Enforcing Human Rights:

Towards an Egalitarian Sri Lanka

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Edited by

S. Ratnajeevan H. Hoole

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Editor

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S. Ratnajeevan H. Hoole

Editor's Preface

Human rights have made a huge difference to our society here in Sri Lanka. Together with the fundamental rights provisions of our constitution, we can for the first time sue the government and even appeal over the Supreme Court to the UN Human Rights Commission in Geneva. A quiet revolution has been going on as the government signed us on to international treaties and conventions by-passing parliament. In short, we were empowered and good times are upon us. These give us the means by which we on our own may seek rights through the courts and correct wrongs.

In an attempt to bring these changes to the urgent notice of scientists, I as a member of The Ethics Committee of the Sri Lanka Association for the Advancement of Science, or SLAAS for short, proposed that we hold a 2-seminar series to highlight these developments. The Ethics Committee agreed to two separate seminars on Human Rights:

i) Whistle Blowing, that is bringing the attention of the public and outside authorities to illegal goings on in one's own organization. The aspect of human rights in this is the right one has to whistle blow with its political dimensions of whistle blowing on one's own community.

ii) Human Rights in Education, touching on the right to education, academic freedom, etc..

I was to edit the talks into a book to be published, in the absence of funds, by the kind sponsorship of the International Centre for Ethnic Studies that I had independently arranged.

The seminars were a resounding success as judged by the 200+ participants at each seminar. All three major English language dailies (*The Daily News*, *The Island* and *The Daily Mirror*) covered the event before and after with very positive comments and summaries of the speeches. *The Sunday Observer* too carried a summary after the first seminar.

Although The Ethics Committee was positive after the first seminar on whistle blowing, it apparently developed reservations after the second which followed exactly the format of the first. I was accused of high-jacking the seminar by making an unauthorized lecture in place of a mere introduction of the authors and the president of The Ethics Committee held that human rights have nothing to do with ethnicity and that I had improperly injected ethnicity into my speech without warrant.

It was, accordingly, formally resolved and passed by The Ethics Committee that it would be imprudent to allow me to organize a seminar again.

The demand was therefore now made that the book be vetted by SLAAS with the participation of others in the editorial role, a form of control to which no self-respecting academic can submit, least of all from an ethics committee and fellow academics who ought to know the ethics of publications and the inviolable principles of academic freedom better.

The demand also had, I think, a clear plagiaristic dimension in taking over the publication when it had reached a mature stage of development.

I therefore took it upon myself to proceed as originally authorized and recorded in the minutes of The Ethics Committee. I have informed The Ethics Committee that I see no compromise possible.

Given these developments, however, as a matter of public disclosure and fairness, I declare that nothing contained in this volume has the endorsement of SLAAS and that as originally intended and authorized by The Ethics Committee, this book is produced completely independently of SLAAS. The views contained here are entirely those of the eminent authors of these chapters. Any editing I have done has been approved by the authors themselves.

In the event, I feel redeemed by the experience – it underscores the fact that the scientific and academic community does indeed need a lot of exposure to the concepts of human rights and their implementation.

To complete the volume and give it some completeness, I have

i. Combined and added to my two introductory speeches;

ii. Invited Justice Mark Fernando to give a new chapter on Nonviolence and the Quest for Peace (based on his Gandhi Memorial Oration for 2003 before The Sri Lanka–India Friendship Society, delivered on October 2, 2003, the birthday of Mahatma Gandhi). I see this as a fitting end to a book advocating a secular human rights-based polity as a basis for an Egalitarian Sri Lanka; and
iii. Asked Dr. Devanesan Nesiah to augment his chapter through additional incidents in his career, in particular the background relating to the introduction and functioning of the District Development Councils.

Further, I have augmented Justice R.B. Ranaraja's chapter by a report he had copied to one Ms. Jeyemini Ratnam-Perera who went to him seeking justice. It is a report that he has no authority to give the public so it devolves on me to declare that what is reproduced here is based on the copy that Ms. Ratnam-Perera received from him as the complainant.

The reason why I produce this is to show what is possible under the new Human Rights regime. The Office of the Ombudsman and the Human Rights Commission are institutions created to offer cheap and quick justice, as opposed to the courts system. We can demand justice without lawyers by simply writing a letter. However, the weakness is that the findings of the Ombudsman and the HRC are recommendations and there is no obligation on the part of the government[1] to implement these recommendations. Thus, in Ms. Ratnam-Perera's case the Ombudsman's recommendations were refused to be carried out, although often the recommendations are carried out after some prodding from him.

However, in such cases of noncompliance, and in similar HRC cases, it is possible to use the determination of the Ombudsman or HRC to file a case. This route takes away the burden to establish facts again and therefore makes the court case less complicated and costly. It also is a means of getting round the 30-day limit for filing Fundamental Rights petitions with the Supreme Court if we had missed the deadline. For now, the petition is not against the original violation but to order the agency to

[1] It is widely believed that only government agencies can be sued for rights-violations in Sri Lanka. Or as Justice Shirani Bandaranayake quotes a previous Supreme Court judgement, "[The] Constitutional guarantee of fundamental rights is directed against the State and its organs." But Justice Mark Fernando, in his chapter, gives a watershed opinion that even private sector agencies can be sued under the fundamental rights provisions of the Constitution. It is certainly a matter to be explored and tested through legal action.

implement the recommendation of the Ombudsman or HRC and the new 30-day clock would run from the time of the agency's refusal to carry out the recommendation.

A plaint has presently been filed by the Movement for the Defence of Democratic Rights (MDDR) of Kote in Ms. Ratnam-Perera's case, asking for a court order to the UGC to have the recommendations implemented. It is in the public interest and to strengthen the hand of the Ombudsman. It is my hope that many such suits will be filed by NGO's as a public interest plaint to make errant institutions take the recommendations of the Ombudsman and the HRC seriously.

Indeed, we all make mistakes and when we are found out, it is easier on everyone if we simply said sorry and rectified our mistakes rather than insist that we were right and cause even more hardship for those grieved already.

I must also apologise for the biographies at the chapter ends being nonuniform. Authors are modest and therefore a little shy to give their own achievements and I had to create these biographies myself through careful enquiry. I therefore accept full responsibility for any errors that might lie in them.

A note on copyright is in order here. While ICES retains overall copyright of the material, the individual authors of these works are given the right if they wish to distribute copies of their chapters within limited circles or republish their chapters if ever they choose to publish a collection of their writings.

Finally, it is my hope that you the reader will agree after reading this book that it is a worthy effort by all the authors and a very useful addition to the archival literature.

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Chapter 1

S. Ratnajeevan H. Hoole

Background

1. Human Rights: The New Paradigm

Why human rights? Why did we choose to bring the attention of the public and the scientific community to the topic of human rights?

I would begin by baiting you a little, needling you, not only because I enjoy doing that but also to engage you intellectually. Let me begin with the rationale for this book by saying that it was but recently that Sri Lanka was a State in a terrible state with many of her citizens estranged from the State. I was in 1983 a committed Eelamist. I was the editor of the New York-based *Ilangaith Thamil Changam*. In that capacity, with others I met Congressmen. We told the story of the Tamils to anyone who would listen. As a Tamil, I felt estranged from the state. Then, you could kill a Tamil anywhere in Sri Lanka with impunity.

But in contrast, we recently had the court verdicts on the Bindunuwewa prison massacre where PTA suspects were killed – death sentences for cold blooded murderers.

The verdict did us proud. The country had turned round. It was unthinkable just ten years ago. It was similarly unimaginable that the state would vigorously seek punishment for the Mirusuvil murders by the army, which pursuit of justice is ongoing in the Colombo High Court under the able leadership of Senior State Counsel Sarath Jayamanne.

Detractors and critics would argue that these things are under pressure and done reluctantly. But the fact remains that there has been a

sea change and greater involvement of civil society in ways unthinkable before, even if it be to push the state to seek real convictions.

Today it would paradoxically seem that it is Tamils who kill Tamils who have real immunity. There are no atrocities like whole villages being wiped out by the army as in the early 1990s, although problems remain on a smaller scale such as of hundreds of disappearances and rampages into recent years. And I can no longer honestly describe myself as a committed Eelamist.

What made the difference? It is the rule of law and the new commitment to human rights. It makes Sri Lanka, however flawed, self-correcting, with hope for the future. We have increasingly credible means of access to justice; to redress. This human rights legacy, this weak but new commitment to the rule of law that gives us hope, must be sustained and strengthened. These gains must be aggrandized upon. It is our last hope. It is our only hope. And scientists must play a lead-role in this aggrandizement of gains and this transformation of ours into a rights based society.

It is to celebrate this new legacy and push it along in its natural course forward that this book is written and appropriately titled "Enforcing Human Rights: Towards an Egalitarian Sri Lanka". As you might know, the word egalitarian has the French word Egal, Equal in English, for its root. Several laws have been enacted leading us to this Promised Land of an Egalitarian or "Equalitarian" Society. We have achieved many new rights. Landmark judgements give us these new rights. But we have only begun our journey.

2. Has Everything been Done that Needs to be Done?

Some of us say that Sri Lanka's problems have been solved. That everything that needs to be done has been done as far as laws and systems are concerned. That there are no human rights problems here in Sri Lanka. Not so. Let me quote Justice Wigneswaran at his installation or enthronement – a word that divides the Church – on the highest bench of this land. He astutely observed that one swallow does not make a summer. One Tamil Supreme Court judge does not mean that Tamils are treated fairly. One woman judge or President does not mean that women have equal access.

As Justice Mark Fernando observes in Chapter 2, we can implement laws encouraging whistle blowing, but, poignantly, what happens after that? Often those in authority ignore the whistle and nothing happens.

Laws by themselves therefore do not make an egalitarian state. Going by the books, Sri Lanka is perfect. It is the same Constitution of

ours that gives us our fundamental rights today that was designed and used by J.R. Jayawardene to Lord it over us. On paper we interview and select the best, but we know that it is ministerial stooges who are invariably selected – Justice R.B. Ranaraja's chapter sheds interesting light on how selection processes are carried out. The selection process for the Sri Lanka Administrative Service is widely acknowledged as flawed. But on paper, the process is perfect with written exams, interviews, etc.. It all indicates the big administrative humbug that Sri Lanka is – Sri Lanka where all is sham and nothing real.

A demonstrably flawed example that is perfect on paper is the selection of bright minds to the university staff. We advertise and select the best. But – surprise, surprise – when University of Peradeniya selects, the so called best candidates who are selected are Peradeniya graduates. And when University of Moratuwa selects, the successful ones are Moratuwa graduates! And when Jaffna selects, they are Jaffna graduates!

And there is more. In engineering, only about 15% of students are women. But on the senior staff, we hardly have 3%. In the matter of lesser staff, the Engineering Teaching Assistant grades for example, about 25% of those selected on merit through advertisement and interview are the wives of the senior male staff!

This experience of women shows that despite having had the first woman prime minister and now a woman president, women have a long way to go. We note that sometimes so called equality leads to inequality. That is, as the Indian Supreme Court observed, to treat unequal people equally, is to treat them unequally. Special concessions are required if we are to treat unequal people equally.

The point is that this search for an egalitarian Sri Lanka is very complex. And we have not got things right although on paper we look fine. A lot more needs to be done. We have much farther to travel on the road to an egalitarian Sri Lanka.

3. Looking up to the Judiciary

While this sham, this humbug, is widespread in every section of our society, we take comfort from the fact that our judiciary is still relatively untainted. True, the MARGA survey of recent times shows how much the judiciary has fallen from its once hallowed place on high. Poor appointment to the highest bench also give concern – for instance, according to a senior retired judge who has studied the judicial scene, four of our supreme court justices have never written a long judgement (that is a studied document as opposed to a short judgement dictated from the bench) because they cannot write.

But, despite all the criticism, the bottom line is that it is only the judiciary that has been able to challenge the powerful and dish out justice, to reverse the bad decisions of those who lord it over us.

Through appeals to the judiciary and the new human rights institutions like the Human Rights Commission and the Ombudsman, and the advocacy of International Nongovernmental Organisations like Save the Children in Sri Lanka, many advances have been made. It is not for me to detail them. Our experts will get into them in their contributions.

My point is that we need to do all that we can to strengthen the judicial arm of government and strengthen the hand of the Ombudsman and the Human Rights Commission through public interest plaints as explained in the editorial preface and advocacy directed at the legislative arm towards the same end.

4. Politicisation of Human Rights

I need to – indeed I like to – dwell a little on how this humbug in which we wallow threatens the access to justice that we enjoy and all the human rights gains we have made. I refer to the politicization of human rights. The idea of human rights, rather than being a broad principle and a basis for civil society that seeks to include everyone, is in real danger of becoming a political tool.

Questions such as why such great interest by the Tamil nationalist parties in the skeletons buried at Chemmany through the agency of the army but not in those buried at the Duraiappah Stadium are awkward. Is it because Tamil lives killed by Sinhalese are somehow of higher value than Tamil lives snuffed out by Tamils? So also questions on why so much interest in democracy for Tamils among Sinhalese nationalists who show little interest in the democratic rights of Tamils imprisoned by the thousands under the PTA with no cases filed; or in the rights of Tamils to leave or visit their villages without a permit.

This humbug reaches a point of caricature when editorialists and op-ed writers who see themselves as liberal let themselves down badly in the matter of fingerprinting of visa applicants at the British High Commission[1]. Even as they cry foul at the humiliation and raise a deafening din, they forget that just a year ago they saw no humiliation in Tamils being fingerprinted upon leaving the Vanni for Colombo. Mr. Mangala Samaraweera I understand has filed an application on this at the Supreme Court. But it is the same Mr. Samaraweera who was part of

[1] A the time of going to press, the US also appears to be ready to fingerprint aspiring visitors.

a government that started fingerprinting Tamils leaving the Vanni. On a personal note, my brother, Dr. Rajan Hoole of the University Teachers for Human Rights, has had to line up with drug dealers and criminals to be fingerprinted on several occasions as he went to register at Police Stations every time he moved house as a safety precaution.

I must confess to a perverse enjoyment as Sinhalese are fingerprinted by the British at the embassy and experience what Tamil were put through regularly as Colombo partied. Perhaps out of this perversity will come greater understanding of and justice for each other.

I cannot resist another example, a personal example if you will excuse me, on this humbug commitment on the part of some of us to human rights. Until the ceasefire, human rights was a problem for the government – after all, it is governments that carry human rights obligations and with the exception of the Geneva Protocols that are today held to apply to all those who control territory and populations, these obligations do not apply to militant movements like the LTTE. Thus human rights was a Tamil thing used against the government and many Sinhalese saw human rights as a tool of the "terrorists" that is used to shackle the government in its legitimate role in suppressing the insurgency. It was in this milieu that I started teaching human rights in the year 2000 to my engineering students at Peradeniya. The loud cry of foul rent the air. Although my work was widely accepted by the Engineering Educator community through peer review[2] and the American Society for Engineering Education had put out a special note in its newsletter encouraging its members to read the article, I was formally charged with bringing disrepute to the university and teaching unauthorized political material. It was a serious situation. I felt the noose round my neck.

Fortunately, as the ceasefire took effect in December 2001, the tables were turned. As the government sat back and gave the LTTE a free hand, human rights became a problem for the LTTE. Human rights had suddenly become a Sinhalese thing. It was suddenly usable against the LTTE in an attempt to bring it into the political mainstream. The University Senate declared that human rights ought to be taught to every

[2] See:

a. S.R.H. Hoole, "Human Rights in the Engineering Curriculum," *Int. Journal for Engineering Education*, Vol. 18, No. 6, pp. 618-626, 2002.

b. D. Hoole and S.R.H. Hoole, "A Curriculum with Human Rights in the Engineering Program and its Implementation," Proc. American Association for Engineering Education, Liberal Education Session, Paper 2002-3261 (8 pages), Montreal, June 2002.

undergraduate. I was invited to lecture to freshers on human rights. A new Centre for the Study of Human Rights was established at Peradeniya. Ultimately the formal enquiry praised me for my efforts at teaching human rights.

The matter of human rights as a tool reached comical proportions when in the Peace Talks Amnesty International's suggestions for human rights monitoring with Mr. Ian Martin as a Human Rights Ombudsman was found to be embarrassing. The LTTE then suggested that, rather than Amnesty International, the Human Rights Commission, known for its snail's pace and perhaps even ineffectiveness and backlog[3], should do the monitoring. It seemed as though being monitored by the HRC was safe. It all seemed to confirm the image of the HRC as toothless and politically pliant. Minister G.L. Peiris quickly chimed in, in vulgar alacrity, in agreement. Let the HRC do the monitoring, he said, knowing full-well how toothless its monitoring would be in the urgent situations that are likely to arise. And that was the end of Amnesty International's proposals that, if implemented, would have done all of us a lot of good.

Therefore breaking out of this image of being a political tool by dispensing substantive justice quickly is the challenge facing the HRC as Dr. Radhika Coomaraswamy and her team have newly taken over the HRC.

This ambivalence towards human rights – selective myopia if you will – will surely erode the standing of human rights unless human rights are applied to all peoples and all situations instead of as a tool for political ends. Human rights principles must apply not just to situations where the other side is guilty. We all agree, surely, that the law must apply equally to all; not just to those whom we do not like. So also it must be with human rights.

If we are to succeed, we must educate ourselves on using the courts and other forums for appealing against bad decisions; on how to challenge usurped power, arrogated power; on how to diffuse power from where it is concentrated. As an astute female justice, Dr. Shirani Bandaranayake, observed – I quote Her Lordship from The Ceylon Daily News of 7 August, 2003 – "The law could assist those who are vigilant and not those who sleep over their rights." Her call was for education on our rights and the need to be assertive of our rights. Even on minor matters if authorities over us – be they from law enforcement agencies, our bosses or the clerks at the Kachcheri or whatever – use their

[3] I am familiar with one case where the HRC took 3 or more months to give a short acknowledgement of a complaint and then nothing happened up to 2 years later which is now.

discretionary authority without reason and responsibility, we must challenge it or that misused power will be used on us one day. As Justice R.B. Ranaraja concurs in his chapter, "There is no such thing as unfettered discretion in public law. Fairness requires public officials to be open and give reasons for their decisions." It is no accident that the third jurist among our authors, Justice Mark Fernando, repeats the same opinion when he writes: "absolute or unfettered discretions cannot exist where the Rule of Law reigns." It seems to me to be the lynchpin of a fair and just society – or in Justice Fernando's words, "the first essential of the Rule of Law."

If we are to succeed in this venture, we must put our heads together and commit ourselves to this common cause. We need to think to form a theoretical basis for our common journey into the future as co-equals committed to a just society with basic rights.

5. Whistle Blowing

5.1 Why Whistle Blowing?

Whistle blowing, as you might know, is calling the attention of outsiders to internal organizational corruption in the interests of the public good. To be free from corruption is to be free to access what is rightfully ours, and to be treated equally before the law. But how is whistle blowing under human rights? And why is whistle blowing given such a prominent place in this book?

The first question is answered by Justice Mark Fernando. It comes under the fundamental right to be free from corruption and we all have the right to whistle blow. As to the second question, it is given such a prominent place in this book because corruption of various forms including patronage taking over where meritocracy ought to prevail, is undoing science and education in Sri Lanka. For the educational system to triumph by doing what education ought to do – make independently-thinking grown-ups out of all of us – the educated must go beyond book-learning and speak out fearlessly on the ills and corruption surrounding us. As of the present, most of us are greatly reluctant to express ourselves on anything in which our bosses have a contrary interest.

As teachers we must learn to treat our students – be they in kindergarten or university – with respect, as persons. For a sense of self-worth is intrinsic to the process of learning. Mistreating students and not telling on colleagues who sexually harass their students or show communal bias towards their students, are also corruption.

As professionals we grapple with how far we can go and indeed how far we are required to go in exposing internal organizational corruption.

As far as I am aware, legal encouragement of and sanction for whistle blowing in Sri Lanka is in the area of customs. When we give information that results in the interdiction of goods being smuggled, the informant, usually a whistle blower close to the smuggler, gets a part of the fines imposed as a reward. Income tax departments in several countries also have similar schemes of reward. Rewards for information on wanted criminals also usually involve whistle blowing by those close to the criminal. But such instruments of whistle blowing are few indeed and the stigma on the whistle-blower remains even when the whistle blowing yields benefits to society and is at the request of government. Such is the plight of the whistle blower.

Many professional organizations worldwide encourage whistle blowing but few *require* us to blow the whistle. This is, in my view, simply wrong. How can a professional of even minimal integrity see internal corruption and sit quietly in silence? Our soft-pedalling this issue is because it can lead to loss of career. Also, generally, few like a whistle blower. The term trouble-maker is used describe those of integrity who will not simply accept the corruption in the system. It takes an enlightened boss to hire a whistle blower. Even colleagues feel you have let the team down.

In judging whether to whistle blow or not therefore, we need to weigh the public good against our personal career loss and our loss of standing among our colleagues. It takes professional judgment. It takes courage. It takes leadership.

5.2 Whistle Blowing in the Engineering Curriculum

We in Sri Lanka need to address ourselves to this important issue. Here in Sri Lanka we have little information on whistle blowing whereas it is a standard topic in the undergraduate curriculum for US engineers. For example, engineering ethics is a compulsory topic for all engineering majors in the US and a standard book on engineering ethics is

Mike W. Martin and Roland Schinzinger, *Ethics in Engineering* (3rd ed.), McGraw-Hill, New York, 1996,

which has been around from 1983 and has a chapter devoted to whistle blowing.

Having taught in the US and though an engineering educator, pressed into the service of teaching humanities and social sciences as an Adjunct Professor because of accreditation complaints on the euro-centric curriculum, I have greater familiarity with the liberal education side than most engineering educators.

It is not untypical for a US textbook on engineering ethics, as with the book described, to devote an entire chapter to whistle blowing that

deals, among other things, with case studies of mishaps. An oft repeated example is of motorcars whose petrol tanks exploded during collisions and how the company knowingly kept selling the motorcars.

The teaching of professional ethics to engineering students is normative in countries that are signatories to the so-called "Washington Accords" (Australia, Canada, Hong Kong, Ireland, New Zealand, South Africa, the UK and the US) and Japan In certifying their engineering programmes, all agree to use an equivalent of the US accreditation standards for education programs for engineers, the standards of the Accreditation Board for Engineering and Technology, or the ABET standards. These ABET standards include attention to professional ethics including whistle blowing.

However, these accreditation standards are far more broad-based than suggested by this limited list of countries because many countries of the British Commonwealth including Sri Lanka seek accreditation of their degrees from Britain's Council of Engineering Institutions with a view to upholding the standards of local degrees, and, flowing from colonial practice, have built-in salary incentives to engineers who acquire corporate membership (conferring the "Chartered Engineer" status) in these British professional institutions subscribing to the ABET standards. In addition, ABET has a program under which universities outside their geographic domain of influence may ask for accreditation. For example, under this scheme, two engineering curricula in the Netherlands (Electrical Engineering and Aerospace Engineering at Delft University of Technology) have on request been evaluated by ABET and are deemed to be 'substantially equivalent' to accredited US degrees, which according to their website means "comparable in program content and educational experience, but such programs may not be absolutely identical in format or method of delivery. It implies reasonable confidence that the program has prepared its graduates to begin professional practice at the entry level."

Together therefore, these professional societies and accrediting agencies advocate the need for teaching professional ethics and will not easily recognize degrees that do not have a component on ethics as it relates to one's obligations to society and professional responsibility.

In Sri Lanka, under the leadership of the Institution of Engineers Sri Lanka, all engineering faculties now seek accreditation in compliance with the Washington Accords. So increasingly we may expect a liberal component being incorporated in the engineering curriculum with time devoted to whistle blowing.

5.3 Mixed Responses to Whistle Blowing

The recent and still ongoing Enron scandal involved the spectacular growth of the company's stocks that was accomplished by fiddling the books to show non-existent strengths and assets. The role of Enron Corporation's auditing firm, Arthur Andersen, one of world's top 5 consultancy firms, came to light partly because a US professional, Sherron Wadkins, a woman and a conscientious employee with a sharp eye for trouble, felt the call to go above her bosses to the top and issue a warning that Andersen's would "implode in a wave of accounting scandals". Instead of responding positively, David Duncan, who was overseeing the Enron audit, went on a shredding and deleting rampage that, now exposed, has led to the virtual collapse of Andersen's reputation. Several of its senior executive face jail terms today. Many Andersen executives have become whistle blowers by striking bargains on reduced jail terms with US prosecutors.

Similarly, weaknesses in the US security apparatus were exposed when the brave agent in the Minneapolis FBI Bureau, Coleen Rowley – also, I note without comment, a woman – blew the whistle at great risk to her career. She told us how the FBI overlooked obvious clues to what would happen on September 11, 2001. Time magazine celebrated her courage through a cover story that declared her co-person of the year.

On the other hand, special Agent Robert Wright of the FBI's Chicago Division did not receive the praises that Rowley received. When he charged in March 2001 that "the international terrorism unit of the FBI is a complete joke," within three weeks, the FBI had opened an inquiry into charges that Wright had supplied classified information to an assistant U.S. attorney. His troubles have continued into the present. In response to his new charge that the FBI was beyond reform, the FBI immediately launched its fourth investigation on him, despite the previous three finding him not guilty of anything. This time, the charges included, believe it or not, embarrassing the FBI and acting unprofessionally. It shows how embarrassed bosses can sink to the ridiculous.

The positive thing is that immediately upon the filing of these absurd charges, senior Republican Sen. Charles Grassley, and senior Democratic Sen. Patrick Leahy, wrote a joint letter in outrage to FBI Director Robert Mueller. We can be sure that Grassley will be protected by the Congressional watchdogs.

My question to you is this. Would a similar attempt to muzzle a whistle blower in Sri Lanka engender the same outrage and protection from high places? Would whistle blowing in Sri Lanka produce the praises as Coleen Rowley received? I think not.

In contrast, here in Sri Lanka most engineers and indeed other professionals have not even heard of the phrase Whistle Blowing. If there is a proper understanding of whistle blowing and our obligations as professionals to blow the whistle, many deaths at hospitals at the hands of quacks could be prevented, quacks who receive protection from colleagues who mistakenly think that the reputation of their colleagues figures far more weightily than the lives of patients. Not surprisingly, this deafening silence – indeed this murderous silence – is justified in terms of ethical obligations towards upholding the dignity of the profession.

With a proper understanding of the duty to blow the whistle among engineers, that bloody railway accident involving the Kandy Inter-city Express about a couple of years ago would just not have occurred to so darken the reputation – to blot the escutcheon – of the engineering profession. I dare say that the Pramuka Bank scandal too would not have robbed aged pensioners of their hard earned savings if government administrators who were offered gold certificates had blown the whistle. Or auditors and banking regulators who it is said knew what was going on for long, had blown the whistle. We avoid trouble and muzzle ourselves.

5.4 Brinkmanship in Whistle Blowing

At present, those of us who dare to whistle blow, practise brinkmanship. That is, we operate at the boundaries of lawful conduct. It should not be so. Right at present, I have a letter from my university's council that they have the right to take disciplinary action against me if I denigrate the reputation of the university through writing of scandals in the newspapers as I have done. The question unanswered is who is denigrating the reputation of an institutions when it involves corruption? Is it the person who practices and entrenches corruption? Or is it the person who tells the world about it?

We who whistle blow do not know if we have a right and duty to whistle blow. Even if we did, we do not know where the balance lies between that right and duty, and organizational rules that demand that we seek our boss' permission prior to writing to the press. The rule that we get the boss' permission to write about his corruption in itself is absurd because he is just not going to give his permission. Such a rule does not belong to this era of transparency and accountability, to this era of human rights. And in fact if the boss is not party to the corruption – be it of financial or administrative nature – there would be no need to blow the whistle.

Nonetheless the rule that we seek organizational permission to write outside is a standing rule that we cannot simply ignore. So when we

break the rule, we need to break it consciously; thoughtfully; and cautiously, being mindful of the consequences. In doing that we must ask ourselves: Can we be fired when we write to the press about our internal corruption? Alas, we are never sure. This is what I mean by brinkmanship. We do not know how far we can go. If we are fired, do we have to fight that firing from outside and jobless and penniless, or can we get the courts to order a stay on the dismissal while we fight it retaining our job with the salary to fight it?

5.5 Alternative Forms of Whistle Blowing

We have other options. Instead of writing to the press ourselves, we may leak the information to the press – as we read in *The Sunday Leader* so often. I see such leaking as legitimate in countering corruption. But on the down-side, anonymous leaking goes without proper responsibility. It goes with fear. Such fear distorts our personalities and is demeaning to our professional self-image. I therefore believe in open whistle blowing as the only way to whistle blow for a professional; the only way that is in keeping with our dignity and that of our professions.

Another option is direct, silent defiance of illegality. For example, Dr. Devanesan Nesiah, one of our contributors, has told me of how a ministry secretary at the Ministry of Plan Implementation once asked him to order type-writers from a particular company in which his family had an interest; and at another time of how a minister asked him to give tender recommendations in pencil with only his signature in ink. Although he did not argue about it, naturally, he did not comply. Instead, he did what he normally did. These acts of defiance led to his career being derailed many times.

But in that process, people talk. Why is he not getting on with the minister? Why is his promotion denied? And so on people ask and in time they get to know why. This is soft whistle blowing by exposing corruption in subtle ways, but ways in which one cannot be accused of whistle blowing. It takes courage and results in self-inflicting punishment upon us. It is perhaps the style of long suffering civil servants used to the anonymity of working quietly behind the scene.

5.6 Political Whistle Blowing

Political whistle blowing also may be listed under cultural impediments to whistle blowing because by political whistle blowing, as opposed to whistle blowing on corruption in an organisation, I mean whistle blowing against your social community in ways that weaken your community in a time of political conflict. It is the most difficult kind of whistle blowing

because it can leave one bereft of any community and branded as a traitor.

A case in point is the University Teachers for Human Rights (Jaffna) which has bravely taken on the abuse of human rights. Although in this conflict UTHR-J has dealt with all abuses, whether by the state or Tamil militancies, many Tamils see this as a time when, as a senior TULF hand put it to me, "the horse and the cart have to run together". According to this view, abuses within the Tamil community have to be ignored for now and after we are free of the oppressive Sri Lankan state, and when "the Tamil leadership" is secure and ages and mellows, democracy will slowly emerge. So, according to this view, right now what is important is freedom and not democracy; or freedom now, democracy later. It does not occur to advocates of this view that democracy is inseparable and indeed is freedom; that the very essence of Tamil grievance with the Sri Lankan state is the lack of democracy – it is after all the lack of connectedness of the vast majority of Tamils to those governing us that makes the state non-responsive when there are massacres of Tamil civilians by state forces, discrimination in jobs and language and so on.

Those Tamils who want democracy later therefore see the work of UTHR-J as treason. On the other hand many Sinhalese liberals have praised UTHR-J and the UN Secretary General's special representative for children and armed conflict, Olara Otunu, has applauded UTHR-J for highlighting violations against children at risk to their on lives, going on to say before the third committee of the UN General Assembly, "I think of the University Teachers of Jaffna (Sri Lanka) [sic.] putting their lives on the lines in order to monitor and report on grievous violations against children" (The Island, 23 October, 2003). Sinhalese communalists too have praised UTHR-J reminding us of the dangers of human rights as a political tool.

But these praises are small consolation to Tamils who must live within and find identity and acceptance within the Tamil community. And identity goes to the core of every individual. When that is questioned, there is nothing that is more demoralizing. Besides fear, I think the greatest impediment to this political whistle blowing is being seen by your own people as a traitor. While whistle blowing in matters of administrative corruption can be easily elevated through concerted education to an act of heroism, political whistle blowing is much more difficult to make people accept it and it is far more difficult to counter the prejudices against it.

Thus political whistle blowing is much more difficult to tackle than ordinary whistle blowing. When your regiment rampages killing Tamil civilians or JVP-ers, how do you break ranks and talk? When you are a

villager – be you Sinhalese, Tamil or Muslim – and you see other communities being slaughtered by fellow villagers before your eyes, how do you whistle blow as surely you must? When children are inducted into the militancy before your very eyes and the parents have no one to turn to – not the Army who have orders to do nothing, not the LTTE, not the SLMM and not your MP – how do you whistle blow? When you as a student from the majority community sit in class and see lecturers lecturing to minority students in the language of the majority in a supposedly English medium course, how do you whistle blow? When you are on an interview panel that favours members of your own community, how do you whistle blow? When your National Academy of Sciences inducts as fellows those who have hardly published a scientific article and foists them on the public as great scientists while leaving out qualified minorities, how do you whistle blow?

It is difficult and those who do go against the wishes of their community for the principle of human rights must find a special place in our hearts.

5.7 Sri Lankan Cultural Impediments

Sri Lankan society has natural cultural impediments that work against whistle blowing – a clear hierarchy that we are scared to break. A feature writer in *The Ceylon Daily News* (3 July 2003) – one R. Perera – spoke of our urge to sir and please everyone on top and of everyone on top expecting the others to sir him. So people pretend not to see that the King has no clothes on. Therefore no formal investigation follows and such subtle whistle blowing often leads to loss of career with little improvement of the system. We hurt ourselves more than we hurt the person we expose. Like leaking, it is therefore an unsatisfactory option.

5.8 The IEEE Model for Professional Societies

The Institution of Electrical and Electronics Engineers, the largest organization of professionals worldwide is a flagship in the area of whistle blowing for other professional organisations.

In the famous Bay Area Rapid Transport System (BART) case, the IEEE took an early stand on whistle blowing and its ethics committee encourages whistle blowing by its members while offering the caution that it can lead to loss of career and for that reason members are not required to do it.[4]

[4] The term supererogatory has been used, that is beyond that which one's basic moral obligations require (R. T. De George, "Ethical Responsibilities of Engineers in Large Organizations: The Pinto Case," *Business and Professional Ethics Journal*, 1:6, Fall 1981).

When the engineers fired by BART went to court[5], the IEEE, at a time when few understood whistle blowing in all its dimensions, filed an *amicus curiae*[6] brief on behalf of its members. It noted that it is part of each engineer's professional duty to promote the public welfare as stated in the IEEE's code of ethics. In 1978, the IEEE presented each of the 3 engineers involved with its *Award of Outstanding Service in the Public Interest* with the citation "For courageously adhering to the letter and spirit of the IEEE code of ethics."[7]

6. The Need for Education

As human rights topics, all these issues hinge on greater understanding. We need professional guidelines. We need legal advice. We need to

[5] One of the earliest known issues in whistle blowing dates from the late 1960s, and involves BART (the Bay Area Rapid Transport System), the high-speed commuter rail system. It is a classic case and resulted in the book R.M. Anderson, R. Perrucci, D.E. Schendel and L.E. Trachtman, *Divided Loyalties*, West Lafayette, IN: Purdue University Press, 1980, the first book devoted to whistle blowing.

In that case BART prematurely tried to incorporate space-age technology into its trains where commonsense dictated otherwise. When several safety violations emerged, 3 engineers took them up. First they wrote an anonymous memo. Second they went to the board by-passing channels of communication. Third they got an independent outside consultant to evaluate their safety concerns. Fourth, they went to sympathetic board director who released their memos and consultant's reports to the press. Fifth, when management tried to find the source of the director's information, the engineers lied.

A week later, they were given the option of resigning or being fired for insubordination, incompetence, lying to superiors, causing staff disruptions and failing to follow understood organizational procedures!

In the event, their concerns proved right as BART faced severe cost over-runs and unsafe control systems had to be re-designed and re-installed.

[6] Friend of the Court brief, a kind of public interest submission to help the court understand things better.

[7] As a footnote, the case filed by the three fired engineers, was settled on the advice of their attorney that they could not win because despite all the right things they did and their concerns being proved right, they had lied to their superior officer when questioned about the leaked information and therefore the firing would be upheld on that count. In that settlement they received $75,000 (a tidy sum those days) minus 40% for lawyers' fees!

understand the ethical basis of our pursuit of human rights. We need an understanding of whistle blowing that elevates it to the status of duty, to professional conduct for the public good as opposed to disloyalty to our employers or community. Employers and the society at large need to be encouraged to institute internal mechanisms and democratic structures and release valves that would take away the need to blow the whistle by complaining to outside authorities. Obstacles to political whistle blowing need social advocacy and education.

If we are to succeed in this great venture, the pursuit of an egalitarian Sri Lanka based on human rights, we must put our heads together and commit ourselves to this common cause. We need to think to form a theoretical basis for our common journey into the future as co-equals committed to a just society with basic rights. We need human rights education. Hence this book of specialized chapters by experts and practitioners of human rights.

7. Post Script: Multiculturalism, Vegetarianism in Sri Lanka, Acknowledgements, etc.

7.1 Multiculturalism and the Ethos of Science

The actual seminars at the Auditorium of the Sri Lanka Association for the Advancement of Science, breaking with past practice and in keeping with the great traditions of science, proceeded with little fanfare and minimum formality, marked by the unusual absence of the traditional lamp with the cockerel from Kataragama, the symbol of the boy god, Muruha, the son of Siva[8], emphasizing the commitment to cultural neutrality[9] of the great enterprise that we call science.

Concomitantly we also had no ministers or other big guns to come up and light that lamp. We thereby underscored the egalitarian ethos of that great enterprise, science.

[8] The Hindu lamp is called a national symbol. No one challenges this and it is difficult to understand how the notion came to be uncritically accepted. I think it points to the dangers of political correctness, where people are scared to object when a religion is imposed on them, fearing that they may be accused of speaking out against a religion. But the battle may be for a lost cause. For, the Anglican Bishop of Kurunagala too has accepted this hoax and lights a lamp to god Muruha before the high altar, prior to celebrating the Eucharist.

[9] An interesting issue in education concerns teaching professional ethics without drawing on any cultural tradition; indeed without drawing on any religion. For the use of human rights as a culturally neutral basis for professional ethics, see S.R.H. Hoole and D. Hoole, "Asian Values and the Human Right Basis of Professional Ethics, *Int. J. for Engineering Education*, Vol. 20, 2004 (in press).

In the same spirit of multiculturalism, refreshments were served catering to the needs of devout Buddhists, Saivites and other assorted vegetarians who normally have only meat and fish to eat at public functions in this country where Buddhism is said to enjoy foremost position under the constitution. The carnivores among us were not neglected insofar as cake was also served.

7.2 Vegetarianism in Sri Lanka

It is relevant to the topic of this book – the pursuit of an egalitarian Sri Lanka – to make a comment on the status of vegetarianism in Sri Lanka today. Vegetarianism has its coeval roots in Buddhism in Greater India and Pythagoras in Ancient Greece. Buddhism expanded and successfully converted many Tamils, so much so that it is likely that the majority of Tamils were either Buddhist or Jain in the period AD third to seventh centuries. In the subsequent Saivite Revival, success was largely because of the acculturation of Buddhism through addressing many criticisms that Buddhism had made of Hinduism in its spectacular growth. The result was a new Hinduism that at least acknowledged vegetarianism as a noble state within Hinduism although many holy men in the Upanishads and the Ramayana still unabashedly praised the virtues of meat. Thus vegetarianism in Hinduism took an uncomfortable seat as the more virtuous state, alongside the older traditions of meat eating an Vedic sacrifice.

Today vegetarianism in Sri Lanka practically is more a Hindu thing than a Buddhist thing. It is generally safe for a vegetarian to eat in a carnivorous Tamil home because what is provided as vegetarian would be truly vegetarian. For even a Tamil meat eater would know what is truly meant by vegetarian. On the other hand, even so-called vegetarian fare from a vegetarian Sinhalese Buddhist home would not be vegetarian because Buddhists, on the whole and broadly speaking do not understand what is truly meant by vegetarian. A Sinhalese Buddhist vegetarian meal almost always contains Maldive fish, sprats or prawns or all of these; sometimes these are liberally added to punctuate the hospitality by providing "a good, tasty vegetarian meal."

I am making two points here that seek to build up a nation of one people with different identities. First, that identity markers are brandied, rather than positively, to assert power. Here I refer to Poya Days when meat eaters cannot buy meat while the nation of meat eaters pretend they are vegetarians. To be sure, even as ordinary folk cannot go to the butcher's or the movie because they are shut by ordinance, the well-to-do who insist on and assert these laws get their beef and chicken from modern supermarkets and watch their movies on cable-TV and home

entertainment systems. This is an aspect of rights being used to assert power and show who is boss rather than to give space to people to do what they choose. Is it not time that we allowed people to be who they want to be?

The second point I make is the shared cultural heritage we have in Sri Lanka. The Sinhalese are largely Buddhist but it is the Hindu Tamils who practise the Buddhist heritage of vegetarianism more and properly so. And I think – it is conjecture that is supported by the available evidence – many Tamil Buddhists fleeing persecution in South India during the Saivite revival came to Sri Lanka and became Buddhist Sinhalese. Poignantly, it was a time when Kerala was still Tamil and the Telugu parts had just shed their Tamil identity and newly emerging as Telugu speaking.

So who is what in Sri Lanka is a lot of hocus pocus.

7.3 Acknowledgements

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Chapter 2

Mark Fernando

Is Whistle Blowing an Exercise of a Fundamental Right to Freedom from Corruption?

1. My Initial Thoughts on Whistle Blowing

Some months ago Professor Hoole, on behalf of the Ethics Committee of the Sri Lanka Association for the Advancement of Science ("SLAAS"), invited me to address this Seminar on "Whistle-blowing" and contribute this chapter. In his letter he observed that the Institution of Electrical and Electronic Engineering stated in its Ethics Guidelines that members "are *encouraged* to whistle-blow, but are *not required* to do so since it is likely to lead to *loss of employment*".

"Whistle-blowing" is not a subject to which I had devoted any particular attention, and Prof. Hoole's summary of the problem gave me much food for thought. It gave rise to several questions. If whistle-blowing is indeed something to be *encouraged*, then – legally, morally and/or ethically – whistle-blowing must be right and proper. It would also follow that there is a *right* to whistle-blow. Again, if whistle-blowing is worthy of encouragement, it cannot be misconduct. And if whistle-

blowing is not misconduct, how could it ever result in any penalty at all, let alone the extreme one of *loss of employment*? Further, if whistle-blowing deserves to be encouraged (and not merely tolerated) should it not also be a *duty* – legal, moral and/or ethical – as well? Finally, is the right to whistle-blow confined to the *public* sector, or does it extend to the *private* sector?

Perhaps all of us have a sub-conscious prejudice against whistle-blowers. Whistle-blowing, after all, is just another term for sneaking, and from childhood sneaking is discouraged. Children are told, if you do something wrong, *you* must "own up" and take your punishment; and if someone else does something wrong, *he* must own up, and if he doesn't, *you* don't sneak on him. Of course, if that someone else happens to be someone you dislike, the temptation to sneak will often be irresistible!

Furthermore, a child is taught that if he is a member of a team, then "team spirit" is important; and that it is disloyal to "let the side down" by disclosing the shortcomings of members of his own team. So, later, in adult life we join and work in various organizations with this in-built prejudice against sneaking, regarding it as something underhand, distasteful and disloyal; not the "done thing". We are also conscious that if we expose the malpractices of others, they in turn may make allegations of misconduct against us, whether true or false. It is not surprising, therefore, that people who nevertheless wish to expose corruption often resort to anonymous letters.

However, today corruption and other forms of malpractice are so widespread both in the public sector and in the private sector, and cause such grave loss and damage to the whole community, that exposure must be encouraged, because without exposure past malpractice cannot be remedied, and future malpractice cannot be prevented. Individual prejudices and loyalties must give way to the public interest[1].

The SLAAS (as well as other professional bodies) may therefore usefully consider (a) the circumstances in which there is a right, and even a duty, to expose corruption in the public sector; (b) the limits of that right; (c) how that right should be recognised and enforced; (d) the

[1] Discussing an Emergency Regulation which prohibited all statements which affect the morale of servicemen, I observed in *Withanage v Amunugama*, [2001] 1 SriLR 391, at 405-6, that while statements which disclose the misconduct or negligence of members of servicemen may indeed affect their morale, yet the concealment of such matters may much more seriously prejudice the security of the nation, and of servicemen themselves, and that therefore "exposure may be the most effective and expeditious means of remedying a situation enormously prejudicial to national security".

legal protection to which whistle-blowers are or should be entitled; and (e) whether the position in the private sector should be any different. And it is on those points that I wish to examine in this chapter.

2. Definitions: Whistle Blowing, Malpractice

What is "*whistle-blowing*"? I would venture to define "*whistle-blowing*" as the voluntary disclosure, by a member, officer, employee or an agent of any organisation, of *malpractice* (whether actual, suspected or anticipated) within that organisation. I would include disclosure to authorities within that organization as well as public disclosure. Ordinarily, whistle-blowing would be intended to remedy some past wrongdoing and/or to prevent its recurrence.

What is "*malpractice*"? "*Malpractice*" would cover not only bribery and corruption, but all forms of malpractice prejudicial to employees, the public and the nation – such as safety violations, nepotism, discriminatory and oppressive practices in employment, pollution and other environmental damage, misrepresentation and suppression of facts in regard to the quality of goods and services, revenue frauds, theft, misappropriation and resource wastage[2]. I would exclude purely *individual* grievances, however genuine, of wrongful or unfair treatment.

The extent of malpractice in Sri Lanka cannot be disputed. In 1938 it was found that the allowances of no fewer than 14 out of the 50 elected members of the State Council had been seized under court orders. It is obvious that financial embarrassment is often a prelude to corruption. Accordingly, the Public Bodies (Prevention of Corruption) Bill was introduced in 1941, but was indefinitely postponed by the majority vote of the Councillors! On the very next day a resolution was moved calling for the appointment of a Commission to inquire into the charges of bribery and corruption made against Councillors. The LMD de Silva Commission was appointed under the Commissions of Inquiry Ordinance. Despite widespread rumours of corruption, only twelve persons volunteered to give evidence. The Commission found five Councillors, out of the 50 elected members, guilty of corruption: i.e. one out of ten; and

[2] See the wide definition of "corruption" in the new section 70 of the Bribery Act, introduced by the amending Act No 20 of 1994.

further reported that another four Councillors (unidentified) were in all probability also guilty[3]. That was more than sixty years ago.

It is reported that a recent *Marga* survey of the Judiciary, covering 50 judicial stations (and over 80 different courts) sought information from judges, lawyers, court staff, and "court users" (such as civil litigants, virtual complainants, remand prisoners, prison officials, police officers, and the corporate sector). Forty one judges, out of a total of 49 who responded to the survey, reported that they were aware of 226 incidents of bribery. Four hundred and forty one lawyers, out of 447 who responded, reported 771 incidents of bribery by lawyers. One hundred and seven court users, out of 879 who responded, admitted that they had resorted to bribery to expedite *legitimate* processes. A large majority of all respondents believed that the judicial system was corruptible.[4]

An Australian writer, Stuart Dawson,[5] refers to two public sector surveys, one in Australia and the other in the USA, which revealed that about one-third of those surveyed had observed conduct in their workplaces which they believed to be illegal or unethical. What is more, a majority of that one-third believed that if they had reported such wrongdoing internally, (a) it was unlikely that something would be done about it, *and* (b) they would suffer official or unofficial reprisals. I doubt whether the situation in Sri Lanka is any better.

In both Australia and the USA there is whistle-blower protection legislation, but Dawson doubts the effectiveness of that legislation.

3. Inhibitions on Whistle Blowing in Sri Lanka

In Sri Lanka there seems to be no such legislation as in Australia and the US offering protection to whistle blowers. On the other hand, there are statutory provisions, and subordinate legislation, which appear to inhibit, if not to prohibit altogether, the exposure of malpractice.

Section 16 of the Sri Lanka Press Council Law, No. 5 of 1973, makes it an offence punishable with imprisonment to publish in any newspaper any part of the proceedings of the Cabinet of Ministers, any document

[3] See the tale of "Corruption in Sri Lanka: The National Legislature, 1938-2001" narrated by Prof K M de Silva, published in *Corruption in South Asia*, (ICES 2002), page 303 at 305-6.

[4] See *"Judicial System of Sri Lanka"*, *Marga Institute*, 2002, pages 1,7, 41, 62, 64, and 67.

[5] *"Whistleblowing: a broad definition and some issues for Australia"*, stuart.dawson@vu.edu.au, published by Victoria University of Technology as Working Paper 3/2000.

sent by a Minister to the Secretary to the Cabinet or *vice versa*, and any matter which purports to be a Cabinet decision – seemingly, even if publication was *bona fide* with the object of exposing malpractice or corruption.

There are many statutes, particularly in regard to financial institutions, which require employees to sign declarations pledging the observance of secrecy in regard to "all transactions" of that institution, except when disclosure (a) is required by the directors, or a court of law, or the person to whom a transaction relates, or (b) is in the performance of his duties, or (c) is in order to comply with any law[6]. This suggests that employees are prohibited from exposing corruption on their own initiative, and must wait until the directors or the court *require* them to do so.

But if employees do not expose corruption, is it not likely that directors and courts will remain unaware of corruption? Section 45 of the Monetary Law Act, No. 58 of 1949, goes even further by providing that no employee shall be required to produce *in any court* any book or document or to divulge *to any court* any matter coming under his notice in the performance of his duties under that Act, except as may be necessary for the purpose of carrying into effect the provisions of the Act. Once again, even exposure of malpractice in the public interest appears to be prohibited.

Chapter XLVII of the Establishments Code prescribes norms of conduct applicable to all public officers. Section 6 authorises "a Secretary or Head of Department (to) use his discretion to supply to the press or the public information regarding Government and Departmental activities which may be of interest and value to the public", *but* stipulates that "no information *even when confined to statements of facts* should be given where its publication may *embarrass* the Government as a whole or any Government Department or officer". Every other public officer "is forbidden to allow himself to be interviewed on, or communicate, either directly or indirectly, any information which he may have gained in the course of his official duties to any person, inclusive of the Press..." These provisions appear to prohibit the disclosure even of the unvarnished truth

[6] Bank of Ceylon Ordinance, No. 53 of 1938, section 61; see also National Savings Bank Act, No. 30 of 1971, section 33, State Mortgage & Investment Bank Law, No 11 of 1975, section 29, National Development Bank of Sri Lanka Act, No. 2 of 1979, section 69, and the Inland Revenue Act.

in regard to malpractice and corruption in the public sector, and even where the public interest demands exposure.

Besides, many contracts of employment expressly provide that the employee must maintain secrecy in regard to the employer's affairs, even after the employment has come to an end.

To sum up, then, apart from our childhood inhibitions against sneaking, there appears to be a broad prohibition on the exposure of malpractice and corruption – imposed by statutory provisions applicable to several public sector institutions, by subordinate legislation such as the Establishments Code, applicable to all public officers, and by contractual secrecy clauses in contracts of employment of both public and private sector employees. The existence of such provisions not only fails to encourage whistle-blowers, but exposes them to disciplinary action including dismissal for doing so.

4. Seeking Legal Recognition of the Right to Whistle Blow

4.1 A Three-pronged Approach

How, then, can legal recognition be obtained for the right, and the duty, to whistle-blow? And how may the law protect *bona fide* whistle-blowers from reprisals?

I must stress that I am not attempting in this chapter to make an authoritative or definitive statement on those issues, because that requires a much more detailed study as well as a consideration of all points of view. My task here is limited to identifying the possible arguments in favour of *one* point of view only, namely that whistle-blowing is entitled to legal recognition and protection. A three-pronged approach is feasible, based on constitutional provisions, statutes and subordinate legislation, and contractual provisions which I will first outline briefly and then discuss in greater detail in the next sections.

4.2 Constitutional Provisions

Constitutional provisions give legal recognition and protection for whistle blowing in four respects:

1. The Constitution recognises, by implication from Article 12(1)[7], a *fundamental right to freedom from corruption* or malpractice. That is confirmed by Articles 3 and 4 of the Constitution. This implied freedom from corruption extends to the *private sector* as well.
2. The *freedom of speech and expression* recognised by Article 14(1)(a), read with Article 12(1), extends to *the exposure of corruption* – subject to very limited restrictions. That freedom, too, is not limited to the public sector.
3. Article 28 of the Constitution expressly imposes on every person in Sri Lanka *fundamental duties*: "to further the *national interest*", "to *work conscientiously* in his chosen occupation", "to *preserve and protect public property*, and to *combat misuse and waste of public property*", and "*to protect nature* and conserve its riches". The fulfilment of those duties will often require the exposure of corruption, even in the private sector.
4. The Constitution itself provides a variety of extensive remedies – judicial, administrative, and parliamentary – in respect of corruption and malpractice, consistent with an intention to remedy corruption and malpractice, and to protect those who expose such conduct.

[7] "All persons are equal before the law, and are entitled to the equal protection of the law."

4.3 Provisions in Statutes and Subordinate Legislation

The provisions in statutes and subordinate legislation giving legal recognition and protection for whistle blowing are addressed as follows

1. Secrecy clauses, introduced by Acts of Parliament, must be interpreted (in the absence of express provision to the contrary) as providing a *shield of confidentiality only for lawful transactions*, and not for corruption and malpractice – particularly in the light of the constitutional rights and duties outlined above.
2. Secrecy clauses, introduced by regulations (such as the Establishments Code), should be interpreted in the same way, but with the difference that they would be unconstitutional and void if they are inconsistent with constitutional rights and freedoms.

4.4 Contractual Provisions

The provisions in contracts against whistle blowing are invalid because:

Secrecy provisions in contracts, public and private – which expressly prohibit the exposure of crime and corruption, or which are sought to be so interpreted – would be illegal under the ordinary law of contract, as being contrary to public policy.

5. Constitutional Backing for Whistle blowing

5.1 Article 12(1): Equality and Equal Protection

The Constitution is founded on *the Rule of Law*[8]. The Rule of Law has a number of different meanings. A primary meaning is that everything must be done according to law – that people must be governed by *laws* (i.e. general rules of uniform application), and not by the *arbitrary commands and dictates* of rulers and their officials. People are entitled to the *protection of equal laws*, applying equally to rulers and their officials – who enjoy no special privileges or exemptions.

Another meaning of the Rule of Law is that government must be conducted under a framework of recognised rules and principles which restrict the discretionary powers of public bodies and officials: absolute or unfettered discretions cannot exist where the Rule of Law reigns[9]. Consequently, whenever the law confers powers (or discretions) on public bodies and officials, those powers are treated as having been conferred on them in the public interest; and not for private or political benefit; such *powers are held in trust for the people*, and must be exercised for their benefit; and they must be exercised lawfully and fairly, and not perversely, arbitrarily, or unreasonably. Where the Rule of Law prevails, there is no room for the arbitrary exercise of power[10].

It is by means of the fundamental rights guaranteed by the Constitution – and in particular, Article 12 – that the Rule of Law has been made a reality[11]. Article 12(1) is today the most reliable shield against the unlawful, arbitrary, perverse, or unreasonable exercise of power.

[8] The high concept of the Rule of Law underlies the Constitution: *Perera v Jayawickreme*, [1985] 1 SriLR 285, 321. The Constitution rests on the Rule of Law: *Bandara v Premachandra*, [1994] 1 SriLR 301, 314.

[9] *Premachandra v Jayawickrema*, [1993] 2 SriLR 90, 102-105, citing Wade, *Administrative Law*, 5th ed p 22.

[10] The absence of arbitrary power is the first essential of the Rule of Law: *Perera v Ranatunga*, [1993] 1 SriLR 39, 53; *Priyangani v Nanayakkara*, [1996] 1 SriLR 399, 404. Respect for the Rule of Law requires the observance of minimum standards of openness, fairness and responsibility in administration: *Jayawardene v Wijayatilake*, [2001] 1 SriLR 126, 143.

[11] *De Silva v Atukorale*, [1993] 1 SriLR 283, 293. Article 12 is a necessary corollary of the Rule of Law which underlies the Constitution: *Gunaratne v Petroleum Corporation*, [1996] 1 SriLR 315, 324-5.

Let me re-state that line of argument. Article 12(1) does not only mean that all those in the same class should be treated in the same way. Article 12(1) combines two concepts, of *equality* and of the *protection* of the law. It is an entrenched guarantee *founded* on the Rule of Law, which has many facets. Interpreted in the context of its foundations, Article 12(1) establishes, expressly or by necessary implication, norms governing the exercise of (and the refusal to exercise) governmental powers – namely, the powers vested and delegated by Articles 3 and 4. Those norms apply to every public body and official, however high. Every person has therefore the fundamental right to be treated according to those norms and to enjoy the protection of those norms. Those norms relate both to substance and to procedure. The exercise or non-exercise of power in disregard of substantive norms, if without any basis, would be arbitrary or capricious; and if for a bad reason, would be unreasonable, and perhaps even unlawful. Does a *bad* reason include a *corrupt* reason?

Does Article 12(1) afford protection against corruption as well? As stated above, a public official must exercise his powers for the benefit of the public, in the manner required by law. If, instead, he exercises his power in some other way, for instance because he has been bribed – that would not only be an abuse or misuse of his powers, but clearly an act of corruption as well. Article 12(1) entitles every person in Sri Lanka to freedom from such acts of corruption. Again, if he misuses his power – in order to benefit himself, or his family and friends, or a political party or politician, etc – that, too, would undoubtedly be a form of corruption or malpractice. Analysed in that way, it will become manifest that any form of dishonesty, fraud, corruption or malpractice is the direct result of the excess, abuse or misuse of power, or of the culpable failure to exercise power, and would thus fall within the prohibition in Article 12(1). In other words, Article 12(1) necessarily prohibits the exercise of powers vested in public officials for a *corrupt* purpose – and it can therefore be contended that *Article 12(1) entitles every person in Sri Lanka to freedom from corruption.*

Articles 3 and 4[12] of the Constitution provide for the exercise of the legislative, executive and judicial powers – which are some of the

[12] Art. 3: "In the Republic of Sri Lanka, Sovereignty is in the People and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise".

essential components of the *Sovereignty* of the People of Sri Lanka. Whether those powers are exercisable by the Legislature, the Executive or the Judiciary, no one can be heard to suggest even for a moment that the People delegated any part of their Sovereign powers to any institution or person with a licence to exploit those powers for corrupt purposes. Articles 3 and 4 confirm that all governmental powers must be exercised *bona fide*, lawfully, and reasonably, free of any form of corruption or malpractice.

Does Article 12(1) apply to the private sector as well? There is a school of thought that fundamental rights, and Article 12 in particular, only afford protection against governmental or executive action, but not as against the acts and omissions of *private* bodies and individuals. This is based on two misconceptions. The first is the facile assumption that the language of Article 12(1) is the same as the corresponding section of the 14th Amendment to the American Constitution – which provides, "... nor shall *any State* ... deny to any person within its jurisdiction the equal protection of the laws". Thus the 14th Amendment is a limited guarantee, only against the acts of *any State*, while Article 12(1) applies to *any* act, whether of the State or of any other. The second misconception flows, to some extent, from the first. Article 126(1) of the Constitution provides that the Supreme Court shall have sole and exclusive jurisdiction to determine questions relating to the infringement of fundamental rights by *executive or administrative* action. On the assumption that the fundamental rights are only a protection against *executive* action, it is often assumed that the only remedy is that under Article 126 – for on that assumption, there is no need for any other remedy.

However, it is clear from Article 12 itself that the fundamental rights grant protection against private action as well. Thus Article 12(3) provides that no person shall, on the ground of race, religion, language, caste or sex, be subject to any disability or restriction, with regard to access to shops, public restaurants, hotels, places of public entertainment and places of public worship of his own religion – quite clearly, these are almost wholly rights in respect of private, or "non-executive", action[13]. If Article 12 is interpreted as being inapplicable to private acts, Article 12(3) will have no meaning. Article 12(3) does not add to Article 12(1): it only

Art. 4: "The Sovereignty of the People shall be exercised and enjoyed in the following manner...".

[13] See *Saman v Leeladasa,* [1989] 1 SriLR 1, 22-24; *Jayagiri Transporters Ltd v Dharmadasa Banda,* SC 152/94 SCM 15.9.94.

states expressly, *ex abundante cautela*, what is anyway implicit in Article 12(1).

There are thus strong arguments in support of the view that Article 12(1) – including the protection it gives against corruption – would apply, to some extent at least, to the private sector.

What are the limits of the right? It seems to me that there are inherent limitations to the right to whistle-blow. Whistle-blowing is intended to remedy *past* malpractice and/or to prevent *future* malpractice. It must therefore be done in good faith for one of those purposes. If a malpractice has been remedied, and is unlikely to recur, whistle-blowing would only be vindictiveness. If a malpractice occurs in an organization, an employee or member of that organization should first raise the matter internally, so that any past malpractice can be remedied and/or a recurrence prevented. Save in exceptional circumstances, he should not first complain to authorities outside the organization, as that would seem inconsistent with good faith. Subject to that, *bona fide* whistle-blowing would enjoy the protection guaranteed by Article 12(1), which would therefore preclude disciplinary action.

5.2 Article 14(1)(a): Freedom of speech and expression[14]

This is another possible basis for sanctioning the exposure of malpractice. The freedom of speech may be subjected to certain restrictions. Article 15(2) enables restrictions to be imposed by Acts of Parliament in the interests of racial and religious harmony, parliamentary privilege, contempt of court, or incitement to an offence. Article 15(7) enables further restrictions, by Acts of Parliament as well as by emergency regulations, in the interests of national security, public order, the protection of public health or morality, for securing due recognition of the rights of others, and for meeting the just requirements of the general welfare of a democratic society[15].

None of these provisions authorise the imposition of restrictions in order to prevent exposure of corruption and malpractice[16]: those are of concern to every member of the public, and not merely to those who are

[14] "Every citizen is entitled to ... the freedom of speech and expression, including publication."

[15] However, pre-Constitution laws remain in force despite inconsistency: see Articles 16(1) and 168(1).

[16] See *Withanage v Amunugama,* [2001] 1 SriLR 391, discussed in footnote 1.

directly affected, and every member of the public is entitled to speak about them[17].

It is therefore arguable that, save in extra-ordinary circumstances, the freedom of speech extends to the exposure of corruption and malpractice; and in the private sector as well[18].

5.3 Article 28: Fundamental Duties

In order to fulfil the fundamental duties imposed by Article 28, every person must not only refrain from corruption and malpractice himself, but must conscientiously expose corruption of which he becomes aware – in order to protect public property, or to preserve the environment, or to advance the national interest. At first sight these fundamental duties may appear not to be far-reaching. But can any one who becomes aware of corruption in his work-place and nevertheless refrains from exposing it, claim that he has fulfilled his duty either to further the *national interest* or to *work conscientiously* in his chosen occupation?

Although Article 28 imposes fundamental duties on every person in Sri Lanka, Article 29 goes on to say that this does not impose a *legal* obligation enforceable in any court or tribunal. However, those duties are at least *morally* binding, and the Constitution cannot be regarded as having intended that any person should be penalised for acting in the fulfilment of a moral duty imposed by the Constitution itself – to which, after all, every public officer takes an oath of allegiance.

5.4 Constitutional Remedies: Judicial, Administrative & Parliamentary

The Constitution provides judicial remedies by the fundamental rights jurisdiction of the Supreme Court (under Article 126), and the writ jurisdiction of the Court of Appeal (under Article 140).

An administrative remedy is provided by Article 156(1), which imposes on the Ombudsman the duty of investigating and reporting upon *complaints or allegations of the infringement of fundamental rights and other injustices* by public officers and officers of public corporations, local authorities and other like institutions, which would cover all forms of corruption and malpractice in the public sector. While that does not

[17] All citizens are entitled to speak, to discuss, and to voice their opinions, on matters of public interest: e.g. *Ratanasara Thero v Udugampola,* [1983] 1 SriLR 461, *Ekanayake v Herath Banda,* SC 25/91 SCM 18.12.91, *Amaratunga v Sirimal,* [1993] 1 SriLR 264.

[18] While the 1st Amendment to the American Constitution provides that "*Congress* shall make no law ... abridging the freedom of speech", our Article 14(1)(a) is not restricted to legislative or executive action.

extend to Ministers, parliamentary remedies are provided by Articles 42 and 43[19], which make the President and the Cabinet of Ministers, respectively, *responsible to Parliament* for the due exercise of their powers and duties[20].

5.5 Conclusion

It can therefore be argued that the Constitution recognises the fundamental right to freedom from corruption and malpractice, and the fundamental right and the fundamental duty to expose corruption and malpractice; that the Constitution also provides extensive mechanisms for the investigation of allegations of corruption and malpractice in further recognition of that right and that duty, consistent with an intention to encourage and protect those who invoke those remedies, and penalizing *bona fide* exposure of corruption or malpractice would be a denial of the protection of the law guaranteed by Article 12(1).

6. Secrecy Clauses in Statutes, Subordinate Legislation, and Contracts

Let me deal first with contractual provisions. Contracts are illegal if they tend to corruption in the administration of the affairs of the nation, because they "diminish the respectability, responsibility and purity of public offices, and ... introduce a system of official patronage, corruption and deceit wholly at war with the public interest"[21]. Weeramantry deals with the question when a contract would be void as being contrary to public policy:

> " It is in the national interest that the public service and its members should be kept free of corruption... Consequently any bribe or

[19] Art. 42: "The President shall be *responsible to Parliament* for the due exercise, performance and discharge of his powers, duties and functions under the Constitution and any written law".

Art. 43(1): "There shall be a Cabinet of Ministers... which shall be *collectively responsible and answerable to Parliament*". Today there are many Parliamentary Committees responsible for overseeing the public sector.

[20] See *Perera v Pathirana,* SC 453/97 SCM 30.1.2003, *Semasinghe v Karunatilleke,* SC 431/2001 SCM 17.3.2003, and *Thavaneethan v Dissanayake,* SC 20/2002 SCM 25.3.2003.

[21] Cheshire, Fifoot and Furmston, *Law of Contract,* 13th ed, p 383, citing Story, *Equity Jurisdiction,* section 295.

personal advantage offered to a public officer in regard to the discharge of his public duties is illegal and a contract to grant any such benefit is void."[22]

"All bargains tending to stifle criminal prosecution whether by suppressing investigations of crime or by deterring citizens from the public duty of assisting in the detection or punishment of crime are void as against public policy."[23]

Those principles would apply to an agreement relating both to a crime already committed, as well as to a future crime. Weeramantry adds that "an agreement not to institute an action for an injury to be committed by another is invalid"[24] (as Voet[25] observes) "as being a temptation to wrongdoing and as involving the forgiveness of a future offence". A secrecy clause which, expressly or by implication, prohibits the exposure of malpractice, past or future, would be a "bargain to stifle prosecution" and "a temptation to future wrongdoing".[26]

Let me turn to statutory provisions. It is unthinkable that Parliament ever legislates with a desire to conceal or condone corruption, or to "diminish the respectability, responsibility and purity of public offices", or "to introduce a system of official patronage, corruption and deceit wholly at war with the public interest". On the contrary, it must be presumed that Parliament – not second to the common law – considered it to be in the national interest to keep the public service free of corruption. If, therefore, an Act of Parliament is capable of two interpretations, and one interpretation would permit the exposure of corruption while the other would compel concealment, the courts should not prefer the latter, as that would be contrary to the public interest, as well as constitutional rights, freedoms and duties. Hence secrecy clauses, introduced by Acts of Parliament, must be interpreted (in the absence of express provision to the contrary) as providing a *shield of confidentiality only for lawful transactions,* and never for corruption and malpractice.

[22] Weeramantry, *Law of Contract*, volume 1, section 367(ii).

[23] *Ibid.* section 369, Williston on Contracts, section 1718, cited by Basnayake, CJ, in *Fernando v Piyadasa,* (1958) 61 NLR 566, 569.

[24] *Ibid.* section 395.

[25] Voet 39.5.22.

[26] In *Initial Services Ltd v Putterill,* [1967] 1 AllER 145, disclosure by an ex-employee of information relating to violations by the employer of the Restrictive Trade Practices Act, 1956, was held to be in the public interest as there is no confidence in the disclosure of an iniquity; see also *Lion Laboratories Ltd v Evans,* [1984] 2 AllER 417 (disclosure of information as to the reliability of a breathalyser approved by the Home Office).

Finally, the same principles of interpretation should be applied to secrecy clauses, introduced by regulations (such as the Establishments Code). If that is not possible, secrecy clauses will be unconstitutional and void to the extent that they conflict with constitutional rights, freedoms and duties.

7. Responsibilities of Professionals

If professional associations desire that whistle-blowing and whistle-blowers enjoy legal recognition and protection, two tasks await them. First, they must press for necessary reforms to make the law and subordinate legislation clear and unambiguous in regard to the right to whistle-blow, the duty to whistle-blow, the procedures for whistle-blowing, the protection for whistle-blowers, and the sanctions for victimization of whistle-blowers. And secondly, they must also adopt Codes of Ethics providing for such matters, bearing in mind that often the law provides only minimum standards while ethical standards are higher.

8. What next?

Let me conclude by referring to the further challenge that faces professionals and professional associations, and indeed civil society. Even if whistle-blowing does get all necessary legal recognition and protection, and corruption and malpractice can be exposed without fear, how can we make certain that past malpractice will be penalized and future malpractice prevented?

Biographical Sketch

MARK FERNANDO, L.L.B. (Hons.) Ceylon, L.L.D. (Honoris Causa) Colombo, President's Counsel, has been a Judge of the Supreme Court since 1988. He is a former Judge of the ILO Administrative Tribunal, and former President of the Asian Development Bank Administrative Tribunal.

There is a lot that can be said of him, particularly his incisive mind that cuts quickly through the superfluous to the core issues to create soundly argued and succinctly expressed judgements. His writings are scholarly like a journal paper with every statement justified through lavish footnotes. From the unity of purpose knitting his thoughts, the clarity of his arguments, and the logic underlying his theses, clearly the

universities lost a good mind that would have elevated the professorate to great heights. The universities' loss is the Supreme Court's gain.

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Chapter 3

Elmore Perera

Whistle Blowing – Bringing Internal Scandals to Light in the Public Interest

1. To all Potential Whistle Blowers

The only defence raised by the State when I alleged that my Fundamental Rights had been violated by the State Officers who retired me compulsorily for inefficiency and incompetence at the age of 51 years was that I was abrasive. Mr. H.L. de Silva countered this with the submission that "Abrasiveness is the Quality of a Cleanser".

Early in April this year I received a letter addressed to Elmo Perera PC. I immediately checked if this was an April Fools Joke. No, it was dated 3rd April and from the contents of the letter inviting me to make this contribution, I concluded that perhaps my patently abrasive whistle blowing had qualified me to be considered a Police Constable – though my daughter was almost angry that I had been "fondly described as a whistle".

I had, since my reinstatement as Additional Surveyor General in 1989 been blowing the whistle against blatant encroachment into the control of Technical/Scientific Departments by Administrative Service Officers and felt strongly enough to submit in May 2000 a scientific abstract on the subject "The Potential Contribution of Sri Lankan Scientists and

Technologists to Sri Lanka's Development has been effectively stifled by Administrators" for presentation at the 56th Annual Sessions of the Sri Lanka Association for the Advancement of Science, SLAAS. This was returned to me on 14.9.2000 as "Rejected by the Referees". This clear indication of reluctance of the SLAAS to "blow the whistle" motivated me to blow the whistle by becoming Secretary of the OPA. The 17th Amendment was perhaps one result of that.

So, this April invitation was a welcome indication to me that the scientific community was alive to its responsibility to promote whistle blowing. When I received the 2nd letter in May 2003 I was elated and at the same time humbled to think that I had been considered fit to speak after the Hon. Mark Fernando the most Senior Supreme Court Judge and *in my book* unquestionably the *Chief of the Justices* of Sri Lanka.

In the April letter I had been identified, *inter alia*, as "Someone who has rocked the system twice and survived". I wish to plead in mitigation that it was not that I rocked the system and survived but that the system rocked me twice and I survived.

2. The Character Underlying Whistle Blowing – Reflections

To survive nowadays one must either say "yes" to everything and be a "sycophant" *OR* one must have a strong foundation. What readily comes to mind is the parable about the wise man who built his house upon the rock and the foolish man who built his house upon the sand.

Permit me to dwell a few moments on my "foundation". My values and my "guts" if any, I inherited directly from my parents. My father was a poor school teacher who was as straight as a rod in all his dealings, was Tennis Champion of the Southern Province for many years and once won the Open Doubles Title at Nuwara Eliya partnered by Mr. Woodhouse, one of my predecessors as Surveyor General. I vividly remember his relating to us in tantalising instalments at Family Prayers the story of how Joseph was sold to the Egyptians as a slave and the highly ethical conduct of Joseph.

My mother was a poor housewife, struggling to make ends meet but finding time to play tennis and dress the numerous wounds of all the children (and sometimes even adults) in the neighbourhood.

As a boy of 9 years I was dumbfounded, and even ashamed, when I saw my father sobbing like a child on the stage when he was replying to the Principal's speech on the occasion of his completing 25 years as a teacher of Richmond College. I learned that this was when he mentioned the name of Rev. James Horne Darrell, 24th Wrangler in Mathematics of Cambridge University who assumed duties as Principal of Richmond

College in 1896 at the age of 26 years and died in 1906 at the age of 36 years from typhoid fever which he contracted from the sick students he tended with dedication.

It was this same Darrell who gave a full scholarship to a poor skinny boy who turned out to be Mr. C.W.W. Kannangara the father of free education who when he came to Richmond for the prize giving in 1936 first worshipped the photograph of Rev. Darrell and stated that he stood on hallowed ground.

Rev. Darrell was succeeded in 1906 by 22 year old Rev. W.J.T. Small the 7th Wrangler in Mathematics of Cambridge University. He was 6 months older than my father and had a tremendous influence on my father's values. Perhaps the only advice of Rev. Small's that my father disregarded was when informed by my father that he had named me "Elmore", he said "I hope there'll be no more". I myself had the rare privilege of associating with Rev. Small very closely from 1965 until his death in 1978.

3. First Whistle Blowing

My first conscious attempt at whistle blowing was at the District Coordinating Committee Meeting (DCC Meeting) in Polonnaruwa in December 1959. I felt deflated when none of the many Staff Officers who agreed with me wholeheartedly in private discussions, refrained from saying even one word in support of pursuing action on the obvious frauds. I thereafter restricted myself to rooting out corrupt practices within my sphere of authority.

4. At the Sri Lanka Tennis Association

It was my uncompromising insistence on fairness and ethical conduct in the activities of the Tennis Association that got me into turbulent waters. When the President's Counsel we had managed to retain to appear for the SLTA withdrew, as a layman, I, who had been referred to as a tyrant in the plaint, successfully defended an action brought against the SLTA by two eminent Queen's Counsel viz. Nadesan and Navaratnarajah.

In July 1983 when I was Additional Director Training and Evaluation in SLIDA, the then Minister of Public Administration took the view that my activities as President of the SLTA were inconsistent with my functions in SLIDA and I reverted to the Survey Department as I was not prepared to deviate from my stand in the SLTA regarding Coaching and Training at a National Level.

On the recommendation of Hon. Sarath N. Silva (then Deputy Solicitor General) the Hon. J. Vincent Perera, then Minister of Sports on 25 May 1984 directed that 14 tennis courts be released for carrying out a coaching and training programme at National Level. The faction supported by the Minister of Public Administration obtained, in the Court of Appeal, an *ex parte* stay order on 8 June 1984. The Hon. Sarath N. Silva (then DSG) appearing for the Hon. Minister of Sports and Mr. K.N. Choksy with Mr. Romesh de Silva appearing for me, resisted extension of this stay order, and O.S.M. Seneviratne J. vacated and refused to extend the stay order on 3 August 1984 (vide 1984 2 SLR 94). I was transferred to a non-existent "Reserve" on 24 August 1984 and thereafter the Minister of Public Administration engineered my compulsory retirement from the Public Service from 2 October 1984.

Hon. Sarath N. Silva had not the slightest doubt that my compulsory retirement was a direct result of the above order and assured me that the Attorney General would not defend the Minister of Public Administration and urged me to institute action against the said Minister for violation of my Fundamental Rights. My good and learned friend Shibly Aziz could not be dissuaded (by Hon. Sarath N. Silva) from defending the Minister and the action filed by me was heard on 8 consecutive days by a Bench of all the Judges of the Supreme Court (then 9) and on 21 May 1985 was "dismissed with regret" by Sharvananda CJ with 3 dissenting Judgments by Justices Wanasundera, Wimalaratne and Colin Thome (vide 1985 1 SLR 285).

I served as Founder National Director of Christian Children's Fund in Sri Lanka from 1.4.'85 to 30.6.'87, entered Law College in 1987, was reinstated, (thanks substantially to the views expressed by Hon. Sarath N. Silva in that connection), as Additional Surveyor General in September 1989 without loss of seniority and with all back wages and appointed Surveyor General in 1991.

As a result of blowing the whistle on fraudulent tender procedures and a sinister attempt to compel surveyors to carry out surveys according to the dictates of administrators who knew nothing of surveying, I was compulsorily retired again at 58 years in October 1991. On that occasion too the attempts of the administrators to recover possession of my vehicle were thwarted by the views expressed by Hon. Sarath N. Silva.

I resumed whistle blowing in earnest after being admitted as an Attorney-at-Law of the Supreme Court of Sri Lanka on 19 November 1992.

5. The Good Governance Initiative

On 14th September, 1998, Hon. Ranil Wickremasinghe, Prime Minister as then Leader of the Opposition convened the Citizens' Consultation on Free and Fair Elections and Depoliticisation of Key Institutions at the Sri Lanka Foundation Institute. A Non-partisan Drafting Committee of 18 independent and non-political persons was constituted to examine and report on ways and means of restoring public confidence in the electoral process and depoliticisation of key institutions. The 18 persons were K.H.J. Wijayadasa, Bradman Weerakoon, D.M. Swaminathan, Swarna Obeysekera, Ana Seneviratne, Shibly Aziz, P.C, W.D. Ailapperuma, Father Oswald Firth, A.L.M. Hashim, P.C., Melvin Wijesekera, Air Vice Marshall Harry Gunatilleke, Austin Fernando, Monica Ruwanpathirane, Kingsley Rodrigo, A.L.M. Thangavel, Elmore Perera, Janak Gunawardena and D.S.S. Mayadunne.

The 17th Amendment which is widely labelled as the "Good Governance Amendment" was preceded *inter alia* by the Draft Amendment adopted, published and vigorously promoted by the Organisation of Professional Associations (OPA). The said Amendment was drafted by several founder members of CIMOGG, based largely on the report of the Citizens' Consultation on Free and Fair Elections and Depoliticisation of Key Institutions presented on 5 January 1999.

However, what was finally passed as a result of an 11th hour "deal" was a far cry from what the people's consultation and the OPA demanded.

Resulting from an urgent need for Good Governance in the conduct of public affairs in the country and convinced of the fact that individuals and institutions remain free only where freedom is founded upon strict adherence to the rule of law and the hallowed principle that all public office is held in trust for the people, CIMOGG, the Citizens' Movement for Good Governance. was established. Devoid of party politics and in the public interest, CIMOGG is deeply committed to undertake any steps deemed necessary to promote the achievement of good governance in the conduct of public affairs in Sri Lanka.

6. Conduct of Professionals

At a seminar arranged by the Centre for Policy Alternatives after the Constitutional Council was established I blew the whistle on a list of 60 + persons nominated for high posts by stating that, barring a few exceptions the said list was akin to a rogue's gallery.

Unethical conduct of Professionals is sadly not dealt with adequately or effectively by professional bodies like the Bar Association or the Medical Council. I have blown the whistle in obvious cases of their reluctance to discipline their own members. Two matters are pending in the Courts. Professionals should set an example without merely prescribing codes of ethics for Parliamentarians and others.

7. Failure of the Legal Profession

However, the decision taken to blow the whistle was never so painful and deliberate as when in November 1999 I marked my appearance for my friend W.B.A. Jayasekera in his application to the Supreme Court for violation of his Fundamental Rights by Hon. Sarath N. Silva whom I apparently owed so much to. Certainly, I would not have continued my brush with the judicial system of this country after my above-mentioned experience of it as a layman, if not for the forthright and unequivocal respect for the Rule of Law clearly impressed on me by the above-mentioned interventions of Hon. Sarath N. Silva.

As a result of the sense of grave concern and acute anxiety in a section of the legal community that the deeply cherished values of Judicial Independence and Moral Integrity among judges were under serious threat, the Human Rights Committee of the Bar Association of Sri Lanka organised a seminar on "The Independence and Dignity of the Judiciary" on 21 August 1999 at which Justice P.N. Bhagawathi, former Chief Justice of India, and Mr. H.L. de Silva PC delivered addresses. In his address on "Threats to Judicial Independence and Integrity from within the System" Mr. H.L. de Silva stated, *inter alia*, that *"Shorn of independence and without moral integrity the whole judicial process will become a ridiculous farce and lawyers will be like clowns prancing around in a meaningless charade"*. Mr. H.L. de Silva further stated, albeit prophetically that:

> "While the primary cause for this degeneration in the Judiciary is the weaknesses of character of the judges themselves, and the ineffectiveness and lack of firmness on the part of those who are called upon to exercise disciplinary control over them,. Yet it is sad to find that lawyers themselves have in no small measure contributed to this deplorable state of affairs by seeking to exploit judicial weaknesses and gain favours for themselves and unfair advantage for the illegitimate advancement of their own interests and those of their clients. Quite plainly, such conduct is both dishonourable and contemptible. Persons who seek to do this cause the gravest harm and need to be condemned, for it will surely bring about the ruin of the legal profession and the collapse of the whole edifice of the administration of justice".

In several Fundamental Rights and Writ applications the in-depth first hand knowledge I have acquired over the years, of the uses and abuses of administrative procedures, has enabled me to blow the whistle on numerous occasions. It is ironical however that the resort to technicalities and strictly legalistic arguments trotted out by senior lawyers and even State Counsel who regretfully seem to have assumed the role of defenders of State Officials who are cited as Respondents, rather than pursuing truth and justice.

It is regrettable that rather than using the wide powers of the Attorney General to investigate and expose fraudulent behaviour of State Officers, strenuous efforts are made at times to suppress or exclude relevant evidence. It is disheartening and positively injurious to good governance to see the lackadaisical attitude of the official bar in many cases when the whistle is blown on corrupt practices in the public sector. The conduct of Examinations Department Officials and Principals of Schools is presently under scrutiny by the Courts.

8. Corruption of SLAS

The absorption of 14 Class 1 Officers of the Local Govt. Administrative Service has been expertly manipulated by Sri Lanka Administrative Service (SLAS) Officers to grant several hundreds of themselves supernumerary promotions with 3 to 10 increments and back wages for several years. Emboldened by this success they have identified key posts held by Technical Officers and classified them as scheduled posts to be held by Class 1 SLAS Officers to accommodate the supernumerary promotees. The Engineering, Scientific, Agricultural, Surveying and other services are effectively controlled by SLAS Officers. The administration of established departments such as Survey, Irrigation, Public Works, Agriculture, Settlement, Fisheries, Geological Survey, Land Use Planning has been stultified by a variety of administrative gimmicks all directed to vest control in SLAS Officers who have no knowledge of what they administer.

9. Land Cases

In respect of Partition and other land cases which perhaps constitute a substantial majority of pending cases, my knowledge and experience of surveying procedures, practices and preparation of plans has revealed a remarkable degree of frauds perpetrated on unsuspecting and often

helpless members of the public and enabled me to blow the whistle. The procedures that have been evolved make it near impossible to establish the existence of a fraud even in the most obvious cases. The superficial or imperfect knowledge regarding survey plans, of lawyers and even some judges engaged in land cases, is a serious barrier to satisfactory adjudication.

10. The Commissions

Ever since the infamous "sticker issue", I have blown the whistle on certain totally unacceptable actions and procedures of the Human Rights Commission which result in a negation of the very purposes for which the Human Rights Commission has been established. The Commission newly appointed by the Constitutional Council are already showing promising signs of change for the better.

The Public Services Commission needs to be more reactive and even proactive. Several cases have been filed in the public interest citing the PSC as Respondents. The appointment of the Commissioner General of Prisons and the Director Nursing (Medical Services) are relevant issues.

The Police Commission regrettably seems to have abdicated all its authority to the Minister of the Interior and the I.G.P.

In respect of the de-merger of the North and East – an action filed in the Court of Appeal on 2.5.2002, is still at the stage of preliminary objections by the AG. Reluctance by the Judiciary to take on the Executive is manifest.

In respect of the Elections Commission, faulty drafting by the Legal Draftsman has created a dangerous situation. The Supreme Court appears reluctant to issue notice on the Attorney General as representing the President and the Constitutional Council.

Several actions against the Judicial Service Commission and the Chief Justice are outstanding, the most pressing being the review of the sentence of one years rigorous imprisonment for Contempt of Court in which application the whistle was blown, loud and clear.

11. Taking on the President

I have blown the whistle on HE the President 4 times:

(1) When she declared that there was a bribe taker on the Supreme Court bench. After a patient hearing leave to proceed was refused.

(2) When the Chief Justice's attempt to clear the issue with respect to a bribe-taker being on the bench failed. On this occasion the CJ not only refused the application for leave to proceed but also ordered costs of Rs. 5000/- for the "judicial time wasted". I considered this the best spent Rs. 5000/-.

(3) The application requiring the holding of the poll on the de-merger in the Eastern Province, is still pending.

(4) The application of the Commissioner of Elections is still being supported.

12. Conclusions

May I conclude by reading out an e-mail I received from my friend Stanley Jayaweera:

> " [In writing this chapter] you must definitely mention that our action cannot be limited to mere verbal denunciation of what is happening today. We must act and resort in an original manner to massive non-cooperation and civil disobedience – Gandhi style. As an example all lawyers can refuse to appear before the Chief Justice because of his conduct, and top Bureaucrats and Administrators can refuse to work in the manner the Govt. Doctors did recently. Professionals must give the lead. They can then mobilize the masses that way".

I wish to add, as the Psalmist says

> "Blessed are they who maintain Justice, who constantly do what is right". (Ps 37:8).

Biographical Sketch

ELMORE M. PERERA, B. Sc. Cey., Dipl. PMD, TREND Conn., Chartered Management Accountant, F.C.M.A. (U.K.), Former Surveyor General, Former Addl. Director, SLIDA, Founder Director, Christian Children's Fund, Sri Lanka, Former Secretary, Organisation of Professional Associations, Attorney-at-Law & Notary Public, Commissioner for Oaths.

He is a forthright speaker who engages in advocacy against corruption and for justice. His activism has led to his being, in his words, the only person to be compulsorily retired from public service twice. It shows the personal dangers of whistle blowing and emphasizes how thoughtfully it must be done.

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Chapter 4

Devanesan Nesiah

Political Whistle Blowing

1. What is Whistle Blowing?

We hear whistles daily and, from the tone of the whistle, we may guess a sense of the message that is intended. There are whistles of appreciation which some among us may have indulged in, and others among us may have been unhappy recipients of but that, surely, is not the kind of whistle blowing that is the theme of this seminar. Traffic police, and organizations such as girl guides, boy scouts and the armed services use whistles to draw attention and signal a message. A whistle may also be blown to alert a danger, as when a burglar or an enemy is sighted or when someone is lost and seeks to be rescued. On the field of play in many sports, including Soccer, Hockey and Rugby, the referee uses the whistle to stop play, draw attention and signal a foul or convey a message.

The theme of our seminar arises from a new dimension in the use of the term Whistle Blowing that has developed in recent decades, and found recognition, since the 1990s, in several dictionaries. This new dictionary definition covers "Bringing an activity to a sharp conclusion as if by the blast of a whistle" (Oxford English), "Giving information (usually to the authorities) about illegal and underhand practices" (Chambers), and "Exposing to the press a malpractice or cover-up in a business or government office" (US, Brewster's). Common to these formulations is to

stop or interrupt an activity or process through disclosing or drawing attention to facts, or raising concerns about misconduct. This understanding of Whistle Blowing is also central to the focus of the Committee, headed by Lord Nolan, appointed a decade ago by the Prime Minister of the United Kingdom to Report on Standards in Public Life. That Committee set down principles applicable to the public life of Members of Parliament, Ministers and Public Servants including the employees of Public Corporations[1] and Non-Profit Organizations providing public services[2].

Through the 1990s and since then, there has been a flurry of high profile Whistle Blowing, of various kinds, in many parts of the globe. Many of these have led to Commissions and Committees of inquiry; some of these have followed or caused the collapse or radical restructuring of major national and trans-national institutions (such as Enron and WorldCom) and, in a few cases, of governments. The various Truth Commissions (such as those in South Africa, Guatemala, Argentina, Chile, El-Salvador, etc.) are illustrations of the latter.

In Sri Lanka we have had Commissions and Committees with much more limited scope; I chair a Committee of Inquiry into Disappearances which is due to report in a few weeks time. Most of the evidence led before these Commissions and Committees may fall outside our definition of Whistle Blowing but, invariably, some of the critical evidence may fall within.

2. Ancient Instances of Whistle Blowing

Though the subject of Whistle Blowing became salient only in the last decade, there have been clearly identifiable instances of such activity in virtually every society all through history and even in mythology. For example, in the creation story set out in *The Book of Genesis*, we read in chapter 2 that God proclaimed the rule that Adam may eat the fruit of any tree in the garden of Eden except that which gives knowledge of what is good and what is bad. In chapter 3 we read that the snake, by revealing the nature of that fruit, induced Eve to eat it and she, in turn, induced Adam to do the same. When challenged by God, Adam put the blame on Eve and she, in turn, on the snake. This episode highlights two tensions, one relating to conforming to the prescribed rules as against

[1] http://www.archive.official-documents.co.uk/document/parlment/nolan/nolan.htm
[2] http://www.archive.official-documents.co.uk/document/parlment/nolan2/nolan2.htm

gaining access to the secrets embedded in the fruit, and the other relating to confessing the breach of the rules as against loyalty to the fellow occupants of the garden of Eden. In both cases, it was the Whistle Blowing option that was taken (i.e. uncovering a secret and thereby precipitating a radical change).

An ancient tale from the second century B.C., recorded in the Mahavamsa, also brings out the tension inherent in Whistle Blowing. When King Kavantissa died, his elder son Dutugemunu was a fugitive and the younger son Saddhatissa usurped the throne. But Dutugemunu returned to claim the throne, won the battle that ensued, and Saddhatissa fled to a temple. On receipt of information, Dutugemunu went to that temple with the intent to kill his brother. He inquired of the monks if his brother slept there. In terms of Buddhist ethics, monks may neither lie nor do anything that would lead to death or injury. A quick-witted monk resolved that dilemma by replying that Saddhatissa was not on any of the temple beds (at that moment he was hiding *under* a bed). Dutugemunu went away and Saddhatissa survived. In this case the monk avoided Whistle Blowing by resorting to sophistry, which, in the circumstances, is surely commendable.

3. Whistle Blowing with Disputable Moral Imputations

In the above cases, the moral implications, i.e. the rights and wrongs of Whistle blowing, are clearly implied. But in other instances the moral implications may be disputable. For example in the Ramayana we read that Ravana's brother, Vibhishanan, crossed over to the enemy (i.e. to Rama's side), and helped to turn the tide against his brother. There could be different opinions on the moral justification, first, of the crossing over (the issue frequently discussed is family, communal and national loyalty v. upholding Rama's right to reclaim his wife kidnapped by Ravana; the issue of two kings leading their populations to war over a domestic dispute is seldom addressed) and, second, of the revealing of any military secrets to which, as the King's brother, Vibhishanan would have been privy. It is only the latter (the revealing of any military secrets) that falls within the definition of Whistle Blowing. In this case the moral implications have been the subject of continuing debate amongst scholars.

Similar issues may arise in the case of those who cross over from one political party or militant group to another, or from one commercial, industrial or research institution to another, particularly if the person crossing over has secrets to reveal pertaining to the functioning of the organization deserted. The whistle blower may be seen by his/her

colleagues as a betrayer, but the Whistle Blowing aspects arise not from the crossing over but from the revealing of secrets. The perception of Whistle Blowing as a betrayal, a subversive act, is a virtually unavoidable feature and, frequently, may have negative psychological and other impact on the whistle blower.

For those interested in further reading on this subject I recommend an excellent paper by Brian Davey, Environmental Economist, and Anti-War and Mental Health Development activist, under the title "Whistle Blowing – The Psycho-Dynamics of Conflict, July 1999"[3]. Apart from fear of physical punishment, loss of employment, damage to career prospects, etc., there may be isolation and alienation from colleagues, which could be gravely disturbing. In many cases the resistance of dissenters may be progressively undermined and they may be dragged back, in one way or another, into conformity. This may explain, but of course not excuse, the complicity of many otherwise decent human beings in the appalling crimes and corruptions of institutions and communities of which they are part. Davey refers to the following Sufi parable outlined in a book by Charles T Tart[4]:

> "The teacher of Moses, Khidr, warns mankind that on a certain date all water that is not hoarded will be replaced by a special kind of water that will drive men mad. Only one person heeds his warning and hoards water. When the date comes this one person observes the wells and rivers dry up and then, shortly afterwards start flowing again. He himself only drinks water from his hoard but everyone else fails to notice, they drink the new water and they start acting very weirdly. In their relationship to him they are either totally hostile to him or compassionate about his oddness. This means he ends up feeling that he cannot actually communicate with anyone properly anymore. He comes to feel totally isolated and alone and so, in the end he too drinks their water. He forgets about his own hoard. Everyone else regards him as a madman who has been miraculously restored to sanity."

4. What is Political Whistle Blowing?

Addressing this is the task assigned to me. Apart from a paper titled "What is Justice?"[5] and another titled "Wars Against Terrorism",[6] both by

[3] http://www.sharelynx.net/A_Strategy_For_Losers/Whistle.htm
[4] Charles T Tart, *Living the Mindful Life*, Shambala Publishers, 1994, p. 172)
[5] http://www.sharelynx.net/A_Strategy_For_Losers/Justice.htm
[6] http://www.sharelynx.net/A_Strategy_For_Losers/Terror.htm

Brian Davey, and of limited relevance to our theme, I could not find any literature or even reference to Political Whistle Blowing. For our purposes we may define it narrowly as Whistle Blowing that is politically motivated or, more broadly, as Whistle Blowing that has major political implications irrespective of motivation. Whichever definition we adopt, in many instances there could be persuasive arguments for or against Whistle Blowing. But in some, Whistle Blowing is a compelling moral duty.

For example in the follow up to the highly publicized case of rape and murder of a school girl by Army personnel in Chemmany, Jaffna, we have the confession of one of the accused relating not only to that crime but to numerous others that he and his colleagues were involved in committing or covering up. That confession is clearly Whistle Blowing and, on account of the nature of the crimes committed and covered up, is surely justified. So too Whistle Blowing on others engaged in the deliberate or avoidable indiscriminate killing or abuse of large numbers of civilians or of those in custody, whether indulged in by the armed forces or by the J.V.P or by the L.T.T.E or by any other militant group, or by "Thalayatties" (masked "informers") whose nods at public round ups by the military appear to have led to the "disappearance" of thousands of civilians caught up in the conflict. We could also include under political Whistle Blowing reporting from within a community on programmes of recruitment of children or the abduction of any one for unlawful purposes. In these and many other cases any Whistle Blowing that would arrest the continuation of such criminal activities would be in the public and national interest.

Reference was made earlier to colleagues turning against Whistle Blowers, resulting in isolation, feelings of guilt, and physical and psychological violence. Judas, who blew the whistle on Jesus by identifying him to his captors, was quickly driven to suicide. Members of University Teachers for Human Rights (Jaffna) and many other human rights activists engaged in Whistle Blowing have been killed. The soldier referred to earlier has repeatedly complained of recurrent physical and psychological issues in custody and continuing threat to his life for Whistle Blowing on his colleagues. The list is endless.

There are some categories of Whistle Blowing in which the moral issues may be less clear than in others. The confessions of a captured soldier or of an activist of a militant group relating to military secrets (as against crimes such as those referred to above) is Whistle Blowing but the moral implications may be disputable. Relevant to this issue are recent reports of the uncovering by the police of an intelligence network of the Army and other reports of the identification and assassination of

undercover agents. Some of these relate to Whistle Blowing on whistle blowers.

Whistle Blowing is at the core of certain kinds of espionage/counter-espionage. Many states have programmes of espionage with networks of institutions and spies to report not only on the secrets of its foes, but also on its own loyal citizens whose views and activities related to a particular political issue may be unacceptable to those in authority. There is often much reluctance to acknowledge the existence of such programs and networks. On the other hand states show little or no reluctance to acknowledge the existence of counter espionage programmes and networks to frustrate the activities of enemies. Many rebel groups, political parties and institutions engaged in commercial, industrial and research activities may be engaged in similar espionage but also make similar denials and acknowledgements. State and non-state organizations alike are usually unwilling to admit that they spy on their own citizens/members. Exposing such spying is clearly within the definition of Whistle Blowing.

Over the last 35 years very large numbers (well over 100,000) of our citizens, including many women and children, have been unlawfully detained, severely tortured or otherwise abused and, frequently, killed for political reasons by the armed services, the JVP, the LTTE and many paramilitary and vigilante groups. Most of these abuses could have been prevented or stopped if there was timely and regular Whistle Blowing. The scale of such abuse fluctuates from time to time depending on the political circumstances. Containment of these crimes requires prompt Whistle Blowing and adequate public response to it.

5. A Personal Act of Whistle Blowing: The DDC and the '83 Pogrom

Few are familiar with the background to the 1983 pogrom. Long before the District Development Council or DDC elections, Dr. Neelan Tiruchchelvam and Prof. A.J. Wilson met me and said they would, in due course, be asking for my appointment as District Secretary and GA Jaffna, and urged me to accept. They agreed with me that, in the prescribed scheme, powers would be de-concentrated to the District Minister (appointed by the President) and not devolved to the DDC, but said that they were promised that if the system functioned well, there would eventually be real devolution. We were skeptical, but had no available alternative.

Moreover, they told me that the President had said that he came to know of plans for a major pogrom, which it might be possible to avert if

the DDC scheme worked, and there was continuing co-operation between the government and the Tamil leadership. The carrot was scarcely appetizing, but the stick bore the thorns of an emerging pogrom.

After the DDC elections, I took over as District Secretary and GA Jaffna. The District Minister was Mr. U.B. Wijekoon, and the Chairman DDC was Mr. "Pottar" Nadarajah. Those were tense times, but we got on well. Mr. Wijekoon was most co-operative, but Mr. Nadarajah was dissatisfied with the lack of devolution and, some time in 1982, threatened to resign. Minister Gamini Dissanayake then flew to Jaffna and invited him to Colombo to discuss devolution proposals. Mr. Nadarajah made several visits to Colombo on this mission, taking with him Mr. S. Sivathasan and myself.

We had several meetings with President Jayawardene, and with Minister Dissanayake, and a meeting each with Prime Minister Premadasa and Minister Lalith Athulathmudali. These went on for a year but the results – offers of substantially more funding, but no devolution – were unacceptable to Mr. Nadarajah and he submitted his resignation.

We then returned to Jaffna. Within a few days the pogrom had begun, consequent to the funeral of the 13 soldiers killed on 23 July 1983.

Throughout my tenure of office in Jaffna, there were frequent incidents in which armed service personnel were killed or injured by militant groups, or armed service personnel killed or injured civilians or militant cadres. Often the District Minister, Chairman DDC and I would go together to see the dead or injured with a view to reducing the tension. These incidents were worrying, but their impact was largely local and fairly quickly contained.

The ambush and killing of 13 soldiers in Jaffna on 23 July 1983 was large in scale but not qualitatively different from numerous other ambushes in Jaffna and elsewhere. What might have changed was the attitude of President Jayawardene to the Tamil leadership consequent on the resignation of Mr. Nadarajah. There were other changes too – such as the imposition of total censorship and authorization for the quick disposal of dead bodies. Whether these developments conditioned the response to the killing of the 13 soldiers is a matter for speculation. The Report of the Presidential Truth Commission poses disturbing questions:

> "Why did the Government fail to use on Sunday (24/07/1983) the censorship, brought into force only the previous Wednesday, to prevent the country-wide splash of the news of the killing of 13 soldiers? ... As much as publicity to the reprisal killings of 51 Tamils could have saved the unfortunate events that followed, the

censorship of the death of 13 soldiers would have equally well prevented the cycle of events that ensued." (para. 100)

The state run media reported the ambush but not the reprisals, and added the false claim that there was a shoot out after the ambush in which 22 persons were killed. In fact those who laid the ambush had quickly disappeared from the scene and there was no shoot out when army personnel arrived after the event.

The public elsewhere knew neither of the reprisal killings nor of the scale of the Tamil civilian death toll. I informed the Ministry of Information of the facts. It seemed clear to me that the version put out by the state controlled media was provoking more violence against Tamils elsewhere in the island; in contrast, if the facts given by me to the Ministry of Information had been communicated to the public, violence may have subsided. I communicated my views to Colombo repeatedly, but to no avail. In the event, the riots escalated and took their course.

In the meanwhile, senior personnel from high commissions and embassies, international human rights agencies and the media came over to Jaffna in large numbers, and many of them sought interviews with me; several (but not all) carried notes of introduction from the Competent Authority in charge of Information directing me to give them interviews.

The situation was such that, first, I could not give appointments to some and deny them to others and, second, I could not hold back information critical to the course of the riots. The information I gave everyone was factual and not expressions of political opinion, but some of the facts, notably in respect of the widespread reprisal killings of civilians in Jaffna immediately following the ambush, contradicted what came over the state controlled media.

I was quoted over the B.B.C and other overseas media. The Competent Authority in charge of Information telephoned me, and I confirmed that the reports were, by and large, in conformity with interviews I had given, several of which he had authorized. We were personal friends. As much as I was concerned that he should act to quell the violence, he was concerned that I should communicate only facts as revealed by the political authorities.

I was told by the Competent Authority that charges would be framed against me for communicating misinformation. I replied that I could substantiate every statement I made and offered to compile the list of the over 50 civilians killed in the reprisals, with names, ages, occupations, and places, time and other circumstances in which the killings took place. He in turn communicated my offer to the decision-makers, but soon got back to me and conveyed the ruling that there would be no charges against me, but I should refrain from collecting

proof of the facts given by me; i.e. I should not prepare a list, with details, of the civilians killed in the reprisals.

It was never acknowledged, but the authorities and political leadership clearly knew all along that the facts were as reported by me. Foreign governments, international agencies, and the population overseas had access to the correct facts, but the population of Sri Lanka continued to be deliberately misled, with major negative impact on human life, national security, unity and reconciliation.

6. The Many Forms of Whistle Blowing

Whistle Blowing may take many forms. It could be done internally and, in many cases, that may be the most appropriate first step. But, frequently, this step may be neither feasible nor appropriate. The internal authority may be unreceptive or even hostile, especially if that authority is likely to be hurt by the revelation. Moreover, those implicated may gang up and muffle the Whistle Blowing or harm and silence the person engaged in it. In some cases it may be necessary to bypass the immediate superior within the institution and reach higher up; but sometimes even that may not ensure either protection or effective corrective action. In such instances, backup and protection may be needed from those outside, such as community and political leaders or the media.

Timely Whistle Blowing may serve to arrest the tumour before it spreads. But even long after the cancer had taken its toll, there could be value in Whistle Blowing. It could serve as a deterrent against such malignancy in the future. It could also help to restore a sense of justice, to heal the victims and, perhaps, pave the way for some compensatory measures. It is such ends that are served by Whistle Blowing in Truth Commissions.

We do not have any legislation on Whistle Blowing. The Public Interest Disclosure Act 1998 of the United Kingdom was a response to a spate of disasters and scandals that rocked Britain in the early and mid-1990s. The objective was to protect public interest disclosure to the authorities, to the media, to Members of Parliament, etc. of, among other items, mistreatment of patients, illegality, miscarriage of justice, abuse in care, danger to health and safety, risks to the environment and, moreover, attempts to cover up these activities. This legislation identifies circumstances in which such disclosures are not merely permitted but explicitly mandatory. In July 2002, Lord Justice Mummery delivered the first Court of Appeal judgment under this Act, in the course of which he conceded that,

"There are obvious tensions, public and private, between the legitimate interest in the confidentiality of the employer's affairs and in the exposure of wrong" (*the Whistleblower*, December 2002).

It is to address such tensions, and to supplement any legislation, that many institutions overseas have worked out codes such as those formulated by Lord Nolan. For example, the Ethics Committee of the British Computer Society has its own Code of Practice[7]. The British charity Public Concern at Work publishes the bulletin *The Whistleblower*[8]. In its inaugural issue of June 2002, it reports that:

"[The Ministry of Defense] is looking to see how their new whistle blowing guidance and the principles of [the Public Interest Disclosure Act] can apply to the armed services even though, at present, the legal protection does not extend to services personnel.... The Ministry is also proposing to promote [Public Concern at Work's] confidential help-line to staff to reassure those who may not have the confidence to raise their concerns internally or who need to know how best to ensure the message is heard."

7. Developments Advocating Whistle Blowing

"Whistle Blowing: Betrayal or Public Duty?" was the theme of a well-attended one-day conference organized by Transparency International Australia[9] on 06 August 2002 in Sydney.

There are many developments in this growing field elsewhere. To the best of my knowledge, the SLAAS seminar of 4 July 2003 where this chapter originated is the first occasion in Sri Lanka on which this subject has surfaced in public. We need more public discussion in this field. We also need prescribed codes of conduct in respect of Whistle Blowing, and legislation too, but adapted to our needs, with special codes and legal provisions applicable to the police, armed services and militant groups.

Biographical Sketch

DEVANESAN NESIAH, B.Sc. Ceylon, M.A. Sussex, M.P.A., D.P.A. Harvard, a decade after entering the Ceylon Civil Service in 1959, moved away from his original discipline of Mathematics to Economics and then, a decade later, to Public Policy, with special interest in Development,

[7] www.bcs.org.uk/ethics/whistle.htm
[8] www.pcaw.co.uk
[9] www.transparency.org.au/wb/whistlebconfhome.htm

Environment, Ethnicity and Nationalism. He is increasingly focusing on these subjects from the perspective of Ethics and Human Rights. He has been a Member of the Public Service Commission, and is currently a Member of the Governing Council of Marga Institute, the Convener of a Group formulating A Vision for Sri Lanka, and a Member of the Press Complaints Commission. As Chair of the Human Rights Commission Committee of Inquiry into Disappearances, he recently unveiled the Report of that Committee, exposing sustained, extensive and acute human rights abuses extending to torture and murder. Among his many publications is, *Discrimination with Reason? The Policy of Reservations in the United States, India and Malaysia*, Oxford University Press, 1997.

Dr. Nesiah played Chess for Sri Lanka and the University of Sussex, and captained the national chess team in 1968.

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Chapter 5

Shirani A. Bandaranayake

The Role of the Courts in Implementing Human Rights and the Application of International Human Rights Norms: The Sri Lankan Experience

General Theme and Layout

The applicability of human rights norms in the field of fundamental rights jurisdiction is a broad theme, considering the wide spectrum of areas that has to be discussed in evaluating the necessary provisions. In order to make the theme more accessible and understandable, this examination would be carried out in two parts. The first part would broadly introduce and analyse the Human Rights norms and the fundamental rights jurisprudence applicable in Sri Lanka. Part II would be specifically devoted to examining the position with regard to international covenants and their applicability in the Sri Lankan Courts of Law, with reference to Education. Finally concluding remarks follow.

Part I: Introduction and Analysis of Human Rights Norms

I.1 Human Rights and its Evolution

The Rule of Law, according to Dicey, forms a fundamental principle of the Constitution, and has three meanings which have been taken from three different points of view. Out of these three, one meaning spells out the necessity for equality before the law, and more specifically the equal subjection of all claims to the ordinary law of the land[1]. This in turn requires the existence of minimum conditions in domestic law which could be applicable in practice. Thus the constitutional guarantee of human rights, referred to as fundamental rights or basic rights under municipal law, would be essential for a civilized existence.

Justice Weeramantry is of the view that the concept of human rights, which is very much in the forefront of political, philosophical, social and legal discourse today, is difficult to define[2]. In his words,

> "The academic or logical purist may deny the existence of such a claim of rights, and indeed there can be little disagreement that its boundaries are vague and indefinable. Still there is a widely held concept that there are certain rights inborn in man in which neither denial by the State nor surrender by the individual ought to be allowed to destroy. The concept gathers strength from year to year, takes root in the consciousness of people of the most diverse cultural and ethnic backgrounds and reflects itself increasingly in the legal system of many nations[3]."

However, the doctrine of Human Rights cannot be treated as a new phenomenon. Buddhism treated the welfare of all human beings as a state duty while Hinduism had many notions of the welfare state. The Islamic approach too subsided to social welfare, whereas Christianity emphasized the infinite value of the human personality[4].

Until the adoption of the Universal Declaration of Human Rights by the United Nations in 1948, there was no structured document which contained the basic law on Human Rights. This Declaration stems from

[1] A.V. Dicey, Introduction to the study of the Law of the Constitution, Liberty Classics Reprint 1982, pg. 120. (Aspects on human rights protection and equality and equal protection which appears in this Article were discussed at a Seminar organised by the Legal Aid Foundation in 2002 and published later).
[2] Prof. C.G. Weeramantry, *An Invitation to the Law*, Lawman (India) (Pvt.) Ltd., New Delhi, 1998, pg. 194.
[3] *Ibid.*
[4] *ibid.*

the provisions contained in the Charter of The United Nations which came into being in June 1945. It could therefore be said that the introduction of the Charter was the beginning of the era on Human Rights and all the human rights documents that the United Nations had passed since then, flow from the provisions contained in this document.

The Universal Declaration of Human Rights therefore has been in existence for over 5 decades. Today we look at it from different perspectives, but on a common theme, it is necessary to be aware that utmost importance should be given to the safeguarding of the basic rights of mankind. These rights could be different as well as diversified depending on the situation or the issue. However, a common phenomenon would be that the basic rights such as the right to life, liberty and equal protection would be placed with high priority.

I.2 The Framework of Human Rights Protection in Sri Lanka

The fundamental rights jurisdiction in Sri Lanka has only a short history in our judicial system. A comprehensive Bill of Rights was not included in the 1947 Constitution of the country. Sir Ivor Jennings, the then Vice Chancellor of the University of Ceylon, who was the chief unofficial constitutional advisor and thus the architect of the 1947 Constitution, held strong views against having a Bill of Rights in the Constitution. Consequently, the Constitution consisted of section 29(2), a provision that was based on section 5 of the Government of Ireland Act of 1920[5]. Section 29(2) was included with the expectation that it would be a guarantee against discrimination on the grounds of race and religion.

In *Bribery Commissioner* v *Ranasinghe*[6] Lord Pearce, referring to section 29(2) of the 1947 Constitution observed that the said provisions

> "represents the solemn balance of rights between the citizens of Ceylon[7]".

Irrespective of the fact that there was no Bill of Rights, it could be said that the Rule of Law prevailed in Ceylon. The main reason for this was that the Courts reviewed the acts of the Executive and interpreted legislation according to the Rule of Law. The decision in *Bracegirdle*, decided during the colonial era[8] could be introduced as a case in point where the Courts exercised their power on the basis of the Rule of Law in

[5] Sir Ivor Jennings, *Constitution of Ceylon*, Oxford University Press, London, 1951, pg. 63.
[6] (1964) 66 NLR 73.
[7] *Ibid.*, at pg. 78.
[8] In re. Bracegirdle (1937) 39 NLR 193.

respect of a basic human right. The Court ordered the release of Bracegirdle who was arrested and detained on the orders of the Governor for deportation when an application was made for a writ of *habeas corpus* for his release. The Governor acted under the provisions of the Order in Council of 1896, which gave him the power to order any person to quit the colony and on refusal to cause such a person to be arrested and detained for deportation. The Supreme Court held that the said power could be exercised only in a state of emergency contemplated by the preamble to the Order in Council and that the Court was entitled to inquire whether the condition necessary for the exercise of such power existed. On inquiring, the Court held that in the absence of a state of war or grave civil disturbance, real or imminent, such power could not be invoked and that Bracegirdle was to be released.

The 1972 Constitution comprised a chapter on Fundamental Rights and Freedom[9]. However, enforceability of these provisions in a Court of Law was difficult as there was no special procedure indicated for their enforcement against the State. During the period the 1972 Constitution was in existence, there was only one case that was filed based on the infringement of a fundamental right[10]. This case was filed in the District Court in 1973 and finally the Appeal came before the Supreme Court in 1986[11]. It is interesting to note that it was only after the repeal of the 1972 Constitution that it became clear that a declaratory action in the District Court was available to challenge the violation of a fundamental right.

The 1978 Constitution on the other hand is extremely explicit and vests the Supreme Court of the Republic with exclusive jurisdiction in respect of the infringement or imminent infringement of a person's fundamental right. Article 17 of the 1978 Constitution read with Article 126 of the Constitution provides direct access to the Supreme Court to move the Court in respect of any infringement or imminent infringement of a fundamental right. The rights guaranteed by Articles 10, 11, 12(1), 12(3) and 13 of the 1978 Constitution are available to all natural and juristic persons, whereas the rights guaranteed in terms of Articles 12(2) and 14 are available only to citizens.

Article 17 of the Constitution refers to an infringement or an imminent infringement of a fundamental right and spells out that in such a situation a complainant is entitled under the provisions of chapter III of

[9] Chapter VI of the Constitution.
[10] *Gunaratne* v *People's Bank* (1986) 1 Sri LR 338.
[11] Dr. J. Wickramaratne, *Fundamental Rights in Sri Lanka*, Navrang in collaboration with Lake House Bookshop, Colombo, 1996, pg. 28.

the Constitution to apply to the Supreme Court[12]. However, it is specifically provided in the Article[13] that the remedy in respect of the infringement shall be by 'executive' or 'administrative' action. As observed by the Supreme Court in *Perera* v *University Grants Commission*[14].

> "Constitutional guarantee of fundamental rights is directed against the State and its organs. Only infringement or imminent infringement by executive or administrative action of any fundamental right can form the subject matter of a complaint under Article 126 of the Constitution[15] ".

Although this Article spells out the need for the action in question to be 'executive' or 'administrative' action, no definition is given as to the kind of action this would involve, in the Constitution. This accordingly has raised a situation with regard to the interpretation of the kind of action that would give rise to an application on fundamental rights, of which we would be looking at subsequently.

I.3 The Applicability of Human Rights Treaties

Human Rights Law which developed as a branch of International Law, assumed a justiceable position when such individual rights became guaranteed against the State in written Constitutions. International Law including Human Rights Law refers to different types of agreements which may take the shape of treaties. A treaty has been defined in the following words:

> "Any international agreement in written form, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (treaty, convention, protocol, covenant, charter, statute, act, declaration, concordat, exchange of notes, agreed minute, memorandum of agreement, *modus vivendi* or any other appellation), concluded between two or more states or other subjects of international law and governed by international law[16].

Out of the numerous treaties, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) may be referred to as the most important universal treaties. In addition to the treaties of the United

[12] Chapter III, Article 17.
[13] *Ibid.*
[14] Fundamental Rights Decisions, Vol. I pg. 103.
[15] *Ibid.*
[16] A Provisional Draft of the International Law Commission

Nations there are other Regional Human Rights treaties which have been adopted under the auspices of the Council of Europe, the Organisation of American States and the Organisation of the African Unity. While the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights are general in nature and deal with a number of human rights, the other universal treaties are more specific and attend to specific spheres.

It is necessary for a State to ratify an international covenant for it to become part of the Municipal Law. However, it has been held that even though a State has ratified such a covenant it has no direct bonding effect on the law of the State except to the extent it has been implemented by the legislature of that country or incorporated into the Constitution of such State[17].

In general terms a State cannot enforce any law other than what is stated in the Constitution and the statutes passed by that nation's legislature. According to Article 3 of the Sri Lankan Constitution in the Republic of Sri Lanka sovereignty is in the people and is inalienable. Article 4(a) of the Constitution states that the legislative power of the people shall be exercised by Parliament. It would therefore be advantageous if the covenant is implemented by the legislature. In fact Article 2(2) of the International Covenant on Civil and Political Rights[18] states that,

> "When not already provided for by existing legislative or other measures, each State Party to the present covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present covenant, to adopt such legislation or other measures as may be necessary to give effect to the rights recognized in the present covenant."

There are instances where in Sri Lanka steps were taken to incorporate the provisions in the covenant into domestic law. For instance, in December 1984 the United Nations General Assembly adopted the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment. Sri Lanka became a party to this Convention in 1994. Article 2(1) of the said Convention states that,

> "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."

Accordingly the Parliament of Sri Lanka enacted the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or

[17] *Re Mitchell* (1983) 150 D.L.R. (3d) 449 at 461
[18] Adopted by the U.N. General Assembly in 1966

Punishment Act, No. 22 of 1994. This enactment was for the sole purpose of giving effect to the Convention Against torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

Considering the modern developments concerning the protection of the individual, especially against decisions taken by his own government, it is necessary to take into consideration the matrices of customary or general international law. On an examination of such developments, it appears that countries can agree to confer special rights on individuals. In the *Danzig Railway Officials* case[19] the permanent Court of International Justice, stated that,

> "It cannot be disputed that the very object of an international agreement, according to the intention of the contracting parties, may be the adopting by the parties of some definite rules creating individuals rights and obligations and enforceable by the national courts [20]."

It is thus clear that, although in general, treaties do not create direct rights and obligations for private individuals, if it had been the intention of the parties to create such direct rights and obligations it is possible to give effect to such intention. Accordingly, based on the agreement between Danzig and Poland, on the regulatory conditions of employment of employees taken into the Polish Railway Service, Danzig Railway Officials had a right of action against the Polish Railway administration. This would be used for the recovery of claims based on the said agreement.

Part II: Rights to Education vis-à-vis International Covenants – their Applicability in Sri Lankan Courts

II.1 The Right to Education

The right to education constitutes a fundamental human right. It has been stated that,

> "Education is both a human right in itself and an indispensable means of realizing other human rights: civil, cultural, economic, political and social. It is the primary vehicle by which economically and socially marginalized people can lift themselves out of poverty and obtain the means to participate fully in national life. Its impact

[19] P.C.I.J. Ser. B. No. 15 (1928)
[20] *ibid.* at pp. 17-18

is thus felt in the future, as much if not more than in the present. Education benefits societies as well as individuals[21].

Several international instruments have recognized Education as a fundamental human right. The Universal Declaration of Human Rights Declares that,

> "Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit[22]."

Notwithstanding the above it further went onto declare that,

> "Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religions groups and shall further the activities of the United Nations for the maintenance of peace".[23]

The international covenant on economic, social and cultural rights has recognized this right and has stated that,

> "The States parties to the present covenant recognize the right of everyone to education."[24]

There are several other International Instruments which have declared not only the right to education, but also the prime objective of such a right[25]. The Dakar Framework for Action is also one such Instrument in which the World Education Forum adopted the framework for Action on Education for all with collective commitments. The Dakar framework for Action re-affirmed the vision of the World Declaration on Education for all which was adopted in Thailand in 1990 and based their work on the rights based approach supported by the Universal Declaration of Human Rights which was referred to earlier. The re-affirmation of the Dakar Framework is that all children, young people and adults have the human right to benefit from an education that will meet

[21] Violations of the right to education, Europe Conventions 12/1998/19, para 1
[22] Article 26(1) of Universal Declaration of Human Rights
[23] *ibid.*, Article 26(2)
[24] Article 13
[25] The Declaration of the Rights of the child, the convention on the Rights of the child, the Vienna Declaration and Programme of Action of the World Conference on Human Rights, UNESCO's convention against Discrimination in Education.

their basic learning needs in the best and fullest sense of the terms[26]. According to the Dakar Framework the commitment is to attain the following goals:

1. Expanding and improving comprehensive early childhood care and education, especially for the most vulnerable and disadvantaged children;
2. Ensuring that by 2015 all children, particularly girls, children in difficult circumstances and those belonging to ethnic minorities, have access to and complete free and compulsory primary education of good quality;
3. Ensuring that the learning needs of all young people and adults are met through equitable access to appropriate learning and life skills programmes;
4. Achieving a 50 per cent improvement in levels of adult literacy by 2015, especially for women and equitable access to basic and continuing education for all adults;
5. Elementary gender disparities in primary and secondary education by 2005, and achieving gender equality in education by 2015, with a focus on ensuing girls have full and equal access to and achievements in basic education of good quality;
6. Improving all aspects of the quality of education and ensuing excellence of all so that recognized and measurable learning outcomes are achieved by all, especially in literacy, numeracy and essential life skills[27].

In Sri Lanka education is not treated as a separate fundamental right. However, our Constitution provides for the right to equality which facilitates all persons to be treated equally. This provision which is discussed in detail subsequently, is one of the most important principles one could think of having in any Constitution.

The principle based on equality has been used in many instances regarding education and *Brown* v *Board of Education*[28] may cited as one of the most important decisions in this sphere. In this case, the US Court held that "separate educational facilities are inherently unequal"[29]. The Court took the view that to separate children from others of similar age and qualifications solely because of their race, generates a feeling of

[26] Clause 3 of the UNDP Dakar Framework
[27] The Dakar Declaration
[28] (1954) 347 U.S. 483
[29] *ibid.* at pg. 495

inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone[30].

Likewise in Sri Lanka, there are several instances where questions on education and education related matters have come before the Supreme Court on the basis of the Article on equality and equal protection in the Constitution. The majority of these cases are on admissions of children to Grade 1 in Government Schools. There have been instances where the question on admissions to other grades in schools has been considered by the Supreme Court. Also there have been instances where university admissions, especially regarding the selection to certain faculties in universities, have been questioned in terms of Article 12(1) of the Constitution[31].

It would therefore be necessary to examine the provisions regarding Equality and Equal Protection to which we now turn.

II.2 Equality and Equal Protection

Article 7 of the Universal Declaration of Human Rights of 1948 refers to the equality clause and reads in the following terms:

> "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination".

Article 12 of the Constitution of the Republic of Sri Lanka, deals with the right to equality and Article 12(1) is on the following terms:

> "All persons are equal before the law and are entitled to the equal protection of the law".

Equal protection means in simple terms the right to equal treatment. This would include the like to be treated alike and that among equals the law should be equal and should be equally administered. However, this does not mean that in terms of equal treatment all persons are to be treated alike in all circumstances. What it means is that persons who are similarly circumstanced must be similarly treated. Thus provision is available for

[30] *ibid.*

[31] *Perera* v *University Grants Commission* (FRD Vol. I, 103) *Seneviratne* v *University Grants Commission* (1978 – 79 – 80) 1 Sri L.R. 182, *Asanka Pathirana and Others* v *University Grants Commission* (S.C. Application) No. 618/2002, S.C. Minutes of 05.08.2002, *Karunathilake and Another* v *Jayalath de Silva_ and Others* – (S.C. Application) No. 334/2002 – S.C. Minutes of 25.11.2002. *R.I.K. de Silva* v *The University Grants Commission* (S.C. Application) No. 642/2002– S.C. Minutes of 30.01.2003).

the state to make laws that treat people unequally and to take unequal administrative action when dealing with persons who are placed in different circumstances and situations. Accordingly reasonable classification is permissible provided that it is not irrational or arbitrary.

Article 12(1) of the Constitution involves two basic concepts, that is "equality before the law" and "equal protection of the law". While the first concept is a negative concept implying the absence of any special privilege in favour of anyone, the latter is positive in content. This also means the application of the same law without any kind of discrimination to all people alike.

The guiding principle in terms of Article 12(1) of our Constitution therefore would be that the like should be treated alike and denotes equal treatment in similar circumstances.

Article 126 of the Constitution refers to the need for the action that would be questioned to be "Executive" or "administrative" action. No definition however has been given to the kind of activities that would involve "executive" or "administrative" action in the Constitution. In such a situation, since the 1978 Constitution's coming into operation, the Supreme Court has been interpreting the provision in question, to evolve a proper concept of this phrase.

At the beginning of the hearing of fundamental rights cases, the Supreme Court has taken a restricted view of the definition of executive or administrative action. For instance in *Thadchanamurthi* v *Attorney General*[32], it was held that the State will be liable for the wrongs of its subordinate officials only where there is a violation of "administrative practice". Accordingly if there is no proof of administrative practice, the State will not be liable for any alleged ill treatment. A broader view however was taken in *Velmurugu* v *Attorney General*[33] where it was stated that the liability in respect of subordinate officers should apply to all acts done under the colour of office to mean that the particular act in question was done within the scope of their authority. However the Court was of the view that, if the acts are not authorized, encouraged, countenanced or performed for the benefit of the State, then the State cannot be held responsible for such acts. In the *Velmurgu* case, the minority view took a broader view with regard to the definition of executive or administrative action to include direct state liability[34]. Later decisions followed this concept and now it is well settled law that

[32] FRD Vol. I pg. 129

[33] [1981] 1 Sri L.R. 406

[34] *ibid.*, pg. 454

executive action stipulated in Article 126 comprehends "official action of all State Officers".

Since the beginning of the 1990's it appears that the Supreme Court has taken a more liberal view when considering the phrase "administrative action", stipulated in Article 126. For instance in *Parameswary Jaya* v *Attorney General and others*[35] the Court was of the view that all acts of legislative or judicial institutions functioning or officials cannot be excluded from the scope of Article 126. The Court held that there may be situations and acts of a judicial officer which may be "administrative" in character and not in the exercise of judicial power. Therefore it is necessary at all times to consider whether the particular act was executive or administrative and not whether the institution or person concerned can be characterized as "executive or governmental". The current question therefore would be whether the action in question is executive or administrative in character.

The decision in *Mohamed Faiz* v *Attorney General and others*[36], directed the earlier liberal view taken by the Supreme Court to a further broader spectrum. Accordingly the responsibility for violation of fundamental rights would extend to a respondent who has no executive states, but is guilty of conniving with the executive in violation of the complainant's fundamental rights.

A broader interpretation on the "executive and administrative" action stipulated by Article 126 of the Constitution was given in *Jayakody* v *Sri Lanka Insurance and Robinson Hotel Company Ltd.*[37]. In this case, the Court took the view that in a situation where a suspension is made by a party who is an agent of a State Agency, that action would be "executive or administrative" in character. The Court came to this conclusion on the basis that the act of the agent was in law the act of the State Agency.

An examination of the earlier cases filed in the Supreme Court alleging violation of Article 12(1) emphasized the fact that the Court was hesitant to expand the jurisdiction on the basis of the equality clause. In India since 1974, a new dimension was introduced to Article 14 of the Indian Constitution. The new doctrine, which was propounded by Justice Bhagawathie, finds that if State action is arbitrary or irrational, it would violate Article 14 of the Constitution.

This brought in the principle of natural justice to be recognized as part of the Constitutional guarantee contained in Article 14. Seervai

[35] [1992] 2 Sri L.R. 356
[36] [1995] 1 Sri L.R. 372
[37] [2001] 1 Sri L.R. 287

however, is of the view that the new doctrine is clearly incorrect and the Indian Courts should have followed the old doctrine[38].

The kind of broadening approach given to the equality clause could not be seen in our Courts until recent times. *Elmore Perera* v *Montagu Jayawickrama*[39] is a classic example of the attitude taken by our Courts on the equality clause. In this case the Supreme Court took the view that a mere violation of law by the Executive does not amount to a violation of the fundamental right of equality, protected by Article 12 of our Constitution[40]. It was clearly stated that the rule of natural justice is not a fundamental right in our country and the Courts cannot elevate such rules to the status of fundamental rights. The Supreme Court in this case has taken the view that to satisfy the provisions in Article 12(1), unjust or wrongful treatment alone would not be sufficient and that there should be unequal treatment or unjust discrimination. At the same time the Court expressed the view that an application must disclose discrimination and that arbitrariness alone would not attract Article 12(1) of the Constitution.

The views expressed by Wimalaratne, J. in the minority judgment in the *Elmore Perera* case[41] on the other hand indicates clearly the kind of broadening that would be desirable in the application of the equality clause. Wimalaratne, J. was of the view that although in ordinary circumstances a comparison is necessary, when it is impossible, comparison would be with the legally applicable norm which has been used on the petitioner. Although there may be reservations on the view expressed by Wimalaratne, J., as it might be viewed as an opening of the floodgates, it is desirable to approach the question in a more liberal sense rather than restricting the doctrine. There would be instances where arbitrary decisions have taken place in which it will be difficult to indicate similarly circumstanced instances. A wider approach in some respects with a broader interpretation on the equality clause would therefore be a welcome change to the fundamental rights jurisdiction.

Such a broad view was taken by Court in *Jayasinghe* v *Attorney General and others*[42]. Considering the denial of equal protection of the law, it was accepted that the failure to prove similar circumstances as laid down in the *Elmore Perera* case, cannot be treated as an inflexible

[38] H.M. Seervai, *Constitutional Law of India*, Volume I, 3rd edition, Bombay, 1983, pp. 272-279
[39] [1985] 1 Sri L.R. 287
[40] *ibid.*
[41] *ibid.*
[42] [1994] 2 Sri L.R. 74

principle of universal application and that the facts of each case must be considered separately. In *Perera* v *Edirisinghe and others*[43], it was stated that there is no doubt that Article 12 of the Constitution ensures equality and equal treatment even when a right is not granted by common law, statute or regulation.

II.3 Applicability of International Covenants in Sri Lankan Courts of Law

International covenants are not directly enforceable in the national Courts in most countries. However in Sri Lanka, in view of the constitutional provisions, the State has a duty to foster respect for treaty obligations. Article 27(15) of the Constitution states that,

> "The State shall promote international peace, security and co-operation, and the establishment of a just and equitable international economic and social order and shall endeavour to foster respect for international law and treaty obligations in dealing among nations."

The question whether such kind of respect for international law and treaty obligations should be restricted to dealings among nations or whether it should be extended in its dealings with its own citizens was discussed in *Weerawansa* v *Attorney General*[44] when the Court held that,

> "Article 27(15) requires the State to endeavour to foster respect for international law and treaty obligations in dealing among nations, that implies that the State must likewise respect international and treaty obligations in its dealings with its own citizens, particularly when their liberty is involved. The State must afford to them the benefit of the safeguards which international law recognises."[45]

There are several instances that could be cited where international human rights covenants were taken into consideration by our Courts. One of the first such cases, where such covenants were discussed by our Courts, was the case in *Leela Violet* v *Vidanapathirana*[46] where Sarath N. Silva, J. (President, Court of Appeal, as he then was) relied upon a leading decision of the Inter American Court of Human Rights and Resolutions of The United Nations Commission on Human Rights. In *Weerawansa* v *Attorney General*[47] Fernando, J. was of the view that our

[43] [1995] 1 Sri L.R. 148
[44] [2000] 1 Sri L.R. 386
[45] *ibid.*, pg. 409
[46] [1994] 3 Sri L.R. 377
[47] Supra

Courts should have regard to the provisions of the International Covenants. In *Manawadu* v *Attorney General*[48] once again the Court referred to the necessity to give due regard to the applicability of The Universal Declaration of Human Rights in enacting statutes. In several other cases, the Supreme Court had made reference to the principles of The Rio Declaration[49] decisions in European Court of Human Rights,[50] The European Commission of Human Rights[51], The Inter-American Court of Human Rights[52] and on Article 10 of The European Convention for the Protection of Human Rights and Fundamental Freedoms[53].

As referred to earlier in most counties International Covenants and Conventions are not directly enforceable in their national Courts unless the relevant provisions have been incorporated by legislation into domestic law. The Bangalore principles, which came into being on 26th February 1988 at the conclusion of the Commonwealth Judicial Colloquium, stated that

> "There is an impressive body of jurisprudence, both international and national, concerning the interpretation of particular human rights and freedoms and their application. This body of jurisprudence is of practical relevance and value to judges and lawyers generally.
>
> "In most countries, whose legal systems are based upon the common law, international conventions are not directly enforceable in national Courts unless their provisions have been incorporated by legislation into domestic law. However there is a growing tendency for national Courts to have regard to these international norms for the purpose of deciding cases where the domestic law – whether constitutional, statute or common law – is uncertain or incomplete".

These principles were endorsed and extended at subsequent colloquia[54].

A further step was taken in this direction by the decision of Indian Supreme Court in *Vishaka and others* v *State of Rajasthan and others*[55].

[48] [1987] 2 Sri L.R. 30
[49] Bulankulame v Secretary Ministry of Industrial Development, [2000] 3 Sri L.R. 243
[50] Supreme Court Special Determination 1-15/1997 in re. Sri Lanka Broadcasting Authority Bill
[51] Sunila Abeysekera v Ariya Rubasinghe [2000] 1 Sri L.R. 314
[52] *ibid.*
[53] *ibid.*
[54] In Harare, Zimbabwe in 1989, in Banjul The Gambia in 1990, in Abuja, Nigeria in 1991, in Balliol College Oxford, England in 1992, in Bloemfontein, South Africa in 1993 and in Georgetown, Guyana in 1996.

In this case it was held that, in the absence of suitable legislation in a certain sphere, the Courts could rely on international conventions and norms so far as they are consistent with the constitutional sprit.

Final Concluding Remarks

A written Constitution in a country is adopted with the object of imposing limitations upon powers of all the organs of the State[56]. This is carried out, as Basu points out, by adopting a paramount law of the land which stands above them all[57]. When fundamental rights are incorporated in a written Constitution, such rights create restrictions on the actions of the Government. An analysis of the chapter on fundamental rights in the Constitution would reveal that such rights are guaranteed against all State actions if they come within the purview of "executive or administrative action".

As referred to earlier, the developments in the field of Human Rights could be used to expand the country's judicial process. Referring to the role of judges with regard to the application of Human Rights norms, Justice Weeramantry was of the view that, judges are engaged in the process of developing the law, in which they do not merely decide cases in the light of the existing law[58]. He further referred to the Indian Supreme Court which has given much leadership in developing new human rights based remedies in order to assist the average citizen[59]. Explaining the importance in using the human rights norms and looking at it from a futuristic view, Justice Weeramantry explained that,

> "We are passing the era when judges needed to dress up their decisions only in terms of statutes and decided cases. It is becoming increasingly legitimate to justify judicial decisions in terms of human rights norms and declarations.
>
> "Judges often make fresh law by choosing between two alternative courses of action; which way the choice falls can often be determined by resort to human rights standards which are therefore of the utmost importance to the Judge[60]."

[55] [1997] AIR 241

[56] *Mc Cauley* v *R* (1920) AC 691, *Marbury* v *Madison* (1803) Cranch's Reports 157

[57] Dr. Durga Das Basu, *Human Rights in Constitutional Law*, New Delhi, 1994, pg. 98

[58] Prof. C.G. Weeramantry, *Justice without Frontiers: Furthering Human Rights* (Vol. I), Kluwer Law International, The Hague/London/Boston, 1997, pg. 25

[59] *ibid.*

The Sri Lankan case Law referred to earlier, reveals that already the Courts have taken that essential step forward in developing the new human rights based remedies, to assist the average citizen.

Biographical Sketch

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She had a promising academic career at University of Colombo where she served for seven years as Head of the Department, as well as as the Dean of the Faculty of Law. This period saw her rewarded with an early promotion to Associate Professor on merit (as against time-served).

She forewent her career in academia to join the highest bench of the land, the Supreme Court.

[60] *ibid.*, pg. 26

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Chapter 6

Greg Duly

A Rights-based Approach to Education: Implications for Sri Lanka

1. A Brief Overview of the Basic Concepts and Principles Underpinning the Right to Education

The right to education is enshrined in the Convention on the Rights of the Child (CRC) which finds its legal basis in the Universal Declaration of Human Rights (UDHR), a paramount framework for international human rights law.

Although subject to the criticism of promoting "...a certain culturally specific 'Western' model ..." (An-Na'im, 1994, p. 121), international human rights, both in conceptual and legislative terms, is gaining increasing importance as a normative framework for the guidance and protection of humankind.[1] Nevertheless, the validity of the universality of

[1] See, for example, Human Rights Watch's 1999 World Report: "Today, human rights are well established as the legitimate concern of all humanity. Governments regularly comment on each other's rights practices and make respect for human rights an important factor in their aid relationships." Human Rights Watch, World Report, 1999, Introduction. A Legitimate International Concern. http://www.igc.org/hrw/worldreport99/intro/index.html.

human rights, particularly as set forth in the Universal Declaration of Human Rights (UDHR) developed in 1948[2], is potentially undermined by questions about its provenance (i.e. having been established by a small group of mostly Western nations) and perceptions of cultural insensitivity (i.e. its secular tone and bias towards individual freedom at the expense of individual responsibility towards the community and various religious value systems).

In regard to children's rights, however, these criticisms are significantly diminished. Children's rights are enshrined in the United Nations Convention on the Rights of the Children (CRC) which was adopted unanimously by the UN General Assembly in November 1989. In contrast to the UDHR, the consultative process that resulted in the Child Rights Convention occurred over a ten-year period and involved all members States of the United Nations. Importantly, between 1989 and 1999, the Convention was ratified by all but two countries – Somalia and the United States of America. Additionally, "the Convention on the Rights of the Child is the first legally binding international instrument to incorporate the full range of human rights – e.g. civil, political, economic, social and cultural rights" (UNICEF, 2003, p. 1).

Thus, theoretically at least, the Convention, as a conceptual framework and legal instrument, should have legitimate claim to a universally accepted set of principles, norms and standards. Notwithstanding this achievement questions remain. Less so regarding the issue of the universality of the Convention and its broad intent than with its implementation at country level where the norms and standards embodied in it encounter local cultural values and attitudes about children that would appear to diverge from the intent of the Convention.

That being said, one of the many implications of the principle of the universality of human rights is that children are also rights holders with entitlements as well as capabilities and responsibilities to act as agents of social change. Whilst this may seem self-evident in this day and age, an historical examination reveals rather shocking attitudes towards children over the years. In European societies of the eighteenth Century, for example, children were deemed to be property of their parents. Dr. Judith Ennew, a member of the Centre for Family Research at Cambridge University, observes that :

> "[I]n England, child abduction was not theft in the legal sense unless the child happened to be dressed. The thief was regarded as having stolen the clothes. Apart from that, child theft was tantamount to stealing a corpse. In the case of both a dead body and a live child, no legal person was involved" (Ennew, 2000, p. 46).

Three hundred years later the litany of violations against and deprivations of children continues to make depressing reading:

(a) Some 600 million children live in households that earn less than $1 per day;
(b) More than 110 million children of primary-school age are not enrolled in school
(c) During the 1990s more than 8 million children were either permanently disabled, seriously injured or died as a result of armed conflict;
(d) As of the year 2000, over 300,000 children have been recruited to participate in armed conflicts;
(e) And an estimated 100 million children work in dangerous circumstance e.g. bonded labour, prostitution & pornography (Bureau of the Preparatory Committee for the Special Session on Children, 2000, pp. 4-5).

Clearly, these horrific conditions place upon us, as citizens of the world, an obligation to ensure that children's rights are realised, a responsibility that includes providing children with a voice and a means for affecting change on matters concerning their well being.

2. The Right to Education

The right to education is enshrined in the CRC by two key Articles – Articles 28 and 29. Article 28 affirms:

1) State Parties recognise the right of the child to education and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:
   (a) Make primary education compulsory and freely available to all;
   (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child and take appropriate measures such as the introduction of free education and offering financial services in case of need;
   (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
   (d) Make educational and vocational information and guidance available and accessible to all children;
   (e) Take measures to encourage regular attendance at schools and the reduction of drop out rates;

[2] The UDHR was adopted and proclaimed by General Assembly resolution 217A (III) of December 1948. http://www.un.org/Overview/rights.html.

2. State Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.
3. State Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

Article 29 states that:

1) State Parties agree that the education of the child shall be directed to:
   (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
   (b) The development of respect for human rights and fundamental freedoms, and for principles enshrined in the Charter of the United Nations;
   (c) The development of respect for the child's parents, his or her own cultural identify, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilisations different from his or her own;
   (d) The preparation of the child for a responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of the sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous groups;
   (e) The development of respect for the natural environment.
2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

3. Education: Return on Investment and Building Human Capital

During the 1990s the World Bank published numerous studies providing empirical evidence of the importance of primary education in developing the human and social capital of a nation. According to the World Bank, universal, high quality education results in, *inter alia* (World Bank, 2003, p. 1):

- poverty reduction and increased equality
- sustained economic growth
- enhanced democratic culture and practice
- globally competitive economies
- the creation, application and spreading of new ideas and technologies which in turn promote sustained high growth
- improved people's skills which, in turn, improve their wages and other income
- improved household welfare, child health and subsequent economic prospects for children in homes where women are educated. For example, infants born to mothers with no formal education are twice as likely to die before their first birthday as those born to mothers with post-primary schooling (UNICEF, 2001).

4. Implications of the Right to Education on Government Policy, Practice & Public Expenditure

4.1 The Many Levels of Implication

Regarding government educational policy and practice, the implications of the right to education occur on many levels: public expenditure, national education policy and strategy, individual school policy, procedures and practice, and civil society.

4.2 The Right to Education and Public Expenditure

The right of children to *free primary education* implies that the State must invest the requisite financial resources to deliver this service. Since independence, the Sri Lankan Government has implemented a policy of free primary education and this resulted in one of the highest literacy rates in Asia (second only to Japan and Singapore).

However, over time the Government's commitment, in terms of public expenditure, has eroded. Expenditure on education declined from 3% of GDP in 1990 to 2% in 2001, well below international standards (UNICEF, 2003, p. 5). This, combined with other factors, has resulted in

lower enrolment, higher drop out rates and reduced learning achievements. For example:

- In terms of literacy, Sri Lanka is now ranked 21st in the Region
- Learning achievements in literacy, numeracy and life skills in year 5 students were only 62.8%, 45.1% and 26.5% respectively (NIE/UNICEF/UNESCO, 1994, cited by Save the Children, p. 10)

Although the Government forecasts increased investment in education to 2.8% of GDP by 2006 (Regaining Sri Lanka, Dec. 2002, p. 108), this is well below the generally accepted international norm of 5 %.

4.3 Specific Implications for the Government of the Right to Education and Public Expenditure

An obvious implication is that the State should increase its resources to the education sector to at least 5% of GDP. Investment in education is clearly correlated to improved economic performance and many other benefits as demonstrated by numerous World Bank studies. More importantly, perhaps, is the correlation between the decline of State investment in education and deteriorating learning achievements.

The provision of free education also carries with it the obligation to demonstrate to the public how State resources are employed to fulfil this right. Therefore, the Government should put in place procedures for making public expenditure in education known to Sri Lankan citizens and, in addition, encourage debate and feedback on this data.

Furthermore, this data should be made available to the public disaggregated by national and district levels as well as by category (e.g. pre-school, primary and secondary education) to permit informed analysis by parents and students of the allocation of State resources. (UNCRC Report, June 2003, pp. 4, 8).

Finally, the financing of education services to children should be prioritised in the Government's loan and structural adjustment negotiations with International Financial Institutions (UNCRC Report, June 2003, pp. 3).

4.4 Implications of the Right to Education on National and Individual School's Education Policies, Strategies and Practice

The right to education places numerous demands on the Government and the Ministry of Education. Chief among these demands is *compulsory primary education*. The Sri Lankan Government has implemented a policy of compulsory education for many years and, happily, appears committed to it.

Article 28 of the Convention also requires Governments to provide education on the *basis of equal opportunity*. In principle, Sri Lanka's education policy supports this principle. In practice, however, there is unease over emerging trends. In May 2003, the UN Committee on the Rights of the Child expressed concerns that "... a significant number of children with disabilities, in particular girls, are not able to attend school ..." (UNCRC Report, June 2003, p. 6).

Furthermore, massive disparities between rural and urban areas, in terms of staffing and resources, also undermine the fulfilment of this particular right as does the discrepancy between trained Sinhalese and Tamil medium teachers. For example, language-wise, the number of *untrained* Tamil medium teachers is 65%, as opposed to 27% untrained Sinhalese teachers.

4.5 Specific Implications for the Government of the Provision of Education on the Basis of Equal Opportunity

The allocation of State resources must ensure equitable distribution by region, ethnic or religious groups, and to children with special needs. These allocations should be made available to the public. Mechanisms for civil society to debate and feedback on the information should be established and encouraged by the Government by means of regular public expenditure reviews.

With regard to non-state schools that run special needs programmes, these schools should be registered and regulated by the Ministry of Education.

Article 28 of the Convention obliges Governments and schools to take measures that will *encourage regular attendance at schools and reduce drop outs*. Historically, Sri Lanka boasted high enrolment rates, but recent estimates are that 12% of children between the ages of 5 and 14 are out of school and that drop out rates stand at 10% nationally (up to Grade 10) and 15.8% for the North-East (UNICEF's Pre-sessional Report, p. 7).

4.6 Specific Implications for the Government Regarding Attendance and Drop Out Rates

Factors contributing to the above are multi-dimensional including, *inter alia*, poor quality of classroom teaching; conflict related damage to infrastructure and displacement of people; and infrequent or expensive transport services. Consequently, the Government's response should also be multi-dimensional and should include, among others, the following interventions:

- Ensuring the supply of sufficient numbers of trained teachers to rural and conflict areas

- Establishing a participatory mechanism for monitoring and evaluating the implementation of education reforms
- Constructing, rebuilding and/or renovating schools structures as necessary
- Maintaining a commitment to a peaceful settlement to the conflict
- Introducing transport arrangements that make it easier and less costly for children to attend school.

5. Implications for Civil Society of the Right to Education

Internationally, it is now received wisdom that civil society engagement improves government accountability and the quality of service delivery. This is no less true in the education sector. In Sri Lanka, concerns for the plight of education in this country have not spurred interested members of civil society to come together and actively and systematically engage in working towards action to address the problems. Whilst individuals from civil society have contributed to policy formulation and implementation, historically there has been no significant civil society collaboration on education. It is not that education is not a priority or that there is no interest in this subject, but inaction may rather derive from the feeling that civil society does not have a role in this area.

A stated goal of the Education for All (EFA) Branch at the Ministry of Human Resource Development, Education and Cultural Affairs is to incorporate civil society into its activities. Although plans are on the boards for such incorporation, they have been implemented only in one or two provinces. At national level, on the other hand, several one-off fora and workshops have been held to initiate dialogue with civil society.

6. Implications of Article 29 on Education Curricula and Methods

The individual elements of Article 29 (c.f. page 78 of this chapter for details) contain significant implications for national education policy and practice, particularly with respect to curriculum and methodology. The Ministry of Education has embarked on sweeping reforms to suit contemporary conditions. At primary school level the emphasis of the reforms is on:

- total personality development,
- competency based curricula,
- and classrooms where the focus is on play and activity based learning

Unfortunately, the implementation of these reforms has not met with complete satisfaction. The problems identified thus far include:

- Teachers in rural areas are not adequately briefed and trained;
- Not all school principals are included in the training programmes;
- Not all parents understand the reforms and some parents consider the reforms to be detrimental to their child's progress;
- Resource allocations for the new methods are inadequate;
- Teachers are not sufficiently trained in using alternative materials for assignments;
- Parents from low-income groups find it difficult to provide children with the required alternative materials. In these cases, there appears to be a correlation between absenteeism and the days in which special materials are required; and
- An excessive proportion of a child's time is spent on academic activities to the detriment of cultural and recreational activities and the development of a well-rounded individual.

7. Specific Implications for Educational Reforms

Whilst a number of these problems can be attributed to the process of change, it is evident that proper and systematically applied monitoring mechanisms would help to remedy the aforementioned problems. Such mechanisms should include the participation of civil society as part of a 360 degree feedback loop. This would enable decision makers in the educational system to understand how the reforms are being perceived and where to identify gaps in the implementation of the reforms.

As mentioned earlier, adequate financial resources should be allocated to the reform measures. This would ensure that successful implementation of the reforms is not undermined simply due to the lack of appropriate levels of investment.

8. Save the Children in Sri Lanka's (SCiSL)

8.1 Child Rights Advocacy

Advocacy is a pivotal element of Save the Children's mission and mandate. Central to our advocacy strategies is the concept of children's participation. Children's participation is enshrined in Articles 12 and 13 of the Convention. The rationale for encouraging children's participation is based on the ontological presumption that children possess capabilities and are seen as full human beings.

The Convention recognises that children are not mere dependants, the property of parents or guardians and this recognition includes the notion that children's views and opinions are significant and are the by-product of their capability to reflect, analyse and consider consequences.

From this perspective, children and youth are capable of becoming active citizens in society, to the extent of their individual and collective developing capacities, maturity and competence. It is through participation that children can develop an appreciation for democratic behaviour, for empathy, a sense of their own competence, and a sense of belonging (Hart, 1997, p. 3). Participation also fosters social responsibility and commitment to contribute to social good.

It is for these reasons that Save the Children will engage children in advocacy issues of relevance to them, including educational issues. Save the Children employs a multi-pronged advocacy strategy. The next subsections give just a few examples of Save the Children's advocacy initiatives.

8.2 Facilitating Children's Contributions to the National Plan of Action

Save the Children is working with the Government and UNICEF to develop Sri Lanka's 10 Year National Plan of Action (NPA). Based on the UN Global Plan of Action, the NPA is a government plan that sets forth the actions and necessary financial requirements for improving the well-being of children over the next decade.

Save the Children facilitated 300 representative children from nine provinces (25 Districts) to put forth their views from their provincial perspectives. Sixty-five children will participate at the National Forum for Children in December 2003 where their views of will be condensed into final recommendations to the government. This marks the first time in Sri Lanka that children would have been able to contribute formally to the National Plan of Action.

8.3 Facilitating Children's Input into the Peace Process

In collaboration with Sarvodaya, UNICEF and Habitat for Humanity, Save the Children organised the opportunity for children from around the country, including children from "uncleared" areas, to make contributions to members of the Peace Negotiating Team. The children had been invited to meet with the SIHRN sub-committee in April 2003, however, unfortunately this meeting was cancelled due to the suspension of the peace talks.

In the meantime, the children decided to meet separately with key decision makers in the peace process to ensure that their views were conveyed to key decision makers. Minister M. Moragoda met the children in mid-July and was favorably impressed with the depth and insights of their recommendations. The children also met with the Norwegian facilitators and are seeking audiences with the LTTE who have agreed to meet them.

8.4 Alternative Reporting to the UN Committee on the Rights of the Child

In accordance with Article 44 of the Convention, Sri Lanka is required to submit periodic reports on the situation of children. Prior to receiving the State report, the UN Committee also seeks submissions from civil society via an Alternative Report. Save the Children, in consultation with other civil society actors, submitted this report and met with the Committee at its February 2003 pre-sessional meeting. Many of the findings and recommendations made in this report were included in the Committee's formal Concluding Observations to the Sri Lankan government. Several of our recommendations related to education.

8.5 Fostering Civil Society Participation in Education Reforms

Save the Children is implementing a project supported by the Commonwealth Education Fund. The aim of the project is to foster civil society's engagement with governmental education authorities as regards education planning and establishing policies and good practice standards that will result in the equitable delivery of high quality education services to children between the ages of 5 and 14. To this end, the project has been able to set up civil society education coalitions in 21 of 25 Districts. These coalitions have established formal relations with divisional, zonal and provincial education authorities. The coalitions are at the beginning stages of including children in education advocacy initiatives, including membership on the Coalitions.

8.6 Influencing National ECD Policy and Strategy: Teacher's Resource Guide for Pre-Schools

Working with the North East Provincial Education Department and the Children's Secretariat, Save the Children helped pioneer an "activity based" early childhood education curriculum. A Teachers' Resource Guide (TRG) was developed to assist Pre-School teachers utilise the "activity based" curriculum. The Resource Guide has been formally adopted by North-East and Southern Provinces and the Sabaragammwa Provincial Council. The Provincial Councils of North Central and Central Provinces will soon adopt it as well.

8.7 Children's Parliament

Save the Children facilitated the process of obtaining the views of more than 11,000 children as part of Sri Lanka's contribution to the UN Special Session on Children. This process culminated in a Children's Parliament which was covered widely by national media and a report, documenting children's recommendations to the government, was produced and

distributed to key government officials. A number of the recommendations from this report have been incorporated into the National Plan of Action.

8.8 Research into Public Expenditure on Education

Save the Children is undertaking research to document disparities in the delivery of education services. This research will culminate in a report to the relevant Ministries with a view to influencing the equitable allocation of education resources.

9. Conclusions

This paper endeavoured to highlight some of the issues, though by no means all, concerning the implications for Sri Lanka of the right to education. The paper began by highlighting and explaining the international legal instruments establishing this right, emphasising Articles 28 and 29. It then compared Sri Lanka's performance against these two Articles and set forth implications and recommendations where the actual provision of education services fall short of this right and good practice standards.

At the behest of the Publisher, this paper also described how a Non-Governmental Organisation such as Save the Children undertakes advocacy initiatives that are intended to influence Government policy and practice. Several examples both completed and in progress, were provided to illustrate Save the Children's experience.

However, in closing, the author would like to focus attention on a particular element of the Convention – Article 29, 1 (d) – that states:

> " [The] education of children shall be directed to ... the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of the sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origins".

The characteristics of understanding, peacefulness, tolerance, equality and social harmony are particularly salient for Sri Lanka. However, for the most part the ultimate aim of most contemporary educational systems is to provide children with marketable skills with which to pursue occupational opportunities (Gandhi, 1997, p. 1). Sri Lanka is no exception where great emphasis is placed on academic excellence and where many children spend much of their limited free time in tuition classes.

This gives rise to an interesting question. Can an educational system that is primarily designed for the pursuit of gainful employment, be able to play its part in fostering tolerance, pro-social behaviour and peaceful co-existence? David Hamburg, of the Carnegie Commission on Preventing Deadly Conflict, posits that "Education almost everywhere has ethnocentric orientations" (Hamburg, 1995, p. 1). Moreover, the institution of the school itself can provide a milieu in which violence is condoned and reinforced by the administrators and teachers.

Education should be equally concerned with the development of pro-social behaviour and promoting harmonious relationships in addition to providing the child with marketable skills. Research indicates that ethnocentric tendencies towards alienation and distrust of the unknown are adaptive, in other words learned behaviours (Muhlschlegel, 1991, p. 139). This suggests, therefore, that co-operation, trust and pro-social behaviour are learned and that educational systems should be designed in such a way as to foster these qualities in addition to academic and employable skills.

The following quotation from Frederic Mayor, the Director of UNESCO, on the subject of education is instructive:

> "Education in its broadest sense is a way in which each of us as an individual can develop into a person, a contributor, a truth-seeker, a truth-teller who can, quite unconsciously, help each community and each society move towards a better existence" (Mayor, 1995).

The author humbly suggests that these may be the kind of outcomes we should seek from our education systems.

References

An-Ni'am, A. (1994). What do we mean by universal? *Index on Censorship, 4/5.*

Bureau of the Preparatory Committee for the Special Session on Children. (November 30, 2000). *A world fit for children.* New York: www.unicef.org/specialsession/pro.outcome.doc

Ennew, J. Dr. (Summer 2000). The history of children's rights: Whose story? *Cultural Survival Quarterly.* Cambridge, MA: Cultural Survival Inc.

Gandhi, G. Dr. (1997). *A new educational model - beyond character: The CGE model.* The Council for Global Education. http://www.itn.is/bahai/globover.htm.

Hamburg, D. (1995) *Education for conflict resolution.* Carnegie Commission on Preventing Deadly Conflict. Carnegie Corporation, NY. http://www.ccpdc.org/pubs/inter/inter.htm.

Hart, R. (1997). *Children's participation: The theory and practice of involving young citizens in community development and environmental care.* London: Earthscan Publications Ltd.

Muhlschlegel, P. (1991). A universal political thesis. In C. Lerche (Ed.), *Emergence: Dimensions of a new world order.* London: Bahá'í Publishing Trust.

Save the Children in Sri Lanka. (January 2003). Submission to the United Nations Committee on the Rights of the Child.

UNICEF. (2003). The convention on the rights of the child. http://www.unicef.org/crc/crc.htm

UNICEF. (January 2003). Sri Lankan Children's Rights: UNICEF Sri Lanka Input to the Pre-Sessional Working Group of the Committee on the Rights of the Child.

UN Committee on the Rights of the Child. (Jun 2003). Consideration of reports submitted by States Parties under Article 44 of the Convention: Concluding Observations of the Committee on the Rights of the Child: Sri Lanka.

World Bank. (August, 2003). The World Bank and education: Education and the World Bank at a glance. http://www1.worldbank.org/education/pdf/EducationIssueBriefAug2003.pdf

Biographical Sketch

GREG DULY is Country Director for Save the Children in Sri Lanka. With an advanced degree in Conflict Resolution and impressive formal credentials in Peace Building, he directs Save the Children's work here in Sri Lanka championing the right of all children to a happy, healthy and secure childhood, putting the reality of children's lives at the heart of all that they do and getting children involved in building a better world. His notable works are his paper "Creating a Violence Free Society: The Case for Rwanda," published by *The Journal of Humanitarian Assistance* and his book *Human Rights and the Rights of the Child: Implications for Children's Participation in the Bahai Community* published by Juxta Publishing. Informed by his studies on Rwanda, his work with children goes beyond education into conflict resolution and relief. His design of a child poverty study in Uganda led to that government's decision to develop indicators for measuring child poverty over time.

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Chapter 7

R.B. Ranaraja

Access to Justice under Human Rights

1. Introduction

The member countries of the United Nations Organization which met in Jomtien, Thailand in 1990 issued the "World declaration on Education for All", whereby they committed themselves to providing universal access to learning to all their citizens. Ten years later in 2000 the World Education Forum was convened in Dakar, Senegal, to assess the achievements over the decade. It was there disclosed that of the more than 800 million children worldwide under the age of six years, fewer than one third benefit from any form of early childhood education. Some 113 million children, of whom 60% were girls, have no access to primary schooling. At least 880 million adults, of whom the majority is women, are illiterate. These figures, they concluded, were an affront to human dignity and a denial of the right to education and stand as major barriers to eliminating poverty and attaining sustainable development. The Dakar Framework set out several strategies to ensure that the goal of education for all would be achieved by the year 2015.

In this context, Sri Lanka has fared better and now boasts of an approximately 90% literacy rate. The British were responsible for establishing the department of education. In 1939 the Education Ordinance was enacted to make better provision for education and to revise and consolidate the law relating to education. This Ordinance, as

amended, regulates the primary and secondary education of this country. The Universities Act No. 16 of 1978, which repealed the University Act No. 1 of 1972, established the University Grants Commission (UGC) and the University Services Appeals Board. This Act provides for the establishment, maintenance and administration of Universities and the Higher Educational Institutions. Pirivena education is regulated by Act No. 64 of 1979.

According to the notification published in the Gazette of 20.12.2001, assigning subjects, functions, departments and statutory institutions, there are three ministries in charge of the subject of education; namely, The Ministry of Human Resources Development, Education and Cultural Affairs, the Ministry of Tertiary Education and Training, and the Ministry of School Education. The last is in exclusive charge of the development of the film industry, the importation and distribution of films and school development boards.

With the 13th amendment to the Constitution, the subject of education devolved on the Provincial Councils. Laying down a national policy on education is the responsibility of the Minister of Education and Human Resources. Since the Provincial Councils on average are able to raise only 1/5 of the funds necessary to meet their budgeted expenditure, the central government provides the shortfall.

The central government retains the control of schools, which are categorized as national schools. There are seven Provincial Ministers of Education, making a total of ten ministers in charge of the subject.

The education service is composed of the Sri Lanka Education Service, the Sri Lanka Principals' Service (Grades III to I) and the Sri Lanka Teachers' Service (Grades 111 to 1). Their members are appointed by the Public Service Commission or with its approval. The transfers of Principals of schools are in the hands of the Secretary, Education and Human Resources or the Provincial Director of Education, depending on whether one is in the service of the central or provincial government. The transfers of teachers of national schools are in the hands of the Director of National Schools. Teachers in the provincial education service are transferred by the provincial or zonal directors of education, on the recommendation of the teacher transfer boards.

2. Pre-School Education

Pre-school education for children between the ages of 3 and 5 years is the responsibility of the Provincial Councils and Local Authorities. Some of the pre-school teachers have received training at the Open University, but the majority has not. Since there is no cadre provision for teachers in

many of the pre-schools run by the Provincial Councils and the Local Authorities, they are employed on a casual or contract basis. Their services are often terminated with each change of regime. There are neither laws nor a national policy in place, for the supervision and monitoring of facilities provided for pre-school teachers and students.

3. Primary and Secondary Education

Primary and secondary schools are classified under four grades, based on infrastructure facilities such as buildings, playgrounds, equipment, the quality of education (qualified staff) and location. There are 600 1AB-type schools, which have the facilities to teach science subjects at GCE Advanced Level (A Level). 1C-type schools, numbering 1745, only have facilities for students to study Arts and Commerce subjects at A level. Type-2 schools have classes up to grade 11 and Type-3 schools have classes up to grade 8 only and they number 4246 and 3235 respectively. At present, there are 9826 functioning government schools. During the period 1997 to 2002, 327 government schools were closed. Of them, 65 were closed within the last year. Of the 3 Type-AB schools closed, two were in the Jaffna District and one in the Mannar District. Most of the 280 Type-3 schools were closed due to the lack of teachers and the students dropping off.

Out of a total number of 418 schools in the Colombo district, only 60 or 14% are of Type-3. In comparison, 266 or 52% of the 514 schools in the Nuwara Eliya district are Type-3 schools. The Colombo district has 63 Type-AB schools, whereas, the Vavuniya district has only 4 of them. The majority of the Type-AB schools are located in the major towns within the districts. There is a great difference in the quality of education accessible to students of different districts as well as students within each district.

Despite the fact that new admissions to government schools at grade 1 level fell from 330,385 in 2001 to 325,667 in 2002, there is still a great demand for admission to Type-AB schools. Only 57,049 students were admitted to grade1 in these schools. The reason is clear. Although Type-AB schools comprise a little over 6% of the total number of functioning schools, 45,991 out of 191,812 or 24% of the total number of teachers, the majority of whom are graduates or trained teachers, serve in these schools. In comparison, Type-3 schools, which comprise 33% of the total number of functioning schools, are served by only 11% of the total number of teachers. While there are excess teachers in some Type-AB schools, 7659 or 78% of all schools have fewer than 25 teachers on their staff. There are 109 schools with only a single teacher.

Problem of Unequal Distribution

Our office received many appeals from students and parents to provide teachers of English and Science subjects, since their requests to the relevant authorities had fallen on deaf ears. A few weeks ago, a teacher of English Literature at the GCE "O" level class in a school was transferred mid-year, to the former school of a politician in a "difficult" area. Fifty one students, who were to sit the exam in that subject and a further 101 students, who were to sit the General English paper at the end of the year, were left without a teacher. At the request of the Principal and the teacher concerned, it was recommended that the transfer be cancelled. The recommendation was carried out.

The solution to the problem of unequal distribution of teachers is obvious. However, there is a great reluctance on the part of the officers responsible for correcting the imbalance to go against the dictates of politicians.

4. School Admissions

Now, 47% of the new admissions to grade 1 in government schools are made on the basis of proximity to the school (40+7), 25% of the places are reserved for children of past pupils, 15% for siblings, and 7% for children of public servants who have been transferred due to exigencies of service. Four percent of the places are reserved for children of officers serving in the department of education and 2% for children of public officers who have returned to the island after a period of stay overseas on official duty. The number of new admissions to each class is restricted to 35 students. A limited number of places are reserved for the children of members of the armed forces and the police serving in the operational areas. Despite the stringent measures taken by the department of education to enforce adherence to the Ministry of Education and Human Resources circular 23/2003 on school admissions, the system has been open to abuse.

The Principal who Disobeyed a Politician

A principal of a state school complained to our office that a politician relieved him of his post, as he allegedly refused to carry out an order of the politician to admit a child to his school, contrary to the rules set out in the ministry circular. At the inquiry it was proved that the officer who gave the transfer order had no power to do so. A recommendation was made to restore the principal to his former post and deal with the errant officer who ordered the transfer. It appears, the persons responsible for

carrying out the recommendation are afraid to do so, for fear of falling foul of the politician.

Donations for Admissions

Section 47 of the Education Ordinance and rule 21 of the Ministry circular prohibit soliciting donations on admission of children to government schools, except where regulations permit fees to be charged to defray the costs of providing for games or physical training. This rule is being openly flouted.

5. Teaching of English

Successive governments have spoken of giving priority to teaching the English language to students. There is an ongoing debate on the success or otherwise of the project to commence an English stream in schools, starting with grade 6 in 2001 and progressively extending it annually to the higher grades and also to teach some science subjects at A Level in English. To overcome the problem of the lack of qualified English language teachers, the government with the concurrence of the University Grants Commission introduced a scheme whereby teachers of that subject could improve their knowledge by following English studies at the university level.

Complaint on Switching from External to Internal Student

We received a complaint that one university refused to enroll those who wished to follow an Arts Degree course with English as a subject, unless the applicant had scored over 50 marks at the External General Arts Qualifying exam.

The reason given by the department of English of the university for the decision was that the department had to maintain standards. The reasoning is untenable as the department permits internal students who obtain less than 50 marks at the internal GAQ to follow a General Arts Course with English as a subject. There are seven teachers in that department, with fewer than fifteen students in all specializing in English. Besides being a waste of scarce resources, that decision amounts to a denial of the student's fundamental right to equality.

Despite all the good intentions on the part of those responsible for promoting English as a medium of instruction, out of a total student population of 4,026,233, only a miniscule 1882 students in government schools follow their studies in the English medium, and, of them, 1025 students attend schools in Colombo.

6. Communal Harmony

Some of the aims of education are to increase the capacity of students to deal with issues of day-to-day survival, to resolve conflict and lead a better life.

The reforms introduced in the sixties and seventies to the system of education at school and university levels were the main cause of the disunity amongst the different communities, religious and ethnic.

With much publicity and belatedly, busloads of school children from Jaffna are brought to meet their counterparts in Colombo and other cities, in a puerile attempt at fostering better understanding amongst them. There are 6870 exclusively Sinhalese and 2836 exclusively Tamil schools in the island. If the authorities are serious about improving relations between students speaking the two languages, they could very well start by integrating rather than segregating children in schools based on language. There are only 64 such integrated schools in the island. Neither have they given any serious thought to preparing common texts in the two languages respectful of ethnic and religious diversities.

7. Tertiary Education

When the basis of admissions to the universities was changed from merit to district quotas by the UGC, that decision was challenged in the Supreme Court. The Court expressed the view that though no one would dispute that, other things being equal, it is the merit principle that should prevail.

The Court added that under the prevailing system, where students who were handicapped through no fault of theirs, by being denied adequate teachers, laboratories and other facilities, the UGC was correct in endeavouring to distribute, on a rational basis, a percentage of seats among them. In approving the decision of the UGC, the Court however failed to take note of the fact that even within the districts, students of less favoured schools faced the same handicaps. The district quota principle which was meant to be a temporary measure till all schools were brought up to a similar standard, continues to prevail up to date.

Except for Arts courses, admissions to other courses at universities are determined on merit 40%, on district quotas based on population 55%, and a further 5% among 13 districts considered backward, also based on the population of each of those districts. The earlier system of selection of students on the raw marks they gained at the GCE A level has been replaced by the Z-score since 2001.

Complaint Based on Mistranslation

The UGC issues a handbook annually setting out the procedure for admission to the universities in the three languages. A student from a Tamil school, following the UGC guidelines, offered a combination of subjects intending to gain admission to the university, to pursue a course in Arts. The student obtained the necessary marks at the A-level to qualify for admission to the university to follow that course. The UGC however refused admission.

On inquiry, the UGC took the stand that the combination of subjects at the A-level exam chosen by the student, was not one approved by the UGC for admission to follow a course in Arts. Then it was pointed out that the Tamil version of the handbook showed otherwise. Despite the fact that the UGC had to admit a mistake had been made in the translations, it refused to change its decision. The student complained to our office. Since this was an obvious case of injustice, a recommendation was made that the student be admitted to a university to follow a course in Arts. The recommendation was carried out. The inconvenience to the student could have been avoided had the UGC acted reasonably.

The UGC and the universities spend millions of Rupees of public funds defending untenable decisions in court. It would be salutary to make those responsible, to bear the burden of compensation and costs awarded by courts out of their personal funds.

Injustices and Waste

In most developed countries a student who obtains the minimum qualification needed for admission, could expect to enter a university, if he or she so wishes. Unfortunately, a student in this country faces a most unjust situation. Out of the total number of students who obtained the minimum requirements to enter one of the twelve conventional universities, only 12,144 or 13% of them, secured a place in 2002. At the end of three or four years of study, in 2001 our universities collectively produced 8896 graduates. Of them, 3256 graduated in Arts and Oriental studies, and 2367 in Commerce and Management Studies. On the other hand, only106 students were enrolled to follow IT or Computer Science degrees in 2002.

The government incurred an expenditure of Rs. 37,209 million on education including higher education. There are approximately 25,000 unemployed graduates. In pure economic terms, this is a poor return on the investment. There is a mismatch between what our education system is producing and what the country needs. These figures prove beyond doubt that a reassessment of our education system is in order. The question is, are those at the helm of affairs prepared for change? The

other day a person holding high office in the education sector was asked the question why a particular university is not taking any action to introduce IT studies? His shocking response was, "What if IT becomes obsolete in three years' time?" With an attitude such as his, there is little hope.

8. The Attitude of Officials

The Supreme Court has on numerous occasions stated that the principle of equality enshrined in Article 12 of the Constitution is a necessary corollary to the concept of the rule of law. The powers vested in public officials are held in trust for the public to be used for the benefit of the public. Public officials are required to maintain minimum standards of fairness and accountability. *There is no such thing as unfettered discretion in public law. Fairness requires public officials to be open and give reasons for their decisions.*

Just three examples would suffice to illustrate that public officers, in this case, in the education sector, do not act always act that way, causing hardship to the members of the public.

Example 1: Arbitrary Punishment

A was registered as an external student of one of the universities and was allowed to sit the final examination in December 1999. The results showed A had passed the exam, but the results were not released as A had been detected being in possession of a bus ticket, with some notes written on it.

The Examination Disciplinary Committee (EDC) after inquiry annulled A's results of the 1999 examination. Then A applied to sit the final exam in 2000 and was allowed to do so by the university. The results of the 2000 exam displayed on the notice board showed that A had passed that exam.

When A made a written application for a written copy of the results, no attempt was made by the university to grant the request till 2002, when a letter stating that A was debarred by the university Senate from sitting the final exam for three years from 1999 was received. The university had neither taken note of the fact that A was allowed to sit the exam in 2000 nor of the fact that A had passed that exam.

On a complaint made to our office by A on the injustice caused, an inquiry was held. It was disclosed that the report of the EDC was forwarded to the University Senate only in 2002, with the recommendation only that A's results at the 1999 exam should be annulled.

The Senate without even reading it, decided, purportedly on the basis of the EDC report, that A should not be permitted to sit the final exam for a period of three years from 1999. As there would have been a clear case of injustice, if A was to be compelled to sit the exam for the third time, it was recommended that A's results at the 2000 final exam be released forthwith. The recommendation was duly carried out.

Example 2: Arbitrary Appointing Process

In selecting candidates for appointment or promotion in the public service, the Public Administration circular No. 15/90 stipulates that an interview should be held only for the purpose of scrutinizing the qualification certificates and where relevant, physical fitness of the applicant, the basis of appointment being merit and seniority.

The UGC called for applications for the appointment of Assistant Registrars from internal and external candidates. All applicants were required to sit a written exam conducted by the examinations department. Those who had obtained a minimum mark at the written exam were summoned for an interview. Sometime later, several appointments to the post were made. A candidate who was better qualified than some who were given appointments, requested the UGC to release the marks awarded for the written test and the interview. As there was no response a complaint was lodged at our office.

At the inquiry into the complaint, the results of the written exam were produced. The complainant had obtained the highest marks at the written exam, very much more than the marks scored by those given appointments. The results of the interview were not produced, but a copy of a document with the heading "marking scheme for structured interview" was produced. In terms of that document, only 10 marks were allotted for service record, which appears to be equivalent to seniority. The complainant had 30 years experience in the university service. Forty marks were allocated for performance at the interview, which did not last more than five minutes; in other words, 40 marks to be juggled at the whims and fancies of the interview board. Ten marks each were allocated for extra-curricular activities and relevant experience/short term. There is no elaboration on the nature of the last two qualifications. Thirty marks have been allotted for educational and professional qualifications.

The allocation of marks at the interview is not only contrary to the directions given in the circular referred to, but also appears to be tailor-made for abuse.

A further report from the UGC on the matter is awaited.

Example 3: Appointment of Wrong Person

The third example concerns the examinations department, which also comes under the purview of the Ministry of Human Resources. Responding to an advertisement inserted in the newspapers by the Secretary Education calling for applications from those qualified, R applied for the post of Probationary Tamil Teacher. All applicants were required to sit a written test conducted by the examinations department. R, in time, received the admission card with the index number assigning an examination center. Due to circumstances beyond R's control R was forced to flee the area of residence and relocate in another town. On representations made to the relevant authorities, a fresh admission card was issued assigning R another examination centre. R sat the written test at that centre.

Sometime later, appointments were made to the posts advertised. On inquiry, R was informed a letter of appointment had already been posted. On further inquiry, it was discovered that the letter of appointment had been delivered to another person bearing R's name. That person had in fact been an applicant for the post, but had not sat the test. R's efforts to have the mistake rectified, were successful up to the point of having the wrong appointment cancelled. Yet R failed to obtain a letter of appointment.

On a complaint made to our office by R in 2002, an inquiry was held, at which it was proved without doubt that it was R who had sat the test and on the results, was entitled to the post. Though the department was well aware of the mistake made, it had taken no steps to rectify it, despite successive appeals by R over a period of five years. A recommendation to issue a letter of appointment to R, on the results of the written test, was carried out by the Department of Education. Years of unnecessary delay and loss of income over that period could have been avoided had the authorities adopted a more sympathetic attitude towards R.

Two months after the above recommendation, our office received a similar complaint, which is now under investigation. How many more such cases there are, is anybody's guess.

Number and Nature of Complaints

Our office received a total of 3564 complaints of injustice and violations of fundamental rights in 2002. Of them, almost 20% were from the education sector. This figure is proportionately very much higher than the number of complaints received from other government departments. This could be attributable to the weak administrative structure with ten different ministers having their say. There were two categories of

complaints, those by members of the public against the education authorities and by officers within the department.

9. Access to Justice

There is an accepted principle of law that where special tribunals are established with jurisdiction to deal with complaints of a particular nature, recourse must be had to those, before seeking justice from bodies vested with a general power.

In the education sector, there are two such bodies. The Minister of Education and Human Resources has appointed an Education Appeals Commissioner to deal with complaints ranging from school admissions to matters concerning the officers within the ministry, including teachers. The Central Government and the Provincial Councils have their respective Public Services Commissions to deal with appeals from those dissatisfied with decisions of subordinate Tribunals.

The University Appeals Board established under the Universities Act No. 16 of 1978, is the final appeals board against decisions of the UGC or governing authorities of Higher Education Institutions, relating to appointments, promotions, dismissals, payment of compensation and disciplinary matters of University employees. Legal representation is permitted at inquiries before the board. The board's decisions are binding on the parties.

The Human Rights Commission established by Act No:21 of 1996 is vested with the power, on application by an aggrieved person or on behalf of an aggrieved person or group of persons or on its own motion, to inquire into and investigate complaints regarding infringements or imminent infringements of fundamental rights caused by executive or administrative action and resolve them through conciliation and mediation and make a recommendation.

The Ombudsman has the jurisdiction to entertain written complaints of allegations of infringements of fundamental rights or other injustice by a public officer or an officer of a public body or corporation. The complainant must have a sufficient interest in the matter. The Ombudsman after inquiry may make a recommendation. In practice, proceedings before the Ombudsman are informal and expeditious. Depending on how one looks at it, there is the advantage or disadvantage of no legal representation being permitted. The complainant has only to bear the cost of a sheet of paper and a stamped envelope.

The Provincial High Courts have been vested with jurisdiction to issue writs of *certiorari* and *mandamus* against any person exercising any

power under any law or any statute made by the Provincial Councils in respect of any matter set out in the Provincial Council list. Any person aggrieved by an executive or administrative order made by an officer of the Provincial Council, may have recourse to the Provincial High Court for relief.

The Court of Appeal has the same powers as the High Court to issue writs of *certiorari* quashing arbitrary or unreasonable orders of public officers or writs of *mandamus* directing such officer to execute an order. In both instances, the person seeking such orders must be the aggrieved party or a person who has a genuine interest in the matter due to his expertise in the subject or a public-spirited person who may be genuinely interested in seeing that the law is observed.

The Constitution has vested the Supreme with the sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement of fundamental rights by executive or administrative action. Only the person alleging the infringement or imminent infringement by himself or by his lawyer is permitted to apply to the Court. The application must be made within one month of the infringement.

10. Conclusions

Sri Lankans as a nation have been content to let politicians and their advisors decide on policy, without any dialogue with those who will be affected by such policy, as well as those who are expected to implement them. There are others who are quite content to let the status quo prevail.

Other nations that lagged behind us, in respect of the quality of knowledge imparted by educational institutions, have long overtaken us. The expenditure on education as a proportion of the GDP in 1992 was 2.95. In 2002 the ratio had fallen to 2.35. We read of corruption in every sphere of the education sector. No voices are raised in protest. One can't blame the audit officer, who was subjected to an acid bath, if he now thinks that all his efforts were in vain.

Biographical sketch

R.B. RANARAJA, with an L.L.B. degree from the University of Ceylon and a Sorbonne doctorate in International Law, is The Parliamentary Commissioner for Administration or The Ombudsman as whom his job is to offer relief from administrative corruption. Rising up the judiciary to

the Court of Appeal, many of his judgements have appeared in the Law Reports because of their lasting value. He retired prematurely giving up a likely seat on the Supreme Court and took up arbitration work; for by then he had earned a reputation on the Appellate Court for settling cases and dispensing substantive justice quickly, a skill that stands him well as Ombudsman today. Being the brother of Shelton Ranaraja, the only M.P. to resign his seat to protest the obnoxious constitutional amendment requiring the oath of allegiance to the state, he is widely seen as sympathetic to the weak and admits shyly that some refer to them in Kandy as the Nadarajahs.

Cutting an elegant figure, as Ombudsman, he does not want powers of enforcement as many do for the HRC. For it would mean giving the right to appeal against his recommendations with its inherent delays. This way he persuades administrators to set things right and much of his work is done quickly over the telephone with a small budget. He has stopped the transfer of teachers, had wrong hiring decisions reversed, and offered relief to students mistreated. Even HRC staff redirect complainants to him saying he is more effective!

Editor's Appendix

Important Editor's Note: This report by the author is not provided by the author who is expected to maintain confidentiality in matters raised with him. Rather, this is recreated from a copy officially given by him to petitioner Jeyemini Ratnam Perera and was scanned and put through an OCR System (Optical Character Recognition System) and corrected by the editor to the best of his ability.

The purpose of providing this appendix is to give readers an idea of how justice is pursued effectively at little cost through the Ombudsman. Also please see the preface.

My No.} p/2/3/1588

Your No.} UGC/HR 1/2

OFFICE OF THE PARLIAMENTARY COMMISSIONER FOR ADMINISTRATION (Ombudsman)

594/3, Galle Road,
Colombo 3,
Sri Lanka
Date} 15.8.2003

Chairman,
University Grants Commission,
20, Ward Place.
Colombo 07.

Dear Sir,

Re: Appeal on the Selection/Compensation for Post of Assistant Registrar-University of Peradenya

Mrs C.U.J. Ratnam Perera, Senior Staff Assistant at the University of Peradeniya, by her letter dated 6th March 2003 complained to this office, that she had suffered an injustice at the hands of the University Grants Commission in the Selection of candidates to fill the Posts of Assistant Registrars and Assistant Secretaries in the University Service.

A copy of the said tetter was forwarded to you together with letter dated 8.5.2003 calling for a report thereon. By your letter dated 18.6.2003 you have stated that Mrs. Perera, responding to a notice doted 15.6.2001, calling for applications to fill vacancies in the Posts of Assistant Registrars of Universities had applied both as an Internal and External candidate. However, as she had not gained sufficient marks at the written examination and the interview to qualify for appointment to the said post, she had been considered unsuitable for appointment.

The matter was thereafter fixed for inquiry on 3.7.2000. The Senior Assistant Secretary who represented you at the inquiry, produced the results of the written test. The results sheet showed that Mrs Perera had obtained a total of 221 marks at the written examination for Recruitment of Internal candidates and was placed first. The Senior Assistant Secretary was unable to produce the results of the Interview. Further inquiry was postponed until the results of the interview were produced.

By your letter dated 5.8.2003, you have sought to explain that though Mrs. Perera had been successful at the written examination, she had failed to gain sufficient marks at the interview to qualify for appointment.

Under the heading "Selection Criteria" in Annex I submitted by you, it is stated that "Selections will be made in order of merit, which will be decided on the basis of aggregate marks of a written examination (75% marks will be allocated) and a structured interview (25% marks will be allocated)".

Nowhere is it stated that a minimum mark is required at the interview to be selected for appointment. Mrs Perera has obtained 59 marks at the written examination and 7 marks at the interview totalling 66 marks. She should hove been placed third in the rank order (Annex V) in the Internal List. She has also appeared as an external candidate and received an aggregate total of 201 marks and 50.25 as average. If the interview was conducted according to the conditions set out in the notice calling for applications for the Post of Assistant Registrar, she would have ranked 14th in that list and been eligible for appointment under that category too. Appointments have been given, according to the officer representing you, to forty two candidates, both internal and external. On the marks gained by Mrs Perera she should have received an appointment to the Post of Assistant Registrar. By denying her that, you have violated her right to equal treatment under Article 12(1) of the Constitution.

Even if your argument that Mrs Perera was not appointed to the Post because she failed to gain a minimum mark at the Interview is accepted, her rights to fair treatment have been grossly violated for the reason that the interview is highly tainted and amounts to no more than a sham. In support, the following facts are submitted.

The minimum qualifications for internal candidates in terms of Annex 1 are as follows.

(i) A Graduate of a recognized University who is a confirmed employee of the Commission or of a Higher Educational Institution/Institute.

Or

(ii) A Staff Assistant of the Commission or of a Higher Education Institution/ Institute.

Or

iii) A confirmed employee of the Commission or of a Higher Educational Institution/Institute who is in a Post categorized under A-07 or above or who is in a post categorized under A-08 **with not less than 12 years service in that grade**.

Selection criteria for External Candidates for the Posts of Assistant Secretary/Assistant Registrar were:

(a) A degree with First or Second Class Honours of a recognized University.

Or

(b) A pass degree of a recognized University with a Post-graduate Degree or diploma in Administration or Management.

Or

c) Internal Candidates who qualify in terms of Commission circular No. 566 of 18th March 1993.

Selection for both categories - external/internal – were to be in order of Merit to be decided on the basis of "**aggregate marks of a written examination (75% will be allocated) and a structured interview. (2 5 % marks will be allocated)**"

Only Candidates who had obtained 40% marks or above in the three papers at the Written Examination were to be summoned for the Interview.

Two Tables have been prepared to tabulate the information supplied by you in respect of the Internal and External Candidates for your easy reference.

(A) In terms of Public Administration Circular No. 15/90 an interview is to be held only for the purpose of scrutinizing the qualification certificates and relevant physical fitness The present interview has been held in violation of that provision.

(B) The Written Examination was conducted by the Examination department. The names of those who passed all three papers were sent to you in two lists (Annex 11, 25 Internal Candidates and 50 External Candidates). The complete list of candidates who passed the written examination in the three subjects has not been made available to me. It is therefore impossible to ascertain how many of the candidates whose names appear in the two lists giving the, rank order (Annex V) did in fact pass all three papers. However, on the marks given in the two lists ranking the candidates (Annex V) for the written examination (Annex II), it is very clear' that those ranked 2nd, 4th, 9th, 14th, 16th, 18th, 20th, 26th to 29th, 31st and 34th in the internal category and 6th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 25th to 30th candidates in the external category had failed to gain an average of 40 marks at the written Examination. In terms of the eligibility criteria these candidates were disqualified from being called for the interview. You have thus acted contrary to the conditions set out in the notice calling for applications for the said posts, by summoning the candidates who failed the Written Examination for the interview.

(C) In working out the final aggregate marks gained by the candidates in Annex II, there appear to be mistakes in the additions. For example, in the list of Internal Candidates, the candidate at the top of the list has obtained 217 marks out of 300 for the written examination and 57 out of 100 for the

interview making a total of 274marks, which should average 68.5 marks. But that candidate has been awarded a final total of 72.25. The same mistake is found in respect of all candidates in both lists.

(D) Candidates Nos. 2, 4, 9 in the Internal Category list do not possess the minimum qualifications given in the notice calling for applications for the said posts. Candidate No. 20 in the infernal list had In fact applied under the external category. That candidate did not have the minimum qualifications to apply under either category for the said posts. However, the name of that candidate has been included in the internal list and ranked 20th.

(E) The marks at the interview for internal candidates were to be awarded in terms of the scheme set out in document titled "Marking Scheme for Structured Interview - Recruitment of Asst. Secretary/Asst. Registrar or Asst. Bursar/Asst. Accountant/Asst. Internal Auditor General". Under the scheme set out therein, no marks were to be awarded under Educational or Professional Qualifications for Candidates who only had either the G.C.E. 'O' Level or G.C.E. 'A' Level examination as the highest educational qualification. Yet candidates Nos. 1, 2, 6, 9, 10, 12, 16, 20, 24, 25, and 37 have been awarded marks ranging from 2 to 12 marks without any provision to do so in the said scheme. Similarly, candidates Nos. 4, 24, 32, 34 and 35 have been awarded 1 to 5 marks for the G.C.E. 'O' Level, whilst candidate 21 has been given 0 marks. All these candidates should not have been awarded any marks for the Educational Qualifications they possessed. The Interview Board has acting arbitrarily and irrationally and contravened the provisions of the Marking Scheme.

(F) The Injustice caused by the arbitrary awarding of marks becomes all the more glaring when candidates possessing Degrees with First Classes had been awarded less marks than those with G.C.E.'O' and 'A' levels. As an example, candidate No. 2 in the Internal list has been awarded 12 marks for the G.C.E. 'A' level whereas, the Petitioner who has a Bachelor of Arts Degree, has been given only 3 marks. Similarly, candidate no. 1 in the External list who has only a G.C.E. 'A' Level pass has been awarded 6 marks whereas, candidate no. 2 in that list who possesses a B.Sc. Special Degree 1st Class with licentiate Part I and II, Professional Part I and Part II exam of the Institute of Chartered Accountants has been given only 11 marks.

(G) It is very significant that in terms of the marking scheme, only 30 marks have been allocated for Educational and Professional Qualifications. A Stenographer with G.C,E. 'A' Level has scored 12 marks, this being the highest mark from amongst the Internal Candidates. This candidate was not even qualified to apply for the said posts. All others with G.C.E. 'A' Levels have scored less than 7 marks.

From amongst the external candidates out of the maximum 30 marks awarded for Educational and Professional Qualifications only one has obtained 13 marks. No candidate has therefore obtained more than 43% of the total marks awarded for the said qualifications under both internal and external categories. The method of allotting marks for educational and Professional qualifications is therefore unfair.

(H) The marks awarded for Performance at the Interview, each lasting an average of less than 10 minutes per candidate is 40% of the total. Under that heading, the candidates were to be tested on their knowledge of Financial/Administration/University Systems, Communication Skills, problem solving and decision making ability, and IT skills. The Petitioner, who had served at a University for 32 years and more than 8 years in the capacity of Senior Staff Assistant, has been able to score only 10 marks, whereas, a stenographer with less than three years' experience has scored 30 marks for Performance at the Interview. How the Interview panel could assess the skills referred to, of any candidate, within a period of ten minutes or less is beyond imagination.

(I) 10 marks each have been allocated for extra curricular activities, relevant experience/Training (Short Term) and Service record. There are no guidelines set out in the marking scheme as to the manner in which marks should be awarded under the three headings. PA circular 15/90 specifically states that appointments should be made on merit and seniority. No reference is made there to extra-curricular activities. The stenographer (ranked no. 2) with three years experience has been awarded 5, 7 and 8 marks respectively under the three headings, whilst the

Petitioner with 32 years service has been awarded 1, 8, and 6 marks respectively.

(J) The Petitioner had applied for the Post under both internal and external categories. According to the Mark-sheet she has been awarded 28 marks at the Interview for Internal Candidates and 24 marks of the interview for External Candidates. The 6 marks awarded for 32 years' experience of the interview for Internal Candidates had declined to 2 marks at the interview for External Candidates. This is only one example. There are several others. This shows that very little urgency has been paid to the manner in which the interviews were conducted.

(K) The calculation of the average of the total marks received by each candidate for the three subjects at the written examination has been done haphazardly. For example, the candidates ranked 13th and 16th in the external category (Annex V) have received a total of 144 and 142 marks respectively (Annex II). The average should be 48 and 47 respectively. However, they have been given only 39.75 and 39.25 respectively. Candidates who had scored less than 141 marks in the list of Internal Candidates and 127 marks in the External Candidates' list at the Written Examination have been given higher averages in the final ranking (Annex V).

I am of the view that the selection of candidates for the said posts has been conducted without any reasonable consideration for the suitability of the appointees. The marks have been awarded to the candidates at the whims and fancies of the Interview panel irrationally, and arbitrarily. Those without the requisite minimum qualifications have been called for the interview and some of them given appointments. There has been no transparency In the Selection process. The U.G.C. has abused the powers vested in it in selecting candidates for appointment to the said posts. The utterly flawed selection process would not have come to light if not for the tenacity of the petitioner in asserting her rights. The petitioner has been unfairly discriminated against without any cause. I hold that the UGC has violated her Fundamental Right to equal treatment. She has thereby suffered an injustice.

Recommendation

The matters referred to above lead to one irresistible conclusion, namely, that the allocation of marks at the interview has been manipulated to favour certain candidates resulting in injustice to others.

I recommend that the Interviews held for the Selection of Candidates to fill the vacancies in the Posts of Assistant Secretary-Assistant Registrar-Assistant Accountant-Assistant Bursar-Assistant Auditor, on 1st July 2002 and 11th July 2002 be annulled and fresh interviews be held only for those qualified to apply for the said posts.

You are kindly requested to inform this office of the action taken to implement the above recommendation on or before 30th September 2003.

Yours faithfully,

Signed

(Justice R.B. Ranaraja)

Parliamentary Commissioner for Administration.
(Ombudsman)

1. Hon. Minister of Higher Education
2. Secretary, Public Petitions Committee.
3. Petitioner

Ren/15.8

External Candidates

Serial Order	Name	Sex	Age	Occupation	Highest Qualification	Educational Professional given	Qualifications Due	Interview	Extra-curricular	Experience	Training service	Total	Written Examination	Marks given	Accurate Marks	Rank Order	
1	W.M.D.P M Ranatunga	F	39	Staff Asst.	G.C.E A/L	6	0	30	8	7	6	57	203	68.75	65. 00	1	
2	D.L,D.Jayantha	M	27	Trainee	B.Sc. ICA(II) (Sp) 1st	11	11	33	2	4	5	55	189	64.75	61.00	2	
3	W.M.C B. Wanninayake	M	27	Trainee	BSc.(Sp) 2nd U, CI M.I, II, ICA I,II	12	12	20	7	6	5	50	176	60. 25	5 7.00	3	
4	W.M.R M Weerasinghe	F	25	-	BBA 2nd U	13	5	30	6	5	2	56	166	59.25	55.50	4(5)	
5	A.L.M.A.Shameem	M	28	Trainee	BBA 1st	9	7	25	6	6	5	51	170	59.00	55.25	5(6)	
6	K..P.Y.T. Malkanthi	F	27	Recorder	B.Com 1st ICAII	12	11	28	2	6	6	54	NA	58.50	----	6	
7	W.L.V. Jayasena	F	32	PA	B.Sc 2nd U	8	5	25	8	8	7	56	159	57.50	53.75	7(7)	
8	A.M.M.Sameel	M	27	Asst. Lect.	BBA 1st Dip	10	8	15	7	7	4	43	170	57.00	53.25	8(8)	
9	I.L.Thasleen	M	28	Visit Lect.	BBA 1st	8	7	18	6	4	4	40	168	55.75	52	9(9)	
10	M.B.J.K B.Karunaratne	F	27	Trainee	B.Sc.2nd L. CIMII	10	7	30	4	7	6	57	150	55.50	56.25	10(4)	
11	K.C.Sanjeewani	F	24	-	B.Sc 1st Dip	7	5	30	8	1	5	51	156	55.50	51.75	10(10)	
12	S.W.Kodituwakku	M	29	Trainee	B.Com.Sp. 2ndL	8	9	25	7	7	6	53	152	55.00	51.25	12(11)	
13	P.P.B.Daluwatta	F	32	Sc Asst.	B.Sc 1st	7	6	33	5	8	6	59	144	54.50	50.75	13(12)	
14	A Javasith	M	27	Instructor	B.Com 2nd U.	10	7	25	7	5	6	53	149	54.25	50.50	14(8)	
15	R.T.M.Ranatunga	F	27	Subwarden	B.A 2nd U	10	4	20	8	8	5	51	145	52.75	45.00	15(17)	
16	W.M.C P. Godage	F	30	Marketer	B.Com 2nd ICATII	10	10	25	5	6	5	51	142	52.00	48.25	16(15)	
17	M.N.M. Abdul Cader	M	40	Dept. In Rev	M.Sc. B.Sc	9	9	25	2	6	6	48.	NA	51.75		17	Not Qualified
18	S.K. Prapakaran	M	32	Audit Exam	B.Com 2nd Dip.	9	7	20	5	7	5	467	NA	51.75		17	Not Qualified
19	M.M.N.T.K.Yalagama	F	30	Asst Lect.	B.A. sp. 2nd	7	7	22	4	8	6	47	NA	51.50		19	"
20	I.M.S.Piyalatha	F	31	Marketing Executive	B,A 2nd L., CIMI BLE	10	4	15	5	6	5	41	NA	51.25		20	"
21	H.G.D. Sriyani	F	39	Staff Asst.	GCE (0/L)	3	0	25	6	7	6	47	NA	51.25		20	"
22	M.S.K.Gunaratne	F	44	Lecturer	B.Com 2nd M.A	11	11	20	5	7	5	48	NA	50.75		22	"
23	S.E.Reginold	M	35	TO	BA., M. Phil.	4	7	25	6	7	4	46	NA	50.75		22	"
24	A.J.Christy	M	32	Trainee	BA 2nd	9	4	15	6	6	4	40	146	50.25	46.50	24(16)	
25	G.U.S.Kurugala	M	29	Asst. Libri	BA 1st	13	8	30	7	7	5	62	NA	50.25		24	Not Qualified
26	M.I.M.Zubair	M	41	Staff. Asst.	G.C.E.A/L	2	0	23	6	6	6	43	NA	50.00		26	"
27	Y.R.A. Kumarayapa	M	35	Asst. Mgr.	B.Sc. 2nd	9	8	25	5	7	6	52	NA	49.50		27	"
28	S. Sathyaseelan	M	28	Asst. Lect.	B.Sc. Sp. 2nd	8	5	25	5	7	5	50	NA	49.50		28	"
29	W. M.R.W.A.B. Weliwita	M	27	Audit Exam	B.Sc. 2nd L ,ICALII	10	7	28	5	7	2	52	127	48.50	44.75	29(18)	"
30	P.M.S.P.Yapa	F	33	Plan Asst.	B.Sc. Hon 2nd	5	5	18	5	6	6	40	NA	47.75		30	"
	C.U.J.R.Perera	F	58	Staff Asst.	B.A.	3	2	10	1	8	2	24	177	50.25	50.25	(14)	

Internal Candidates

11Serial Order	Name	Sex	Age	Present Employment	Highest Qualification	30% marks Prof. Qualifications	Educational qualification marks due	Communication skill Interview	Extra curricular Activities	Experience	Service	Written Exam marks	Interview Marks	Given Aggregate	Correct Aggregate	110 Correct Rank	Not qualified for interview
1	W.M.D.P.M.Ranatunga	F	39	S/A	G.C.E. (A/L)	6	0	30	8	7	6(18yrs)	217	57	72.25	68.5	1	
7	G.S.Amaratunga	F	28	Steno(1.1.99)	GCE (A/L) 91	12	0	30	5	7(3yrs)	8(3yrs)	204	62	70.25	66.5		NQ
3	M.M.R.A.Alwis	F	54	S/A	B. L.E	5	02	15	3	10	8	207	41	65.75	62	3	
4	P.K.Seneviratne	M	27	Clerk Gr,II(1.00)	G.C,E (0/L)	3	0	20	6	5(1 yr)	8(1 yr)	197	42	63.5	59.75	5	NQ
5	H.K.S.D.Geegange	F	28	Clrk Gr.III(2 95)	B.Sc	2	2	20	4	7	8	191	41	61,75	58	4	
6	S.Karunaratne	F	35	S/A	G,C.E (A/L)	2	0	20	7	7	8	176	44	58,75	55	8	
7	N.D.Kuruppuarachchi	M	30	T/O 88-93	B.Sc (2000)	4	2	22	2	10	8	171	46	58	54.25	9	
8	R. Logendra	M	34	Clerk III	B.Sc. (94)	6	2	20	4	6	8	168	44	56.75	53	10	
9	J.K.S.Ranapura	M	40	Clerk Gr.II 1.97	G.C. E. (A/L)	7	0	18	2	6(4yrs)	8(4yrs)	169	41	56.25	52.5		NQ
10	H.G.D.Sriyani	F	39	S/A	G.C.E (A/L)	3	0	27	6	7	9	NA	52	54.75			
11	W. M.G. Udayakumara	M	46	T/0- 2.7.79	L.L.B-(1988)	7	4	30	6	5	10	144	58	54.25	50.50	12	
12	P.K.Herath	F	35	S/A (96)	G.C.E (A /L)	2	0	20	4	6	8	161	40	54	50.25	13	
13	S.Kumaru	F	34	Clerk Gr.III	BA (1996)	07	7	18	5	4	8	153	42	52.50	48.75	15	
14	S.E.Reginold	M	35	T/0(3.8.98)	BA (1997)	4	2	25	6	7	8	NA	50	52.25			NQ
15	D.N.Gurusinghe	F	29	Clerk Gr,II (91)	BA (1996)	4	2	18	5	5	8	NA	40	51.75			
16	M.I.M.Zubair	M	41	S/A (82)	G.C.E (A/L)	2	0	23	6	6	8	NA	45	51.25			NQ
17	R.Rajeswaran	M	46	Asst.Reg.	BA-1991	5	2	20	7	8	8	141	48	51.0	47.25	17	
18	N.Thavarajah	M	44	S/A (1.1.2000)	BA-(1994)	3	2	22	5	6	8	NA	44	49.50			NQ
19	P.M.D.A.S.Kumari	F	30	Clerk Gr.II	B.Sc(1998)	5	2	15	2	6	7	194	35	61.0		05	
20	E,K.N,Dharmaratne-(Not in 25 in written test)	M	31	Clerk Gr.II 1.99	G.C.E.(A/L)	7	0	15	1	5(3yrs)	8(3yrs)	174	36	56.25	57.25		NQ
21	A.Somanathan	M	55	S/A (1.1.99)	G.C.E,(0/L,)	0	0	20	3	5	10	169	38	55.50	51.75	11	
22	L.S.Weeraddana	M	45	Clerk Gr.I (83)	BA	2	2	18	2	5	8	NA	35	53.75			
23	S.M.D.B.Jayawardene	F	33	Clerk Gr.III 96	B,Sc 2nd Up	5	4	12	5	6	8	NA	36	52.25			
24	S.C.M.de Silva	F	43	P/A	G.C,E.(0/L)	3	0	18	3	5	7	156	36	51.75	48	16	
25	S.T. Hewwasam	F	37	Steno(Gr.I)	G.C.E.(A/L)	5	0	15	3	6	9	NA	38	49.75			
26	K. Sudharshanan	M	33	Clerk (Gr.II) 93	BA(1997)	2	2	22	2	4	8	NA	38	48.0			NQ
27	I.K.K.Wijekoon	F	44	S/A (83)	BA-(1994)	2	2	15	7	6	7	NA	37	47.75			NQ
28	T.M.H.P.K.Gunatileka	F	38	Lib./Asst. Gr.I	BA-(2000)	5	2	16	2	5	7	NA	35	44.75			NQ
29	K. Kamaleswaran	M	42	T/0 Gr. I	BA-(1996)	2	2	15	6	5	7	NA	35	42.0			NQ
30	H.G.N.Devika	F	30	Clerk Gr. IIII	BA- (2000)	4	2	12	4	4	7	193	31	59.75	56	06	
31	S.Dodantenna	M	47	S/A	G.C.E.(A/L)	0	0	5	2	7	5	NA	19	42.75			NQ
32	G.S.Gnanendran	F	49	S/A	G.C,E.(0/L)	1	0	8	2	3	7	NA	21	46.75			
33	U.K.Gunasinghe	M	32	Clerk Gr.III	B.Sc (1994)	2	2	15	4	3	7	NA	31	51.75			
34	L.P.Gunawardana	F	44	S/A	GCE O/L	5	0	4	0	3	7	NA	19	44.0			NQ
35	A.S. Jayaratne	F	48	S.A	GCE O/L	1	0	8	5	6	7	174	27	54.00	50.25	13	
36	J.A.M.M. Jayasinghe	F	46	S.A	BLE (99)	5	2	12	4	6	7	NA	34	49.75			
37	G.J. Pieris	F	41	Clerk Gr.I	G C,E. A/L	2	0	12	2	6	6	NA	28	51.25			
38	C.P. Rajakumara	F	27	Clerk Gr III	B.Sc. (98)	2	2	8	1	6	5	199	22	59.00	55.25	07	
39	C.U.J.R.Perera	F	58	S.A	B.A – (99)	3	2	10	1	8	6	221	28	66.00	62.25	02	

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Chapter 8

Mark Fernando

Non-violence and the Quest for Peace in Sri Lanka

1. Preamble

Mahatma Gandhi is undoubtedly modern India's greatest son, as well as one of the world's leading apostles of peace and non-violence. Sri Lankans can claim a share in Gandhi's legacy to the world because the vast majority of Sri Lankans are, ultimately, of Indian origin, however remote, and remain linked to India by ties of ancestry, religion, culture and friendship. The intensity of Gandhi's struggle for Indian independence enabled Sri Lanka to gain her independence almost effortlessly.

Peace and non-violence are of great concern in Sri Lanka now, and I have therefore chosen as my topic for this chapter, "Non-violence and the Quest for Peace in Sri Lanka". How can Gandhian non-violence advance the search for peace?

2. Gandhi

I do not have a deep knowledge of Gandhi's life, work and ideals. Perhaps like many others, I have some indelible impressions of him: a man with a relatively privileged background and upbringing; an educated

lawyer with good prospects of material success; one who suffered such insults and humiliation whilst living and working in South Africa a to make him a changed person who simply would *not* accept injustice as the norm, and lead him to give up his privileges and his prospects, and ultimately to carry on the struggle on three fronts in his own homeland, armed only with the weapon of non-violence. He fought against colonial rule, demanding a prompt transfer of power to the people of India. He campaigned for an end to discrimination, injustice, and the oppression of the poor and the underprivileged of India. At the same time, he had to overcome disunity and strife among various factions and communities within India.

Gandhi had his successes and his failures. According to the *Encyclopaedia Britannica*, Gandhi was the catalyst, if not the initiator, of three of the major revolutions of the 20th century – the revolutions against colonialism, racism and violence; and his greatest disappointment was that Indian freedom was based on the partition of India, rather than the unity of India. He raised the status of the so-called "untouchables", by identifying them as Harijans, or "children of God" – thereby acknowledging a common parentage and the brotherhood of all Indians. He sought to build the nation from the bottom up. Nevertheless, religion, and not politics, was always the mainspring of his life. He drew inspiration from all the great religions of the world, pining and striving "to see God face to face". He was able to find truth in all religions. His life was an example of religious tolerance and respect for the freedom of conscience, in perfect compliance with what Judge Weeramantry[1] has described as "one of the greatest human rights documents of all times" – the Edict of Toleration issued by the Emperor Asoka of India:

> " ...the sects of other people all deserve reverence for one reason or another. By thus acting a man exalts his own sect, and at the same time does honour to the sects of other people. By acting contrariwise, a man hurts his own sect, and does disservice to the sects of other people."

While Gandhi did not achieve all his goals, he nevertheless won notable victories for peace, harmony, justice and non-violence. To Gandhi, the victories of peace were more precious than those of war – as the poet says, "Peace hath her victories, no less renowned than war". However, he did not receive due recognition. He was not awarded the Nobel Prize for Peace. Paradoxically, many years before, the Nobel Prize for Peace had been awarded to Theodore Roosevelt who had once asserted that "No triumph of peace is quite as great as the supreme triumph of war".

[1] *The Lord's Prayer*, pp 132-133

3. Gandhi's Relevance to Sri Lanka

Sri Lanka today faces problems which have similarities to those which confronted Gandhi. We can learn from his experience in finding non-violent solutions: in regard to matters such as the equitable sharing of power as between centre and regions in order to avert the dangers of separatism; eliminating discrimination and the denial of equal treatment, whether real or perceived, especially to the underprivileged; arresting the deterioration in the maintenance of law and order, and in the administration of justice; and preserving ethnic and religious harmony and toleration.

4. The Law and the Resolution of the Sri Lankan Conflict

Every Sri Lankan desires a resolution of the armed conflict that has raged for twenty years, and a lasting peace. Some regard a military solution as the best. Most others prefer a just, democratic and peaceful solution, through discussion, negotiation, and compromise. There is, however, considerable disagreement as to whether the present "peace process" is satisfactory or not. I offer no contribution to that debate. However, the Constitution enjoins all the organs of government, of which the judiciary is one, to secure and advance fundamental rights, and imposes a fundamental duty on all citizens to further the national interest and to foster national unity. In the discharge of those obligations I will attempt to identify some important issues, relating to the law and the administration of the law.

I believe that the initial cause of the prevailing conflict was the widespread conviction, long prevalent to varying extents among members of all communities, that their human rights were being infringed or denied (particularly the right to equal treatment). Those grievances were most acute in respect of language, education, university admission, land, citizenship and public employment.

Unfavourable economic conditions, serious unemployment, and the scarcity of land aggravated those grievances. It is futile now, in the midst of a quest for peace, to argue to what extent those grievances were real, to what extent they were mere perceptions, and who was to blame. It is enough to acknowledge nevertheless that, even if those grievances were not real, those perceptions were so strongly ingrained as to lead to armed conflict. Clearly, the resolution of that conflict must ensure not only that human rights are respected and protected, but must also remove any perception that they are being infringed. Justice must not

only be done, but must be seen to be done. Hence a peaceful solution must guarantee that the human rights presently recognised will be broadly construed, on par with international standards, and effectively implemented.

The judiciary is required to secure *and advance* fundamental rights. I must mention, in particular, Article 12 of the Constitution which guarantees equality before the law and the equal protection of the law. That provision has been liberally interpreted in several decisions as providing sweeping protection against arbitrary governmental action, as in India. In a fundamental rights application challenging the postponement of elections, the respondents argued that the Court could give no relief because the right to vote was not expressly enumerated as a fundamental right in the Constitution. It was held that voting was a recognised form of "expression", and was therefore included in the freedom of speech and expression[2].

Going a step further, in another case it was held that the exercise of the right to vote was a collective right.[3] In another decision it was held that although there was no express constitutional recognition of the right to life, that right is implicit in Articles 11 and 13(4)[4].

That process of liberal interpretation must continue. However, there will remain other omissions and shortcomings that cannot be cured by judicial interpretation, and those will have to be remedied by legislative intervention.

5. Institutions Sustaining Human Rights

But laws are not enough. There must be a sustained effort to prevent infringements of human rights. When infringements do occur, remedies must be more effective and expeditious. There must be national institutions to ensure that human rights are fully, effectively, and speedily respected and enforced by all organs of government. Such institutions must enjoy the full confidence of the nation in respect of their competence, independence, impartiality and integrity. The lack of such guarantees for the protection of human rights will make other issues more difficult to resolve. One challenge facing those who believe in the non-violent path to peace is to ensure that human rights are fully recognised, and duly respected, and that infringements are adequately remedied.

[2] under Article 14(1)(a), Karunathilaka v Dissanayake [1999] 1 SriLR 157, 173
[3] Mediwake v Dissanayake [2001] 1 SriLR 177, 211-214
[4] Silva v Iddamalgoda SC 471/2000 SCM 8.8.2003

It is principally by the exercise of governmental powers that human rights are either secured or violated. It was the real or perceived denial of human rights and the inadequacy of remedies which led, inevitably, to demands for a greater share of governmental powers. Although the need for such sharing is generally accepted, there is a serious political controversy as to whether such sharing should be in the form of federalism, or devolution, decentralization, or otherwise. Whatever the system finally adopted for sharing governmental powers, there is no doubt that complex legal arrangements will be needed. Besides, as the experience of other nations shows, even the most *bona fide* and careful demarcation of powers will not prevent disputes arising in regard to interpretation and implementation.

A peaceful solution must therefore offer solid guarantees that all such disputes will be resolved fairly, swiftly and effectively. That, too, requires a national institution, enjoying the full confidence of all concerned in respect of its competence, independence, impartiality and integrity.

6. Officials of Institutions

The sharing of governmental powers leads naturally to another issue: the manner of selecting the persons who will actually exercise governmental powers under the new system. A peaceful solution in this context means a democratic solution, namely, a reliable guarantee of free, fair and equal elections, conducted by an independent person or institution, with effective and swift remedies and penalties for electoral misconduct.

A peaceful solution must ensure the democratic rights of all citizens of Sri Lanka, including those in the "conflict" areas, who must without exception be governed by their duly elected representatives. Recent elections have created serious misgivings as to the electoral process – and not only in Jaffna in 1981 or in Batticaloa in 2001. Early this year I had to decide a fundamental rights application relating to the 2001 general election in Batticaloa[5] at which 55,000 voters were prevented from voting. I concluded:

> " The proved infringements were in themselves serious. The number of voters affected was so large that the elections in the Batticaloa and Vanni districts were neither free nor fair. The decision-making processes which resulted in those infringements were shrouded in secrecy, haste and bad faith. The infringements took place at a time

[5] Sothilingum Thavaneethan v Dayananda Dissanayake SC No 20/2002 (FR) SCM 20.3.2003

when there was a serious erosion of public confidence in the integrity of the electoral process, and when it was extremely important to ensure that elections were free and fair, particularly in the "uncleared" areas – because citizens living in those areas needed reassurance, if peace and national reconciliation were to become realities, that elections would be truly democratic, that fundamental rights would be respected and protected, and that judicial remedies would be available for wrongdoing. In that context, the infringements were a national disaster."

To make matters worse, at that same general election, while checkpoints were being suddenly closed in the Eastern Province, thus wrongfully preventing voters from reaching their polling booths, extraordinary arrangements were made in the Western Province for five voters to cast their vote in the security of their homes.

A free and fair election conducted in exemplary fashion, without fraud, violence and intimidation, would have gone far to demonstrate adherence to democratic principles, and would have enhanced the trust and confidence necessary to facilitate negotiations aimed at a peaceful settlement.

7. Peace and Law and Order

Notwithstanding a peaceful settlement, there will continue to be the day-to-day problems of law and order throughout Sri Lanka – in relation to the reporting of offences; the investigation of offences; the arrest and remand of suspects; the institution of criminal proceedings; the prosecution of offenders and the hearing and determination of cases. There has been, unquestionably, deterioration and a consequential loss of public confidence in regard to the maintenance of law and order, and the administration of justice. That is probably the reason why, increasingly, victims of crime and their families take the law into their own hands. The breakdown of law and order in any part of the country will hardly inspire confidence that law and order can be maintained in other parts of the country, and that has serious implications for peace.

I have referred to four issues connected with the law and its administration. There may be others as well. I wish to stress that peace is not an event, or a moment in time, or signing a document. A compromise or a settlement is by no means the end, but only a new beginning. The implementation, the consolidation, and the preservation, of peace are even more arduous tasks. Mistakes, misunderstandings and disputes can undermine mutual trust and confidence. As I have mentioned, the establishment of institutions to deal with such issues is

therefore vital, and the success of those institutions will depend on continuing public confidence in their competence, independence, impartiality and integrity.

Here, too, some legal issues arise which deserve serious thought, now rather than later. Are our existing institutions sufficient, or are new institutions necessary? Do we need one or many? How representative should they be? Should they be entirely local? Should they be permanent or *ad hoc*? What safeguards are needed to ensure public confidence? How will their performance be reviewed?

8. Peace, the Great Prize

Let me conclude by saying that peace is a very great prize for us, and for our children; it is not easily won, and once won, it is even more difficult to retain. All citizens have a right and a duty to make their constructive contributions to the ongoing debate about peace, in order to create a better understanding of the issues, and to build mutual trust and confidence. Peace won by non-violence, will certainly be more enduring than peace imposed by war.

One persistent image associated with Gandhi is the spinning wheel, reminding us of his campaign to urge people to wear garments made of locally produced cloth – perhaps because locally made garments were more suitable for the climate. Settlements, too, may be more comfortable and acceptable if designed to suit the local climate and conditions.

Biographical Sketch

MARK FERNANDO, L.L.B. (Hons.) Ceylon, L.L.D. (Honoris Causa) Colombo, President's Counsel, has been a Judge of the Supreme Court since 1988. He is a former Judge of the ILO Administrative Tribunal, and former President of the Asian Development Bank Administrative Tribunal.

There is a lot that can be said of him, particularly his incisive mind that cuts quickly through the superfluous to the core issues to create soundly argued and succinctly expressed judgements. His writings are scholarly like a journal paper with every statement justified through lavish footnotes. From the unity of purpose knitting his thoughts, the clarity of his arguments, and the logic underlying his theses, clearly the universities lost a good mind that would have elevated the professorate to great heights.

The universities' loss is the Supreme Court's gain.

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