. Access to antiviral treatment is of vital importance, as is the supply of medicines to combat opportunistic diseases. The right to life is a fundamental right, linked to the right to health. The lack of access to treatment violates the right to benefit from scientific progress. Social assistance programs, consistent with the Constitution, should cover those who are outside the social security system.

The judgment of the CSJ affirmed the right to health based on positive obligations of the state beyond prevention and assistance. The opinion emphasized that treatment, utilizing available scientific advancements, must be continued until a cure is found. The CSJ ordered the Ministry of Health "to provide drugs on a regular and periodic basis, to perform or cover the costs of the specialized exams, to supply drugs to treat the opportunistic diseases, and to develop a policy of providing information, treatment, and comprehensive medical care."[72] Several committees, comprised of persons who filed the writ petition, were formed to track the state's compliance with the CSJ's order. Using political pressure, these committees have been instrumental in securing swift implementation.

One of these petitions was argued in front of the Supreme Court of Venezuela and resulted in the landmark decision of *Cruz Bermudez, et al v Ministerio de Sanidad y Asistencia Social.*[73] In *Bermudez* the petitioners argued that the Venezuelan government's failure to provide them with ARV therapies[74] was a violation of their rights to life, health, and access to scientific advances as established under

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70 Mary Ann Torres, "The Human Right to Health, National Courts, and Access to HIV/AIDS Treatment: a Case Study from Venezuela," in *3 Chi. J. Int'l L. 10*, Spring 2002, at 109.

71 International Human Rights Internship Program and Asian Forum for Human Rights and Development, "The Right to Health," from *Circle of Rights: Economic, Social and Cultural Rights Activism: A Training Resource,* at. 111.

72 Ibid.

73 *Cruz Bermudez, et al v Ministerio de Sanidad y Asistencia Social*, (July 17, 1999). available online at http://www.csj.gov.ve/sentencias/SPA/spa15071999-15789.html.

74 Antiretroviral therapies

Venezuelan law. Medical evidence was presented that ARV therapies would prolong the plaintiffs' lives.

The Ministry of Health raised an economic defense. The government lacked the capacity to provide ARV therapy for all Venezuelan persons living with HIV/AIDS. However, the Ministry claimed to fulfill the progressive realization of rights as articulated in the ICESCR, evidenced by the state's HIV/AIDS prevention programs, i.e. "distributing informational booklets and condoms and implementing a "safe sex" initiative."[75] The current state of health in developing countries bolsters this argument so far as the vicious cycle of poverty simultaneously exposes vulnerable populations to ill health and undermines the ability of developing nations to meets the health needs of its people.

The Venezuelan Supreme Court based its opinion on the right to health found in both constitutional law and international treaties. The Court held that the right to health, rooted in Article 76 of the Venezuelan Constitution and international human rights instruments, was violated by the state's failure to provide ARV. The Court noted the economic crisis in Venezuela at the time of judgment and the state's financial incapacity, succinctly stating, "Everything is reduced to a budgetary problem."[76] However, the Court also noted the government's failure to utilize all of its financing mechanisms which could have provided additional funds for health services.

The Court underlined that its ruling applied to not only the plaintiffs in this case but to all persons living with HIV/AIDS in Venezuela. The Ministry of Health was ordered to, among other things, (i) request immediately funds from the President to implement prevention and control programs for the remaining fiscal year; (ii) request an increase in budgetary allocations from the President for future needs and (iii) provide the appropriate medicines, including ARV, to all Venezuelans living with HIV/AIDS.[77]

Invoking the progressive realization qualification as a defense for lack of services has served as a loophole in some countries where lack of resources is a reality. "This dynamic has eroded the duty to fulfill the right to health--to adopt appropriate legislative, administrative, budgetary, judicial, promotional, and other measures towards its full realization--because progressive realization rendered the right to health relative to a country's level of economic development and a government's willingness to spend resources on health."[78] The *Bermudez* decision is significant because the Ministry of Health's poverty defense was ultimately rejected. Unfortunately, the decision was more symbolic than effective. The government largely ignored the court's order. Public interest litigation spearheaded by NGOs is an important step forward in the battle to enforce health rights. Yet without government support and the sustained commitment of policy makers, even court orders lack force.[79]

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75 Torres, op cit, p. 110.
76 Ibid, at. 112.
77 Ibid.
78 Ibid, at. 113.
79 Ibid,at. 114.

Conclusion

While international standards have shaped many constitutional health rights, it is largely the national constitutions that give Courts the power to enforce state obligations. Yet the resource gap remains a formidable foe. Given the lack of resources in developing countries, governments have enjoyed some success when employing the progressive realization provisions as a defense. There are signs from the cases cited above that the tide is turning against state programs that fail to provide services for critical health problems. Public pressure from within the local community and from the international community is influential in setting priorities against which courts measure government health policies. Perhaps the lesson to be learned from these decisions is that silence may be the biggest health threat.

Attribution of State Responsibility: The Indo – Pakistan Conflict

Tamanna Salikuddin

Kashmir is oft likened to a jewel nestled amongst the world's highest mountains. Its beauty has inspired poets, sages, and travelers. Three Himalayan ranges, Karakoram, Zanskar and Pir Panjal, snow-capped, majestic, frame the landscape from northwest to northeast.[1] They are the source of great rivers which flow down into the valleys below, covered with wild flowers and glistening lakes. It is this piece of land which has been the source of conflict between India and Pakistan since their independence from Great Britain and partition in 1947. Both India and Pakistan claim Kashmir, and have been embattled over its status since the time of independence.

India and Pakistan have fought three wars over Kashmir, ending with Pakistan in effective control of the western half of the state and India in control of the eastern half.[2] Additionally, a small part is controlled by China. Since 1989, violent insurgency has been on the rise in Kashmir. India claims that since 1989, Pakistan has aided and controlled an insurgency movement to overthrow the Indian government in Kashmir. Pakistan responds by denying any responsibility for acts of terrorism by Kashmiri separatists. Additionally, Pakistan claims that it has sought to repress any terrorism which may emanate from within its borders.

India attributes the insurgency and other acts of terrorism to Pakistan, and thus sees Pakistan as being in violation of international law. The issue of attribution of violence by non-state actors to the government of Pakistan is at the centre of India's claim. In the situation of non-state actors committing violent acts, the attribution of these acts to a state can only be found if the standard of attribution for state responsibility is met. Once the standard is clarified from international law, the facts on the ground may be assessed in light of this standard. If indeed Pakistan's actions reach the level of the standard, the government can be held responsible for the actions of the non-state actors.

Brief History

Jammu and Kashmir, the official name of the state, is a historically princely state located at the northern border between India, Pakistan, and China. The state is made up of five districts: Ladakh and Baltistan which are predominantly Buddhist; Jammu which is predominantly Hindu; and Kashmir Valley and Gilgit which are primarily Muslim and form the majority in the state.[3] Most of the dispute is over the region of the Kashmir Valley which has long been the heart of the state.

Kashmir's status has been in dispute since the British ended their colonial rule over India in 1947 and partitioned the empire, thus creating the independent states of

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1 India Travelogue (http://www.indiatravelogue.com/dest/jklad/kashgeog.html)

2 Ali Khan, 'The Kashmir Dispute: A Plan for Regional Cooperation', 31 *Colum. J. Transnat'l L.* 495, 497 (1994).

3 Ibid. at 496.

Pakistan and India. British India proper consisted of 11 provinces and various tribal areas, over which the control was more direct.[4] These provinces were allocated to India or Pakistan based on location and population. However, the princely states were in constitutional theory quite separate from British India; their allegiance was directly to the British Crown.[5] The British plan for withdrawal did not settle the political future of the more than 500 semi-independent princely states, such as Jammu and Kashmir. From a legal standpoint, these princely states had several options: they could accede to either India or Pakistan, or they could become independent nation-states. Due to their geographic location and cultural and religious background, many states had no real choice but to join either India or Pakistan. Most did so without problems. Three princely states, Hyderabad, Junagadh, and Jammu and Kashmir, did not choose to join either country as the deadline of partition and independence approached.[6] These states were dealt with in three very different ways. In Western India, Junagadh was a small state with 80% Hindu population, and a Muslim ruler who wished to join Pakistan. New Delhi held a plebiscite in Junagadh, where the populace voted to join India. Pakistan promoted the right of the ruler to decide accession, whereas India supported the right of the population to decide.[7] In the Deccan, Hyderabad was a state with a Muslim ruler and a Hindu majority population. The Nawab of Hyderabad did not want to join India or Pakistan, rather he wished to establish an independent state. Indian army forces were sent into Hyderabad and eventually the Nawab was made to join India.[8]

This left Jammu and Kashmir as the only princely state which had yet to make a decision. Jammu and Kashmir was quite a large state with over 80,000 square miles in area and over 4,000,000 people.[9] Additionally, this was a state which was geographically situated such that it had a realistic chance to join many different nations. It bordered not only on India and Pakistan, but also on Tibet, China, and Afghanistan. The state's population was more than three-quarter Muslim, however, the King, Maharaja Sir Hari Singh, was Hindu. However, the Maharaja was reluctant to accede to either Pakistan or India, fearing loss of political power.[10] As result of a revolt in the Poonch region and unrest in the area, Pathan tribesmen entered Kashmir in order to provide military support to revolutionaries.[11] On October 22, 1947, when armed tribesmen from northwest Pakistan entered Kashmir, the Maharaja, fearing the fall of Srinagar, requested help from Lord Mountbatten, the Governor-General of India. In order to receive help, Mountbatten required a document of accession.[12] The maharaja signed the document and the Indian army came to repel the tribesmen. The maharaja considered his signing of the accession treaty as a temporary legal mechanism that allowed India to repel the warriors, Mountbatten had referred to the special circumstances and added that once things returned to normal, the question of accession would be settled by the people.[13] As a result of this incident, Jammu and

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4 Alastair Lamb, *Kashmir: A Disputed Legacy, 1846-1990* 4 (Roxford Books 1991).
5 Ibid.
6 Ibid.
7 Khan, *The Kashmir Dispute*, *supra* note 2, at 507-508.
8 Ibid.
9 Lamb, *Kashmir: A Disputed Legacy*, *supra* note 4, at 6-7.
10 Brian Farrell, 'The Role of International Law in the Kashmir Conflict', *21 Penn St. Int'l L.* Rev. 293, at 297 (2003).
11 Ibid.at 298.
12 Ibid.
13 Ibid.

Kashmir became part of India. In direct contradiction to the positions taken regarding accession for Junagadh, both India and Pakistan changed their perspectives. India now supported the right of the ruler to choose to which state to accede; while now Pakistan called for a referendum of the populace. Thus began the complex conflict between India and Pakistan over the status of Jammu and Kashmir.

Since the beginning of the dispute, both India and Pakistan have involved the United Nations, and within months of partition, the issue was being considered by the Security Council.[14] Neither India nor Pakistan have adopted a consistent approach to self-determination. Instead, both countries stress the legal principles which promote their interests at that particular time. India argues that Jammu and Kashmir are historically and culturally part of an ancient India. Pakistan stresses the fact that the majority of the populace is Muslim as reason to allow them to vote to join Pakistan. However, neither nation allows for the right of Jammu and Kashmir to opt for independence. Kashmir plays a large role in the national identity of both nations and thus the issue is very emotional to the people of both countries.

Shortly after Independence, India and Pakistan entered into the first war over Kashmir.[15] In 1948, the UN created the United Nations Commission for India and Pakistan (UNCIP) to end the conflict.[16] In 1949, the UNCIP finally negotiated a ceasefire which resulted in the de-facto division of Kashmir. Each country and its military force occupies a significant portion of Jammu and Kashmir with an 870 mile 'line of control' separating the two. Between the 1949 and 1989, there were two additional wars between the countries and various attempts at peace. In 1972, Pakistan and India signed the Simla Accord, which still governs the peace in Kashmir, in which the parties agreed to settle the dispute over Kashmir through mutual consultation.[17] In 1989, a significant increase in separatist insurgency began in Jammu and Kashmir. The number of separatists fighting India's security forces has increased to thousands. According to figures provided by the Indian military, there are about 125,000 paramilitary troops and militants in the Kashmir Valley and surrounding areas.[18] The separatist groups wielding the most power have changed over the years. Currently, three main groups, Hisbul Mujahideen, Lashkar-e-Tayba, and Harkat-ul-Mujahideen, are leading the separatist activities in Kashmir.[19] India claims that these groups are controlled and supplied by Pakistan, and thus Pakistan should be held responsible for their actions. However, the groups will not give details as to who they are fighting for, other than to assert that their goal is to remove India from Kashmir.[20] Pakistan claims that the actions are attributable to Kashmiri separatists from within India. Additionally, Pakistan claims that it only gives political and moral support, emphasizing that its government is trying hard to stop any cross-border terrorism. It is clear from the facts that there is a large amount of separatist activity and violence. However, whether this violence can be attributed to Pakistan and whether they can be held legally responsible are important questions for international law.

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14 Lamb, *Kashmir: A Disputed Legacy, supra* note 4, at 164.

15 Karen Heymann, 'Earned Sovereignty for Kashmir: The Legal Methodology to Avoiding a Nuclear Holocaust', 19 Am. *U. Int'l L. Rev.* 153, 161 (2003).

16 Ibid.

17 Ibid.

18 'Who are the Kashmir Militants?', BBC News February 19, 2003, www.news.bbc.co.uk/1/hi/world/south_asia/1719612.stm (last visited May 4, 2004).

19 Ibid.

20 Ibid.

international law does not have any set rules of evidence; thus there is no clear evidentiary point at which the action of non-state actors can be attributed to a state. However, the International Court of Justice (ICJ) has mentioned *various evidentiary* standards in different cases.[21] In *Corfu Channel (UK v Albania),* the ICJ considered the international responsibility for explosion of mines in territorial waters where mines were laid by unknown persons.[22] The Court considered how much evidence was necessary and said: "proof may be drawn from inferences of fact, provided that they leave no room for reasonable doubt."[23] Thus, the court allowed the use of indirect evidence and concordant inferences of fact, however it required that these inferences leave no room for doubt. Additionally, several international tribunals have pointed to the need for 'clear' and 'convincing' evidence in such cases. In cases such as these, where a state's official actors, such as its army, carry out violence against another state, the question of attribution is fairly straightforward. Whenever a state uses force against another it is responsible for any legal ramifications of these actions. However, in today's world where many acts of violence are carried out by non-state actors, the question of attribution is murkier. States may be involved to varying degrees - from planning, or funding, or issuing direct orders to non-state actors. The standard of attribution reveals the level of participation by a state, which is necessary for the state to be held responsible for the violence.

The Nicaragua Test: Control Standard

Arguably, the most important international law case related to attribution is that of *Nicaragua v. United States.*[24] In this case, Nicaragua brought the US to the ICJ with charges of violating its sovereignty with armed attacks.[25] Nicaragua claimed that the US was responsible for the actions of the Contras and other paramilitary groups acting on Nicaraguan soil, due to the US's role in recruiting, training, arming, equipping, financing, and otherwise supporting the actions of the militants.[26] The ICJ did not find the US to be responsible for the actions of the Contras, and further stated: "despite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the contras as acting on its behalf."[27] Further, the court discussed the actions of the US and clarified what would be necessary for control: "All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts..."[28] The Court required that in order to find legal responsibility, the US would have to exert effective control over the paramilitary forces: "For this conduct to give rise to legal responsibility of the United

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21 Mary Ellen O'Connell, 'Lawful Self-Defense to Terrorism', 63 *Univ. of Pittsburgh L. Rev.* 4, 896 (2002).

22 *Corfu Channel (U.K. v. Albania),* 1949 I.C.J. 4, 4-6 (Apr. 9) [hereinafter *Corfu Channel*].

23 Ibid. at 27.

24 *Military and Paramilitary Activities (Nicaragua v. U.S.),* 1986 I.C.J. 14, (June 27) [hereinafter *Nicaragua*]

25 Ibid. at 18.

26 Ibid.

27 Ibid. at 109 (emphasis added).

28 Ibid. at 496.

States, it would in principle have to be proved that the State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed."[29] From this case evolved the standard of requisite control. In order to establish state responsibility, it would need to be shown by 'clear evidence' that the state controlled the actors.[30] This standard of control has continued to be the test articulated by many scholars. Additionally, many have argued the public policy factors inherent in the test would limit the abuse of self-defense as a means to attack other nations. Regarding responses to recent terror attacks, Lobel writes that *Nicaragua* supports a standard of 'stringent' evidence:

> "Given the potential for abuse of the right of national self-defense, international law must require that a nation meet a *clear and stringent evidentiary standard* designed to assure the world community that an ongoing terrorist attack is in fact occurring before the attacked nation responds with force. Such a principle is the clear import of the International Court of Justice's decision in *Nicaragua v. United States.*"[31]

From *Nicaragua*, a clear control standard emerges, such that the test would be: "Whether or not the relationship was so much one of dependency on one side and control on the other that it would be right to equate the [rebels], for legal purposes, with an organ of the [Pakistani] Government, or as acting on behalf that government."[32]

The Tadic Test: Coordination Standard

A recent international case in the International Criminal Tribunal for the Former Yugoslavia (ICTY) has rekindled the attribution question. Originally, the Tribunal posited a coordination standard, where a nation was attributable if it has a "role in organizing, coordinating, or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group."[33] In the Appeals Chamber, the Tribunal has further elucidated the test for attribution. In *Prosecutor v. Tadic*[34], the ICTY considered the legal criteria necessary for establishing when, in an internal armed conflict, armed forces may be regarded as acting on behalf of a foreign power. The *Tadic* court considered this question not in the arena of attribution, but rather in determining whether a conflict is internal or international. In discussing the notion of control set forth by the ICJ in *Nicaragua,* the ICTY did not expressly overrule the *Nicaragua* test, however, they further expanded and clarified the test[35]. A standard which has been referred to as one of coordination emerges from the decision in *Tadic.*

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29 Ibid.

30 O'Connell, 'Lawful Self-Defense to Terrorism', *supra* note 21, at 896.

31 Ibid. at 898 (citing Jules Lobel, 'The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan', *24 Yale J. Int'l L.* 537, 547 (1999)).

32 *Nicaragua, supra* note 24, at 590.

33 *Prosecutor v. Tadic, Opinion and Judgment,* No. IT-94-1-T, ¶ 137 (May 7, 1997).

34 *Prosecutor v. Tadic, Appeals Chamber Judgment,* 38 I.L.M. 1518, 1536 (July 15, 1999).

35 Ibid. at ¶¶ 99-101.

The court distinguished the circumstances in which the *Nicaragua* and *Tadic* cases emerged: "As is apparent, and was rightly stressed... the issue brought before the International Court of Justice (in *Nicaragua*) revolved around State responsibility; what was at stake was not the criminal culpability of the contras... but rather the question of whether or not the contras had acted as de facto organs of the United States on its request, thus generating international responsibility of that State."[36] However, the court went on to state that the difference in the two types of responsibilities, state responsibility and individual criminal culpability, should not make a difference in the determination, and that logically both types of responsibility should carry the same type of test, one of attribution.[37]

Rather than seeking to overrule the *Nicaragua* standard, in *Tadic* the ICTY sought to expand the standard to make it more flexible and case-sensitive. The ICTY found the control standard to be too rigid and formalistic: "the whole body of international law on State responsibility is based on a realistic concept of accountability, which disregards legal formalities and aims at ensuring that States entrusting some functions to individuals or groups of individuals must answer for their actions."[38] The ICTY described different ways to analyze attribution depending on the specific circumstances, and rejected the theory that in every situation the same bright-line rule should be applied: "The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The degree of control may, however, vary according to the factual circumstances of each case."[39]

Finally, the ICTY set forth a multi-prong test to determine whether a State has responsibility for the actions of non-state actors. In this case-sensitive test, "the extent of the requisite State control varies."[40] The first question in the multi-prong test is what type of actors are responsible for carrying out the actions. If the actors are a single private individual or a group that is not militarily organized but that has acted as a de facto state organ, the test becomes: "Whether specific instructions concerning the commission of that particular act had been issued by that State to the individual or group, alternatively it must be established that the unlawful act was publicly endorsed or approved ex post facto by the State in question."[41] However, if the actors in question are subordinate armed forces or militias or paramilitary forces, the test changes : "control by a State over subordinate armed forces or militias or paramilitary units may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training). This requirement, however, does not go so far as to include the issuing of specific orders by the State."[42]

The court continues in defining special circumstances which may alter the standard; such as where the violence occurs. The ICTY also described circumstances that would alter the standard for determining where state control exists.

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36 Ibid. at ¶ 101.
37 Ibid. at ¶ 104.
38 Ibid. at ¶ 121.
39 Ibid. at ¶ 119.
40 Ibid. at ¶ 137.
41 Ibid.
42 Ibid.

> "...if, as in Nicaragua, the controlling State is not the territorial State where armed clashes occur or where at any rate the armed units perform their acts, more extensive and compelling evidence is required to show that the State is genuinely in control of the units or groups not merely by financing or equipping them, but also by generally directing or helping plan their actions."[43]

However, the ICTY further qualified the standard with the following: "Where the controlling State in question is an adjacent state with territorial ambitions on the State where the conflict is taking place, and the controlling State is attempting to achieve its territorial enlargement through the armed forces which it controls, it may be easier to establish the threshold."[44] Accordingly, the appropriate test of state control applicable in Kashmir would be the following:

> "In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law."[45]

In sum, both *Tadic* and *Nicaragua* work together to elucidate a detailed set of necessary requirements which a form a test for attribution of state responsibility. The test becomes one where control is of overall character and more than mere assistance, but short of direct orders.

Situation in Kashmir

India's Argument

India argues that most of the separatist groups and militant organizations are funded, supplied, and controlled by Pakistan. India's perspective is articulated by its Embassy in Washington, D.C., claiming a pattern of aggression by Pakistan in Kashmir starting in 1947, and escalating since the mid-1980s.[46] India claims that Pakistan's actions are carried out through their armed forces and their intelligence service, the Inter Services Intelligence (ISI).[47] India further claims that Pakistan has, in the past, openly supported the militants, but that, due to tactical interests in the global war on terror, Pakistan has now taken outward actions against the militants. Yet, India claims that it continues to support them through the ISI, which served as the training agency for the Afghan Mujahideen, and India claims that it has used the same training camps and tactics to send militants into Kashmir.

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43 Ibid. at ¶138.
44 Ibid. at ¶ 140.
45 Ibid. at ¶ 131.
46 'A Comprehensive Note on Jammu & Kashmir', Embassy of India, Washington D.C., http://www.indianembassy.org/policy/Kashmir/Kashmir_MEA/paki_1984-1998.html (last visited on May 4, 2004).
47 Ibid.

India has always been a prime focus of the ISI's activities. With regard to Jammu and Kashmir, the ISI has been instrumental in organizing operations of mercenary outfits like the Harkat ul Ansar, declared and subsequently banned, as a terrorist organization by the United States.[48] Jane's Intelligence Review, in its October 1997 issue published an article on the Harkat ul Ansar that detailed the organization's operations and said: "...the complicity of the ISI is more than merely passive. The Harkat ul Ansar owes its considerable arsenal in large measure to the generosity of the Pakistani Government, or more specifically, its intelligence service..."[49] India claims that Pakistan continues to support anti-Indian brainwashing, which has ultimately led to the deaths of thousands in cross-border terrorism. They note that the base locations of all the leading militant groups are in Pakistan and that the leadership of these groups usually reside in Pakistan. In support of its position, India argues that the locations of the attacks in the high mountains and the sophisticated weaponry suggest that these attacks are not being launched by local separatists, but rather by trained and funded paramilitary groups emanating from Pakistan.

Additionally, in many of the attacks, the perpetrators who were captured are Pakistani nationals. For example, in 1995, militants of the Harkat al-Ansar and the Hezb ul Mujahideen led an attack in Charar e Shareef and, the leader of the attack was a Pakistani national, Mast Gul.[50] Also, India claims that most of these groups are fighting not just for Kashmiri freedom, but for accession to Pakistan. India argues that the biased agenda of the militants, points to the complicity of Pakistan. Many of the lead groups have held open meetings and conferences in large Pakistani cities, such as the November 1997 Lashkar e Tayba meeting at its headquarters near Lahore.[51] Moreover, the presence of General Pervez Musharraf is cited by India as a reason for concern. It is widely know that before coming to power, as head of Pakistan's army, Musharraf opposed the Lahore peace process, helped to plan the Kargil war, and made statements prior to his military coup declaring that Kashmir was a cause for Islamic Jihad against India.[52] All of these facts, for India, point to clear responsibility on the part of Pakistan for the militant actions.

Pakistan's Argument

According to the Pakistani government, the insurgency in Kashmir is due to a popular uprising beginning in 1989.[53] Pakistan claims that in 1989, there was a change in Kashmir, and that people disappointed by decades-old indifference of the world community towards their cause and threatened by growing Indian state suppression, rose to start a revolt against India. Pakistan cites the initial Indian response to the uprisings against the imposition of Governor's Rule from 1989-1990 as another factor instigating insurgency for rights and liberation. Kashmir has remained under

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48 Ibid.

49 'Pakistan's Cross-Border Terrorists', *Jane's Intelligence Digest*, October 1997, http://jid.janes.com (last visited on May 4, 2004).

50 'A Comprehensive Note on Jammu & Kashmir', *supra* note 47

51 Ibid.

52 Subhash Kapila, 'India's Invitation to General Musharraf', South Asia Analysis Group, Paper no. 247, May 28, 2001.

53 Pakistan Government Fact Sheet on Kashmir, http://www.pak.gov.pk/public/kashmir/facts-kashmir.htm#2 (last visited on May 4, 2004).

presidential rule, and the elections held in September 1996, were seen as a sham.[54] Subsequently, the situation deteriorated further.

Pakistan cites India's heavy-handedness in crushing the Kashmiri Separatist movement, with draconian laws, massive counter-insurgency operations, and other measures, as further explanation for the insurgency movements within Kashmir. Indian laws which have taken away freedom and liberty from Kashmiris include: *Armed Forces Special Power Act* (1990), *Terrorist and Disruptive Activities Act* (1990), the *Jammu & Kashmir Public Safety Act* (1978, 1990), and the *Jammu & Kashmir Disturbed Areas Act* (1990).[55] Pakistan cites these measures, in combination with severe human rights abuses in Kashmir as the reason why internal militants have been acting against India.

Pakistan claims that it only gives moral and political support to the Kashmiri cause, and that it does not support the militants militarily. Pakistan also notes that the groups that have bases in Pakistan are private organizations and not run by the state. In its defense, Pakistan cites statements made by its own officials and US officials concerning its active stance against terrorism. The US Department of State has been quoted as describing Pakistan as one of the foremost and indispensable allies of the United States in the war against terrorism. Musharraf has made many public comments against terrorism recently, including: "Violence and Terror has been going on for years, we are weary and sick of this Kalishnokov Culture".[56] The Pakistani government points to the crackdown against militants in recent years. The government has banned the five major militant organizations which India claims are responsible for attacks. It requires all religious schools be registered and all mosques are banned from making political statements. Additionally, in 2001, it has arrested large numbers of potential militants. They cite India's obsession with the ISI as unfounded and unproven.[57]

As Pakistan's Foreign Minister stated: "If some people go endangering their lives, and if the Indian Army which is present [in the region] and is also along the Line of Control cannot stop them...then which Alladin's Lamp do we have that we rub and make it all stop".[58] Pakistan is a small and poor country which makes controlling all the terrorists a difficult task. They urge that they are doing their best, fighting terrorism both on the border with Afghanistan and on the Kashmiri border. Pakistan has always vehemently denied supporting cross-border terrorism and always argues that the militants are Kashmiri separatists from within the state.

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54 Ibid.

55 Ibid.

56 'Musharraf Declares War on Extremism', BBC News, January 12, 2002, http://news.bbc.co.uk/1/hi/world/south_asia/1756965.stm (last visited May 4, 2004).

57 Ishtiaq Ahmad, *State, Society and Politics*, Pakistan Government India Watch 1997-98, (available at www.infopak.gov.pk/public/kashmir/india-watch.htm) (last visited on May 4, 2004).

58 Hasan Suroor, 'No Magic Wand to Stop Terrorism: Kasuri', *The Hindu*: India's National Newspaper, June 3, 2003, (available at http://www.hinduonnet.com/thehindu/2003/06/03/stories/2003060304070100.htm) (last visited on May 4, 2004).

India blames Pakistan for fomenting rebellion, as well as supplying arms, training, and fighters. Pakistan, for its part, claims only to provide diplomatic and moral support to what it calls 'freedom fighters' who resist Indian rule. The situation on the ground in Kashmir has been increasingly violent and dangerous. Following the controversial election of 1989, India imposed rule by the central government in 1990, and sent troops to establish order in the state.[59] Many Kashmiris were moved to support newly established militant separatist groups after several incidents in which Indian troops fired on demonstrators. Some groups, such as the Jammu and Kashmir Liberation Front (JKLF), continue to seek an independent or autonomous Kashmir. Other local groups, including the Hizbul Mujahideen (HM), seek union with Pakistan,[60] while other groups based in Pakistan, Jaish-e-Mohammed and Lashkar-e-Tayba, agitate for accession to Pakistan. In 1993, the All Parties Hurriyat (Freedom) Conference was formed as an umbrella organization for groups opposed to Indian rule in Kashmir.[61] The Hurriyat membership includes some 23 political and religious groups including the JKLF and Jamaat-e-Islami, the political wing of the HM. The Hurriyat Conference, which states that it is committed to seeking dialogue with the Indian government on a broad range of issues, seeks a tripartite conference on Kashmir, which would include India, Pakistan, and representatives of the Kashmiri people. Between 1995 and 1998 there were many attempts at elections and re-starting of the political process in Kashmir, although, voter turnout has declined sharply in the last few years.

In 2001 and 2002, a series of violent incidents worsened the region's security climate and brought India and Pakistan to the brink of full-scale war. In October 2001, militants attacked the state assembly building in Srinagar, killing 38 people.[62] In December 2001, 14 people were killed in the attack on the Indian Parliament complex in New Delhi, including 5 of the attackers.[63] The Indian government blamed Pakistan-based militant groups for both attacks and initiated a massive military mobilization that brought hundreds of thousands of Indian troops to the border with Pakistan. In May 2002, in the midst of this armed showdown, militants attacked an Indian army base in the Jammu town of Kaluchak, leaving 34 dead. India accused Pakistan of sponsoring Kashmiri terrorism; Indian leaders spoke of 'pre-emptive' military strikes against separatists' training bases on Pakistani territory.[64] The situation was further aggravated with the assassination of two moderate Kashmiri separatist leaders in late 2002 and early 2003. International pressure including visits from top US diplomats led President Musharraf to publicly announce that no infiltration was taking place at the Line of Control. On receiving assurances from US Secretary of State Powell and others that Pakistan would terminate support for infiltration and dismantle militant training camps, India began the process of reducing tensions with Pakistan.[65]

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59 'Security Issues- India-U.S. Relations and Bilateral Issues', *U.S. State Dept. Reports*, CRS-6, IB93097 07-15-03, (available at http://fpc.state.gov/documents/organization/93097.pdf) (last visited on May 4, 2004).

60 Ibid.

61 Ibid.

62 Ibid.

63 Ibid.

64 Ibid.

65 Ibid.

Recent actions by Pakistan do indeed show that it is cracking down on any terrorism emanating from Pakistan. In June 2001, Pervez Musharraf indicted Islamic clergy and potential jihadists for making inflammatory statements against India. He was lauded for this even in Indian newspapers.[66] He has publicly condemned the terrorists and has stated that Pakistan's policy is to "never allow terrorists to use its territory to conduct terrorist activities," and Pakistan banned the five leading militant organizations: Jaish-e-Mohammed, Lashkar-e-Tayba, Sipah-e-Sahaba, Tehrik-e-Jafria Pakistan, and Tehrik-e-Nifaz-e-Shariat-e-Mohammedi.[67]

Many may criticize recent moves by the Pakistani government as being a response to pressure from the United States and other nations after the tragedies of September 11th, 2001. The bases of various militant organizations and their large weapons supplies have existed at least under tacit approval from the Pakistani government until recently. Sources show that India does not have any hard evidence of Pakistan's direct support for the militant groups. Pakistani officials are careful to emphasize that they only offer moral support to the Kashmiri people and that they are fighting to combat any cross-border terror. Recently, a leader of the separatist Kashmiri group, JKLF, was tried in a special Indian anti-terrorism court. He was found guilty under a very stringent anti-terrorist law, and yet the government was unable to prove in court that he had received any funding from Pakistan.[68] Also, the religious schools which are supposed to be training militants have been shown to be funded by Saudi Arabian and other donors; these schools are being closed down by the Pakistani government.[69]

However, the efforts by Musharraf have been limited. Leaders of militant groups were arrested only to be released or kept under nominal detention.[70] Whether his actions were due to the weakness of his government or because, despite his pledges, he wishes to maintain an active program of insurgency is not clear. The line between what Pakistan maintains is moral, political, and diplomatic support, and the financial and military aid which India claims is taking place is a tenuous one. Yet, it is difficult to see how Musharraf's interests are served by the insurgency violence. Additionally, India is lacking enough proof to definitely show that the attacks are emanating from the Pakistani government.[71] Also, the media and analysts have recognized the importance to India of maintaining a 'threat of the ISI' in order to continue funding and developing its nuclear program.[72]

In light of the evidence available, it seems that finding Pakistan legally responsible for the separatist insurgency would be a premature conclusion. The legal standard for attribution as developed in *Tadic* and *Nicaragua* is one of control in a general, overarching sense. Though the standard does not require direct instructions or

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66 "Musharraf Assume Large-Than-Life Image", *The Tribune*, June 7, 2001, Chandigarh, India (www.tribuneindia.com/2001/20010608/j&k.htm)

67 'Peaceful Resolution to Kashmir Issue', *China People's Daily*, January 13, 2002, www.english.peopledaily.com.cn (last visited on May 4, 2004).

68 'Court Acquits Kashmiri Separatist', BBC News, September 23, 2003, www.news.bbc.co.uk/go/pr/fr/-/hi/world/south_asia/3133640.stm (last visited May 4, 2004).

69 'Fundamentalists Without a Common Cause', *Le Monde Diplomatique*, October 1998, http://mondediplo.com/1998/10/04afghan, (last visited on May 4, 2004).

70 'Martin Woollacott, Kashmir and Terrorism Aren't the Problem, It's the Bomb', *Guardian Unlimited*, May 24, 2002, www.guardian.co.uk/comment/story/0,3604,721165,00.html, (last visited on May 4, 2004).

71 Ibid.

72 Ibid.

commands; it does require more than mere funding or supplies. On the basis of the decisions in *Corfu Channel* and *Nicaragua*, the evidence must be clear and convincing. Though direct evidence is not necessary, any inferences made from the available evidence can not leave room for reasonable doubts. In the Kashmiri context, the evidence which is presented includes the level of sophistication and weaponry of the militants. However, this training or weaponry could have been provided by private groups funded by other outside donors or nations. There is not a direct link between the militants and the Pakistani government. Additionally, the actions and statements of the Pakistani government, at least on their surface, are to disavow any connection with the militants. In addition, the Pakistani government is making efforts to stop the training and movements of the militants. Without clearer proof of control in terms of planning, or funding, or facilitation, it is not possible to legally attribute the actions of the militants to the Pakistani government.

Conclusion

The conflict over Kashmir has been an explosive issue in the Indian subcontinent since the time of partition and independence in 1947. The issue over the status of Kashmir remains an emotional one between Indians and Pakistanis. The two governments struggle to reach an amicable solution which would please each of their constituencies. Caught in the middle of the two nuclear powers are the people of Kashmir, many of whom are tired of the violence and their treatment by both countries. Since the increase of violence and separatist insurgency, India has accused Pakistan of using cross-border terrorism to influence the question of Kashmiri accession.

The attribution standard in international law, as defined in *Tadic* and *Nicaragua*, requires that a state have an overall character of control. Some have interpreted this standard to be a lower one, requiring only coordination. However, the evidence does not clearly support such control or coordination on the part of Pakistan. India has accused Pakistan of supporting the militant actions, however, Pakistan denies supporting the separatists other than morally. As Pakistan and India move toward a new round of peace talks and both vow to fight terrorism, there is insufficient evidence to attribute separatist insurgencies to Pakistan. Hopefully, the new peace talks and plans for compromise will allow for a peaceful solution to the conflict in Kashmir. If the dispute over Kashmir can be resolved through peaceful methods, the valley once likened to heaven, can once again become a place of beauty and security.

Human Rights Dimensions to HIV/AIDS

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Sri Lankan Fulbright Commission Lectures

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Introduction

I am so pleased to be in Sri Lanka. I would like to thank Dr. Tissa Jayatilaka, director of the Sri Lankan Fulbright Commission for extending me the invitation to come to Sri Lanka. Also, I would like to thank Rohan Edrisinha, Director of the Legal and Constitutional Unit at the Center for Policy Alternatives and lecturer at the law faculty of the University of Colombo. I owe thanks to Dr. Kamalika Abeyratne and Dr. Michael Abeyratne of the AIDS Coalition for Care, Education and Support Services for their role in making this program possible.

My work in the field of human rights has focused on violations of individual human rights, particularly during armed conflict. As many of you may know, addressing gross human rights violations after they occur is disheartening because the damage to lives and livelihoods has already been done. The struggle is to fight against impunity for crimes. This is an uphill battle, which, with few notable exceptions, is marked more by failure than victory. And even the victories do not erase the loss of loved ones and injuries sustained.

So I welcomed the opportunity when I was asked in 2001 by Manel Kappagoda of the U.S.-based nongovernmental organization, AIDSLanka, and the AIDS Coalition for Care, Education and Support Services to examine the human rights obligations of states with regard to HIV and the international right to health. Here is an opportunity to become involved in an area where the state has undertaken commitments to prevent human rights abuses. Indeed, the intersection between health and human rights is a burgeoning and compelling field. When one speaks of human rights and HIV the stakes are life and death but the focus is forward-looking – to promote and fulfill the basic conditions which give human life dignity and respect – rather than seek retribution for past violations. Success here can be measured not by punishment or compensation for past harms, but by restoring health and hope to those who are ill and enabling an approach to HIV that will advance human well-being for everyone. In short, I leapt at the chance.

At the request of the AIDS Coalition and AIDSlanka, three law clinics at the University of California, Berkeley prepared a memorandum addressed to the World Bank and the Sri Lankan government requesting that a pending World Bank loan to fund HIV/AIDS prevention in Sri Lanka include financing for treatment.[1] The law clinics – the HIV Project of the East Bay Community Law Center, the International

Human Rights Law Clinic (which I direct) and the Samuelson Law, Technology and Public Policy Clinic brought expertise in HIV/AIDS treatment and law, as well as in international human rights and intellectual property laws to analyze the international legal framework and scientific studies regarding HIV/AIDS treatment in resource-constrained countries.

We distributed our memorandum to the Sri Lankan government and met with World Bank officials to discuss our recommendations. The World Bank agreed that it would fund HIV treatment programs, but the request to do so needed to come from the Sri Lankan government. While not yet committed to make universal HIV/AIDS treatment available, the government has agreed to consider proposals to fund treatment of HIV positive mothers to prevent transmission of the virus to newborn children in its most recent World Bank grant.

Thus the current climate of political stability and an openness of the government to provide HIV treatment makes this an opportune moment to discuss HIV/AIDS treatment and human rights in Sri Lanka.

HIV Is an Important Human Rights Issue

Twenty years into the HIV/AIDS epidemic, the international community has begun to condemn the inherently unfair practice of providing comprehensive HIV care only to those fortunate enough to live in the developed world. Peter Piot, Executive Director of the United Nations Special Programme on AIDS, states, "The new paradigm [of AIDS care] recognizes the ethical impossibility of denying to the majority of people living with HIV the life-saving treatment that has been available to the minority."[2] There is an emerging consensus among international legal experts that not only is this practice unfair, but that governments have legal obligations in the context of human rights to provide HIV/AIDS treatment. Conceptualizing the problem of access to treatment for HIV/AIDS in terms of unfulfilled human rights, not just unmet human needs, highlights the legal aspects of the HIV/AIDS crisis.[3]

HIV Is A Growing Concern for Sri Lanka

Some of you may well be asking yourselves why the focus on HIV in Sri Lanka? The total number of reported cases of HIV in Sri Lanka is very low. The World Bank issued figures that the total number of reported cases of HIV is **418.** Yet this number is misleading, in part because there have been no comprehensive studies to assess the prevalence of HIV, and in part due to social factors that inhibit accurate reporting.

For example, health care workers report incidents in which the family of a person who has died of AIDS ask doctors not to list the cause of death as AIDS. Families fear they will be shunned by their communities if it becomes known that a family member contracted AIDS. In addition, lack of testing and accurate diagnosis of the disease causes underreporting. As you may know, individuals do not die of something called "AIDS" but rather the virus which causes AIDS compromises the body's immune system to the point where it succumbs to an opportunistic infection which causes death. Thus individuals who have not been tested for or diagnosed as being HIV

positive, may die of pneumonia or tuberculosis without doctors or family members being aware that the person had AIDS.

Estimates of HIV/AIDS infection in Sri Lanka provide a more accurate picture of the dimensions of the problem. UNAIDS estimated that as of the end of 2001, **4,800** individuals were infected with HIV/AIDS. However, based on the prevalence rate of HIV/AIDS in South Asia of **0.69%** measured by the WHO in 2000, the comparable number of individuals infected in Sri Lanka would be **120,000** (out of population of 18 million). And there is reason to believe that this estimate may be too low. One study in Tamil Nadu indicated that the HIV prevalence in women attending antenatal clinics was **6.5%** in 2002. The United Nations Development Program has predicted that, without effective intervention, the number of HIV-infected individuals in Sri Lanka will increase exponentially to **80,000 by 2005**.

Moreover, the indicators for HIV/AIDS infection for Sri Lanka point to the country's vulnerability to an epidemic similar to those experienced by other resource-constrained countries. These indicators include the sex industry, which according to World Bank estimates in Sri Lanka employs approximately 30,000 women and girls and 15,000 men and boys. Also, low condom use and high prevalence of sexually transmitted diseases heighten the risk of HIV transmission among those engaged in sex work. Injecting drug use is also a risk factor for transmission and in Sri Lanka, heroin has become the most commonly-used drug, consumed by approximately 40,000, according to the Sri Lankan Ministry of Health.

Finally, migration and HIV infection are linked. **146** of the 384 Sri Lankan AIDS cases officially reported in 2001 were those of women, **half of whom had been employed abroad**. As a comparison, one survey of Nepalese migrants found that ten percent of migrants returning from India were infected with HIV, compared to 2% of non-migrants. India is home to an estimated 10% (4 million of the 40 million) of the individuals worldwide living with HIV. The South Asia Monitor recently reported that India may be on the verge of a second "breakout" of HIV/AIDS – the virus appears to be spreading from traditional high risk groups (sex workers, truck drivers) into the general population.[4] The consequences will be dire: the most economically productive members of society, ages 15-49, are also those sexually active and therefore the spread of infection strikes a blow to productivity and increases the burden on the state to care for the disabled, dragging down growth and causing severe social disruption. Given the proximity of the two countries and the migration from Sri Lanka to India, the number of HIV cases in India should serve as an indicator for what may lie ahead for Sri Lanka.

At the same time, Sri Lanka is poised to mount an effective response to HIV/AIDS and become a success story of a country that "got ahead" of the virus. Sri Lanka has a solid health infrastructure that can form the basis for effective HIV/AIDS testing, treatment and monitoring. The country's health care delivery is noteworthy for its provision of services to all socioeconomic sectors, incorporating family health workers who act as critical liaisons between the community and the formal health care delivery system. These can become the front-line response team to conduct HIV/AIDS prevention education, testing, counseling, and to provide treatment. In addition, Sri Lanka maintains an excellent medical infrastructure, with over six medical schools and over 600 hospitals, many of which would be suitable sites for integrated HIV/AIDS treatment and care pilot programs. In short, the dire predictions of an HIV/AIDS epidemic need not come to fruition. Nevertheless, the country faces

important choices about how it will implement an effective response, which implicate core human rights values.

Health and Human Rights: Three Relationships

To begin to articulate what human rights adds to our understanding and conceptualization of HIV/AIDS, I want to articulate three different relationships between health and human rights and how they apply to the issue of HIV/AIDS. These relationships and examples, identified by Dr. Jonathan Mann, Professor at Harvard School of Public Health and pioneer in the field of health and human rights, help guide our understanding of the multi-dimensional and dynamic intersection of these two fields and how one informs and influences the other.[5]

The first relationship is that between state health care policies, practices, and programs and human rights. One of the functions of state health care policy is to assess health needs and develop policies to prevent and control critical health issues. In order to assess health needs, the state needs to collect data. Data collection, particularly in the area of HIV/AIDS implicates human rights concerns. Because of the stigma attached to HIV/AIDS, how the government collects, maintains, and reports data implicates an individual's right to privacy. Additionally, depending on how widely health information is shared, individuals may suffer discrimination in employment, housing, or delivery of health care.

Social service providers to individuals with HIV/AIDS in Sri Lanka report that confidentiality and discrimination are key issues in their work. Hospital staff has identified HIV positive patients, resulting in villagers burning the homes of these persons. Particularly disturbing are reports of doctors and health care professionals refusing to treat individuals who are, or are suspected of being HIV positive.

Yet state officials do not appear to take confidentiality measures seriously. HIV/AIDS advocates brought to the attention of a high-ranked government public health official tasked with HIV/AIDS care an incident in which a doctor treating a HIV positive patient discussed the patient's HIV status and treatment with the patient in the presence of other patients and hospital staff, thus fatally compromising the patient's privacy. Instead of concern, the official dismissed the complaint, stating that one could not expect adherence to Western standards of confidentiality in Sri Lankan hospitals.

I would like to point out that the Sri Lankan government has recognized the right to privacy in the international instruments it has adopted. Confidentiality is not a western standard or imposition, but a universal human right the state must respect. Arguments of cultural relativism fly in the face of national and international law. Privacy protections are most needed to protect those who are HIV positive from discrimination and indeed require greater vigilance in their application, not less.

Furthermore, as Mann has pointed out, the issue of health care delivery implicates human rights norms of nondiscrimination. If state clinics and hospitals do not take into account the financial and logistical implications of service provision, the state may erect access barriers to poor and marginalized populations who cannot afford or access services. For example, as Sri Lanka implements plans to expand HIV testing and counseling to pregnant women, it must take into account the practical aspects of

how poor women will access these services. For example, state medical professionals should ask themselves whether locating HIV testing and counseling outside ante-natal clinics and placing services with medical facilities identified as sexually transmitted disease clinics will erect barriers of social stigma associated with STD and additional transportation costs that will impede women from following up on testing and counseling appointments.

The second relationship Mann identified is the impact on health resulting from human rights violations. This link is most obvious when one considers the adverse effects on health from state-sponsored torture practices or imprisonment in inhumane conditions. Yet, the detrimental effects on health extend to human rights violations beyond these core principles. For example, the state negatively impact public health if it violates the right to information by suppressing accurate, scientifically sound data which will enable individuals to make decisions about their health. For example, if the state withholds information about contraception, for example the use of condoms as a valid means to prevent HIV/AIDS transmission, the health consequences may be deadly.

The third relationship Mann proposes is the recognition that the promotion of health and the promotion of human rights are complementary enterprises. Confronting HIV/AIDS brings us face to face with the societal dimensions of this threat to public health. In reviewing the risk factors for HIV transmission in Sri Lanka, as in most parts of the world, a common denominator is that the disease exerts the greatest impact on the most vulnerable populations: women, sex workers, injection drug users, migrants. As Mann observed: "In each society, those people who before HIV/AIDS arrived were marginalized, stigmatized, and discriminated against became over time those at highest risk of HIV infection."[6] Mann's practical insight into the link between societal factors and conditions of vulnerability to HIV/AIDS leads to an important theoretical insight: human rights offers a framework to address the societal factors that contribute to the spread of HIV/AIDS while promoting individual rights and human dignity.

For example, one of the risk factors for HIV transmission among women is related to the subordinated social status of women in society. Although it is well-known that reduction of sexual partners and use of condoms will reduce the risk of transmission, many women are unable to follow this straightforward advice for a number of reasons. In some parts of the world, multiple male partners for women is a matter of economic survival, others may not be able to exert control over their sexual relationships and insist on condom use. In other words, women's ability to reduce their risk factors for HIV transmission is inextricably linked with their low social status. To address HIV/AIDS more than education about modes of transmission is needed: the social structures that create vulnerabilities to HIV/AIDS must be addressed as well. For this, the rights-based approach of human rights has much to offer.

The Normative Framework of Human Rights and HIV/AIDS

From the destruction of World War II, the modern human rights movement was born of the determination of states to erect a bulwark against state-sponsored violence and its irreparable destructive effects. The world community established a set of international agreements, which states voluntarily undertook to adhere to universal standards that protect core minimum rights. These foundational documents consist of

the U.N. Charter, which recognizes human rights as a basic component for peace and stability. The U.N. General Assembly in 1948 adopted the Universal Declaration of Human Rights, identifying a core set of basic human rights. In addition, the Covenant of Civil and Political Rights and the Covenant of Economic, Social and Cultural Rights articulate further basic rights and standards of the Universal Declaration. Together, these instruments are considered to be the international constitution of human rights.

Together, these agreements establish a comprehensive set of standards that define negative obligations of states – what states are prohibited from doing to individuals, for example torture – as well as contain affirmative obligations that states have undertaken to fulfill rights, like the right to health.

The Right to Health

The right to health belongs to the family of economic, social and cultural rights enumerated in the International Covenant on Economic, Social and Cultural Rights ("Covenant") and in other international instruments[7] ratified by the Sri Lankan government.[8] Each state party to the Covenant is required "to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights [enumerated in the Covenant],"[9] and to achieve "progressively the full realization of the rights recognized in the Covenant [...] to the maximum of its available resources."[10] Scarcity of resources does not relieve the responsibility of the state to meet certain minimum obligations.[11] Further, state parties must take steps necessary for "the prevention, treatment, and control of epidemic, endemic, occupational and other diseases."[12]

Access to health care and the prevention and treatment of diseases are recognized by major international human rights treaties and covenants as essential components of the right to health.[13] Specifically, in the context of the HIV/AIDS pandemic, the U.N. Commission on Human Rights, an important U.N. human rights body composed of representatives from fifty-three member-states elected by the U.N. Economic and Social Council, has declared that "access to medication is one fundamental element for achieving progressively the full realization of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[14]

What does the Covenant require states to do? I now examine in greater detail the content of the state's human rights obligations in this emerging area.

Human Rights Norms and State Health Policy

The observable disparate impact of the disease on poor and vulnerable populations serves as a striking reminder that the principles of non-discrimination, equality, and participation in relation to strategies to reduce the incidence of HIV/AIDS and its impact on individuals are central to the government's obligations to promote and protect health and human rights.

The principle of nondiscrimination applies to all rights enunciated in the Covenant, including the right to health.[15] Therefore, states not only must implement laws that prohibit discrimination against persons living with HIV/AIDS by private and state actors, but also must adopt measures to ensure that all persons infected with

HIV/AIDS have access to basic treatment, including antiretroviral medications. The former obligation calls on the state to create a normative regime that protects the individual rights of those infected with HIV/AIDS. The latter obligation is twofold: (1) states must refrain from denying equal access to existing health care/treatment to individuals or populations on the basis of their HIV status; and (2) states must take affirmative steps to establish access to care and treatment for such individuals and populations where none exists.[16]

The government of Sri Lanka currently is addressing these obligations and already has committed itself to increasing education programs to promote social acceptance of and nondiscriminatory attitudes towards people living with HIV and highly vulnerable groups.[17] This is an area that requires further and sustained attention since the reduction of stigma is necessary to encourage treatment.[18]

HIV/AIDS treatment and counseling are key aspects of care for the disease. Voluntary counseling and testing or VCT provides those who test positive the ability to make informed decisions about their behavior and reduce the risk of transmission. For example, a cook who tested positive for HIV was reassured by Sri Lankan medical personnel that he would not transmit the virus to his customers by preparing their food.

HIV/AIDS experts readily acknowledge that VCT is more effective when offered together with treatment. Individuals have an incentive to come forward for testing. Moreover, treatment reduce transmission by lowering the amount of the virus in those under treatment and by reducing behaviors that transmit the disease. Dr. Brundtland, Director-General of the World Health Organization has stated that access to affordable medicines is a key element in improving the efficacy of prevention. I learned of a case in Sri Lanka that illustrates this link.

A woman became ill and doctors were unable to diagnosis her. She saw doctors in multiple wards of the local hospital, each perplexed and unable to help her. Over months, she continued to deteriorate. Finally, her husband quietly suggested to her doctors that they test his wife for HIV. The positive results were not a surprise to the husband, as he had tested positive earlier, but neither did the results help his wife, who died a week later. Perhaps, if treatment had been available, he might have divulged his HIV status in time to save his wife's life. This example highlights the need for treatment and its associated benefits of reducing stigma. Thus, treatment that is selective and/or discriminatorily narrow will be insufficient to treat, and could further stigmatize, HIV-infected or vulnerable populations. In contrast, by acknowledging and valuing the lives and suffering of those living with HIV/AIDS, policies that increase access to treatment for all HIV-infected persons regardless of their socioeconomic or other status can help reduce stigma, denial, and other negative attitudes facing these individuals within the health care system and society at large.

Human Rights Norms and Access to HIV Treatment

Concrete approaches to ensure the respect, protection and fulfillment of human rights in the context of HIV/AIDS have been set out in some detail in the United Nations international guidelines on HIV/AIDS and human rights.[19] In September 2002, the UN updated these guidelines. A key change was to Guideline 6 on "Access to prevention, treatment, care and support" which calls on governments to take specific

action to combat HIV/AIDS and provide treatment. For example, governments are requested to:

- establish concrete national plans on HIV/AIDS-related treatment, with resources and timeline that progressively lead to equal and universal access to HIV/AIDS-related treatment, care and support
- ensure that vulnerable populations have access to treatment, care and support
- ensure quality control and assurance of medicines, diagnostic and related technologies

These guidelines, as well as numerous other international declarations and agreements, reflect an international consensus that access to medical treatment for HIV/AIDS is a fundamental component of the right to health.

The gap between normative statements regarding HIV/AIDS and human rights on the one hand, and state policies and practices on the other, is dramatic. Particularly in resource-constrained countries like Sri Lanka, one must ask what obligations does a state have to provide treatment.

As the General Assembly of the United Nations has noted, "[i]ncorporating human rights in the response to HIV/AIDS implies recognizing that [the] three elements of adherence to rights standards—to respect, to protect, and to fulfill—are essential, interdependent, and indivisible."[20] Even in "resource-restrained settings," international human rights standards call for government recognition that "access to medication in the context of pandemics such as HIV/AIDS is one of the fundamental elements to achieve progressively the full realization of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[21]

Several U.N. bodies as well as national courts have recognized that a government's obligation progressively to fulfill the right to health includes a duty to provide essential HIV medicines to the maximum extent of the state's resources.[22] In 1999 the Venezuelan Supreme Court of Justice recognized that access to antiretroviral medicines is a component of the right to life, the right to health, and the right to the benefits of scientific progress for HIV-positive persons.[23]

Justiciablity of Access to HIV/AIDS Treatment

Last year, the Constitutional Court of South Africa decided a landmark case regarding access to medicines for HIV/AIDS. The case illustrates quite well the important role that courts are playing in shaping the content of the state's obligations progressively to realize the right to health. The Treatment Action Campaign (TAC) case or TAC as it is known, was decided in 2002 by the Constitutional Court of South Africa in favor of a group that challenged the government's policy that resulted in limited access to the drug Navirapine for the purposes of preventing mother to child transmission of HIV at state health facilities.[24]

Plaintiffs in the case alleged that the government's program violated the constitutional provisions of art. 27 which is patterned after the International Covenant on Economic, Cultural and Social Rights, and guarantees access to health services and obligates the

state to take measures progressively to realize this right.[25] The court addressed two questions:

(1) what actions the government is constitutionally obligated to take with regard to Navirapine and

(2) whether the government had an obligation to establish a comprehensive plan for the prevention of HIV transmission from mother to child.

In answering the first question, the court relied upon earlier decisions regarding progressive realization of positive rights to health (Soombramoney: renal dialysis) and to housing (the Grootboom case). The court held that the right to health care services "does not give rise to a self-standing and independent fulfillment right" that could be enforced irrespective of available resources. Nevertheless, the court found the state was obligated to take reasonable steps to progressively realize the right and reviewed the government policy under this standard.

The government's principal argument was that the real costs for a mother to child transmission program were not the drugs – which had been donated – but the costs of the testing, counseling, follow-up and provision of formula for parents who could not afford it. The government's position was that this whole package was necessary to provide treatment, which it did not have the resources to do, therefore the restriction of offering the drug to a limited number of sites where full care was available, was reasonable.

The court concluded that availability of resources was relevant to the universal delivery of the full package of treatment, but are "not relevant to the question of whether nevirapine should be used to reduce mother –to-child transmission of HIV at those public hospitals and clinics outside the research sites where facilities in fact exist for testing and counseling." The court held the restrictive policy was unreasonable and violated the state's obligation to take reasonable measures, within available resources, to achieve progressive realization. In other words, where the government had resources available that reasonably could be used to prevent mother to child transmission, it had an obligation to utilize them. Just because the state cannot do all that is possible in terms of providing treatment, does not justify it doing nothing.

The court's answer to the second question – the obligation of a reasonable national plan to combat mother to child transmission – followed from its answer to the first. The court held that the government's plan to move slowly from restrictive access to Navirapine to more availability was not reasonable in light of the severity of the HIV epidemic in the country.

In addition, the court addressed the issue of its able in reviewing health policy. In short, the question was whether the court was able only to issue a non-binding declaration about the government's policy or whether it could issue a binding order. The court concluded that its role was not to evaluate whether the state chose the best plan, or could have allocated public funds more effectively. In other words, the role of the court is not to make health policy, but to decide whether the state has justified its plan as reasonable. The court went on to point out that all branches of government have an obligation to progressively realize the right to health: the legislative branch is tasked with adopting "reasonable legislative" measures while the executive branch must promulgate "appropriate, well-directed policies and programs." The court's role

was to resolve conflicts regarding whether particular laws or policies were consistent with the constitution.

In sum, in the TAC case, the court found that it was not reasonable under the circumstances for the state to restrict access to Navirapine to research and training sites, and that it failed to address the health needs of mothers and children who had no access to these facilities. The court emphasized that to satisfy the reasonableness test, the state had to demonstrate that "those whose needs are most urgent and whose ability to enjoy all rights therefore is most in peril" are addressed in its national plan. Thus the court acknowledged the interrelationship of social factors, human rights and health that Mann articulated, and required the state to take into account the dire urgency of treatment in light of the HIV/AIDS epidemic in the country.

Sri Lanka's Obligations to Progressively Realize and What It Has Done

While the content of the state's duties of progressive realization is highly contextual, the normative framework provides guidance. For example, listing HIV/AIDS drug's on the country's national formulary does not require significant expenditure of resources, while making life-saving drugs legally available. In fact, recently Sri Lanka took this important step and now HIV/AIDS patients have access to some medicines that will treat their illness and provide hope – and restore health – to those infected with the virus. The issue of access to these same life-preserving drugs remains an issue for those who cannot afford to purchase HIV/AIDS medicines. The decision whether to list these same drugs on the country's Essential Drugs List and so provide them free to those unable to afford them, requires a national plan to address how the state will work to progressively make HIV/AIDS treatment available to all in need. But Sri Lanka need not bear this burden alone.

Progressive realization has been interpreted to mean that if limited resources present an obstacle to the implementation of specific rights, states have an obligation under the Covenant to seek international assistance and cooperation.[26] The U.N. General Assembly, recognizing the synergistic relationship between prevention strategies and the provision of treatment in the context of the AIDS pandemic, has pointed out that "greater levels of funding for other care and prevention activities, public health infrastructure and training in clinical care" must accompany any large-scale effort to provide access to HIV treatments, including antiretroviral therapy.[27] And increasingly wealthy countries are considered to have an obligation to provide assistance to poorer countries to finance HIV/AIDS. The revised International Guideline for HIV/AIDS calls upon governments to "strengthen international cooperation and assistance to HIV/AIDS . . . through contributions to the recently-established Global Fund to Fight AIDS, Tuberculosis and Malaria."

There is little room to dispute the U.N.'s contention that "[a] comprehensive approach to prevention, care and support is essential if we are to halt the HIV/AIDS pandemic."[28] The U.N. Commission on Human Rights has urged states "to adopt all appropriate positive measures to the maximum of the resources allocated ... to promote effective access to ... preventive, curative or palliative pharmaceuticals or medical technologies for all."[29] This suggests that Sri Lanka should consider making available affordable HIV/AIDS medications to the greatest extent permitted by resources that are directly available to the government or that could be sought from outside sources. [30] Domestic policy and existing resources alone will not necessarily

suffice to progressively realize the rights to health and access to health care for all; therefore, the Sri Lankan government has a duty to devise plans and seek resources domestically and internationally in order to fulfill these rights.[31] And the international community and donor countries need to contribute financially to enable Sri Lanka to build capacity to fulfill its obligations.

Conclusion

Currently, plans are underway to begin a pilot project at the General Hospital in Kandy to provide HIV/AIDS testing, counseling and treatment to pregnant women to reduce transmission of HIV from infected mothers to their children during childbirth. This collaborative project between the General Hospital in Kandy, the University of California, Davis, and the AIDS Coalition may prove to be an example of effective treatment that may be replicated by the state more broadly. The HIV/AIDS pandemic raises serious questions regarding how the state will allocate its resources to meet the health challenges. Given the urgency of HIV/AIDS, it is worth considering whether there is time for progressive realization of the right to health.

HIV/AIDS is a medical and social challenge. Yes, there is much to be done to meet these challenges, but there is reason to be optimistic about the ability to accomplish what lies ahead. All social sectors can contribute to a solution, but the professional, spiritual and political leaders will play a critical role.

Civil society may take a leading role in making the legal system accessible and responsive to the needs of those infected with HIV/AIDS. Vigorous legal protections against discrimination need to be in place and utilized to provide meaningful promotion, protection, and enforcement of human rights norms. Public leaders can call for efficacious HIV/AIDS prevention, treatment and monitoring programs. Establishing sound medical practices conducted with compassion and respect for human dignity will elaborate and innovate the best practices of HIV/AIDS care and treatment in resource-constrained settings. The contribution of the medical and public health professions is essential to promoting HIV/AIDS practices and policies that will promote well-being and health among this vulnerable population.

Community and spiritual leaders can take a leading role to acknowledge HIV/AIDS as a vital issue deserving of compassion and not contempt, sensitivity rather than stigma. The relationship of the community to those living with HIV/AIDS establishes the social fabric in which rights will be fulfilled or fought for. Spiritual leaders can educate and guide communities to a human rights-friendly approach.

Political leaders should be called on to speak out forcefully and act to create the political, economic, and social structures that are vital to promote human rights protections for those living with HIV/AIDS. Moreover, government officials can act within their spheres to create policies and practices that move the country closer toward full realization of the right to health.

In sum, the challenges to combating HIV/AIDS are great, but the stakes are greater. Human rights is premised on the belief that each of us is entitled to a basic standard of dignity; in that sense the collective is measured by how the most vulnerable are treated. All sectors of civil society can call on the government to begin to provide treatment – and hope – to those who are HIV positive. By advocating for the most

vulnerable, we advocate for adherence to core human rights protections that benefit everyone. Human rights provide a framework to guide how countries address the fight against HIV/AIDS. With courage, compassion, and commitment, this is a fight that can be won.

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1 Memorandum Addressing the Need for a Treatment Agenda Included in the Proposed World Bank-Financed Sri Lanka National AIDS Prevention Project (April 2002), at http://www.samelsonclinic.org. Much of the human rights analysis contained in this lecture is drawn from the Memorandum.

2 WHO, Report on Infectious Diseases, *Scaling up the Response to Fight Infectious Diseases: A way out of Poverty* (February 2002), *at* http://www.who.int/infectious-disease-report/2002/.

3 Since the 1990s, there has been increased awareness of human rights as an important factor "in determining people's vulnerability to HIV infection and their consequent risk of acquiring HIV infection and chances of accessing appropriate care and support." Sofia Gruskin and Daniel Tarantola, *HIV/AIDS and Human Rights Revisited*, CANADIAN HIV/AIDS POLICY & L. REV., Vol. 6, No. 1/2 (2001), at 3, http://www.aidslaw.ca/Maincontent/otherdocs/Newsletter/vol6nos1-22001/discrimination.htm#_edn4 (last visited April 9, 2002). Even more recently, "human rights have come to be understood to be directly relevant to every element of the risk/vulnerability paradigm." *Id.* Response to the epidemic requires attention to the links between HIV/AIDS and international human rights law as contained in such human rights treaties as the International Covenant on Economic, Social and Cultural Rights ("ICESCR" or the "Covenant"), the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"), the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"), and the Convention on the Rights of the Child ("CRC"), all of which Sri Lanka has ratified. *See* Status of Ratification of UN Human Rights Treaties, *infra* note 8. The connections between HIV and the human rights articulated in these treaties have been reiterated and increasingly clarified in the normative statements of the U.N. General Assembly; the World Health Assembly (*see*, http://www.who.int/m/topicgroups/governance/en/index.htm (last visited April 9, 2002) and, for an example of the exercise of this body's policymaking function, *see*, World Health Assembly Res. 54.10, *Scaling up the Response to HIV/AIDS*, May 21, 2001); United Nations human rights treaty monitoring bodies, and by the U.N. Commission on Human Rights. For an example of one such statement by the Commission, s*ee* Res. 2001/33.

4 *The HIV/AIDS Crisis in India*, 58 South Asia Monitor (May 1, 2003).

5 JONATHAN M. MANN, ET AL (EDS.), HEALTH AND HUMAN RIGHTS A READER (1998).

6 Ibid.

7 *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217 A(III), U.N. Doc A/810 at 71 (1948), art. 25 ("Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services [...]"); International Covenant on Economic, Social and Cultural Rights, Jan. 3, 1976, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16 at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, art. 12 [hereinafter ICESCR]: ("(1) The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. (2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for [...] (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases [and] (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness."); International Convention on the Elimination of All Forms of Racial Discrimination (CERD), 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969, article 5(e)(iv); and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), G.A. Res. 34/180, U.N. GAOR Supp. No. 46 at 193, U.N. Doc. A/34/180, *entered into force* Sept. 3, 1981, arts. 11.1(f) and 12 (requiring, respectively, that State parties eliminate discrimination against racial minorities and women in health care policies and systems); Convention on the Rights of the Child (CRC), article 24 (providing that State parties are obligated to support the right to access to health care services, including facilities for treatment of illness and rehabilitation of health for children;

take steps to reduce infant and child mortality; provide health care to children; combat disease and malnutrition; and develop preventive health care, medical assistance and health care for children).

In addition, the World Health Organization (WHO), of which Sri Lanka is a member state, defines health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity." Constitution of the World Health Organization (preamble), *opened for signature* July 22, 1946, 62 Stat. 2679, 14 U.N.T.S. 185, *reprinted in* BASIC DOCUMENTS (WHO, 36th ed. 1986) ("The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being."). While this definition of health was not explicitly incorporated into article 12 of the ICESCR, "the reference in article 12.1 of the Covenant [on Economic, Social and Cultural Rights] to 'the highest attainable standard of physical and mental health' is not confined to the right to health care." U.N. GAOR, *General Comment No. 14: The Right to the Highest Attainable Standard of Health*, Committee on Economic, Social and Cultural Rights, 22nd Sess. (2000), U.N. Doc. E/C.12/2000/4, para. 4 [hereinafter General Comment No. 14].

[8] *See* the Office of the U.N. High Commissioner for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties as of February 8, 2002*, at 8, *at* http://www.unhchr.ch/pdf/report.pdf (last visited April 9, 2002).

[9] U.N. GAOR, *General Comment No. 3: The nature of States parties obligations (Art. 2, par. 1)*, Committee on Economic, Social and Cultural Rights, 5th Sess. (1990), U.N. Doc. E/1991/23, Annex III, para. 10 [hereinafter General Comment No. 3].

[10] ICESCR, art. 2(1).

[11] *See* Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, *reprinted in* International Commission of Jurists, ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A COMPILATION OF ESSENTIAL DOCUMENTS, at pars. 9-10 (International Commission of Jurists ed., 1997).

[12] ICESCR, art. 12.

[13] *See, e.g.,* Universal Declaration of Human Rights, art. 25; ICESCR, art. 21.

[14] G.A. Resolution 2001/33, *Access to Medication in the Context of Pandemics Such as HIV/AIDS*, U.N. Human Rights Comm., 71st mtng., U.N. Doc. E/CN.4/RES/2001/33 (2001), para. 1 [hereinafter Res. 2001/33].

[15] *See* ICESCR, art. 2(2) (guaranteeing the rights enunciated in the ICESCR shall be exercised "without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"); International Covenant on Civil and Political Rights ("ICCPR"), G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16 at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, art. 2(1) (requiring each state party "to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the [Covenant], without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status").

[16] *See*, General Comment No. 14, para. 34.

[17] *See* Sri Lanka's Prevention Project (ID# LKPE74730).

[18] *See* Dr. Michael Abeyaratne, "HIV/AIDS: A Story of Suffering," in Stigma & Discrimination (conference paper from Stigma and Discrimination Conference held in Colombo, Sri Lanka on December 28, 2001).

[19] *See* HIV/AIDS and Human Rights: International Guidelines, HR/PUB/98/1, Geneva 23-25 September 1996 (U.N., New York and Geneva 2001), http://www.unaids.org/publications/documents/human/law/JC520-HumanRights-E.pdf [hereinafter International Guidelines] (last visited April 9, 2002). The guidelines were produced at the Second International Consultation on HIV/AIDS and Human Rights, jointly organized by the Office of the

United Nations High Commissioner for Human Rights and UNAIDS. They offer concrete measures that could be taken to protect human rights and health, in line with Member States international human rights obligations. While in many resolutions the General Assembly has urged countries to implement the guidelines, they are not legally binding.

[20] U.N. GAOR, Special Session of the General Assembly on HIV/AIDS, *Roundtable 2: HIV/AIDS and human rights*, U.N. Doc. A/S-26/RT.2, June 15, 2001, para. 5 [hereinafter Roundtable 2]. *See also*, General Comment No. 14, para. 33.

[21] Declaration of Commitment, para. 15, U.N. Doc. S-26/2 (2001).

[22] *See* Res. 2001/33, para. 3(c).

[23] *See* Mandamiento de Amparo, Corte Suprema de Justicia Sala Político Administativa, Dra. Hildegard Rondón de Sansó C. del V.S. y otros(as) v. Ministerio de Sanidad y Asistencia Social, 15 July 1999 [Injunctive Order, Supreme Court, Administrative Law Branch] (Venez.). ACCSI—Acción Ciudadana Contra el SIDA [Citizens' Action Against AIDS], an NGO in Caracas, Venezuela, summarizes the holding on its Web site. *See* http://www.internet.ve/accsi/htm/actual.htm. Another example of courts affirming the right to HIV treatment is in Argentina. On June 2, 2000, the Supreme Court of Argentina affirmed the government's obligation to provide free diagnostic care, medications, and other necessary treatment for HIV-infected persons in hospitals pursuant to Argentina's national AIDS law (n° 23.798), the Constitution of the City and Province of Buenos Aires, and the National Constitution. *See* AIDS Network ("Red SIDA"), *at* http://www.redsida.org.ar/corte.htm (last visited April 9, 2002).

[24] Minister of Health and Others v. Treatment Action Campaign and Others (No.2), 5 SA 721 (2002).

[25] *See* Alexander Tsai, *The Right to Health and the Nerivapine Case in South Africa*, New England Journal of Medicine, available at http://lists.essential.org/pipermail/ip-health/2003 February/004372.html.

[26] ICESCR, art. 2(1).

[27] U.N. GAOR, Special Session of the General Assembly on HIV/AIDS, *Roundtable 1: Prevention and Care*, U.N. Doc. A/S-26/RT.1, June 15 2001, para. 27 [hereinafter Roundtable 1].

[28] *Ibid.* at para. 28.

[29] Res. 2001/33, at para. 3(c).

[30] This obligation is further supported by the U.N. General Assembly's *Declaration of Commitment on HIV/AIDS*, para. 55 (calling on State Parties "[i]n an urgent manner [to] make every effort to provide progressively and in a sustainable manner, the highest attainable standard of treatment for HIV/AIDS, including... [the] effective use of quality-controlled antiretroviral therapy in a careful and monitored manner to improve adherence and effectiveness and reduce the risk of developing resistance; and to cooperate constructively in strengthening pharmaceutical policies and practices, including those applicable to generic drugs and intellectual property regimes, in order further to promote innovation and the development of domestic industries consistent with international law.") Further, the duty to adopt "a national strategy to ensure to all the enjoyment of the right to health, based on human rights principles" is discussed extensively by the U.N. Committee on Economic, Social and Cultural Rights in General Comment No. 14, para. 43(f). *See also*, Eleanor D. Kinney, *The International Human Right to Health: What Does This Mean for Our Nation and World?*, 34 IND. L. REV.1457, 1470 (2001).

[31] General Comment No. 14, paras. 35-37.

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