M. C. M. Iqbal

LST REVIEW

Volume 14 Issue 195 January 2004

CONSUMER REFORMS, CHALLENGES AND THE LAW

CRITIQUE OF SRI LANKA'S DRAFT FREEDOM OF ACCESS TO OFFICIAL INFORMATION ACT

LAW & SOCIETY TRUST

CONTENTS

Editor's Note	**i - iv**
Extracts from the Consumer Affairs Authority Act, No. 9 of 2003	**1 - 6**
Consumer Ideology for the Developing World - Challenges for Consumer Movements	**7 - 18**
- Rasika Mendis De Silva -	
Consumer Rights and Geneticallly Modified Organisms: Unsolved Dilemmas and Particular Problems	**19 - 25**
- Yoga Sanjeewani Gunadasa -	
Critique of Sri Lanka's draft Freedom of Access to Official Information Act [Commonwealth Human Rights Initiative]	**26 - 40**

Law & Society Trust,
3, Kynsey Terrace, Colombo 8
Sri Lanka.
Tel: 2691228, 2684845 Telefax: 2686843
e-mail:lst@eureka.lk
Website: http://www.lawandsocietytrust.org

ISSN - 1391 - 5770

Editor's Note ... ...

A revised consumer rights regime was legally articulated in Sri Lanka when the Consumer Affairs Authority Act, No 9 of 2003, (hereinafter referred to as the Act), was certified by the Speaker on 17th March, 2003. The Act replaced old laws relating to consumers such as the Consumer Protection Act, No 1 of 1979, the Fair Trading Commission Act, No 1 of 1987 and the Control of Prices Act.

Many of its provisions, intended to promote effective competition and protect consumers as well as regulate internal trade, are an improvement on the old. Extracts from the Act are published in the Review in order to give readers an idea of what the new law intends to achieve.

However, a continuing critique of the new consumer regime, (from the time that the first draft of the Act was made public in 2001), was that the law does not adequately cater to individual consumers in the country. Equally, it does not set up a satisfactory system of complaints redressal, filtering to the rural areas in Sri Lanka as opposed to central bodies operating in Colombo.

Critics contended that this was in contrast to, for example, India's Consumer Protection Act of 1986 which establishes not only a Central Consumer Protection Council but also its regional equivalents known as State Consumer Protection Councils. In turn, district forums and state consumer disputes redressal commissions are mandated to come into being, the latter being overseen by a National Consumer Disputes Redressal Commission. In all, the systems of consumer rights supervision are far more detailed than what is envisaged by the Sri Lankan Act.

The composition of these bodies under the Indian Act and supplementary Rules, are also superior to Sri Lanka. District forums in India that investigate consumer complaints are mandated to consist of three members, a District Judge, a person of eminence in the field of education, trade or commerce and, interestingly enough from the perspective of gender equality, a lady social worker.

The state commission to which appeals from a district forum lie, consists of a Judge of the High Court and two other members, (of proven integrity, ability and standing), one of whom shall be a woman. The National Commission, to which again appeal lies from the State Commission, consists of a Chairman who is a Judge of the Supreme Court and four other members, one of whom shall be a woman. An

overseeing Central Consumer Protection Council has equal provision for gender representation. Members of the Council may by writing under his or her hand, resign from the Council.

Meanwhile, rules under the Indian Act passed in 1987 stipulate that members of the National Commission be placed in a similar position as Supreme Court judges regarding their conditions of employment and removal from office. Using the 1986 Act to their advantage, activist consumer groups petitioned the Supreme Court of India, a scarce two years following the enacting of the Act, pointing out that the Central Government had not established district forums and state commissions throughout the length and breadth of India as contemplated. In an excellent example of consumer rights activism, the Court directed that the Government fulfill the provisions of the Act.

Sri Lanka's Act, No 9 of 2003 provides for a Consumer Affairs Authority and a Consumer Affairs Council, the latter functioning primarily as a higher body before which decisions of the Authority could be brought for review. The Colombo located Chairman and ten member Authority shall be appointed by the Minister, subject to the condition that they possess recognised qualifications, have wide experience and are distinguished in particular fields including industry, law and economics. Lesser conditions govern the appointment of the three member Council. The security of tenure of the members of both these bodies is highly unsatisfactory.

As far as the substantive provisions of the Act are concerned, its effective reach is limited to the promotion of effective competition and the regulation of internal trade and the prices of goods and services. Provisions in the first draft relating to the prevention of monopolies and mergers, (wherein a monopoly situation was taken to exist where the supply of goods or services to the market place by a single party exceeds 33.3. per cent whereas a merger is deemed to exist where a party, whether body corporate or not, directly or indirectly, acquires or proposes to acquire any shares in the assets of a corporate or any other person as a result of which, such party would be or would likely to be in a position to control or dominate a particular market), have been taken out entirely from the Act.

However, significantly limited, as it is, the Act does bring about an improved **status quo** as far as consumer rights in Sri Lanka are concerned. Part 11 of the Act, for example, mandates the Authority to issue directions to manufacturers or traders in respect of price marking, labelling and packeting of goods (Section 10). Failure to obey these directions or the alteration ***inter alia*** of any label etc on goods to which

such direction applies or the selling/offering to sell such goods, constitutes an offence under the Act. A similar prohibition applies with regard to the selling or offering to sell such goods above the marked price.

Under this Part, (in reference to regulation of trade), the Authority is also empowered to determine standards and specifications relating to goods and supply of services. Complaints against any goods that do not conform to such standards or the manufacture or sale of goods that do not conform to the warranty or guarantee, can be made to the Authority under Section 13 of the Act. After inquiry at which the trader or manufacturer against whom the complaint is being made has a right to be heard, the Authority is empowered to order the same to pay compensation, to replace the goods or to refund the amount paid. Sections 15 to 17 makes refusal to sell goods, the denial of possession of any goods ***inter alia*** and the hoarding of goods, also an offence.

Particular powers are meanwhile bequeathed to the Authority and its Director General in respect of goods being sold or services provided at an excessive price or where market manipulation or marker imperfections exist in respect of such goods (Section 19). Such matters could be referred to the Council for investigation and report by the Authority/Director General itself or by members of the public, associations or organisations. Upon the recommendations of the Council, the Authority is enabled to fix the maximum price above which the goods shall not be sold or the services provided (Section 20(5)). An appeal is provided therefrom to the Court of Appeal.

Further sections of the Act stipulate deceptive or misleading conduct and false representations by traders or manufacturers to be an offence. Breach of implied warranties relating to the supply of goods or services is prohibited, with regard to which complaints could be made to the Authority. The succeeding Part 111 of the Act deals with anti-competitive practices.

One interesting feature of the Act is the fact that the term 'service' has been defined to include not only services in connection with the supply of goods but also professional services such as accounting, auditing, legal, medical and health, surveying, architecture and engineering. Included in these categories are also the sale and supply of utility services such as electricity, water, gas and telecommunications as well as banking, financing, insurance, shipping and entertainment. The possible impact of the inclusion of these services within the

reach of the Act, if effectively utilised by imaginatively dynamic consumer activists in this country, is indeed provocative.

The Review brings some of the provisions of the Act to the attention of its readers. It also publishes an analysis, which reflects on the nature of the consumer movement worldwide and its challenges for consumers in developing countries, including Sri Lanka. Its concluding article examines a facet of consumer rights not much ventilated domestically in relation to genetically modified foods, which debate has, for some time, raged furiously among consumer activists in other countries.

We are also pleased to publish a critique of Sri Lanka's draft Freedom of Access to Official Information Act which has been engaged in, on our request, by the New Delhi based Commonwealth Human Rights Initiative (CHRI). The draft FOI Act, (published in the LST Review, Joint Issue 192 & 193 [October-November] 2003), is presently undergoing public scrutiny prior to being brought before Parliament.

The Review hopes that these discussions would act as a catalyst in bringing about more rights focussed and people-oriented activist initiatives in Sri Lanka both in relation to consumer rights and the right to freedom of information in general.

Kishali Pinto-Jayawardena

EXTRACTS FROM THE CONSUMER AFFAIRS AUTHORITY ACT, No. 9 OF 2003

[Certified on 17th March, 2003]

AN ACT TO PROVIDE FOR THE ESTABLISHMENT OF THE CONSUMER AFFAIRS AUTHORITY; FOR THE PROMOTION OF EFFECTIVE COMPETITION AND THE PROTECTION OF CONSUMERS; FOR THE REGULATION OF INTERNAL TRADE; FOR THE ESTABLISHMENT OF A CONSUMER AFFAIRS COUNCIL; FOR THE REPEAL OF THE CONSUMER PROTECTION ACT; NO. 1 OF 1979, THE FAIR TRADING COMMISSION ACT, NO. 1 OF 1987 AND THE CONTROL OF PRICES ACT (CHAPTER 173); AND FOR ALL MATTERS CONNECTED THEREWITH OR INCIDENTAL THERETO.

Preamble.

WHEREAS it is the policy of the Government of Sri Lanka to provide for the better protection of consumers through the regulation of trade and the prices of goods and services and to protect traders and manufacturers against unfair trade practices and restrictive trade practices:

AND WHEREAS the Government of Sri Lanka is also desirous of promoting competitive pricing wherever possible and ensure healthy competition among traders and manufactures of goods and services:

NOW THEREFORE be it enacted by the Parliament of the Democratic Socialist Republic of Sri Lanka as follows:-

Short title.

1. This Act may be cited as the Consumer Affairs Authority Act, No. 9 of 2003.

PART I

Establishment of the Consumer Affairs Authority

Establishment of the Consumer Affairs Authority.

2. (1) An authority called the Consumer Affairs Authority (hereinafter referred to as the "Authority") is hereby established which shall consist of the persons who are for the time being members of the Authority under section 3.

(2) The Authority shall, by the name assigned to it by subsection (1), be a body corporate and shall have perpetual succession and a common seal and may sue and be sued in such name.

Constitution of the Authority.

3. (1) The Authority shall consist of a Chairman and not less than ten others members who shall be appointed by the Minister from among persons who possess recognized qualifications, have had wide experience and have distinguished themselves in the field of industry, law, economics, commerce, administration, accountancy, science or health.

(2) The Chairman and three of the members, selected by the Minister from among the members appointed under subsection (1), shall be full time members (hereinafter referred to as "full-time members of the Authority").

(3) The members of the Authority other than the Chairman and the three full time members of the Authority shall be paid such remuneration as may be determined by the Minister in consultation with the Minister in charge of the subject of Finance.

(4) The provisions of the Schedule to this Act, shall have effect in relation to the term of office of the members of the Authority, the meetings and seal of the Authority.

Chairman and full time members.

4. The Chairman and the full time members of the Authority shall each hold office for a period of three years from the date of their respective appointments, and shall be paid for their services such remuneration as may be determined by the Minister in consultation with the Minister in charge of the subject of Finance.

Director-General to act as the Secretary to the Authority

5. The Director-General of the Authority appointed under section 52, shall act as the Secretary to the Authority.

Delegation of powers to public officers.

6. The Authority may for the purpose of discharging its functions under this Act, delegate to any public officer by name or office such functions vested in, or imposed upon, or assigned to the Authority by or under this Act, on such terms and conditions as may be agreed upon between such officer and the Authority.

Objects of the Authority.

7. The objects of the Authority shall be –

(a) To protect consumers against the marketing of goods or the provision of services which are hazardous to life and property of consumers;

(b) To protect consumers against unfair trade practices and guarantee that consumers interest shall be given due consideration;

(c) To ensure that wherever possible consumers have adequate access to goods and services at competitive prices; and

(d) To seek redress against unfair trade practices, restrictive trade practices or any other forms of exploitation of consumers by traders.

Functions of the Authority.

8. The functions of the Authority shall be to –

(a) Control or eliminate –

(i) Restrictive trade agreements among enterprises;
(ii) Arrangements amongst enterprises with regard to prices;
(iii) Abuse of a dominant position with regard to domestic trade or economic development within the market or in a substantial part of the market; or
(iv) Any restraint of competition adversely affecting domestic or international trade or economic development;

(b) Investigate or inquire into anti-competitive practices and abuse of a dominant positions;

(c) Maintain and promote effective competition between persons supplying goods and services;

(d) Promote and protect the rights and interests of consumers, purchasers and other users of goods and services in respect of the price, availability and quality of such goods and services and the variety supplied;

(e) To keep consumers informed about the quality, quantity, potency, purity, standards and price of goods and services made available for purchase;

(f) Carry out investigations and inquiries in relation to any matter specified in this Act;

(g) Promote competitive prices in markets where competition is less than effective;

(h) Undertake studies, publish reports and provide information to the public relating to market conditions and consumer affairs;

(i) Undertake public sector and private sector efficiency studies;

(j) Promote consumer education with regard to good health, safety and security of consumers;

(k) Promote the exchange of information relating to market conditions and consumer affairs with other institutions;

(l) Promote assist and encourage the establishment of consumer organizations;

(m) Charge such fees in respect of any services rendered by the Authority;

(n) Appoint any such committee or committees as may be necessary to facilitate the discharge of the functions of the Authority; and

(o) Do all such other acts as may be necessary for attainment of the objects of the Authority and for the effective discharge of the functions of such Authority.

PART II

Regulation of Trade

Authority may undertake studies on the distribution of goods and services.

9. The Authority may –

(a) Undertake such studies in respect of the sale or supply of any class of goods and services as would ensure the availability to the consumer of such goods and services of satisfactory quality at reasonable prices and in adequate quantities;

(b) Promote, assist and encourage the State or other organisations including organisations of consumers, for the purpose described in paragraph (a); and

(c) Assist and encourage associations of traders to enter into agreements with the Authority for the purposes described in section 14.

Authority to issue directions to manufacturers or traders in respect of price marking, labelling and packeting of goods.

10. (1) The Authority may, for the protection of the consumer –

(a) issue general directions to manufacturers or traders in respect of labelling, price marking, packeting, sale or manufacture of any goods; and

(b) issue special directions to any class of manufacturers or traders, specifying –

(i) the times during which and the places at which, such goods may be sold; and

(ii) any other conditions as to the manufacturing, importing, marketing, storing, selling and stocking, of any goods.

(2) Every direction issued by the Authority under subsection (1) shall be published in the Gazette and in at least one Sinhala, one Tamil and one English newspaper.

(3) Any manufacturer or trader who fails to comply with any direction issued under subsection (1) shall be guilty of an offence under this Act.

(4) Any person who removes, alters, obliterates, erases or defaces any label, description or price mark on any goods in respect of which a direction under subsection (1) has been issued, or sells or offers for sale any such goods from or on which the label, description or price mark has been removed, altered obliterated, erased or defaced, shall be guilty of an offence under this Act.

Selling or offering to sell above the marked price.

11. Any person who sells or offers to sell any goods above the price marked on the goods in accordance with a direction issued under section 10, shall be guilty of an offence under this Act.

Sections of the Act continued .....

Agreement to provide for maximum price etc. of goods

14. (1) The Authority may enter into such written agreements as it may deem necessary, with any manufacturer or trader or with any association of manufacturers or traders to provide for-

(a) the maximum price above which any goods shall not be sold;

(b) the standards and specifications of any goods manufactured, sold or offered for sale:

(c) any other conditions as to the manufacture, import, supply, storage, distribution, transportation, marketing, labelling or sale of any goods.

(2) Every written agreement entered into under subsection (1) between the Authority and any manufacturer or trader or with any association of manufacturers or traders, shall be binding on every authorised distributor or such manufacturer or trader and every member of such association, as though he was a party to such agreement and whether or not he was a member at the time of entering into the agreement.

Sections of the Act continued .....

PART III

Promotion of Competition and Consumer Interest

34. (1) The Authority may either of its own motion or on a complaint or request made to it by any person, any organization of consumers or an association of traders, carry out an investigation with respect to the prevalence of any anti-competitive practice.

(2) It shall be the duty of the Authority to complete an investigation under subsection (1), within one hundred days of its initiation.

35. For the purpose of section 34, an anti-competitive practice shall be deemed to prevail, where a person in the course of business, pursues a course of conduct which of itself or when taken together with a course of conduct pursued by persons associated with him, has or its intended to have or is likely to have the effect of restricting, distorting or preventing competition in connection with the production, supply or acquisition of goods in Sri Lanka or the supply or securing of services in Sri Lanka.

Sections of the Act continued .....

A Consumer Ideology for the Developing World – Challenges for Consumer Movements

Rasika Mendis De Silva[*]

Introduction

The word consumer plays a central role in political, economic and ideological debates in today's context of transnational capitalism. What we consume dictates production, decides who governs and determines our quality of life. The consumer is thus a powerful entity around which new age economics revolves and is essentially a figure of modernity and the culture of freedom and the good life that is associated with it. The meanings of the words 'consumer' and 'consumerism' has changed according to its ideological setting and context. In early English usage the word 'consume' signified to 'use up', 'waste' or 'destroy'. It latterly became associated with large-scale industrial production, where it indicated the 'using up of what was going to be produced.'[1]

The word consumerism today denotes a particular culture of consuming. While the traditional connotation implies an overt obsession with consuming, it is now 'a vehicle for freedom, power and happiness...which lies in the consumer's ability to choose, acquire, use and enjoy material objects and experiences.'[2] Consumerism also takes on several ideological senses: it is at times a means by which a 'status is established', by the accumulation of status symbols; or it denotes the advent of the modern state as the 'guarantor of consumer rights' or the provider of goods and services.[3]

Central to the discussion of this paper however, is the ideological base, which the advent of modern consumerism provides to the global system of transnational capitalism. Sklair refers to this ideology as the 'culture ideology of consumerism', which 'claims literally that the meaning to life is found in the things that we possess.'[4] The label culture-ideology is used in the sense that 'culture always has an ideological function for consumerism in the capitalist global system, so all transnational practices in this sphere are at the same time ideological practices.'[5] It provides the 'primary agents' of this system, the transnational corporations, with the impetus to dominate the production of goods and services, to meet the ever-

---

[*] *Rasika Mendis is an Attorney at Law from Sri Lanka. Having completed a Master in Laws at the University of Warwick in 'Law in Development', she is currently engaged in independent research while working (part time) for a law firm based in the UK.*

[1] Williams R., (1988) *Key Words - A Vocabulary of Culture and Society*, Fontana Publishers, p. 79

[2] Gabriel Y. Lang T., (1998) *The Unmanageable Consumer – Contemporary Consumption and its Fragmentation*, Cambridge University Press p.8

[3] *Ibid*

[4] Sklair L, (2002), *Globalisation, Capitalism and its Alternatives*, Oxford University Press, p.62

[5] *Ibid*

increasing standard of living. Thus it is vital for the sustenance of international trade and commerce that the consumerist society transcends borders, and this culture -ideology is nurtured.

Closely knit to the proliferation of this ideology is the modern mass media, which induces excessive wants, and creates desires that are associated with the 'better life' surrounded by a larger quantity of consumer goods. With the global integration of mass communication, developing countries are pervaded by this ideology, which is more western in its inception. While these countries do not themselves own the production processes that manufacture the majority of these goods, they have access via the media to western ideologies of consumerism, and are 'possible converts' to fulfillment that is preached by a consumerist life style. Consumers in this scenario may be perceived as weak and malleable in the face of forceful media images that appeal to the senses and imagination.

Central to the contentions surrounding the all pervasiveness of consumerism across the globe, are the disparities that are all too apparent between the consumers of goods and services of the North and South. Consumer concerns at the heart of these nations can vary drastically in nature from those that are common in the North. There has been in the recent past, the rise of a 'consumer movement' that have attempted to challenge these particular concerns and vulnerabilities of developing countries. Given that the forces of globalisation further accentuate the vulnerabilities that are particular to the consumers of developing countries, the challenge is substantial. Consumer movements need to define themselves and their purpose in relation to the particular context and culture within which they operate. This paper ventures to highlight what those challenges may entail to consumer movements of the South, and assess in which way their role must be distinct to the consumer needs of the context in which they operate.

Consumer Rights and Consumer Movements in Developing Countries

Consumer rights derive from a whole gamut of rights extending to human rights, social rights, political rights, and economic rights of persons.[6] Consumer justice that the articulation of these rights seeks to achieve in developed societies, differ drastically in nature and scope to the consumer justice that is sought by consumer movements in the developing world. This is vividly illustrated by the divergent interpretations of the 'right to choose'. The right to choose is hailed as the supreme value that governs consumers in the North, and a 'driving force for efficiency, growth and diversity'.[7] In a context of meager earnings and abject poverty, one questions the relevance of this right. Consumers of the South may not have the luxury of choosing; rather their economic means will dictate the ambit of the

[6] The Consumer Unity & Trust Society, (2001) *State of the Indian Consumer – Analysis of the Implementation of the United Nations Guidelines for Consumer Protection, 1985 in India*, p. xi
[7] Gabriel Y. Lang T (*Supra* note 2) p.27

exercise of this right. These consumers would inevitably choose the lowest price rather than the best commodity or service. It is said that -

'While western consumers may deliberate over 16 brands of cereal, ... One in five persons in the developing world suffer from chronic hunger – 800 million people in Africa, Asia and Latin America. Over 2 billion people subsist on diets deficient in the vitamins and minerals essential for normal growth and development, and for preventing premature death and such disabilities as blindness and mental retardation'.[8]

Initiatives regarding the promotion of consumer welfare and justice in developing countries, must rather focus on the realization of basic needs and adequate standards of living. There has been much collaborative effort on the part of the developing world to build consistent consumer policies, aimed at promoting consumer welfare that is relevant to their context. These efforts however, also need to focus on any 'transnational' influences that may attempt to detract from the 'equitable realization' of these basic needs, as will be elaborated on later. It is proposed at this juncture to assess the efforts on the part of consumer movements in the South, in interpreting consumer rights in a manner that translates to the needs of their particular communities. It is also proposed to assess the effectiveness and relevance of guidelines which have been articulated at the international level, towards the greater harmonization of consumer policies in the developing world.

The Indian Consumer Movement has demonstrated much initiative in attempting to articulate and define consumer rights and their realisation. The Indian government has done much to promote this movement. The Consumer Protection Act (COPRA) enacted in 1986 incorporated under the definition of 'complainant', all voluntary organizations as having the *locus standi* to file a complaints on behalf of consumers. This fueled a positive response from public minded persons in India, which resulted in the formation of a number of voluntary consumer organizations. India has the biggest consumer movement in the world today.[9] The Consumer Unity & Trust Society of India has attempted to evaluate the United Nations (UN) Guidelines for Consumer Protection, which was adopted in the same year as the COPRA, in a report aimed at formulating a National Consumer Policy for India.[10]

The UN Guidelines makes particular reference to the interests and needs of developing countries in view of the 'imbalances in economic terms, educational levels, and bargaining power'. It has amongst it objectives – to assist countries in achieving or maintaining adequate protection for their population as consumers, and to encourage the development of

[8] UNICEF (1992), *Food, Health and Care: The UNICEF Vision and Strategy for a World Free from Hunger and Malnutrition.* New York: United Nations Children's Fund in Gabriel Y. Lang T (*Supra* note 2) p.31 - 32
[9] The Consumer Unity & Trust Society (*Supra* note 7) p. vi
[10] The Consumer Unity & Trust Society (*Supra* note 7)

market conditions which provide consumers with greater choice at lower prices.[11] The Indian report translates the eight areas outlined in the UN Guidelines into eight consumer rights for its analysis. These eight rights relate to – basic needs, safety, choice, information, consumer education, redressel, representation, and a healthy environment. It is pertinent to elaborate on a few of these rights as discussed in the Indian report.

While the UN guidelines do not make special reference to the right to 'basic needs', the Indian report brings within the ambit of this right, the UN guideline requesting governments to take 'appropriate measures to ensure the efficient distribution of essential goods and services to consumers'. The Government of India is called upon to give priority to essentials relating to the health of the consumer, in the provision of food, water and pharmaceuticals. The Indian report further includes within the right to basic needs, the right to food, clothing, drinking water and sanitation, shelter, education, energy and transportation.[12]

The UN guidelines do not refer to some of these rights. The right to safety is related to the two kinds of safety measures outlined in the UN guidelines – physical safety and standards for the safety and quality of consumer goods and services. Measures to be adopted by the government of India for ensuring the right to safety include appropriate legal systems, safety regulations, national and international standards.[13] The Indian report brings within the right to consumer education, the right to 'acquire knowledge and skills to be an informed consumer'.[14]

The UN guidelines do not refer directly to the right to choice. The stipulation to 'promote and protect the consumer's economic interests', is said to refer to this right. The Indian report in contrast defines the right to choose as the 'assurance wherever possible, of availability, ability, and access to a variety of products and services at competitive prices'. It seeks to pursue this right within the framework of the 'welfare state' in order that competitive prices may also reflect 'just prices'. This right has been difficult to implement in India as Indian industry has engaged in price competition rather than quality competition, and also because of the lack of knowledge on the part of consumer.[15]

There has been a distinct effort on the part of the Indian consumer movement to apply the UN Guidelines in a manner that is relevant to the particular circumstances of the Indian consumer. Two further rights, namely the right to boycott and the right to opportunities has

---

[11] Unites Nations (1986), *Guidelines for Consumer Protection*, Department of International Economic and Social Affairs, http://www.law.osaka-u.ac.jp/~kagayama/Consumer/Documents/UNGuidelines/E.html, accessed April 01, 2003

[12] The Consumer Unity & Trust Society (*Supra* note 7) p. xii - xv

[13] *Ibid* p. xvi - xvii

[14] *Ibid* p. xxi

[15] *Ibid* p. xvii - xix

also been adopted. The rationale being that without the latter right, the right to basic needs remain meaningless.[16]

It is relevant at this point to note that UN guidelines place a heavy emphasis on governmental responsibility towards consumers. In the Indian context, a central challenge for the protection of the consumer remains the lack of an 'adequate mechanisms for implementing the measures' that have been outlined.[17] Measures such as the empowerment and education of the rural poor, in order that they might appreciate the subtleties involved in identifying one product over another, and engaging them in a participatory process, is indeed a Herculean task.

While it is paramount to effectively articulate consumer rights to the knowledge of both the urban and the rural communities, it must be appreciated that major segments of society in these countries may not perceive themselves as 'consumers' in the sense that the UN Guidelines, or even national legislation perceives them. There are a number of instances in which consumers of the developing world 'make do', with what is available, despite detrimental effects of the use of these products. Thus, in their efforts towards attaining healthy consumer welfare, consumer movements in developing societies are faced with the challenge of addressing the shortfalls of governments and the different perceptions or non – perceptions of consumers in their societies.

A greater challenge for consumer movements in developing countries is to achieve more 'specificity' in defining consumer concerns in the context of transnational capitalism, and governmental responses to these concerns. On an analysis of various collaborative efforts in this regard, one finds the terminology becoming very 'regular'. This does not reflect a greater convergence in consumer policies in addressing the challenges of transnational capitalism, but rather 'over generalisation' of consumer concerns in this context. For instance, in a report that was the result of a collaborative effort by two consumer organisations and the United Nations[18], one finds statements to the following effect:[19]

'There is a need for transparency, particularly in cross border business activities to ensure that consumer interests are adequately addressed'; and

'Governments should encourage **fair and effective competition** in order to provide consumers with the appropriate range of choices among products and services given that

---

[15] 3rd National Convention of Consumer Activists in Calcutta in November 1991 in The Consumer Unity & Trust Society (*Supra* note 7) p. ix

[17] The Consumer Unity & Trust Society (*Supra* note 7) p. xxvii

[18] Consumers International, Consumer Unity & Trust Society, Department for Economic and Social Affairs of the United Nations Secretariat (1997), *Consumer Protection for Asia and the Pacific* – Report of the International Conference on Consumer Protection: Consumers in the Global Age, New Delhi, p.

[19] *Ibid* p. 19

consumer interests would be better served by having lower prices without compromising on consumer safety...(*emphasis added*)'

It has not always been the case that competition regimes in developing countries have led to lower prices, and an 'appropriate' range of choices. One must question between whom competition is generated. With greater liberalisation and privatisation, foreign companies compete against each other within developing countries. The choice that is ultimately laid before the consumer may be between the better of two sub-grade products that does not have a market in the North. Further, the liberalization of trade advocated by institutions such as the World Trade Organisation (WTO), may stifle the growth of local industry, with the result that any hopes of lower prices in the long term become remote.

The UN guidelines makes it provisions applicable to 'home – produced goods and services and to imports'. It further stipulates that 'in applying any procedure of regulation for consumer protection, due regard should be given to ensuring that they do not become barriers to international trade and that they are consistent with international trade obligations'.[20] Given the complexities that greater economic integration and transnational capitalism presents to developing countries, achieving greater specificity and coherence to the particular concerns of the consumers in the South seems an immense task. For instance, it may be difficult for developing countries to compromise on their trade obligations in the face of very powerful entities that control transnational practices, while it may not be as difficult for these entities to compromise on requirements of transparency in cross border transactions.

Consumer movements in developing countries must be watchful that they do not get drawn in by predominant 'global rhetoric', and lose focus of the greater specificity they require in addressing consumer concerns. There is a tendency for a western consumer culture ideology to pervade the globe and the forces of consumer capitalism to take over the process. Approaches to consumer protection in the west cannot at the same time be transported wholesale to the developing countries. A wider focus of the inherent inequalities of consumers in the South needs to be maintained, as against a preoccupation with isolated economic measures, which may have little relevance to a particular context. Such a preoccupation may well detract from the root problems of these consumers.

Transnational Corporations and the Consumer

Transnational Corporations (TNCs) present powerful economic entities to which the culture ideology of consumerism is of great significance. They present the primary agents through which transnational capitalism is fostered. As much as one-third of world output is said to be 'under the common governance of TNCs and hence potentially part of an integrated

[20] United Nations (*Supra* note 12) provisions 7 - 8

international production system ..... Thus TNCs constitute **the productive core of the World Economy** (*emphasis added*)'.[21]

The magnitude of their operations indicates that these corporations have much to gain from the spread of the consumer goods around the world. The culture ideology of consumerism fuels the interests of consumer capitalism. The success of this ideology is seen, as observed by Sklair, in third world malls, where 'large numbers of workers and their families flock to buy, usually with credit cards, thus locking themselves in to the financial system of capitalist globalisation'.[22]

There is much technological and scientific advancement that can be attributed to TNCs. They have contributed to the advancement of health research, pharmaceuticals, agriculture, and other consumer needs that are vital to the growth and development of the world population. They may be perceived as contributing to the causes of global justice by their innovation and advancement. However, there is much controversy surrounding the modes of production adopted by these corporations, and the ethical value of their means of promotion and distribution. Features of the production and distribution patterns adopted by them are such that consumer demands are met 'in ways that neither the retailer nor consumer is aware, where the goods originate from.[23]

It has been observed that TNCs 'enter the scene when sellers, intermediaries, and the buyers are part of the same transnational network'.[24] Further, the 'do good' image that TNCs are increasingly compelled to permeate of themselves, does not always tally with the 'inequitable' methods by which consumer goods produced by them, are promoted. The kind of visionary image that TNCs find it advantages to portray, is encapsulated in the image that Nestle attempted to present of itself - as 'feeding the whole world in the new millennium'.[25] This image was rebutted by the controversy that Nestle was recently embroiled in with the Ethiopian government. Nestle was attempting to claim a colossal 6 million dollars as compensation from this government, for a nationalized subsidiary. While the Ethiopian government was willing to pay 1.5 million dollars based on the exchange rate at the time of payment, Nestle was demanding that the sum be calculated according to the exchange rate at the time of the nationalisation.[26] It was commented by Oxfam that 'it was extraordinary that Nestle is trying to claim $6 million from a country suffering such severe deprivation'[27]

---

[21] UNCTAD (1994) *Transnational Corporations, Employment and the Workplace*, World Investment Report, p.xxi
[22] Sklair L., (*Supra* note 4) p. 109
[23] *Ibid* p. 89
[24] Morgan G., (2001) *Transnational Communities and Business Systems*, Global Networks, ½ p. 113 – 30 in Sklair L., (*Supra* note 4) p.90
[25] Sklair L., (*Supra* note 4) p. 69
[26] *Nestle in Ethiopia Compensation Row*, BBC News (18 December 2002), 18.21.GMT, http://news.bbc.co.uk/2/hi/business/2587697
[27] *Ibid*

Further, a report entitled 'Nestle and the Sri Lankan Milk Industry', speaks about the 'destruction of the milk industry, since transnationals, principally Nestle, entered the market'. It is said that while 'dairy farmers are paid too little by Nestle to make a living, the distribution of fresh milk has been largely replaced by processed, often imported milk'.[28] It further reports that 'since gaining market dominance Nestle has significantly increased prices, whilst conducting aggressive marketing campaigns ...'[29]

Nestle's promotional campaigns around the world were also reputed as attempting to undermine the benefits of breast-feeding to that of 'bottle feeding breast milk substitutes'. This resulted in the adoption of the WHO/UNICEF International Code of Breastmilk Substitutes, which bans all promotion of bottle-feeding. Any activity, which undermines breastfeeding, is seen as violating the spirit of the code.[30]

The sadder aspect of the whole Nestle story is that, while there has been a massive international campaign to restrict the sale of powdered milk for babies in developing countries, it is very rarely that these efforts have been translated into legislative measures. Papua New Guinea is cited as a 'rare instance where legislative action was taken prohibiting advertisements which encourage bottle feeding, in 1977.'[31] It is contended that 'only national governments can curb the actions of transnational corporations.'[32]

However, while this may be possible in the case of banning promotional literature, overcoming other manipulative practices by TNCs, may involve a more complex process of action. It may not be feasible for a government to muster the capacity to confront an entity with resources larger than itself, and to which it is beholden for much of its foreign direct investment and employment generation. Challenging the inequitable and manipulative practices of TNCs, will require a larger and more organized strategising on the part of consumer movements in the developing world. It would require a collaborative effort that exceeds measures such as the formulation of a framework on which national policies for consumer protection are built.

Developing countries further suffer from 'double standards' exercised by TNCs. While these companies maintain high standards (of health and safety) in their home countries, the same standards are not applied to consumer goods exported to developing countries. The hazardous pesticides that are dumped into the South illustrate the gravity of this double standard. A report entitled Consumers of the Global Age highlights that in Bangladesh pesticides are used profusely to mitigate food shortages and increase production. While these

---

[28] Baby Milk Action Resource Centre, *Nestle and the Sri Lankan milk industry*, 10 December 2002, http://www.babymilkaction.org/ram/monlar/monlarinterview.html, accessed April 20, 2003

[29] *Ibid*

[30] WHO/UNICEF (1981), *The International Code of Marketing of Breastmilk Substitutes*, http://www.babymilkaction.org/regs/fullcode.html, accessed April 20, 2003

[31] Gabriel Y. Lang T (*Supra* note 2) p.131 - 132

[32] *Ibid* p. 132

pesticides are banned in developed countries, illiterate and poor farmers use them and are oblivious to their ill effects. While consumers demand better assurance on a range of issues from product safety to ethical concerns, the food and water remains adulterated.[33] In the area of health care in Bangladesh, consumer groups pushed for a drug policy that was promulgated in June 12, 1982, which amongst other things, restricted the marketing of unnecessary and harmful drugs, controlled the pricing of drugs, and made medicines available at a fair price. Much benefit must derived to the populace by this policy. However, pharmaceutical companies exercise continuous pressure to restrict this policy.[34]

Conclusion

Consumers in the developing world, present somewhat of a different picture to the dominant consumer, able to influence the processes of production, trade and politics. The picture in the developing world is rather, one of victimisation, where neither their governments nor market forces can provide them adequate protection. Consumer movements are said to emerge as a reactive force to persisting problems that lead to victimisation.[35] Victimisation can occur both in an active and passive sense. For instance governments may not be in a position to protect the consumer in a given context, thus leading to the consumer's victimization. It is pertinent for consumer movements to diligently assess where the forces of victimization stem from in attempting to work towards the protection of the consumer.

A consumer ideology that has as its focus a good life built around a profusion of consumer goods has no relevance where basic needs are not met. This ideology is deeply entrenched into transnational practices, which attempt to secure dominance in this ideology.

Consumer activism, can only have meaning within a context of a consumer ideology that meets the 'particular' (and basic) needs of a community. Consumer movements must be sensitive to work towards consumption patterns that fit this ideology, in order that consumer satisfaction and welfare is guaranteed. Ideological differences that exist in consuming (or in consumerism) between the developed and developing societies, (and in cases within developing societies) must be defined and appreciated, for the effective dissemination of a relevant ideology of consuming and also for the effective realisation of consumer rights.

While there is a tendency to generalise consumer concerns at the international and global level, consumer movements in the South must be diligent to always highlight the special and specific circumstances of consumers in the developing context. The Indian consumer movement has made substantial strides towards achieving this objective. Certain measures that have been initiated for the redressel of consumer concerns further emphasise the

---

[33] Consumer Unity &Trust Society (1997), *Consumers in the Global Age*, Proceedings of the International Conference on Consumer Protection, New Delhi, India, p.220

[34] *Ibid* p. 221

[35] Gabriel Y. Lang T (*Supra* note 2) p.121

attention given to the particular circumstances of the consumer in India. The Consumer Protection Councils that were established in 1986 by the passing of the COPRA, comprise a majority of non- official participants. In certain states consumer activists themselves are nominated to these councils. While these councils greatly empower the grass roots, they further gave credibility to consumer movements to 'raise and resolve consumer problems at the local level.'[36] Further, there has been much innovation on the part of the consumer movement in India to bring within its ambit other abuses suffered by citizens. It is said that the 'movement is straining its nerves in removing the distortions which have crept in to the governance system ...'[37]

Thus the government of India has demonstrated much initiative in affecting measures that have proved effective in addressing the particular concerns of the Indian consumer. Other initiatives within South Asia may be compared and contrasted in view of the fact that consumer concerns within the region may be similar in nature. In Sri Lanka, the Consumer Affairs Authority Act No. 9 of 2003 (the Act) was enacted after a period of public consultation. The Act provides for the establishment of a Consumer Affairs Authority (the Authority) consisting of members with experience in fields such as industry, law and economics.

The Authority is vested with wide ranging powers, from an overall supervisory power to regulate trade, to entering into written agreements with manufacturers concerning the various specifications and conditions of trade. It is also vested with the powers of the District Court in determining consumer complaints. A separate Consumer Affairs Council (the Council) is established by section 39 of the Act. The Council has both the power to investigate matters, and may determine matters relating to anti – competitive practices, based on investigations conducted by the Authority. Further, a person or body dissatisfied with a determination by the Authority may refer the matter to the Council.

Further, it can make determinations with respect to excessive price of goods or services, and recommend the maximum price above which, such goods should not be sold or services provided. The Director General of Consumer Affairs refers such matters to it for determination, and Section 22 provides for interested citizens or groups to also refer these matters to the Director General.

While one perceives a certain amount superfluity and overlap in the functions of the Authority and Council, it must be appreciated that a mechanism that purports to function independently, as the above, can do much to promote greater consumer welfare. However, average consumers may well have to grapple with the complex and bureaucratic nature of the provisions and procedure contained in the Act, in attempting to realise their consumer needs and rights.

---

[36] Consumer Unity & Trust Society (*Supra* note 6) p.v

While the complaint mechanism established by the Act may well serve the purposes of more complex consumer complaints, it will have the effect of deterring the average consumer from having to go through the system, for the redressal of relatively 'small' consumer grievances, outside the scope of those specified by the Act. An all-encompassing mechanism, such as the mechanism of consumer councils in India, is lacking from the purview of the Act.

The Sri Lankan Act has not achieved the 'flexibility' that the provisions of the COPRA has achieved, in terms of empowering the grassroots to effectively redress their consumer rights. Consumer movements able to process a complaint within the provisions of the Act may necessarily have to comprise of experts and professionals.

There is little room in this Act for public minded citizens and volunteers to exercise their innovation and initiative. It lacks the potential to create consumer awareness by a meaningful presence of a redressal mechanism, which operates at the grass root level itself. The inability of legislation to 'enable' consumer activism at the grass roots may hamper the growth of a meaningful and effective consumer movement in Sri Lanka.

The UN Guidelines for Consumer Protection provide a coherent framework upon which developing countries may build national consumer policies. These guidelines provide the basis upon which governments may redress the particular vulnerabilities consumers are subject to in the context of capitalist transnational capitalism. However, one questions the adequacy of state initiated measures to effectively address the inequities that consumers 'suffer' by the transnational practices of TNCs. The global phenomenon of suffering cannot be addressed in isolation.

One needs to deconstruct the very system that generates suffering for the sake of its own expansion and dominance. There needs to be a greater synthesis and convergence by consumer movements of the South, of coherent strategies that challenge the practices and ideologies of these transnational entities. While governments have a part to play in attempting to protect consumers from the adverse influences of transnational practices, a mechanism that stems from the transnational arena itself may need to be articulated to effectively address these particular concerns. Such a mechanism may need to transcend national boundaries to objectively assess the ideological underpinnings that guide consumers, with a view to assessing its relative impact on consumers around the globe.

---

[37] *Ibid* p. vii

BIBLIOGRAPHY

Books

1. Williams R., (1988) *Key Words - A Vocabulary of Culture and Society*, Fontana Publishers,

2. Gabriel Y. Lang T., (1998) *The Unmanageable Consumer – Contemporary Consumption and its Fragmentation*, Cambridge University Press

3. Sklair L, (2002), *Globalisation, Capitalism and its Alternatives*, Oxford University Press

Reports

4. The Consumer Unity & Trust Society, (2001) *State of the Indian Consumer – Analysis of the Implementation of the United Nations Guidelines for Consumer Protection, 1985 in India*

5. Consumers International, Consumer Unity & Trust Society, Department for Economic and Social Affairs of the United Nations Secretariat (1997), *Consumer Protection for Asia and the Pacific* – Report of the International Conference on Consumer Protection: Consumers in the Global Age, New Delhi

6. UNCTAD (1994) *Transnational Corporations, Employment and the Workplace*, World Investment Report

7. Consumer Unity &Trust Society (1997), *Consumers in the Global Age*, Proceedings of the International Conference on Consumer Protection, New Delhi, India

Websites

8. United Nations (1986), *Guidelines for Consumer Protection*, Department of International Economic and Social Affairs, http://www.law.osaka-u.ac.jp/~kagayama/Consumer/Documents/UNGuidelines/E.html, accessed April 01, 2003

9. *Nestle in Ethiopia Compensation Row*, BBC News (18 December 2002), 18.21.GMT, http://news.bbc.co.uk/2/hi/business/2587697

10. Baby Milk Action Resource Centre, *Nestle and the Sri Lankan milk industry*, 10 December 2002, http://www.babymilkaction.org/ram/monlar/monlarinterview.html, accessed April 20, 2003

11. WHO/UNICEF (1981), *The International Code of Marketing of Breastmilk Substitutes*, http://www.babymilkaction.org/regs/fullcode.html, accessed April 20, 2003

Consumer Rights and Genetically Modified Organisms; Unsolved Dilemmas and Particular Problems

*Yoga Sanjeewani Gunadasa**

The term 'Genetic Modification' is commonly used to refer to the artificial insertion of genes from one organism into another. The term GM food or genetically modified organism, consequently refers to crop plants created for human or animal consumption, using these molecular biology techniques. Hence, genetically modified organisms are the result of gene manipulation, producing a change in the biological characteristics of plants or animals, through means other than conventional breeding programs. Genetic engineering encompasses a wide range of new techniques that allow scientists to alter the molecular biology of an organism from entirely unrelated organisms. Unlike traditional breeding, these techniques artificially breach natural reproductive barriers from distant species in ways that could never occur in nature.

Genetically Modified Organisms (GMO) originate from path breaking advances in science and have their detractors as well as their enthusiastic. The latter contend that GMOs contribute to higher crop yield and lower production costs. GM foods have the potential to increase global food security by addressing many world hunger and nutrition problems. Plants can be genetically altered to enhance resistance and tolerance to pests, herbicides, disease, cold, drought, and salinity. In turn, as is argued, this will provide a more plentiful food supply without increasing the acreage in production. Foods can also be altered to enhance taste and quality or improve nutritional value. GM foods help protect and preserve the environment by reducing reliance on chemical herbicides, pesticides or fertilizers. Thus, the benefits of increased yield, nutrition, and reduced cost of inputs can be significant.

On the other hand, opponents of GMOs point out that this may result in long term and unpredictable health and environmental consequences. The process of genetic engineering creates risk and uncertainty. The reason for the uncertainty is the imprecise techniques used for inserting D.N.A. Hence this same uncertainty and risk is reflected in the GMOs.

In fact, scientific investigations show that GM. foods are associated with toxins, allergies and reduction of immunity causing unlimited harm to human health, sometimes even leading to death. It is in this context that the European Union has banned imports of GM foods since the late 1990s. However the Word Trade Organization (hereinafter, WTO) has taken the

* LL.B (Colombo), Research Assistant, Law & Society Trust.

position that that the EU ban was not based on scientific evidence but was rather, a trade barrier. Hence the topic needs to be discussed in depth.

Genetically Modified Organisms and International Regulatory Agreements

The WTO is one of the most significant international organizations focussed on international trade and economic activity. A number of agreements have come into effect regarding member countries under the auspices of the WTO, one of the most important being the Agreement on Sanitary and Phytosanitary measures, (hereafter the SPS Agreement), which basically relates to regulation of GM organisms. The Agreement discusses primary issues of food safety as well as animal and plant health regulations. Its major objectives are -

- To protect and improve the current human health, animal health and phytosanitary situation of all member countries.
- To protect member countries from arbitrary or unjustifiable discrimination due to different sanitary and phytosanitary standards.

The Agreement encourages member countries to utilise standards set by international organizations with regard to the achieving its objectives. However, it also allows countries to set their own standards. Hence, domestic standards may be higher than those imposed by international regulations. But there is a limitation regarding the whole. The SPS Agreement states that those standards should be based on scientific evidence.[1] This evidence should be based on a risk assessment.[2]

Accordingly, the SPS Agreement provides for two types of risk assessments. One type of risk assessment is to evaluate the likelihood of pests and diseases entering, establishing and spreading in the country of import. The other type is to evaluate the potential for adverse effects on human and animal health arising from the presence of contaminants, toxins or disease causing organisms in food, beverages and feedstuffs. Such a process should take into account the appropriate risk assessment methodologies. This should also not be a restriction to trade. Hence the SPS Agreement appears to prevent government from using health and safety laws to limit international trade. In fact the requirement of scientific evidence is a difficult requirement for the developing countries. Lack of facilities and knowledge give no space to many developing countries to fulfil the requirements.

[1] Article 2.2 of the S.P.S agreement

Problems faced by the developing countries vis a vis the SP.S Agreement

Knowledge of SPS issues is somewhat poor in most developing countries. As such, active participation on the part of developing countries towards the SPS Agreement is unsatisfactory. In fact, many countries are not represented at SPS committee meetings or meetings of the international organization. Due to this, these countries fail to utilize the mechanisms laid down by the Agreement to their advantage. Lack of financial resources and technical assistance are serious problems in all developing countries. This problem is compounded by the fact that the SPS Agreement commits all members to take account of the special circumstances of developing countries when developing SPS measures and to permit time or limit exemptions where necessary. However, there is little evidence that developed countries actually do this. Developing countries also hold the view that certain aspects of the S.P.S agreement (for example equivalency[3]) are rarely applied in the case of developing countries. The term 'sufficient evidence' in the agreement is actually difficult to define. There is no clear criteria regarding the quality and the quantity of the evidence that is needed.

Developing countries meanwhile face many obstacles when participating in the complaints procedures provided for under the Agreement, such as limited financial resources, lack of scientific data and lack of expertise. Hence, complaints by developing countries are based not so much on the contention that the provisions of the SPS Agreement are flawed but rather that their trading partners are not properly implementing the SPS Agreement. It appears that developing countries lack a collective effort to resolve these burning issues.

The SPS Agreement is not a public health agreement. It is only a business oriented trade agreement. However, there are ways in which we can reduce its harmful effects, particularly by enhancing the capability and capacity of citizens of developing countries. Enhancing awareness and understanding of SPS issues amongst the agricultural and food sector in developing countries will be significant.

Developed countries also have particular duties in this regard which involves taking greater account of the needs of developing countries. In fact, many provisions of the SPS Agreement enforce this duty upon developed countries. Thus, Article 10 of the SPS Agreement states that special needs of developing countries must be taken into account. Article 9 of the SPS Agreement requires that developing countries be provided with technical assistance to assist them in complying with health and safety standards. Hence, developed countries must support research on the impact of SPS measures on developing countries to generate more rigorous and quantified assessment processes.

---

[2] Article 5.1, 5.2, 5.3 of the S.P.S agreement

Consumer Rights to Information and Labeling - The Precautionary Principle in Environmental Law

According to the SPS Agreement, members shall take into account, available scientific evidence in the assessment of risk process mandated by the Agreement. It seems that the proof of scientific evidence is an essential requirement but the European Union has brought in the argument of the precautionary principle in environmental law in this regard. According to this principle, a country can take precautionary measures to protect the environment even though there is a lack of scientific evidence with regard to those measures. Hence, this encapsulates an approach to decision making that needs to be widely adopted on a global basis. In essence, this approach maintains that a lack of scientific evidence shall not be used as a reason for not acting in a way that prevents degradation to the environment or to human health. As a result, the European Union has decided to strictly label GM food in order to give consumers a choice .In that instance, the European Union recognizes the consumer's right to information and labelling as a tool to make an informed choice.

According to prevalent E.U. Legislation (July 2003),[4] a company intending to market a GMO must first submit an application to the competent national authority of the member state where the product is to be first placed on the market. The application must include a full environmental risk assessment.

Again, the draft Organization of African Unity Model Biosafety Laws - (2002)[5] requires that all GMO's, whether classified as food, crops, pharmaceuticals or commodities and products and thereof must be approved before import, transit, contained use, release and market release can take place. Any GMO or product thereof must be labeled as such, thus emphasizing a strict liability regime.

Given the above, it is high time that Sri Lanka follows the precautionary principle in so far as regulation of GM foods is concerned.

---

[3] Article 4 of the S.P.S agreement

[4] Council of the European Union (7th march 2003) common position adopted by the council with a view to the adoption of a Regulation concerning GM, directive 2001 .18 EC

[5] November 20, 2002, Lusaka, Zambia-leaders from 20 organizations in 20 African countries who gathered in Lusaka for the African consumer Leaders conference on Biotechnology and Food Security announced their formal positions on the issue of GM –Lusaka Declaration http:www.greens.org /s-r/31/31-02.html

The Cartagena Protocol of the Biosafety Convention and genetically Modified Organisms

The Cartagena Protocol to the Bio-diversity Convention regulates the transboundary movements of genetically modified organisms and provides an international forum to discuss the issue on GMOs. The Protocol sets up a Bio-safety clearing house which facilitates exchange of information on GMOs. The AIA procedure (Advanced Informed Agreement) in the Protocol also ensures that countries are provided with the information necessary to make informed decisions about GMOs.

It is ironic that the United States is not a party to the Bio-diversity Convention and therefore has not signed the Biosafety Protocol. It will be vital to remember at this stage that the U.S has pioneered the use of biotechnology and is the world's leading producer of GM crops. The U.S opposes the Bio-safety Protocol on the basis that the enforcement of the protocol will interfere with the main U.S. agriculture exports. This position has been heavily critiqued as propounding an insular and limited outlook regarding an issue which has profound consequences for the world in general

Recent Developments regarding Sri Lanka, GMO and the SPS Agreement[5]

Sri Lanka is one of the countries which imposed a total ban on GM foods.[6] The import of GM food was banned, unless a certificate had been issued from an accredited laboratory or competent government authority certifying that this product does not contain genetically modified organisms.

It is relevant in this context that the U.S.A took exception to the ban imposed by this country on GM foods and threatened to initiate proceedings at the W.T.O. One factor in this regard was that the W.T.O required Sri Lanka to provide scientific evidence to support its decision. Proof of scientific evidence is an essential requirement of the S.P.S Agreement that is in force under the auspices of the WTO

Regulations banning GM foods in Sri Lanka were suspended in August 2001. It can reasonably be contended that this suspension is unjustifiable on both scientific and legal grounds, bringing serious consequences to our consumers. Accordingly, peoples' human rights but also Sri Lanka's right to enact their own food safety and environmental laws were violated. Sri Lankan citizens had neither the right to an informed choice nor the right to

[5] Agreement on Sanitary and Phyto sanitary measures

public participation in decision making in this context, infringing the right to democratic participation as well as justice and equality.

This paper makes the point that this suspension has an adverse impact on future unborn generations in this country as well. As examined before, GM foods may result in unpredictable consequences, further resulting in negative environmental repercussions as its processes are imprecise.

The Sri Lankan Constitution, in Article 27 (14), affirms that 'the state shall protect, preserve and improve the environment for the benefit of the community. Hence, Sri Lanka should strengthen the precautionary approach to remedy the current situation which has come about as a result of the suspension of the ban imposed earlier. It seems that pressure exerted by the W.T.O goes beyond the ability of the Sri Lankan government to regulate the manner in which Sri Lankan citizens should live their own lives, including the manner of food that they might have the choice to eat. This type of pressure inevitably violates the right of all people to select what they consume. It is relevant that in Sri Lanka, most people are either Buddhist or Hindu observing strict food codes. Hence, a situation wherein they are brought to unknowingly consume GM foods which contain animal genes, is neither fair nor just.

In any event, it is submitted that risk assessment is a difficult process for a developing country like Sri Lanka. This problem is heightened by the fact that internationally there is an overall lack of scientific evidence with regard to this process. Strict enforcement if this requirement therefore poses many problems.

Impact on Farmers

The term "genetically modified crops' has an inevitably adverse effect on farming and agriculture. These crops are normally patented. Permission for pubic use of the invention is granted by paying the patent holder a license or royalty fees. Thus, if multinational companies take patent rights over the modified crops, innocent farmers will remain without compensation. They are the people who protect the ancient crops. Besides the high cost of genetically modified crops is also likely to push many small and medium sized farmers out of business. As a result this will increase the dependence on industrialized nations by developing countries. This will also lead to bio-piracy which is the foreign exploitation of natural resources.

[6] Regulations made by the Minister of Health in consultation with the Food Advisory Committee under se.32 of the Food Act No: 26 of 1980 as amended by Food (Amendment) Act, No 20 of 1991. (These regulations may be cited as the provisional food regulations –2001)

Ethics and Consumer Protection

This paper re-iterates the fact that the consequences of genetically modified organisms are unpredictable. It may result in adverse long term health and environmental consequences, posing a threat to human life and violating both the right to life and the right to environment. It is axiomatic that citizens should have the right to an informed choice which in turn implies the public right to participate in decision making. This also implies the concept of autonomy of individuals. The principle can clearly be applied in labelling foods derived from genetically modified foods. It is also noteworthy that food productions which include animal genes also affect the natural eco- system. This offends the moral duty imposed on us to preserve and protect the environment for the future generations.

Biotechnology and related consumer protection issues have caused multiple trade and policy conflicts. Particularly the application of the precautionary principle in international trade, environmental and consumer protection laws is a sore point of transatlantic contention.

Conclusion

In the past, many laws have been enacted to protect consumers in Sri Lanka. A recent law titled the Consumer Affairs Authority Act, No 9 of 2003 abrogates the old consumer laws such as the Consumer Protection Act, the Fair Trading Commission Act and the Control of Prices Act.

It could be contended that the new law is not sufficiently activist as far as the rights of the consumer are concerned. However, according to Section 10 (1) of the Act, the Authority created thereunder may, for the protection of the consumer, issue general directions to manufacturers or traders in respect of labelling, price marking, packeting, sale or manufacture of any goods. Any manufacturer or trader who fails to comply with any direction shall be guilty of an offence under this Act.

In addition, any person who removes, alters, obliterates, erases or defaces any label, description or price mark on any goods in respect of which a direction under subsection (1) has been issued, or sells or offers for sale any such goods from or on which the label, description or price mark has been removed, altered obliterated, erased or defaced, shall be guilty of an offence under this Act.

These sections could be effectively utilised in order to ensure that, like the European Union, GMO foods are strictly labelled in order to give Sri Lankan consumers a choice The new Consumer Affairs Authority should play an important role in this respect. While this analysis recommends that the suspension of the February 2000 ban on GM foods be reconsidered. It is imperative that the Sri Lankan consumer be educated on consumer safety and protection.

A critique of the draft Freedom of Access to Official Information Bill 2003 (Sri Lanka)

Submitted by the
Commonwealth Human Rights Initiative*

> *"The great democratising power of information has given us all the chance to effect change and alleviate poverty in ways we cannot even imagine today. Our task, your task...is to make that change real for those in need, wherever they may be. With information on our side, with knowledge a potential for all, the path to poverty can be reversed."*
>
> ***Kofi Annan***

1. It is extremely positive that the Government of Sri Lanka is currently considering the enactment of legislation to entrench the right to information. It is well recognised that the right to information brings enormous benefits to society:

   - ***It strengthens democracy***: The foundation of democracy is an informed constituency that is able to thoughtfully choose its representatives on the basis of the strength of their record and that is able to hold their government accountable for the policies and decisions it promulgates. The right to information has a crucial role in ensuring that citizens are better informed about the people they are electing and their activities while in government. Democracy is enhanced when people meaningfully engage with their institutions of governance and form their judgments on the basis of facts and evidence, rather than just empty promises and meaningless political slogans.

   - ***It supports participatory development***: Much of the failure of development strategies to date is attributable to the fact that, for years, they were designed and implemented in a closed environment - between governments and donors and without the involvement of *people*. If governments are obligated to provide information, people can be empowered to more meaningfully determine their own development destinies. They can assess why development strategies have gone askew and press for changes to put development back on track.

   - ***It is a proven anti-corruption tool***: In 2003, of the ten countries scoring best in Transparency International's annual Corruption Perceptions Index, no fewer than nine had effective legislation enabling the public to see government files. In contrast, of the ten countries perceived to be the worst in terms of corruption, not even one had a functioning access to information regime. The right to information increases transparency by opening up public and private decision-making processes to scrutiny.

---

* This analysis was written by Charmaine Rodrigues, Right to Information Programme, Commonwealth Human Rights Initiative (New Delhi)

- ***It supports economic development***: The right to information provides crucial support to the market-friendly, good governance principles of transparency and accountability. Markets, like governments, do not function well in secret. Openness encourages a political and economic environment more conducive to the free market tenets of 'perfect information' and 'perfect competition.' In turn, this results in stronger growth, not least because it encourages greater investor confidence. Economic equity is also conditional upon freely accessible information because a *right* to information ensures that information itself does not become just another commodity that is corralled and cornered by the few for their sole benefit.

- ***It helps to reduce conflict***: Democracy and national stability are enhanced by policies of openness which engender greater public trust in their representatives. Importantly, enhancing people's trust in their government goes some way to minimising the likelihood of conflict. Openness and information-sharing contribute to national stability by establishing a two-way dialogue between citizens and the state, reducing distance between government and people and thereby combating feelings of alienation. Systems that enable people to be part of, and personally scrutinise, decision-making processes reduce citizens' feelings of powerlessness and weakens perceptions of exclusion or unfair advantage of one group over another.

What a Right to Information Law Should Contain

2. <u>*Maximum Disclosure*</u>: The value of access to information legislation comes from its importance in establishing a framework of open governance. In this context, the law must be premised on a clear commitment to the rule of maximum disclosure. This means that there should be a presumption in favour of access. Those bodies covered by the Act therefore have an *obligation* to disclose information and every member of the public has a corresponding *right* to receive information. Any person at all should be able to access information under the legislation, whether a citizen or not. People should not be required to provide a reason for requesting information.

3. To ensure that maximum disclosure occurs in practice, the definition of what is covered by the Act should be drafted broadly. Enshrining a right to access to "information" rather than only "records" or "documents" is therefore preferred. Further, the Act should not limit access only to information held by public bodies, but should also cover private bodies "*that carry out public functions or where their activities affect people's rights.*" This recognises the fact that in this age where privatisation and outsourcing is increasingly being undertaken by governments, the private sector has increasing influence and impact on the public and therefore cannot be beyond their scrutiny. Part 3 of the South African *Promotion of Access to Information Act* 2000 provides a very good example to draw on.

4. Bodies covered by the Act should not only have a duty to disclose information upon request, but should also be required to proactively publish and disseminate documents of general relevance to the public, for example, on their structure, norms and functioning, the documents they hold, their finances, activities, any opportunities for consultation and the content of decisions/policies affecting the public.

5. In order to support maximum information disclosure, the law should also provide protection for "whistleblowers", that is, individuals who disclose information in contravention of the law and/or their employment contracts because they believe that such disclosure is in the pubic interest. Whistleblower protection is based on the premise that Individuals should be protected from legal, administrative or employment-related sanctions for releasing information on wrongdoing. It is important in order to send a message to the public that the government is serious about opening itself up to legitimate scrutiny.

6. *Minimum Exceptions*: The key aim of any exceptions should be to protect and promote the public interest. The law should therefore not allow room for a refusal to disclose information to be based on trying to protect government from embarrassment or the exposure of wrongdoing.

7. In line with the commitment to maximum disclosure, exemptions to the rule of maximum disclosure should be kept to an absolutely minimum and should be narrowly drawn. The list of exemptions should be comprehensive and other laws should not be permitted to extend them. Broad categories of exemption should be avoided and blanket exemptions for specific positions (eg. President) or bodies (eg. the Armed Services) should not be permitted; in a modern democracy there is no rational reason why such exemptions should be necessary. The law should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions.

8. Even where exemptions are included in legislation, they should still ALL be subject to a blanket "public interest override", whereby an document which is presumed exempt under the Act should still be disclosed if the public interest in the specific case requires it. The test for exemptions (articulated by Article 19) is in 3 parts:

   (i) Is the information covered by a legitimate exemption?
   (ii) Will disclosure cause substantial harm?
   (iii) Is the likely harm greater than the public interest in disclosure? *Simple Access Procedures*: A key test of an access law's effectiveness is the ease, inexpensiveness and promptness with which people seeking information are able to obtain it. The law should include clear and uncomplicated procedures that ensure quick responses at affordable fees. Applications should be simple and ensure that the illiterate and/or impecunious are not in practice barred from utilising the law. Any fees which are imposed for gaining

access should also not be so high as to deter potential applicants. Best practice requires that fees should be limited only to cost recovery, and that no charges should be imposed for applications nor for search time; the latter, in particular, could easily result in prohibitive costs and defeat the intent of the law. The law should provide strict time limits for processing requests and these should be enforceable.

10. All public bodies should be required to establish open, accessible internal systems for ensuring the public's right to receive information. Likewise, provisions should be included in the law which require that appropriate record keeping and management systems are in place to ensure the effective implementation of the law.

11. *Independent Appeals Mechanisms*: Effective enforcement provisions ensure the success of access legislation. Any body denying access must provide reasons. Powerful independent and impartial bodies must be given the mandate to review refusals to disclose information and compel release. The law should impose penalties and sanctions on those who wilfully obstruct access.

12. In practice, this requires that any refusal to disclose information is accompanied by substantive written reasons (so that the applicant has sufficient information upon which to appeal) and includes information regarding the processes for appeals. Any such process should be designed to include a cheap, timely, non-judicial option for mediation with review and enforcement powers. Additionally, final recourse to the courts should be permitted.

13. The powers of oversight bodies should include a power to impose penalties. Without an option for sanctions, such as fines for delay or even imprisonment for wilful destruction of documents, there is no incentive for bodies subject to the Act to comply with its terms, as they will be aware that the worst that can happen is simply that they may eventually be required to disclose information.

14. *Monitoring and Promotion of Open Governance:* Many laws now include specific provisions empowering a specific body, such as an existing National Human Rights Commission or Ombudsman, or a newly-created Information Commissioner, to monitor and support the implementation of the Act. These bodies are often be empowered to develop Codes of Practice or Guidelines for implementing specific provisions of the Act, such as those relating to records management. They are also usually required to submit annual reports to Parliament and are empowered to make recommendations for consideration by the government on improving implementation of the Act and breaking down cultures of secrecy in practice.

15. Although not commonly included in early forms of right to information legislation, it is increasingly common to actually include provisions in the law itself mandating a body to

promote the Act and the concept of open governance. Such provisions often specifically require that the government ensure that programmes are undertaken to educate the public and the officials responsible for administering the Act.

Analysis of draft Act and suggestions for improvement

16. For right to information legislation to be effective, it needs to be respected and 'owned' by both the government and the public. Experience shows that this is most likely where legislation is developed participatorily. Participation in the legislative development process requires that government proactively encourage the involvement of civil society groups and the public broadly. This can be done in a variety of ways, for example, by: convening public meetings to discuss the law; strategically and consistently using the media to raise awareness and keep the public up to date on progress; setting up a committee of stakeholders (including officials and public representatives) to consider and provide recommendations on the development of legislation; and inviting submissions from the public at all stages of legislative drafting.

17. While it is necessary to ensure that the public participates in the drafting process to ensure that the final legislation developed is appropriate for the national context, it is generally well-accepted that there are basic minimum standards which all RTI legislation should meet. Chapter 2 of CHRI's Report, *Open Sesame: Looking for the Right to Information in the Commonwealth*, provides more detailed discussion of these standards. The critique below draws on these standards. NB: all of the legislation referred to in this analysis can be found on CHRI's website at http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_&_papers.htm.

Short Title

18. Section 1 sets out requirements for the Act to come into force. The provision is quite complicated and reliant on subsequent action by the Government. It is not clear why this complexity is necessary. Ideally, the Act should come into force on the date it is given Presidential assent. If it is felt that any additional time is required to allow the bureaucracy to prepare for implementation, explicit provisions to that effect should be included in the Act. Experience from around the world shows that a maximum of 12 months should be sufficient preparation time.

Application of the Provisions of the Act

19. Section 2 of the Act unnecessarily restricts the right of access to "official information" that is in the "possession, custody or control" of a public authority. These additional terms could be interpreted to restrict the coverage of the Act. To more effectively implement the principle of maximum disclosure, s.2 should confer a more general "right

to information" (eg. s.1 UK *Freedom of Information Act 2000*), which would only be restricted by those exemptions specifically described in the remainder of the Act. Further, the right of access is restricted to "citizens" only. While the definition of "citizen" in s.36 does not specifically exclude persons who do not hold Sri Lankan citizenship, it is arguable that the definition was intended only to clarify the ordinary meaning of the term. Consideration should be given simply to allowing all persons, whether citizens, residents or non-citizens, access to information under the Act.

20. Following the best practice example of Part 3 of the South African *Promotion of Access to Information Act 2000* (POAIA), consideration should be given to extending the coverage of the Act from public authorities only to enable access to information held by private bodies which is necessary to exercise or protect a person's rights. Private bodies are increasingly exerting significant influence on public policy, especially as a result of the outsourcing of public functions, such that they should not be exempt from public scrutiny simply because of their private status. In the event that this broad extension of coverage is not acceptable, consideration should be given to including at least all of those bodies exercising public functions.

21. Section 3 is confusingly drafted and should be reworded and reconsidered for clarity. Sub-section (1) appears to attempt to override any laws inconsistent with the Act, but sub-section (2) then exempts from the coverage of the Act any official information held by bodies whose constituting Acts prohibit the release of such information. The latter provision may seriously undermine the Act and should be deleted. The exemptions clauses contained within the Act itself should be sufficient to protect information which should legitimately be exempt from disclosure. No other law should be necessary to protect information. In practice, the retention of secrecy provisions in other legislation can cause confusion in the public service and support a continuing culture of secrecy.

<u>Denial of Access to Official Information</u>

22. While the exemptions regime is laudably relatively narrow, section 4 suffers from the fact that it does not make every single exemption subject to a public interest override. The test that should be applied to all exemptions is set out in paragraph 8 above.

23. More specific critiques of the exemptions include:

- Section 4(1)(a) is too broadly worded and could therefore is open to misuse by officials. The exemption should not apply to "any matter." Best practice shows that the protection of an exemption should be legitimately extended only *"the disclosure of the record could, by premature disclosure of a policy or contemplated policy, reasonably be expected to frustrate the success of that policy"* (see s. 44(1)(b)(ii) POAIA South Africa).

- Section 4(1)(b)(ii) and (c): The public interest override included in these sections should not require that disclosure should be "vital" in the public interest; depending on interpretation, this may unjustifiably restrict the application of the public interest override.

- Section 4(1)(f): Query what "medical secrets" is intended to cover. Consideration should be given to deleting this clause on the basis that relevant information will be protected either by s.4(1)(b) or s.4(1)e). If this suggestion is unacceptable, the phrase "medical secrets" should be deleted, or at least be specifically defined, or the clause reworded for clarity.

24. Paragraph of section 4(3) is unnecessary, as bureaucrats will usually be subject to disciplinary action for unwarranted disclosures under public service regulations and their own employment contracts. In practice, the result of the section will likely be to undermine the operation of the Act by making bureaucrats wary of releasing any information for fear of prosecution. Section 4(3) also conflicts with section 34 dealing with whistleblowers.

Duties of Ministers and public authorities

25. Consideration should be given to rewording section 6(1) to more strongly reflect that record keeping and management practices should be implemented with a view to ensuring that the purposes of the Act are furthered. For example, *"Every public body is under an obligation to maintain its records in a manner which facilitates the right to information as provided for in this Act."* Consideration should also be given to whether the Information Commission should be responsible for developing a Code of Practice or other such regulation to provide guidance to bodies covered by the Act on how to keep, manage and dispose of their records (see s.46, United Kingdom *Freedom of Information Act 2000*).

26. Section 7 imposes obligations on the Government to proactively disclose information of relevance to the public. Currently, the provisions fall short of best practice standards.

- To ensure consistency with the coverage of the Act, the obligations for proactive disclosure should be explicitly imposed on all bodies covered by section 2 of the Act (howsoever that section is finally drafted (see paras 18-19)). It may be confusing for the public to be required to know which Minister has responsibility for a certain body. The reports may also become unnecessarily complicated if only one report needs to be published for a huge range of bodies covered by one Minister.

- The reports should be published/updated every 6-12 months, rather than every 2 years to ensure that the public has access to up to date information without imposing too heavy a burden on the bureaucracy.
- The manner of publication should not be determined by each Minister, as it may be confusing for the public if each Minster decides upon a different method of publication. It is suggested that section 7 should be reworded to require information to be published "in such a manner as to ensure that it is easily accessible by the public", with a minimum obligation that the report described in section 7 is published in both of the national languages on every body's website and a copy held for (free) inspection at all of the body's offices, ie. not just the body's headquarters. (See the South African *Promotion of Access to Information Regulations 2002*, ss.2-3 for more.)

27. In addition to the current provisions in section 7(i)-(vi), consideration could be given to the inclusion of **additional** categories of information with which the public should be proactively provided. Best practice principles are listed below:

Every public body shall, in the public interest, publish and disseminate in an accessible form, key information including but not limited to: -

(f) a description of its structure, functions, duties and finances;
(g) relevant details concerning any services it provides directly to members of the public;
(h) any direct request or complaints mechanisms available to members of the public regarding acts or a failure to act by that body, along with a summary of any requests, complaints or other direct actions by members of the public and that body's response;
(i) a simple guide containing adequate information about its record-keeping systems, the types and forms of information it holds, the categories of information it publishes and the procedure to be followed in making a request for information;
(j) a description of the powers and duties of its senior officers, and the procedure it follows in making decisions;
(k) any regulations, policies, rules, guides or manuals regarding the discharge by that body of its functions;
(l) the content of all decisions and/or policies it has adopted which affect the public, along with the reasons for them, any authoritative interpretations of them, and any important background material; and
(m) any mechanisms or procedures by which members of the public may make representations or otherwise influence the formulation of policy or the exercise of powers by that body. (Article 19 Model Law, s.17)

28. Section 8 should be reworded for clarity, taking into account the following:

- The section requires the communication of specified information "prior to the commencement of *any* work or activity relating to the *initiation* of any project", but at such an early stage (ie. prior to initiation) one must query just how much useful information will be available.

- Communication is required in relation to information that is "available as on the date of such communication", but this overlooks the fact that for the public to be meaningfully informed and engaged, they need to be provided with information throughout the life cycle of a project. In realty, it is a well known fact that many public projects take years to complete and undergo significant changes during their implementation. Consideration should be given to amending the section to require the government to provide updated information both at the time a project is being developed and at least annually during the implementation of the project.

- The costs limits which apply to the section 8 are too high. The intention of the section is to enable people to more effectively monitor development projects, but the cost limits will in practice operate to exclude a large range of development activities which still have a major effect on people's lives. In contrast, similar provisions in the Indian *Freedom of Information Act 2002* apply no such limitation.

- Taking into account bullet point 3 of paragraph 26 above, consideration should be given to including a minimum publication standard in section 8 which is the same as that for the information to be published under section 7. The Information Commission can then be empowered to issue supplementary guidelines as appropriate.

29. Section 9(2) appears out of place in a section dealing with reporting to Parliament. Consideration should be given to moving the provision to the Part on "Appeals Against Rejections".

<u>Establishment of Freedom of Information Commission</u>

30. It is very positive that the Act seeks to create a dedicated body with responsibility for monitoring the Act, raising public awareness, training public officials and with powers to act as a cheap independent appeals mechanism. It is imperative that the Government supports the creation of the new Information Commission by properly resourcing the body to enable it to perform its new role.

31. Under section 13(c) the Information Commission is given the power to hear and determine appeals. In order to ensure that the Information Commission can perform these

functions effectively, additional provisions should be included which explicitly grant the Commission the powers necessary to undertake a complete investigation and ensure enforcement of its orders (see paragraph 44-46 below for more re enforcement). The powers granted to the Canadian Information Commissioner under s.36 of the Canadian *Access to Information Act 1982* provide a good example:

(1) The Information Commissioner has, in relation to the carrying out of the investigation of any complaint under this Act, power

(f) to summon and enforce the appearance of persons before the Information Commissioner and compel them to give oral or written evidence on oath and to produce such documents and things as the Commissioner deems requisite to the full investigation and consideration of the complaint, in the same manner and to the same extent as a superior court of record;

(g) to administer oaths;

(h) to receive and accept such evidence and other information, whether on oath or by affidavit or otherwise, as the Information Commissioner sees fit, whether or not the evidence or information is or would be admissible in a court of law;

(i) to enter any premises occupied by any government institution on satisfying any security requirements of the institution relating to the premises;

(j) to converse in private with any person in any premises entered pursuant to paragraph (d) and otherwise carry out therein such inquiries within the authority of the Information Commissioner under this Act as the Commissioner sees fit; and

(k) to examine or obtain copies of or extracts from books or other records found in any premises entered pursuant to paragraph (d) containing any matter relevant to the investigation.

(2) Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the Information Commissioner may, during the investigation of any complaint under this Act, examine any record to which this Act applies that is under the control of a government institution, and no such record may be withheld from the Commissioner on any grounds

32. Section 18 requires the Commission within 6 months of its establishment to determine its own procedural rules for the submission of appeals. It is imperative that any such rules are published as soon as possible. The rules should be developed following public consultation, to ensure that the procedures are user-friendly and simple.

Information Officers

33. Section 20(1) permits the imposition of a fee prior to the provision of information. In accordance with best practice, the section should be reworded to clarify that no fee should be charged for inspection or for the time taken by bureaucrats to process requests, and that only the actual cost of reproduction should be passed on to requesters.

34. It is not clear how the fee provisions in section 21(1) and (2) interact; specifically, there does not appear to be any justification for the imposition of the "additional fees" permitted by section 21(2). Sub-section 2 should be deleted.

35. Section 21 should be reworded to make it clear that both the decision regarding disclosure and its communication to the requester should be done within fourteen days. Further, a time limit should be included for granting access to information once the decision is made. Best practice suggests a time limit of no more than 28 days. Consideration should also be given to including an additional clause requiring applications for information which relate to life and liberty to be responded to within 48 hours (see s.7(1) of the Indian *Freedom of Information Act 2002*).

36. It is very positive that section 21(3) allows for the Minster to introduce fee waiver provisions. However, for the sake of certainty and simplicity and in accordance with best practice, the Act itself should include a provision which allows Information Officers to waive fees under the Act in the public interest.

37. Section 22 should be amended to set basic parameters for the development of fee guidelines by the Information Commission. For example, fees should be reasonable, be set only to cover actual costs incurred and should cover only reproduction costs not the time taken by bureaucrats.

38. Section 25(1) is ambiguous and should explicitly deal with the issue of whether applications which relate to third party information are subject to the time limits set out in section 21. The section could usefully set out more clearly the timeline for sending notices to third parties, receiving representations and making a decision on a request. Best practice allows for an extension of time where third parties are involved, but no more than an additional 30 days.

39. Section 27 should be deleted. There is no justifiable reason why the government should try to place a restriction on publication of information which has been disclosed and is therefore in the public domain. If the intention of the section is to protect the Government from legal action for authorising breach of copyright or the like, this should be explicitly addressed. Section 38 of the Trinidad and Tobago *Freedom of Information Act 1999* provides a useful example:

38. **(1) Where access to a document has been given in accordance with the requirements of this Act or in good faith, in the belief that it was required to be given in accordance with this Act, unless malice is proved –**

(a) no action for defamation, breach of confidence or infringement of copyright may be brought against the public authority or against the responsible Minister, or an officer or employee of the public authority as a result of the giving of access;

(b) no action for defamation or breach of confidence may be brought, in respect of any publication involved in the giving of access by the public authority, against –

(I) any person who was the author of the document; or

(II) any person as a result of that person having supplied the document or the information contained in it to the public authority;

(c) no person shall be guilty of an offence by reason only of having authorised, or having been involved in the giving of the access.

(2) The giving of access to a document, including an exempt document, in consequence of a request shall not be taken for the purposes of the law relating to defamation, breach of confidence or copyright, to constitute an authorisation or approval of the publication of the document or its contents by the person to whom access is given.

(3) Nothing in this Act affects any privilege, whether qualified or absolute, which may attach at common law to the publishing of a statement.

Appeals Against Rejections

40. It is very positive that the overall impact of the appeals section is to allow for independent review of the decisions of Information Officers.

41. It is recommended that section 28, which presumes some form of internal review as a first appeal, be deleted. In light of the fact that section 29 allows for appeals to the independent Information Commission, there is little value (assuming that the Information Commission develops procedural rules which ensure appeals are cheap, simple and quick) in first requiring aggrieved requesters to put their case again before another government official. In the event that section 28 is retained, it is recommended that the section be reworded to make it clear who is responsible for determining "the person designated to hear any such appeal" – the Department, the Information Commission or the Government via regulations?

42. Section 29 should include a time limit for the disposal of appeals to the Information Commission. In accordance with best practice, this time limit should be no more than 30 days.

43. Section 32(2) should be amended to require the Information Commission to make its Reports available on its website, should it eventually create one.

General

44. Section 33 is commendable in allowing for penalties to be imposed on officers for misconduct and delay. However, currently it is not clear who has the power and/or responsibility to determine whether and who should be fined and how much. Consideration should be given to redrafting the enforcement provisions (or the appeal provisions or both) to make it explicit that at least the Information Commission and the courts are empowered to exercise section 33 powers to impose penalties on non-compliant bodies and officials.

45. Section 33 also does not make it clear whether the enforcement powers can be exercised unilaterally or whether a complaint by a requester must first be received. The latter point should be clarified because, for example, it may be that the Information Commission, while exercising its monitoring functions, discovers that a department regularly delays its response to requests and could usefully use enforcement powers to impose a fine for such conduct, even in the absence of a specific complaint by a request.

46. While the penalties provisions already included in the Act are a good start, best practice would encourage the inclusion of additional enforcement/penalty provisions to ensure that departments cannot simply ignore the provisions of the Act and the orders of the Information Commission with impunity. For example:

- s.49 of the Article 19 Model Law:

(1) It is a criminal offence to wilfully: -

(a) obstruct access to any record contrary to this Act;
(b) obstruct the performance by a public body of a duty under this Act;
(c) interfere with the work of the Information Commission; or
(d) destroys records without lawful authority.[or
(e) conceals or falsifies records.]

(2) Anyone who commits an offence under sub-section (1) shall be liable on summary conviction to a fine not exceeding [insert appropriate amount] and/or to imprisonment for a period not exceeding two years.

- s.12 of the Maharashtra (India) *Right to Information Act 2002*:

  (1) Where any Public Information Officer has without any reasonable cause, failed to supply the information sought, within the period specified under sub-section (2) of section 6, the appellate authority may, in appeal impose a penalty of rupees two hundred fifty, for each day's delay in furnishing the information, after giving such Public Information Officer a reasonable opportunity of being heard.

  (2) Where it is found in appeal that any Public Information Officer has knowingly given –

  (a) incorrect or misleading information, or
  (b) wrong or incomplete information ;
  (c) the appellate authority may impose a penalty not exceeding rupees two thousand, on such Public Information Officer as it thinks appropriate after giving such officer a reasonable opportunity of being heard...

  (3) The penalty under sub-sections (1) and (2) as imposed by the appellate authority, shall be recoverable from the salary of the Public Information Officer concerned, or if no salary is drawn, as an arrears of land revenue

- s.54 of the UK *Freedom of Information Act 2000*:

  (3) If a public authority has failed to comply with [a notice of the Information Commission the Commissioner may certify in writing to the court that the public authority has failed to comply with that notice.

  (4) Where a failure to comply is certified under subsection (1), the court may inquire into the matter and, after hearing any witness who may be produced against or on behalf of the public authority, and after hearing any statement that may be offered in defence, deal with the authority as if it had committed a contempt of court.

47. Section 34 is intended to protect whistleblowers but has been too narrowly worded. Currently, the section protects only disclosure relating to "official information which is permitted to be released or disclosed on a request submitted under this Act". This seriously restricts the protection afforded – it adds little to the protection generally afforded by the introduction of the Act. Best practice whistleblower provisions require that persons should be protected from prosecution for disclosing "*any information* so long as such employee acted:

  (a) in good faith; and
  (b) in the reasonable belief that:

(i) the information was substantially true; and

(ii) such information disclosed evidence of any wrongdoing or a serious threat to the health or safety of any citizen or to the environment".

48. The definition of "official information" in section 36 appears to be inclusive but would benefit from explicitly stating that it is "not exhaustive". Currently, it focuses too narrowly on documentary material and should be broadened to include, for example, materials and models. It has been shown in many countries that the public's ability to oversee government activities and hold authorities to account, in particular those bodies which deal with construction or road works, is enhanced by allowing them to access samples of materials and the like.

49. In accordance with paragraphs 18 and 19 above, the definition of "public authority" should be broadened to at least include private bodies which exercise public functions. The exemption from coverage of the Act for Parliament and Cabinet under sub-section (b) of the definition should be deleted. There is no justifiable reason for these bodies to be exempted and while it may be argued that they are liable to be in possession of sensitive information which should be protected from disclosure, such protection can be ensured by the exemptions in section 4. Best practice rejects the notion of total exemptions for entire bodies or positions.

Subscriptions

The annual subscription rates of the LST Review are as follows:

Local : Rs. 800 (inclusive of postage)

Overseas :

South Asia/Middle East	US$ 32
S.E. Asia/Far East/Australia	US$ 37
Europe/Africa	US$ 42
America/Canada/Pacific countries	US$ 47

Individual copies at Rs. 75/- may be obtained from the Trust, No. 3, Kynsey Terrace, Colombo 8, and BASL Bookshop at No. 153, Mihindu Mawatha, Colombo 12.

For further details, please contact

Law & Society Trust
No. 3, Kynsey Terrace
Colombo 8
Tel: 2691228, 2684845
Fax:94 11 2686843