ASPECTS OF 50 YEARS OF LAW, JUSTICE AND GOVERNANCE IN SRI LANKA

A Compilation of Papers Presented at The Conference on 50 Years of Law, Justice and Governance in Sri Lanka

Law & Society Trust
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Law & Society Trust
3, Kynsey Terrace
Colombo 8
Sri Lanka
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<tr>
<td>ABC</td>
<td>Audit Bureau of Circulation</td>
</tr>
<tr>
<td>ANCL</td>
<td>Associated Newspapers of Ceylon Ltd</td>
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<td>BASL</td>
<td>Bar Association of Sri Lanka</td>
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<td>BBC</td>
<td>British Broadcasting Corporation</td>
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<tr>
<td>BIMSTEC</td>
<td>Bangladesh, India, Myanmar, Sri Lanka, Thailand Economic Cooperation</td>
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<td>BOI</td>
<td>Board of Investment</td>
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<td>BP</td>
<td>British Petroleum</td>
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<td>CAT</td>
<td>United Nations Committee Against Torture</td>
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<td>CBC</td>
<td>Ceylon Broadcasting Corporation</td>
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<td>CBD</td>
<td>Convention on Biological Diversity</td>
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<td>CDS</td>
<td>Community Development Service</td>
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<td>CEA</td>
<td>Central Environmental Authority</td>
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<td>CEDAW</td>
<td>Convention on the Elimination of all Forms of Discrimination against Women</td>
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<td>CID</td>
<td>Criminal Investigation Department</td>
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<td>CINTEC</td>
<td>Computer and Information Technology Council of Sri Lanka</td>
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<td>CMEV</td>
<td>Centre for the Monitoring of Election Violence</td>
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<td>CP</td>
<td>Communist party</td>
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<td>CRC</td>
<td>Convention on the Rights of the Child</td>
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<td>CSO</td>
<td>Civil Society Organisation</td>
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<td>CYPO</td>
<td>Children and Young Persons Ordinance</td>
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<td>Acronym</td>
<td>Description</td>
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<tr>
<td>CZOP</td>
<td>Children as Zones of Peace</td>
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<td>DIG</td>
<td>Deputy Inspector General of Police</td>
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<td>DIT</td>
<td>Department of Internal Trade</td>
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<td>EC</td>
<td>European Community</td>
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<td>Emergency Miscellaneous Provisions and Powers Regulations</td>
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<td>Employees’ Provident Fund</td>
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<td>Global System of Trade Preferences</td>
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<td>Human Rights Task Force</td>
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<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICJ</td>
<td>International Commission of Jurists</td>
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<td>ICRC</td>
<td>International Committee of Red Cross</td>
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<td>IEE</td>
<td>Initial Environmental Examination Report</td>
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<td>ILO</td>
<td>International Labour Organization</td>
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<td>IMF</td>
<td>International Monetary Fund</td>
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<td>IOR-ARC</td>
<td>Indian Ocean Rim Association for Regional Cooperation</td>
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<td>IT</td>
<td>Information Technology</td>
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<td>ITN</td>
<td>Independent Television Network</td>
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<td>Janatha Estate Development Board</td>
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<td>JICA</td>
<td>Japan International Cooperation Agency</td>
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<td>JSC</td>
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<td>JVP</td>
<td>Janatha Vimukthi Peramuna</td>
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<td>LTTE</td>
<td>Liberation Tigers of Tamil Eelam</td>
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<td>Multi-Fibre Agreement</td>
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<td>MSF</td>
<td>Medecins Sans Frontieres</td>
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<td>NARA</td>
<td>National Aquatic Resources Agency</td>
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<td>NEA</td>
<td>National Environmental Act</td>
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<td>Non-Governmental Organisation</td>
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<tr>
<td>NIBM</td>
<td>National Institute of Business Management</td>
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<td>NSSP</td>
<td>Nava Samasamaja Party</td>
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<td>PAA</td>
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<td>PAFFREL</td>
<td>Peoples Action for Free and Fair Elections</td>
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<td>PEACE</td>
<td>Protecting Environment and Children Everywhere</td>
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<td>PERC</td>
<td>Public Enterprise Reform Commission</td>
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<td>PGIM</td>
<td>Post Graduate Institute of Management</td>
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<td>PHTI</td>
<td>Police Higher Training Institute</td>
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<td>PMB</td>
<td>Paddy Marketing Board</td>
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<td>Public Security Ordinance</td>
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<td>PTA</td>
<td>Prevention of Terrorism Act</td>
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<td>PTC</td>
<td>Presidential Tariff Commission</td>
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<td>Restrictive Business Practices</td>
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<td>SAARC</td>
<td>South Asian Association for Regional Cooperation</td>
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<td>SAPTA</td>
<td>South Asian Preferential Trading Agreement</td>
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<td>SCF</td>
<td>Save the Childrens Fund</td>
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<td>SEA</td>
<td>Strategic Environmental Assesment</td>
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<td>SLBFE</td>
<td>Sri Lanka Bureau of Foreign Employment</td>
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<td>SLFP</td>
<td>Sri Lanka Freedom Party</td>
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<td>SLIDA</td>
<td>Sri Lanka Institute of Development Administration</td>
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<td>SLRC</td>
<td>Sri Lanka Rupavahini Corporation</td>
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SPCI - Special Presidential Commission of Inquiry
STF - Special Task Force
TRIPS - Trade Related Aspects of Intellectual Property Rights
TULF - Tamil United Liberation Front
UNDP - United Nations Development Programme
UNFPA - United Nations Population Fund
UNGA - United Nations General Assembly
UNHCR - United Nations High Commissioner for Refugees
UNICEF - United Nations Children’s Fund
UNP - United National Party
VSSO - Voluntary Social Services Organisation
WFP - World Food Programme
WHO - World Health Organisation
WIPO - World Intellectual Property Organisation
Foreword

This book contains a compilation of papers presented at the conference organized by Law & Society Trust on Law, Justice and Governance at the Taj Samudra Hotel in November 2000. The occasion was the commemoration of fifty years of independence in Sri Lanka, which fell on 4th February 1998. Although the conference was to coincide with the fiftieth anniversary of Sri Lanka’s independence, it was postponed due to other pressing matters.

The various topics discussed at the conference seek to trace the progress of law, justice and governance in the post independent Sri Lanka relevant to that particular area. The subject areas cover a wide range of issues including the media, the judiciary, international trade, commercial law, income tax law, labour law, national security laws, the police system, prisons, environmental law, children’s rights etc. Specific topics were assigned to individuals with special competence in the relevant areas.

It is hoped that this book would contain interesting material for readers and that it would give them an idea of the progress and development of law, justice and governance in the specific areas. However it must be noted that the various articles contained in the book have been published as they were presented in the year 2000 without any revision whatsoever and that certain changes may have occurred since then especially, in relation to the legal status.

March 2005
Law & Society Trust
INTRODUCTION
This paper has two broad objectives. Firstly, to look back at the manner in which civil society has over the past five decades assisted in defining, defending and developing democracy and the fundamental human rights the Sri Lankan people are entitled to and secondly, to examine the nature of some emerging challenges to civil society, how they may be addressed and an agenda of unfinished business. The analysis will proceed largely from a rights dimension and focus on such critical areas of civil society endeavor over the past half-century such as the resolution of the ethnic conflict, the protection of the rights of all those, especially women and children, affected by the conflict, humanitarian access to the displaced and those living in the war zone, the empowerment of women and children, freedom of association, assembly and expression, the right to free and fair elections and the right to development, including such issues as natural resource use and care of the environment.

DEFINING CIVIL SOCIETY
In any discussion of civil society there is an overriding difficulty of defining its boundaries. Some clarity is obviously needed at the beginning. The popular view is that it comprises the work of non-governmental organisations of which there are reportedly several thousands in the country; but clearly the concept is broader and deeper than that and a

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* Former Advisor to the President, Consultant to the UN system and Director, Centre for Policy Alternatives, Colombo.

1 A 1995 Ministry of Planning report estimates the number of local NGO’s at 3,856.
short analysis of the historical growth and development of civil society in general may be of value in setting the scene.

The concept of civil society has a rich and complex history in political and social theory, since at least the eighteenth century. There appear to be broadly two contrasting views of civil society. The first is a reformulation of the pluralist theories of democracy derived from the tradition of de Tocqueville and others. According to this, democracy depends on balancing the power of the State by diffusing power and influence amongst a multiplicity of cross-cutting civic organisations which de Tocqueville called ‘political society.’ In such a balance of power no single organisation could presumably dominate and the State itself would be saved from being captured by a particular class or interest.²

The other school of thought, drawing from the sociological traditions of both Marx and Durkheim, sees civil society as “a realm of social life which is both collective and associational and yet rooted in private interests perceived as separate from the State based on the division of labour, social differentiation and inequality associated with the emergence of a market economy.”³ Bringing the two strands together in an overall definition of civil society would therefore include “all those self-conscious associations and organisations representing private interest groups and local, class, religious and intellectual ‘publics’ which emerge with rise of a market economy.” It is the engagement of these groups in the political or public realm and their interrelations and contestation with the State in the production of social norms that constitutes the sum and substance of the work of civil society. It is also regarded as an essential feature of civil society that “there be a rich density of voluntary associational life, and that excessive polarization be avoided through cross-cutting memberships and a citizen culture of social engagement and civic virtue.”⁴

It is asserted by some analysts that the organisations which make up civil society can be both ‘civic’ (civil) or ‘uncivil’ in their behaviour and orientation.⁵ The spectrum of special interest groups which make up civil society could range from political parties of both class and mobilised ethnic, cultural or religious communities, to business associations, trade unions and farmers’ movements. In fact some authorities include highly informal kinds of interaction (‘street corner’ society, neighbourhood relations⁶), which is public or a collective activity, as civil society. To such theorists civil society is the arena where individuals pursue group-mediated or defined issues with their own ‘publics’ or with other groups, whether this be co-

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³ From a Concept paper by Richard Crook, IDS, Sussex; Workshop on Strengthening Democratic Governance in Conflict Torn Societies; Colombo, February, 2000.
⁴ Dalil, 1982.
⁵ See for example the writings of David Rieff.
operative or conflictual. In addition, at the dimension of the local community there could be local civic groups such as rural development associations - in Sri Lanka Grama Sangwardena Samities or Gramodaya Mandalayas would also qualify to be part of civil society. In some countries, at particular times, political groupings such as the ‘pro-democracy’ organisations concerned with civil rights or political reform which agitated against authoritarian regimes as in the Philippines or Poland were hailed as critical components of civil society. The particular economy and society in which these groups function and its specific history and ethos will define the character and strength of these civil society groups. Different societies will therefore have “different mixes of civil society organisations, with differing degrees of vibrancy, coherence and the potential for fragmentation.”

It is also important to assert at this definitional stage of our discussion, since civil society is usually portrayed as an alternative to the State, that ‘civil society’ is in fact structured through its relations with the State. The State, it has been perceptively put, “is the overarching definer of the public realm and of the boundaries of a particular social formation.” Although seemingly separate from the State, civil society interests are in fact engaged in a constant, reciprocal relation with the State over the distribution of power and resources in society. In Gramsci’s terms, they are about the way in which a dominant class attempts to reproduce its hegemony through manipulation of cultural identity and ideological world views. The State and its public discourse are important tools in this process, and hence the importance of civil society as a site for both enforcement of hegemony and ‘counter-hegemonic struggles.’ The realm of the State interfaces with civil society at all points where it enforces, upholds or represses particular relationships, through law or through political action. It thus permeates the whole of civil society. As Crawford Young has argued, ‘the very notion of civil society loses its meaning if severed from the State.’ The State and society are inextricably bound together in a mutual process of structuration and negotiation.

As a working definition of civil society in Sri Lanka, and for the purposes of this Paper, we will define it as being composed of all associations and organisations that are non-profit making and non-governmental that are engaged in the promotion and protection of human rights, development, social justice, social welfare, gender equality, environmental protection, conflict resolution and relief and rehabilitation. Political parties and Trade Unions in so far as they are not part of the government, religious organisations such as churches and the Sangha and commercial organisations such as Employers’ Federation and Chamber of Commerce must also necessarily form part of civil society.

7 Crook, 1999.
8 Young C. in Harbeson, Rothchild and Chazan, 1994.
10 Supra, n. 8.
THE RISE OF CIVIL SOCIETY IN SRI LANKA

Although in Sri Lanka non-governmental organisations (broadly, and popularly regarded as the crux of civil society) have been in existence since Independence, and have a considerable record of achievement especially in the health and social welfare fields - the Family Planning Association, for example, was constituted in 1952 - the concept of civil society in the sense of a collectivity in contestation with the State in the arenas of democracy and governance, are of somewhat recent origin. Perhaps the earliest manifestation of such a tendency could be placed in the early 1970’s. As in much of the Third World, the rise of civil society in the sense that we will be using it, owed a great deal to the dissident movements of the former communist bloc States of Eastern Europe in the 1970’s.\(^\) The example of popular movements like Solidarity in Poland and the rise of Havel in Czechoslovakia, which sought space or a realm of freedom outside the control of a totalitarian party and State, led political analysts to emphasize the value of an autonomous civil society. Such a civil society would be non-political, and independent of the State but through free association, embody and promote democratic ideals and norms. In Poland and Czechoslovakia as in the other countries of East Europe the hostility to the State derived from its association with foreign domination. The ideology of these pro-democracy movements based on the association with civil society, was warmly accepted by donors and Western sympathisers and spread into the discourse which surrounded democratisation in the ‘South.’ A strong civil society therefore came to be valued as a pre- eminent and necessary condition in the process of democratisation and reform, in countries with similar histories of weak and marginalized societies being dominated by authoritarian post-colonial States.

Bearing in mind the focus of our inquiry, namely civil society activism in Sri Lanka, we will need to impose some limits to the bounds of our discussion. But there are some existentialist problems to face straightaway. Are we to confine ourselves to the groupings that are civic and civil, and not uncivil, as analysed above. Should we only look at the civil society organisations (CSO’s) which have impacted in a positive way on the functioning, strengthening and continuation of democracy. While the strengthening of democracy in its many dimensions must necessarily be the central criterion, an objective examination of civil society activism would have to address the negative formations and forces as well. After all they too whether ethnically or communally organised are part of civil society and have displayed activism which compels our attention. Take for example the Sangha (the Order of Buddhist monks) as a part of civil society. They may be a group hostile to the idea of devolution which is considered a central plank of the democratic reform agenda, but their activism is undoubted. Those in civil society who are very pro-devolution may well consider certain positions and attitudes of the Sangha as uncivil but by what reasoning could it be excluded from our discussion particularly when non-violent dissent is at the heart of democracy.

\(^{12}\) Walzer, 1997.
One of the hypotheses of our discussion therefore needs to be that the composition and character of civil society itself, and the extent to which the civil society organisations (CSO’s) which make it up are inclusive and broad-based, will be crucial in determining how supportive civil society itself will be for democracy. As a corollary, groups which are defined as ‘exclusive’ and ‘narrow’ such as some which by composition and objective are ethnic or overtly cultural nationalist, would inevitably have a negative effect on democracy and good governance. And the manner in which the legal domain accommodates or impacts on such uncivil groups will in turn have an influence on the civic or civil groups themselves.

This inquiry into the activism of civil society in Sri Lanka over the past 50 years will be structured in the following manner. The State as has been outlined in the preceding paragraphs is the “overarching definer of the public realm.” Through its manifold institutions and legal frameworks and control of public expenditure it assumes responsibility for providing to all of the people within its territory the rights and services obligatory on a democratic State. At the start of Sri Lanka’s existence as a nation in 1948, these rights were eloquently given expression to as four basic freedoms, namely;

- The freedom from ignorance
- The freedom from disease
- The freedom from want, and
- The freedom from fear.

The discussion in this paper is predicated on the argument that where the institutions of the State - the Ministries, Departments and statutory agencies that translate the above policies into action - that should function as pillars of democracy, diversity, equality and pluralism are either incompetent, inefficient or corrupt. Civil society in the form of NGOs and organised formations as described above, have played, often in the face of adverse circumstances, a valuable role in acquiring and securing these rights on behalf of the people. In the final analysis undoubtedly it is the government that through the formulation of empowering legislation, the setting up of institutional structures and administrative procedures and providing budgetary support transforms the desired policies into goods and services which benefit people. But civil society can play a profound role in lobbying and advocating good causes and monitoring the manner in which the State operates and performs its executive and administrative functions. Civil society in essence does so by interrogating the State when it acts in violation of the rights and interests of the members of the society.

Our endeavour in the rest of this first section of the discussion would be to reflect on the extent to which civil society organisations helped to negotiate and mediate with the State to ensure the current and future rights of the Sri Lankan people, and how successful or not they...

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13 From the oration of SWRD Bandaranaike as Leader of the House at Independence Square - 4th February, 1948.
were in their efforts. In short did the existence and work of the CSO’s in the last 50 years make a difference to the way we were governed. And if so, how far, and with what consequences for future development, did their interventions succeed. An examination in depth of this proposition would take us beyond the scope of this discussion but to highlight what such an inquiry might do may involve the following specific areas, among others;

- freedom from discrimination on the grounds of gender, ethnicity, religion, age, etc.,
- freedom from fear - which would ensure freedom from personal insecurity, and freedom from torture, arbitrary arrest and other violent acts,
- freedom from injustice,
- freedom from expression, assembly and association and the right to participation in decision making, including the right to vote freely at elections,
- freedom from want - the right to education, health, employment, and to be free of the curse of poverty.

It would be true to say that for many years after independence Sri Lanka enjoyed a reputation for its social achievements, in health care and education, and for its liberal democratic processes chief among them peaceful, orderly and regular elections. Although not entirely free of violence and corrupt practices, elections were yet meaningful exercises in the expression of the choice of the people in which almost 80 per cent of the population usually participated. With a bi-partisan commitment of governments to social welfare the country advanced for several years with an impressive record of achievements in the social sector. Although the levels of poverty remained pervasive, noteworthy gains were made in education (literacy around 90% for both males and females), health (low rates of infant mortality - 17 per 1000 live births, and maternal mortality) and life expectancy (today over 73 years for both men and women).

However, from about the mid-1970’s this picture of the satisfaction of basic needs through a centralised, welfarist administration has been subject to transformation. The regular 5 year turnover tendency in the formation of governments ceased after 1977 and, misusing the provisions for a referendum in the new 1978 Constitution the UNP which had come into power with an unprecedented 5/6th majority in Parliament, continued for 10 years. During this period and in the following years, important changes were taking place in the State’s policies towards welfarism. The pursuit of the open economy and the market resulted in some gains in economic growth but the withdrawal of the State from its traditional role of social welfare and poverty alleviation had serious adverse consequences for the vulnerable sections of the community.

The other paradigm shift was the intrusion of institutionalised political violence as a method of conflict resolution in the Sri Lankan body politic. Where formerly the instruments of
political opposition were verbal protest, strikes and satyagraha, mostly non-violent, the inability of these forms of dissent and protest to engender change inevitably led to violence and armed struggle to achieve political goals. The defining moment in this shift was perhaps the JVP insurgency of 1971. The government’s (SLFP) response to this was equally violent, effective and short. A longer term governmental reaction was land reform, but its fruits did little to assuage the causes for the violence generated by mainly the educated youth and the problem was to recur in the late eighties. The response of the UNP government of the time was predictably at an enhanced level of violence, engendering record levels of disappearances and extra-judicial killings. The ratchet-like race of violence and counter-violence had begun and seemed virtually unstoppable.

The culture of violence which was to engulf the country was intensifiied after 1983. With the deterioration in Sinhala-Tamil relations which followed the pogrom against the Tamil community, the armed struggle for a separate State became a desired option for several Tamil separatist militant organisations fuelled by a growing Tamil expatriate diaspora and supported by elements in the neighbouring Indian State of Tamil Nadu. The State’s response to the secessionist struggle was again predictable-rapid and large scale militarisation, prolonged emergency rule and massive human rights violations as a consequence. A veritable nightmare for Sri Lanka as a country, but ample opportunities for activism for civil society.

THREATS AND OPPORTUNITIES FOR CIVIL SOCIETY

The NGOs of today constitute an important element of civil society and their spread and influence can be pervasive. While most NGOs have a primary focus on a specific subject they are prone to list their objectives in multi-dimensional terms. It has been observed that NGOs generally couch their objectives and goals in terms of “development.” There is, it has been said a cultural, if not an ideologically driven need for NGOs in Sri Lanka to identify with development, either in terms of economic development or of empowerment. One of the possible reasons for this tendency is the expectation that fund raising with foreign donors may thereby be facilitated.

14 Introduced in 1972 the first Land Reform Law nationalised foreign owned Tea, Rubber and Coconut plantations. Then in 1975 the Land Reform brought under State control all private plantations exceeding 50 acres which could be owned by any person.

15 Often described as ‘the ethnic riots’, the word pogrom more clearly reflects the systematic destruction set in train at the time.


17 Take for example, Community Development Services (CDS), a NGO which has Family Planning as its core component but links its work with rural development.
The proliferation of NGOs by orientation may be gauged by the following Tables.

**Table 1** (Figures are of 1995)

<table>
<thead>
<tr>
<th>Source</th>
<th>Local</th>
<th>Foreign</th>
</tr>
</thead>
<tbody>
<tr>
<td>Department of Social Services</td>
<td>2,161</td>
<td>-</td>
</tr>
<tr>
<td>Department of Probation and Child Care Services</td>
<td>515</td>
<td>-</td>
</tr>
<tr>
<td>Ministry of Policy Planning and Implementation</td>
<td>-</td>
<td>47</td>
</tr>
<tr>
<td>Development NGOs</td>
<td>291</td>
<td>-</td>
</tr>
<tr>
<td>Approved Charities</td>
<td>889</td>
<td>-</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>3,856</strong></td>
<td><strong>47</strong></td>
</tr>
</tbody>
</table>

*Source: Sunil Bastian, Development NGOs and Ethnic Conflicts*

**Table 2**

(Number of NGOs registered in terms of the Voluntary Social Services Organisations (VSSO) Act up to 30th Sept 2000)

<table>
<thead>
<tr>
<th>Area of Primary Activity</th>
<th>No. Local &amp; Foreign</th>
</tr>
</thead>
<tbody>
<tr>
<td>Development-Rural development, Poverty Alleviation, Environment, Relief, Rehabilitation and Reconstruction</td>
<td>84</td>
</tr>
<tr>
<td>Protection of Human Rights-Women and Development, Protection of Children, Human rights</td>
<td>22</td>
</tr>
</tbody>
</table>

The number of applications received so far - 30.9.2000 - for registration exceed 500.

*Source: NGO Secretariat*

At a time when local mobilisation of resources is difficult - indeed it seems always to have been that way - the space provided by the international donor community in encouraging civil society to play a part in development has led to a proliferation of NGOs espousing development. There have also been political concerns by the donor community concerned with ‘good governance’ that many States have not been accountable to the people and have

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Fifty years of Civil Society Activism in Sri Lanka

been more interested in controlling society than responding to peoples’ needs. NGOs and voluntary action have therefore been seen as partners alternative to the State.

In Sri Lanka the long drawn out war and its destabilising effects on the society and economy has acted as a spur to NGO action. As a direct consequence of the armed conflict between the government and the LTTE, several prominent International NGOs have been working in Sri Lanka for many years along with United Nations agencies, national NGOs and government agencies. Linkages between international and national NGOs have manifold implications for the latter. Primarily there is a funding stream which makes some of them donor dependent in terms of programme and policy. This is usually held against the national NGOs by forces who seek to perceive them as anti-national, and sometimes in the context of the on-going war as subversive. So while there is a gain in terms of increased funding, stronger infrastructure and programme development, the down side could be a decline in the NGOs capacity to advocate its cause and in the number and quality of its membership. The consensus in development assistance among donors and their faith in the value of NGO action in advancing social transformation is reflected in the increasing proportion of aid channelled through NGOs. For example, the OECD countries aid to NGOs increased from 0.7% in 1975 to 3.6 in 1985 and 5% in 1994.19 Such assistance is bound to rise further in future years as the US, a major player, intends to channel 40% of its bilateral resources through NGOs up to 2000 and beyond. This while presenting continuing opportunities to civil society to organise itself has also the in-built threat of increasing, the already considerable, donor dependence of the NGO sector.

National NGOs are of two kinds - some like the Sri Lanka Red Cross being branches or local affiliates of international NGOs and others, like ‘Sarvodaya’, purely Sri Lankan in composition, objectives and membership. But in either case - and ‘Sarvodaya’ is a good example - they are heavily dependent on foreign funding.

A distinction could also be drawn between national level NGOs and grassroots NGOs. Some of the latter are undoubtedly caught up in the enumeration in Table 1 above but there could well be others at village level which have escaped such a census. Grassroots level NGOs generally, if not affiliates of national NGOs, are not well resourced and depend on volunteer inputs and membership subscriptions. The most ubiquitous of these are the ‘maranadhara samitis’ (Death Donation Societies) - which support the funeral expenses of the members and the ‘dayaka sabha’ (The lay ‘congregation’ of each village temple) - which is expected to attend to the material needs of the resident monks and the care and maintenance of the physical structures in the Temple. While the ‘maranadhara samitis’ are active and of great use to rural folk, the ‘dayaka sabha’ appears to have lost some of its traditional roles with

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19 Overseas Development Institute, Briefing Paper, 1995.
the increasing patronage\textsuperscript{20} of the State over the temple and closer relationships between the chief monk and the local political elites.

The Policy and Regulatory Framework

Civil Society has become, as we have seen, the favoured partner of the international community. The World Bank\textsuperscript{21} and IMF, the Aid Consortium and the agencies of the UN system have at various times extolled the virtues of civil society. These external actors would generally hold with the view that:

\begin{quote}
"NGOs hold a distinct advantage over the government in much of their activities. They approach their work informally, work from a multi-disciplinary perspective, gather information more quickly and use resources more efficiently, innovatively, flexibly and in a timely fashion-whether it be human resources, finances or material goods. They intervene in areas and among people either ignored, neglected or marginalised by government policies, mobilising public support for social issues and functioning as watchdogs of the state by interrogating it when it acts to the detriment of society."\textsuperscript{22}
\end{quote}

On the other hand national governments in reality would obviously not be that enthusiastic about the way NGOs go about their work. This tension is borne out in several ways and will be explored since it comprises the environment within which NGOs operate.

However, this ahistorical notion of NGOs, and by extension ‘civil society’, implied in the above quotation, is incomplete because it does not reveal the social forces and ‘politics’ in the organisations that constitute civil society itself. For example, as has been noted,\textsuperscript{23} the constraints that have inhibited a resolution to the ethnic conflict are found not only in State structures but within civil society as well.

For civil society to function at all the fundamental freedoms of association, assembly and expression are a \textit{sine qua non}. As far as the normative framework in Sri Lanka is concerned the supreme Law - the Constitution - has invariably provided these freedoms but as we shall see, with important caveats, which at times could seriously limit their enjoyment. For example

\textsuperscript{20} Note for example the increasing importance of the Ministry of Buddha Sasana. In 2000 it was made one of the portfolios of the Prime Minister.

\textsuperscript{21} The World Bank Handbook 1996 suggests that NGO’s can enhance efficiency and provide indirect support to the market economy.

\textsuperscript{22} \textit{Supra} n. 16, at p. 7.

\textsuperscript{23} Sunil Bastian, Development NGO’s and Ethnic Conflicts, in \textit{Nethra} Vol 1. No. 3, June 1997. I am indebted to the writer for his exploration of Gramsci’s approach in using civil society as a means of social transformation.
the 1978 Constitution\(^\text{24}\) (Chapter 111) incorporates provisions on fundamental rights, including those relating to freedoms of association, assembly and expression. Article 14(1)(c) guarantees freedom of association subject to such restrictions as may be prescribed by law in the interests of racial and religious harmony or national economy. Article 14(1)(b) guarantees freedom of peaceful assembly but this right may be subject to lawful restrictions imposed in the interests of racial and religious harmony. Freedom of expression, including publication, is provided in Article 14(1)(a) subject to restrictions that may be imposed in accordance with law in the interest of racial and religious harmony, or parliamentary privilege, contempt of court, defamation, or incitement to an offence.

These rights moreover are available only to citizens. Apart from the specific restrictions on individual rights spelled out in the Constitution, Article 15(7) prescribes that all the rights enumerated in Chapter 111 may be restricted by law.

> "... in the interests of national security, public order and the protection of public health and morality, or for the purposes of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society..."

Article 16 which states that all laws - “written and unwritten” - in existence at the time the Constitution came into force remain valid, regardless of whether they are consistent with the Fundamental Rights enumerated in Chapter 111, also have the effect of undermining the rights guaranteed by the Constitution.

At the general elections of October 10\(^{th}\) 2000, a draft Constitution, amending significantly the 1978 Constitution was virtually placed before the country for ratification. The draft Constitution greatly expands the entitlement to the freedoms of association, assembly and expression so vital to the functioning of civil society. Freedom of speech and expression including publication is guaranteed by Article 16(1), freedom of association and freedom of peaceful assembly are guaranteed by Articles 18(10) and 17(1) subject to the usual restrictions in the interest of national security, public order, racial and religious harmony etc. From ‘citizens’ under the 1978 Constitution these rights are now available to ‘all persons.’ The language also in several respects is consistent with that in the International Covenant on Civil and Political Rights (ICCPR). But there are yet provisions that have the capacity to undermine the exercise of these rights. The validity of “written and unwritten” laws that are inconsistent with the rights proposed in the Draft Constitution still remains, as Article 28(1) prescribes. Although the People’s Alliance government returned to power with a small majority, it has not been possible to have these amendments approved as constitutional change requires a two thirds majority in terms of the 1978 Constitution.

As observed earlier, the fundamental freedoms of speech and expression, association and peaceful assembly critical to the proper and effective functioning of civil society have been severely constrained in the last 25 years, particularly by the use by the state of emergency rule. While this situation in itself has provoked institutions of civil society to mobilise and challenge the more odious of the emergency provisions, the very pervasiveness, arbitrariness and continuing existence of emergency rule has no doubt acted as a chilling element to the activism of civil society. It would therefore be of value to examine this highly constraining condition in some detail.

The pre-eminent factor in this constricting environment is the existence of the Public Security Ordinance of 1949. It is under this Law that emergency rule can be sanctioned and was enacted around the time of Independence. It has now been further sanctified through incorporation into the 1978 Constitution as Article 155(2). The Public Security Ordinance permits the President to declare a public emergency thus enabling the Executive to promulgate “regulations” which have the status of laws under the Constitution. While Article 155(2) of the Constitution declares that Emergency Regulations can override, amend, or suspend any general law, except any provisions of the Constitution, given that the freedoms of association, assembly, and expression can be restricted under Article 15(7) in the interest of national security and public order, the Public Security Ordinance can circumvent the constitutional prohibition. (The only Constitutional rights that emergency regulations cannot affect are those that are deemed absolute, i.e. freedom of thought, conscience, and religion; and freedom from torture, but the latter, as every one knows, is routinely and cynically violated by the law enforcement authorities). In the past quarter century emergency rule has been more the rule than the exception. Although the ICCPR limits the declaration of a state of emergency to circumstances in which the life of the nation is threatened such as in a state of war, successive Sri Lankan governments have not acted in strict observance of these standards. The question therefore has been often raised of what constitutes a real public emergency and particularly as to whether there is a necessity to continue the emergency once it has been declared. Questions as to the “reasonableness” or “necessity” of an emergency have been raised by civil society activists (notably by Neelan Tiruchelvam). The Supreme Court has ruled “that the existence of a state of emergency is not a justiciable matter that the Court could be called upon to determine by an objective test.”

Considering the arbitrary and sometimes ad hoc manner in which emergencies - with all their consequences for civil society activity - have been declared and continued over time this issue is crucial and compelling in the attention it will need from civil society.

However, in reviewing executive and administrative action taken under emergency regulations, the Supreme Court has evolved a standard of reasonableness in subjecting particular emergency regulations to its scrutiny. The Court has held that even during periods

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of emergency rule any regulation promulgated by the government that seeks to restrict fundamental rights must have a reasonable relationship to the objective sought. Although this is a significant decision it still leaves much scope for government intervention and restriction of the three freedoms crucial to civil society action.

The Prevention of Terrorism Act (PTA) No. 48 of 1975 (as amended) is another piece of legislation that has been and could be utilised to chill civil society activity. Although it was originally meant to be a temporary measure it is now part of the permanent law. Under the statute the Executive is given wide powers to issue orders that could infringe on the freedoms most important to civil society.

The environment in which civil society institutions work is also influenced by the international instruments that Sri Lanka has acceded to. Of these the ICCPR is paramount and was acceded to by the government in 1980. Mainly as a result of civil society activism (the Civil Rights Movement being especially prominent in this regard), the First Optional Protocol to the ICCPR which allows for individuals to petition the Human Rights Committee in Geneva was acceded to in 1997. It is unfortunate that the formal acceptance of the ICCPR has not meant that our constitutional and statutory regime strictly conforms to it or to other international instruments, including the 1948 Universal Declaration of Human Rights. As has been observed, the restrictions in place in the current (1978) Constitution in regard to the freedoms of association, assembly and expression are certainly wider than those provided for in the ICCPR.

For a variety of reasons, not the least being the regard in which civil society is held by the international community, most governments have been supportive of civil society activity in their public pronouncements, notably in their election manifestos. But the reality has not generally matched the rhetoric. For example the UNP in its 1988 Manifesto declared;

"Whether big or small, foreign or local, we consider NGOs to be committed to development on the side of the needy communities. We will strengthen their role in future, through mobilising them as intermediaries of support, especially in local level development."

Although some attempt to do so was made through the constituting of ‘Gramadoya Mandalayas’ under the Development Councils (Amendment) Act No. 45 of 1981 and giving voluntary social service organisations the legal right to participate in the ‘Gramadoya Mandalayas’, some of the other measures taken during the Premadasa administration (1990-1993) indicated a desire to curb and regulate NGOs rather than provide space for their growth and development. One such initiative was the appointment in March 1990 by President Premadasa of a Committee of Officials to investigate allegations that foreign funds were flowing into both international and national NGOs without the knowledge or concurrence of the government. A key finding of this Committee (clearly indicative of the overall attitude
of the bureaucracy to NGOs and the activities of civil society was that no framework existed to monitor the activities and funding of the NGOs and that funds received from both foreign sources and those generated in Sri Lanka were being either misappropriated, or being used for “activities prejudicial to national security, public order and or economic interests, and for activities detrimental to the maintenance of ethnic, religious and cultural harmony among the people of Sri Lanka.” This led inevitably to the appointment of the NGO Commission in December 1990 mandated to conduct a public inquiry with wide Terms of Reference. The NGO Commission as is customary for bodies appointed under the Commissions of Inquiry Act No. 17 of 1948 adopted an inquisitorial approach and targeted 3 prominent NGOs – ‘Sarvodaya’, the ‘Eye Donation Society’ and ‘World Vision’ for intensive investigation. While many local and foreign observers found the workings of the Commission and its methodology objectionable and its agenda questionable, the media coverage was laudatory of the Commission and hostile to the NGOs as some extremely embarrassing facts began to be disclosed, especially by staff members within these organisations. The report of the Commission came out in December 1993 and it was left to President Wijetunga to follow up its recommendations. The report was poorly structured and badly written but it affirmed the validity of several charges and allegations brought before it.

It found that there had been deceitful conversions to Christianity by certain NGOs, that NGO officers enjoyed extraordinarily high salaries and fringe benefits, that there was misappropriation and other malpractices by NGOs, and that the NGOs were spending unusually high proportions of their funds for administrative purposes. The Commission had formulated charges against ‘Sarvodaya’ and its leader, and recommended the appointment of a separate commission of inquiry to probe these charges.

The Commission’s key recommendations was for the appointment of a ‘Commissioner for NGOs’ staffed by a secretariat, and the enactment of a new law requiring compulsory registration of all NGOs - organisations whose income fell below a certain level were exempted - and the supervision of all NGO funding and activities.

The NGO Commission, its working methodology and its recommendations posed a real threat to civil society and acted as a catalyst for NGOs to mobilise in defending their hard won gains. Local activists were assisted by an international campaign led by the ICJ, which sent a mission in May 1991. What is noteworthy in this entire episode is that the international campaign failed to make much impact and that the local effort too was unco-ordinated and

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27 The Commission of Inquiry in respect of Non-Governmental Organisations was chaired by Justice R.S. Wanasundera and included 6 other distinguished members prominent in civil society.

28 The Terms of Reference included the misuse of funds by NGO’s, whether the existing legal provisions for monitoring the activities of NGO’s were adequate and if not, what provisions needed to be adopted.

29 One critic likened it to the Mahaweli ganga - ‘long, murky and often overflowing its banks.’
muted. Possibly taking its cue from the media coverage which was generally critical of the NGOs, the populace at large did not evince much support for the NGOs as a collectivity.

What indeed was the problem? Were not the NGOs representative of the larger society? Were their needs not the needs of the people? Was there not more than a tinge of truth in what the NGO Commission was saying about the lifestyles and malpractices of some of the NGOs? These and other doubts began to manifest themselves at this time of trauma and challenge to civil society.

Undoubtedly the personal animosity that President Premadasa had for the ‘Sarvodaya’ leader, Dr. A.T. Ariyaratne (they had been close associates for years) on account of Sarvodaya’s widening reach and growing popularity in the rural areas in which it worked - also Premadasa’s favoured terrain- may have had a hand in the “witch hunt” against Sarvodaya and the other NGOs. But this may not be all the story as the following very revealing extract from the Commission report indicates. This discloses the mind-set of the Commissioners most of them professionals who at one time or another had belonged to NGOs and were very much part of the civil society of Sri Lanka. There was no dissenting note.

“The political role advocated for NGOs at its most innocuous level may be seen as an attempt to influence politics by politicising development and welfare work even such as health, education and environment, natural resources and technology. They can assume a political significance or can be used for political purposes bypassing as it were the ordinary political process of parties, elections and manifestos. Social activist groups would now think it legitimate and within their province to influence government policies, laws and legislation... In this new advocacy role where NGOs attempt to influence government policy and interfere with foreign funding support for governmental development work, an NGO could in some instances be wittingly or unwittingly conniving in, or collaborating with unfriendly foreign agencies. Such foreign organisations may enlist unsuspecting local NGOs by offer of money or other deceitful means to support their designs which may be to subvert national sovereignties and the progress and development of Third World development. While NGOs have a duty to play their ordained role which includes constructive criticism of the government this should not be done indiscriminately. There would be occasions when silence would be an option. There may be occasions where the destructive and even constructive criticism may burden or weaken the State which may be placed at odds battling devious and designing powerful international forces.”30

This amazingly antediluvian conceptualisation of the role of civil society in the ‘Third World’ that its activities could be not only anti-government, but anti-national/ unpatriotic; that it

could be subverted at will by offers of money from foreign sources; and that it should follow the example of the monkey ‘who sees no evil, hears no evil or speaks no evil’, appears to be unfortunately not only the view of the learned Commissioners, but that of a wide segment of the Sri Lankan middle class who constitute the heart of the wider Sri Lankan civil society. This is the contextual challenge that an activist civil society faces in a country like Sri Lanka.

The final act in this particular demonstration of governmental attitude towards the NGO community came through its use of an Emergency Regulation - the Monitoring of Receipts and Disbursements of Non-Governmental Organisations Regulation No. 1 of 1993, to implement the main recommendation of the NGO Commission. NGOs were defined as non-governmental organisations that are dependent upon the public or government grants-in-aid for funds and are, engaged in social welfare, development, empowerment, research, and environmental protection activities. Only the co-operative societies and NGOs with annual budgets less than Rs. 50,000 were excluded. Organisations that fell within the above definition needed to register with the Director of Social Services, and submit detailed information regarding receipts and disbursements, including the sources of receipts and the recipients of funds, goods and services. Heavy penalties for non-compliance were incorporated into the regulation. NGOs had no option but to comply, until with a change of government the regulation was allowed to lapse.

The respite the NGOs enjoyed with a change of regime was regrettably short. In 1998 the government amended the Voluntary Social Services Organisations (VSSO) (Registration and Supervision Act No. 31 of 1980) and incorporated in it the requirement for mandatory registration of NGOs that had been the objective of the earlier emergency regulation. The former stringent penalties for non-compliance-fines and prison sentences up to 5 years for officials were reduced but an administrative authority - the NGO Secretariat constituted in 1996, was authorised to monitor the registration process. The amendment gave rise to much controversy including legal action by civil society groups to stay its implementation. The dilemma this occasioned for policy makers is evident in the fact that the amendment was finally passed when the Parliament itself was in some disarray and after it had lain dormant on the Order Paper for about two and a half years.

The VSSO Act which had remained virtually unused for 15 years was utilised in 1995 by the Minister of Social Services to appoint an interim Board in place of the existing elected officials of the Red Cross Society who had been found guilty of serious allegations of fraud and misappropriation by an officially appointed Board of Inquiry. This became a cause celebre when on an application to the District Court it was determined that the ministerial

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31 Jayadeva Uyangoda has in a recent paper ‘A State of Desire: the Unreformability of the Sri Lankan State’ (unpublished manuscript) brilliantly analysed the play of possibly similar anxieties and paradoxes in the modern Sri Lankan polity.
appointment of the Interim Board was in violation of the law. However even this relief was short-lived as the government through the 1998 amendment of the VSSO empowered the Minister to appoint an Interim Board of Management for the purposes of administering the affairs of a voluntary organisation where he “was satisfied that the fraud or misappropriation was of such a nature that it would affect the financial management of the organisation and that the public interest would suffer” if the business was carried on by the same executive committee. Accordingly the Sri Lanka Red Cross remains today under a government appointed Board of Management.

One of the lessons of the Red Cross affair is that it is not only the attitude of the politician that matters. The State bureaucracy has also often been seen to be extremely hostile to NGOs. While the reasons for this pervasive attitude have not been studied in any depth there is no doubt that State bureaucrats resent the manner in which NGOs claim credit for much of the work they feel they have been responsible for, as well as the high profile and ‘perks’ that the executive officials of the more prominent NGOs enjoy.

Manipulation of the legal framework is not the only instrument through which the State has sought at times to intimidate civil society in Sri Lanka. An ominous development, coincidental with the increasing overall recourse to violence to achieve political or partisan ends, has been the blatant use of strong-arm tactics, physical assaults, on civil society activists. A particularly regrettable instance of such intimidation (now part of a recurring pattern) occurred in 1996 and was reported as follows by Article 19, the international NGO for media freedom.32

“...in November (1995), an article appeared in the state-owned Daily News alleging that an un-named NGO which was angered by the government’s policy of channelling aid (to the displaced in the North) through state machinery was convening a meeting of over 80 leaders of international and local NGOs in an attempt to tarnish the international image of Sri Lanka by showing that food and other aid items are not reaching the affected refugees (from the war torn areas).’ Other newspapers also carried similar items, as did the state television and radio news and other broadcasts.

The meeting at issue was the annual consultation of the London-based NGO Forum on Sri Lanka, which had in fact been planned in March 1995, well before hostilities resumed between the PA government and the LTTE.

The Daily News the next day (15 November 1995) published a press release issued by the NGO Forum which explained the nature of the Forum and of the meeting, which was ‘to discuss co-operation between voluntary organisations

(and) discuss ways to promote development, human rights and peace in Sri Lanka.’ Yet the damage had already been done. The meeting was cancelled after agitated protesters gathered outside the hotel where it was to be held. The Foreign Ministry had given assurances that the meeting could proceed, and security was provided. However, the hotel management cancelled the meeting, after the police said they could no longer control the situation.

Four journalists who were travelling to the meeting were attacked by a mob and injured. Both state-owned and private press the next day carried news of the cancellation, and also carried allegations that the meeting was pro-LTTE.”

The instance described above reflects the manner in which the seemingly intractable armed conflict with the LTTE has brought a different frame of reference to evaluate NGOs and their activities. Humanitarian and human rights violations arising from the war - which civil society is quick to seize upon - become very sensitive issues for the government which is today being continually monitored by international opinion, particularly in the donor countries. In the past the traditional opposition political parties and Trade Unions have been the main interrogators of the State. But the challenge to the State from civil society is qualitatively different. It is usually well researched and has a greater credibility since it apparently comes from informed and impartial sources. Consequently the crackdown on the NGOs have necessarily to be on a wider basis using such legitimising symbols as safeguarding national security, maintaining public order and ethnic and religious harmony etc. In today’s context the easiest way of de-legitimising the work of civil society is to collapse most of these issues into one or two, namely by calling them sympathisers of the LTTE or those who want to demoralise the war effort.

While, as the aforesaid has indicated, there have been several threats and challenges to civil society in the past, there have been opportunities too for partnership with the State. This has been mainly in the area of policy reform and policy formulation where representatives of civil society have been regularly and in considerable numbers co-opted into statutory bodies. Some examples of fruitful collaboration are;

The Monitoring Committee on Child Rights established under the Sri Lanka Children’s Charter to monitor the implementation of the Convention on the Rights of the Child and the National Child Protection Authority in which several NGOs are represented. The National Environmental Council[33] under the National Environmental Act No. 47 of 1980 (as amended) has seven NGO representatives sitting on it. Although this body is dominated by government officials it has played a significant role in environmental regulation. The Women’s Bureau

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[33] Environmental NGO’s can be registered under the National Environmental Act with the Central Environmental Authority. Registration allows them to be elected to the Environmental Council. Under the 1980 Act the number of NGO representatives was 2 and this was raised to 7 by the 1988 amendment.
and the Children’s Secretariat have an NGO Panel and NGO Committee respectively, while
the Ministry of Policy Planning and Implementation has a NGO Liaison Unit. The NGO
Liaison Unit has the important function of negotiating Memoranda of Understanding with
each of the international NGOs engaged in Sri Lanka. By 1993, some 40 of the 47 international
NGOs concerned had entered into such bilateral agreements. All international NGOs seeking
to launch projects in Sri Lanka are required to enter into formal agreements with the
government.

One of the positive features regarding Government / NGOs relationships in Sri Lanka is the
diversity and flexibility in treatment that is found in practice. Here again as in other areas of
activity, the government does not come out as monolithic or homogeneous. In reality there
is an abundance of heterogeneity in the way government authorities in Ministries,
Departments and statutory bodies perceive and interact with civil society. There is definitely
space here to penetrate the political and bureaucratic order and assert and make acceptable
the points that civil society organisations wish to have accepted. A strategic approach to
identify and work on the available ‘soft entry’ points needs therefore to be adopted if success
is to be ensured. Skills of negotiation and presentation are therefore civil society tools of
high value as some of the later discussion will illustrate.

Opportunities for civil society activism have also opened up with the entry into the country
of external actors of high repute like the agencies of the UN system. CSO’s who collaborate
with the UN agencies like UNICEF (United Nations Children’s Fund), UNFPA (United
Nations Population Fund), UNHCR (United Nations High Commissioner for Refugees), WFP
(World Food Programme) or WHO (World Health Organisation) have found it possible to
extend and intensify their work working alongside and under the broad umbrella of the UN
agency. Recent policy pronouncements from the Secretary-General of the UN on involvement
with local community-based organisations have assisted this approach. Apart from occasional
admonitions from zealous bureaucrats34 alarmed at apparent transgressions of ‘sovereignty’
by the ever probing UN system, the opportunity of collaboration with the high profile UN
agencies has been a shot in the arm to civil society. In the case of international NGO’s like
Save the Children, Redd Barna and ICRC (International Committee of Red Cross) who
work in the war zones, the public perception is that their neutrality in the conflict equates
them with the enemy. Any close collaboration of civil society with external actors of this
genre is obviously fraught with personal and institutional danger.

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34 The writer recalls a rebuke a former UNDP representative received from a Minister for so-called “undue
interference” in matters connected with humanitarian supplies to the internally displaced in the conflict zones.
SOME EXAMPLES OF CIVIL SOCIETY ACTIVISM: THE ‘WHERE’ AND THE ‘HOW’

The indicators of activism premised in this paper include both the intensity and relative success of the formal civil society organisations in the causes for which they are committed and also the extent to which on specific issues civil society had the capacity to spontaneously mobilise itself into informal but durable formations to achieve desired ends. One example of the latter movements would be the group of relatives of those children who had disappeared during the counter insurgency of 1989 - 1991, calling themselves the ‘Mothers for the Disappeared’, whose public appearances and protestations succeeded in expediting the appointment of and obtaining relief through the government appointed commissions on the ‘Involuntary Removals of Persons.’ Another example would be the ‘Association for bringing back the Missing Servicemen in Action’ who have had some success in visiting and obtaining release of servicemen in captivity under the LTTE.

What follows are a few examples of where and how civil society activism was displayed in recent times.

Protection of Human Rights under Emergency Rule

The quotation below from a speech made by the Indian President last year reflects the kind of thinking which must move civil society activists as they labour for the protection of the human rights of those taken in for alleged offences under the emergency law.

“Fifty years into our life in the Republic we find that justice - social, economic and political - remains an unrealised dream for millions of our fellow citizens. Nor surprisingly there is sullen resentment among the masses against their condition erupting often in violent forms in several parts of the country. Many a social upheaval can be traced to the neglect of the lowest tier of society, whose discontent moves towards the path of violence.”

Human rights activists faced with instances of unlawful arrest, confessions obtained under duress, torture and disappearances have laboured through the years to remedy the situation either by moderating the Regulations in line with international practice or by seeking judicial relief for the victims. Their task is often complicated by the fact that the view of the State is that human rights defenders are a “wing” of the armed opposition.

Human rights activists are the men and women of civil society committed to realising the ideals that all people should enjoy freedom from “fear” proclaimed in the Universal Declaration of Human Rights. These may be grass-roots activists who have joined in protest

35 Address to the Nation by the President of India - Republic Day 2000, 25th January 2000.
demonstrations in public places or it may be through a high public profile global presence arguing at the national or international level (like at the CHR in Geneva) in the defence of human rights. The methods civil society has employed in this work vary enormously. But in general wherever there has been persecution and oppression, when human rights have been denied or human dignity has been threatened, Sri Lankan human rights defenders have striven to protect the weak and hold to account the government for having abused their power. Local activists are often the only source of information about what is really happening in a country. The Sri Lanka civil society reports of abuses to the relevant United Nations bodies has certainly helped in bringing down the wall of silence that governments have tried to erect to conceal abuse.

Human rights defenders in Sri Lanka have often paid a high price for their courage. The new forms of harassment and repression carried out both by governments, and parts of uncivil society, include smear campaigns against individuals, attempts to criminalise activities essential to the defence of human rights, and the creation of legal obstacles in obtaining the means to do human rights work. There are regrettably some notable examples in our country of human rights defenders, working on the front line, who have been victims of reprisals, threats, arbitrary arrests, forced exile, torture, and disappearance or death.

**Constitutional Reform**

Civil society has made a vigorous and sustained input into the constitutional reform process. This process has heightened ever since the government embarked on a reform agenda from 1995 following on the rupture in the talks with the LTTE. The need for meaningful devolution leading to regional autonomy as a means of resolving the ethnic conflict has been the heart of the constitutional reform debate. Civil society’s strong advocacy of this objective has been greatly helped by the receptivity displayed by the government arm leading the process—namely the Ministry of Constitutional Affairs. A feature of the 5 year long public debate has also been the extremely vocal ‘civil’ society opposition to devolution and the prospect of regional autonomy. These social groups would favour a centralised form of State structure with safeguards for minorities through checks and balances. The religious elements in civil society too have polarised on this critical issue with the Christian clergy being more favourable to devolution while almost the entirety of the ‘Sangha’ led by the four Mahanayakes (the accepted leaders of the Sects or Chapters of the Buddhist clergy) have been violently opposed to the “treacherous attempt to separate the nation.” The opposition to the reform process has

36 Lipton’s Circle at lunchtime and Victoria Park have become favoured sites.

37 As co-leader of the government delegation to the CHR in the years 1990-1993 the writer has had first hand experience in observing the work of our human rights defenders on the front line of the struggle for human rights.

38 Take for example the elimination of the HR lawyers, Kanchana Abeypala, Wijedasa Liyanarachchi or the journalist Richard de Soyya by death squads and the exile of Prins Gunasekera.
been so potent - social formations such as the National Movement Against Terrorism and the ‘Mawbima Surakeema Viyaparaya’ also playing a highly vocal, though minor role, Cral Agency that the government has had to draw-back from its earlier positions on regional autonomy as exemplified in the August 1995 draft. In terms of the characterisation taken up in this Paper between civil and uncivil society it could be said that uncivil society too has been highly active, and to that extent successful, on this particular issue.

Humanitarian Access to the War Affected

The same elemental contradiction that has permeated ethnic conflict resolution can be seen in the effort of civil society in ensuring humanitarian access to those affected by the war. Those international and national NGOs who work behind the ‘enemy lines’ - euphemistically termed the “uncleared areas” - like UNHCR, ICRC, UNICEF, MSF (Medecins Sans Frontieres), SCF (Save the Children Fund), the local Red Cross and others usually do so under suspicion that they are helping the rebel cause. Other national NGOs focus their attention on so called ‘border villages’ which are ethnically different than the war zones in the belief that their needs are being ignored by the conventional aid givers. In this charged atmosphere over almost two decades of armed conflict civil society has by sustained pressure on the government and security apparatus been able to ensure at least a minimum supply of essential food items and medicine to people in territory in the war zone both inside and outside the control of the LTTE. A positive response to the charge that humanitarian relief is sporadic and unco-ordinated has been the formation of the Consortium of Humanitarian Agencies - an important civil society initiative to address what has been a perennial problem in the provision of humanitarian access.

Women’s Empowerment

The Sri Lanka Women’s Charter (1993) in the formulation of which civil society played a major role has been accepted as governments policy document on women. Based on the internationally accepted Convention on the Elimination of Discrimination against Women (CEDAW) it focuses on the priority concerns of the women of Sri Lanka and identifies the following vital rights - political and civil rights, rights within the family, right to education and training, right to economic activity and benefits, right to health care and nutrition, right to protection from social discrimination and the right to protection from gender based violence. The area of gender equality has engendered a very high level of civil society participation and involvement. This activity involving sustained advocacy has resulted in administrative and legislative reforms which have enhanced women’s role and status and

Fifty years of Civil Society Activism in Sri Lanka

may be reckoned from a long-term point of view as one of the real success stories of civil society activism. However several issues yet remain which demand attention - especially the gross under-representation of women in political and decision making arenas, the situation of female labour migrants, women at work in the formal and informal sectors and violence against women, including domestic violence. A recent positive development, greatly helped by civil society activism\textsuperscript{40} were the speedily concluded Court cases against the perpetrators of the rape and murder of Krishanti Kumaraswamy and Rita John.

Protecting the Environment

Civil society has had notable successes invoking violation of fundamental rights through the Courts, in the protection of the environment. The Eppawela Rock Phosphate mining project and the Norocholai Coal Power project have had to be abandoned by the government as a result of a long campaign by environmental activists which included sustained media support. In the 80’s the Kandalama Hotel project\textsuperscript{41} and the Voice of America project had to have substantial amendments made to proposed plans to accommodate the views of a coalition of activists. A feature of environmental activism has been the collaboration between different religious orders, Buddhist and Catholic, in a Solidarity Group, to achieve common goals. It needs to be observed that the focus of the environmental activists has been essentially on environmental protection and that long term social objectives of sustainable development - a balance which the global consensus at Rio particularly attempted to inject into the debate - has been overshadowed.

Environmental NGOs have played a valuable role in assisting those who need legal advice by providing a legal aid clinic on environmental issues. In fact environmental litigation which was unknown territory until a few years ago has been put on the litigation map, as it were, in Sri Lanka due to the efforts of these groups. They have certainly done much in the way of environmental education.

It is also undoubted that NGOs and the public have participated vigorously and positively in the decision making process relating to several projects. The Environment Act provides for public participation in environment impact assessment and national level NGOs particularly have been consistent in their study of these reports and their participation in public hearings on behalf of affected parties. Civil society contribution has therefore been considerable in this important area of national development.


\textsuperscript{41} The public agitation against pollution hazards compelled the Hotel industry to give high priority to conservation in its development plans. It is perhaps ironic that Kandalama Hotel has twice won global Environmental Awards for its important work in this area.
Right to Free and Fair Elections

Systematic and cynical manipulation of Elections laws, rules and procedures by governments in the last two decades has led to a vigorous movement in civil society to protect the voters right to a free and fair election. There have been several noteworthy successes. The attempt to postpone five Provincial Council Elections in the second half of 1998 on the grounds that the security situation was unsatisfactory was contested by civil society. Subsequently violation of fundamental rights action was instituted successfully in the Courts. The limits to civil society action in ensuring clean elections was graphically demonstrated in the Wayamba provincial Elections of 1998 which was rampant with impersonation, booth capture, stuffing of ballots, and an unparalleled degree of violence. However PAFFREL (Peoples Action for Free and Fair Elections) and CMEV (Centre for the Monitoring of Election Violence), in spite of repeated accusations of partiality continued with increasing public acceptance their role of monitoring election offences and reporting them. Civil society initiatives have also been responsible for stronger and more professional international monitoring of the country’s elections. The presence of the International Observers has had some limited chilling effect on election malpractice. Regrettably their major recommendations including the key one of the National Identity Card being made mandatory for voting has as yet not been accepted by either of the main parties. Civil society interest in ensuring free and fair elections have elicited innovative ideas recently such as the ‘million wearers of the yellow ribbon’ and the initiative of the Institute of Human Rights which has offered to support with free legal help, officials who may fall into trouble with State authorities for trying to ensure the observance of due procedures at election time.

Protecting the Rights of Children

Child rights activists have been prominent in the field for many years. Much of civil society endeavour had been through religious and charitable efforts directed at rescue and rehabilitation of orphaned, abandoned and abused children through their care in private run institutions. The media publicity about child adoption by foreigners elicited great interest and resulted in legal amendments which have considerably tightened procedures in adoption. It was with the ratification of the Convention of the Rights of the Child (CRC) in 1991 and the multi-party consensus on the Children’s Charter that civil society initiatives on the entire gamut of child rights - particularly the protection rights - proliferated. The growth of tourism along with its concomitant, sex tourism, led to the emergence of several groups, notably PEACE (Protecting Environment and Children Every Where) committed to the investigation and follow up of sexual abuse cases. Child labour in the informal sector and in domestic service and hazardous employment including child recruitment for the armed conflict also

44 Notably Section 360 (c) of the Penal Code (1995).
brought forth civil society responses which have finally resulted in policy, administrative and legislative remedial action by the State authorities. Children in armed conflict received close attention following the Gracha Machel report to the United Nations and an interesting civil society initiative - Children as Zones of Peace (CZOP) - comprising of a coalition of UN agencies, International NGOs, national level NGOs and individuals was commenced in 1997. The catalytic work of UNICEF and the ILO (International Labour Organisation) in supporting local civil society endeavours was invaluable. The intersection between volunteer effort in the education field and on labour issues bore fruit in the path breaking ‘Compulsory School Attendance regulations’ of 1997. This virtually sealed off child labour in domestic service by making it compulsory for all children between the ages of 5 to 14 to attend school. Concurrently the State by ratifying ILO Convention 138 has stipulated that the minimum age for admission to employment shall be 14. Civil society activism has certainly been a major contributor to these advances in the protection of child rights.

ADDRESSING EMERGING CHALLENGES TO CIVIL SOCIETY

What are the critical challenges? How do we meet them?

In a world in which the Sri Lankan State is seen as increasingly beset from within by an armed rebellion and ethnic tensions, and from outside by the frontier-transcending forces of globalisation, civil society, as we have defined it, has taken on a greater significance. The international community too now views the rise of civil society as a most promising political development. In the earlier section we have noted some examples of civil society activism which have strengthened democracy and the rule of law.

However, as some analysts45 have pointed out, there is the danger that we could go too far in seeing civil society as the panacea for all our ills and this may be one of the challenges we need to address. The problem arises from the fact that we usually use the term ‘civil society’ to apply to groups and social trends of which we approve. Our ideal society is based on pluralism and tolerance, in which people trust and assist one another and solidarity is deeply established, and the State is responsive rather than repressive. In a way ‘civil society’ has become a conventional term to describe all those democratically minded groups that have opposed and sometimes brought about the overthrow of repressive regimes. Marcos’ Philippines and Husak’s Czechoslovakia are two favoured examples. The theory is that where civil society is absent, repressive forces have a freer hand and where it is present, it is supposed to be a protective wall against conflict, exploitation and want. Civil society has therefore come to be considered as encompassing everything that is not the State (which by definition is authoritarian, corrupt and inefficient) and as exemplifying a set of inherently democratic values. Accordingly ipse facto strengthening civil society is the key to creating

45 See particularly the writings of David Rieff and Richard Crooks.
or sustaining a healthy polity. The danger of this line of reasoning is that the conditions may not be exactly as premised and that we may be guilty of using ‘civil society’ not only as a descriptive term but as a prescriptive one. Are we misusing what is properly a descriptive term as an ideological or moral one?

There is a challenge here to draw lessons from some instances which contradict the conventional wisdom.

- The example of Rwanda\textsuperscript{46} which was viewed by development experts before the genocide as having one of the most developed civil societies in Africa. So one cannot assume that the existence of a vibrant civil society or its size, by themselves are a sure measure of a country’s political health or a guarantee against chaos.

- The admiration for civil society in the North and the shift from channelling assistance to governments, to NGOs for local capacity building - of NGOs arose at the same time as development aid from most major donor countries was falling.

- Civil society is being increasingly played up as an essential part of liberal market capitalism - the dominant ideology of the post cold-war period.\textsuperscript{47}

- When civil society is advocated to the extent of undermining the State, we undermine the only remaining force that has the potential to stand up against globalisation.

- Can civil society cope where nations have failed? Critics of civil society have argued that “without a treasury, a legislature or an army at its disposal, civil society is less equipped to confront the challenges of globalisation than nations are, and more likely to be wracked by divisions based on region and the self-interest of the single-issue groups that form the nucleus of the civil society movement.”\textsuperscript{48}

As against the challenge that civil society faces and will face in the future of being looked up to as the panacea of all ills (an act of faith that can scarcely be justified in the face of the trends noted above), there is the critique of civil society which accentuates the reality of its powerlessness in situations when the authoritarian State is determined to have its way. Many instances of this kind where as cynically put, “the dogs bark but the caravan moves on”, come to mind.\textsuperscript{49} The question that is asked is whether being a watchdog means anything

\textsuperscript{46} See Peter Uvin in \textit{Aiding Violence}.

\textsuperscript{47} See for example, Executive Summary of the 1997 Carnegie Commission on ‘Preventing Deadly Conflict where civil society is assigned a pivotal role.’

\textsuperscript{48} Rieff, David, ‘The false dawn of civil society.’

\textsuperscript{49} Take for example the manner in which some appointments to the judiciary have been effected over the past five decades or the unprecedented malpractice at the: Wayamba Provincial Elections in spite of the sustained and vigorous protest and work of several elements of civil society.
more than just that, when the chips are really down. A question that civil society activists need to ponder on in the light of sometimes extravagant claims made on its behalf.

As the discussion of the power and functions of the NGO Secretariat showed, Sri Lankan governments - a bipartisan consensus here - have come out clearly in favour of controlling the work of NGOs, a critical component of civil society. The details we have assembled on NGO registration - see Table 2 - indicate that most NGOs, what ever their private feelings on the matter, have fallen in line with the government dictate and have been compelled to submit details of their internal organisation and work programmes which must seriously limit their flexibility and freedom of decision making. The power of the Minister of Social Services to appoint Boards of Management to replace duly elected Executive Committees of NGOs for apparent irregularity in running their affairs is now untrammelled. How does civil society meet this challenge? Most often NGOs back off from contestation and follow the safe and time honoured dictum by which some of the early social service NGOs survived, namely ‘to complement and supplement the work of governments.’

A related dimension is that of the dilemma of ‘development NGOs’ in times of conflict. Development NGOs are here defined as those NGOs whose primary concern is the production and distribution of resources and social development. Their chief objective is to improve the lot of the poor which given the level of poverty in the country at around 23 per cent provides ample opportunities for service. Their role in the context of what is called the ethnic conflict is complex and surfaces certain inherent contradictions of these organisations. Most often the discussion of NGOs/civil society is carried out on the assumption of its neutrality and the belief that it performs an instrumentalist role. But NGOs themselves are the product of the historical development of their societies. They have different historical backgrounds, arise from diverse social bases, and represent varying ideologies and interests. NGOs, in the form of their institutional leaders are linked to other actors and sometimes to the State itself. So NGOs are in fact far from being neutral in how they act in particular situations. The ethnic conflict which has polarised Sri Lankan society has had its own impact on the NGO community. A good example of this is the Sri Lanka Red Cross whose branches in the North with an ethnic leadership different from that in the South display differing attitudes and motivations to the conflict. A similar differentiation along ethnic lines can be observed in the response and attitudes of parts of the Christian clergy. Of course the positive aspect of this being on both sides of the divide should not be ignored and a vital bridge-building role in conflict resolution offers interesting possibilities here.


But the question remains of the so-called ‘non-political’ role of the development NGOs. As Bastian points out, development itself is a very political act and development NGOs “make interventions into the various relationships in society where there are constant struggles in terms of access to resources and various forms of power.”

In the situation of protracted conflict in which they have found themselves many NGOs have adopted the strategy of taking care of the social costs of the war - relief and rehabilitation etc. - and avoided the fundamental issues connected with the reform of the Sri Lankan State. This appears the only course open to them to continue their work but it does lead to the proposition that they then become open to manipulation, especially in terms of the military arm of the State which plays an important role in this area of activity. An interesting example of the dilemma facing development NGOs and the manner in which their relationships with the State have been conceptualised is found in the Code of Ethics formulated for NGOs by the NGO National Action Front in September 1995. NGOs need ‘recognition of the State’ and they pledge to ‘solemnly’ and ‘dutifully’ follow the Code within the ‘national framework of a sovereign State’, etc.

How does civil society position itself to respond to some of the compelling needs that have been outlined above? In a complex and changing environment with some central challenges like the resolution of the ethnic question and poverty alleviation still potent, focused attention on a few structural elements of civil society may be helpful:

- Strengthen institutional organisation. As government hopefully downsizes in the next decade, the opportunities for NGO/ civil society will broaden. NGOs will need to be ready with their management systems professionalised to take up these challenges. There will be opportunities for profit too, to move away from donor dependency and make the NGOs self-sufficient and sustainable. Following on the disclosures of patchy accounting of public contributions, by the NGO Commission, even in the largest and best known NGOs, stronger accountability systems for all incomes received will need to be introduced. Civil society organisations will increasingly and invariably be officially or manifestly accountable to public authorities such as the Auditor General. The credibility of civil society organisations will be measured by their level of transparency.

- There is the problem of internal and inclusive democracy. Elections alone are not enough. Leaders of associations, pressure groups and NGOs - unlike politicians in democracies - are accountable to no one except their members and those who provide them with funds. This may seem a minor question to those committed to a particular cause. But the problem arises because civil society is claiming that it offers a better alternative, or at least an important voice, to that of governments and parliaments; and not just on a single issue but on all the pressing political,

52 Supra., n, 50 p.55.

social and economic questions of the time. And as some critics aver, “leaders of such groups, unlike politicians, do not have to campaign, hold office, allow the public to see their tax returns or stand for re-election.” Civil society should not become the “new medievalism, with the leaders of the NGOs as feudal lords.” Civil society will need to be looked at not as an alternative to government but as complementing government whenever necessary. The critical attribute will be the ability to work in partnership with government where necessary without losing ones autonomy.

- One of the benefits of globalisation and the new communication networks - the fax and the internet in particular - is that the small players are being empowered. It is on record that the hitherto unheard voices of NGOs collectively helped halt the secretive Multilateral Agreement on Investment in 1998. One of the opportunities that can be seized by civil society is that the barriers of size, time, and distance are coming down for small NGOs, remote academics and specialists in the field. The new technology can help garner their voices.

- It is necessary to understand that governments are not as monolithic and homogeneous as they appear to be. Identifying and utilising the ‘soft entry’ points to advocate change of prevailing governmental attitudes and behaviours could be a valuable strategic approach.

- The concept of “social capital”, which social scientists have coined, is regarded as the ‘critical mass’ for the vibrancy of civil society. One of the key elements of social capacity is trust - a concept difficult to measure and articulate since it is more qualitative than numerical. Are some of the present difficulties, which NGOs are facing in the way of recruiting and retaining volunteers and networking effectively with other groups to do with the matter of building and sustaining trust? Are the modernist or post-modernist tendencies now influencing our society leading to what has been pithily expressed in the Sinhala language as the ‘kotu thappa sankalpay’ (the concept of the individual, alienated from society, comfortably ensconced in his fortress home) in which considerations of self have become paramount? It is probably no cause for surprise that this recent malady in the global South coincides with the agonised debate now going on among American intellectuals over the “alleged crisis of declining participation, social fragmentation and lack of civic virtue in the very home of pluralist liberal democracy.” Trust is also a factor governing relations between NGOs. Duplication of the work of NGOs has resulted in many problems. It is no secret that NGOs compete among themselves for scarce resources and work in secret. Networking and openness in one’s dealings helps to build trust.

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54 David Rieff.
55 Ibid.
Civil society initiatives are strengthened by becoming inclusive. Broadening partnerships with other major groups like the Media, the private sector, the religious and regional opinion leaders, as manifested in several examples, both locally and abroad, can only increase impact and acceptance.

The ever present tension between national level NGOs and those who work at the grassroots should be addressed. The former are said to operate without a knowledge of the ground reality, while the latter are accused of ignoring the broad picture. There is a case for a healthier relationship between the two each complementing the undoubted strengths of the other.

In conclusion, while much has been achieved in the past 50 years in improving the prospects for peace, democracy, pluralism and equality in Sri Lanka for which civil society can take credit, there still remains an unfinished second generation agenda of formidable proportions. Among these are:

- Women, children and minority groups who suffer discrimination in various ways. They need reforms in laws, norms and the institutional structures which reproduce inequalities.

- Freedom from want especially for the vulnerable and marginalised, who based on the poverty index, who now constitute one in every five persons in the country. Sri Lanka’s economic structure and systems have to honour the rights and obligations of the many men, women and children who are presently humiliated by want.

- Although formally proscribed by Law, the elimination of torture and the prosecution of those who engage in it, sometimes with impunity. This is central to the struggle for freedom of personal security.

- Although the country has a long history of regular elections the right to choose governments freely and without fear and the freedom to participate in decisions that affect their lives.

- Securing freedom against injustice in the private and public domains and the arbitrary exercise of power by administrative or elected officials.

- Freedom to work in the formal and informal sectors (the plantations and domestic service need special focus) without humiliation and exploitation.

These may appear ambitious goals but the means available in the next half-century hold the possibility that these aspirations can become a reality for all Sri Lanka’s people.
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A GENERAL OVERVIEW OF THE MEDIA IN SRI LANKA SINCE INDEPENDENCE

Victor Gunewardena*

INTRODUCTION

The period since Sri Lanka’s Independence in 1948 has witnessed vast changes in several spheres of life in the country, in particular in the overall welfare and well-being of its people. While the country’s population doubled between the Census of 1946 from 6,657,000 to 14,847,000 at the Census of 1981, its annual rate of growth reflected a decline from 1.7% in 1981 to 1.4% by 1995, registering a population of 18,112,000 and an estimated population of 19,100,000 in 2000.

Three other aspects of the country’s population profile are significant in relation to an understanding of the media environment, especially in terms of access and exposure to the different media by their audiences.

(i) The distribution of the total population as between urban and rural sectors was 15.4% in the former in 1946 and 84.6% in the latter. It must be noted, however, that the total population in Town Council areas was also included under “rural” in the census of 1946.

At the Census of 1981 the rural component of the population had declined to 72.2% while the urban sector had increased to 21.5 per cent. Since then this proportion of distribution has remained somewhat stable. Thus, there is a very large rural population, which also has become increasingly exposed to the various mass media, particularly during the past 20 years.

(ii) A second significant aspect of the population data is the increase in adult life expectancy from 42.2 years in 1946 to 72.5 years in 1991 and the increase in

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male life expectancy from 43.9 years to 70.1 years during the same period and that of females from 41.6 years to 74.8 years.

(iii) These figures combined with the increase in literacy from 57.8% in 1946 to 90.1% in 1997 together with significant increases in life expectancy for both males and females reflect major improvements in health care and social services which enable the bulk of the population to lead long lives. Additionally, there have been major increases in the enrolment and retention rates in primary, secondary and tertiary education for both males and females, during the past 50 years.

**Human Development**

It is pertinent to note that according to the first National Human Development Report (NHDR) for Sri Lanka of 1998, the country’s social development:

“... is well above the world average. In terms of basic health and education indicators, the level of achievement in the country approaches the levels seen in industrial countries. The main reason for this high performance in basic social indicators has been strong State investment in education and health over a period of more than fifty years.”

However, the Sri Lanka NHDR also reveals a pattern of uneven and unequal development marked by deprivation and disparity of access to relevant resources among the country’s various districts and within them. Notwithstanding these facts, the data emerging from several media surveys conducted during the 1990s indicate that overall, educational attainment has provided the population at large with an appreciable degree of media literacy which has made possible a greater exposure to the various media by young, middle-aged and older persons in the population.

But the crucial issue which will be examined later in this chapter is whether the expansion of media outlets and their reach has made media more responsible and responsive and helped improve the access of ordinary people to information on their rights as citizens to participate in decisions that affect their lives.

**MEDIA AT INDEPENDENCE**

The major thrust of politics in the country during the first half of the 20th century had been the attainment of Independence. To achieve this goal various associations had been formed and the views of the different groups were reflected chiefly in the main English language

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newspapers of the time. The largest and most influential newspaper publishing company in 1948 was the Associated Newspapers of Ceylon Limited (ANCL), founded in November 1926 by D.R. Wijewardene. Its English newspapers then were the “Ceylon Daily News” (begun in 1918), the “Ceylon Observer” (founded in 1834 under different auspices) and the “Sunday Observer” (founded in 1928). The ANCL’s Sinhala language newspapers were the “Dinamina” (1909) and on Sundays the “Silumina” (1930). Its Tamil daily was the “Thinakaran” (1932) and on Sundays it was the “Thinakaran Varamanjadi” (May 1948).

While Wijewardene was a major figure in the country’s reform movement and in the agitation for Independence, the ANCL’s journalists did not enjoy real freedom of statement. They were in the words of Wijewardene’s biographer, H.A.J. Hulugalle, neither initiators nor creators but collaborators.²

The incongruous side of Wijewardene’s personality was his refusal to recognise trade unions. When a resolution on these lines proposed by him at a meeting of the Ceylon Employers’ Federation was lost he promptly resigned from it. Earlier, in 1929 he had broken a strike of linotype operators at the ANCL by getting down operators from India and he did not permit the formation of any trade unions within his establishment, thus denying to his employees the freedom of association.³

Further, the ANCL journals at the time did not reflect the emergence of a rural-based intelligentsia with a variety of interests as did the publication of as many as 188 Sinhala newspapers and periodicals between 1932 and 1934 alone. This was preceded between 1928 and 1931 with the publication of 187 such Sinhala journals.

The ANCL journals also did not publicise the politicisation of the working class which was taking place under the influence of the Marxist parties that had been formed in the mid-1930’s. The Left movement, which was gaining ground in the country, was portrayed as a subversive influence and a threat to religion as well.

Besides the Left movement there were other groups, political and otherwise, that were pressing for much-needed labour and social legislation. On the one hand, there was the Labour Party and on the other, a small group of intellectuals led by a socially activist Catholic priest, Fr. Peter Pillai, who published the journal “Social Justice.” The government responded by appointing a Social Service Commission in 1947 with Sir Ivor Jennings as chairman and Mr. N.E. Weerasooria QC and Fr. Peter Pillai as the other members. The recommendations of the Commission led to the enactment of several pieces of labour and social security legislation, and the setting up of a Department of Social Services in 1947.

The mainstream newspapers of the time played a reactive role rather than a proactive and advocacy one. In contrast, the debate on the Free Education Scheme introduced in 1945 saw the English newspapers promoting discussion by the public and counselling caution and moderation in the implementation of the scheme.

After the country won Independence, the ANCL newspapers perceived their role as one supportive of the UNP government of the day in consolidating that achievement. The manner in which such support to be extended would be largely in conformity with the policies of its founder, whose political affiliations were no secret.

In the immediate aftermath of Independence the ANCL gave the pursuit of professionalism in journalism further impetus by recruiting more graduates than earlier to its respective editorial departments and provided them with training both here and abroad. An Economic Research Unit was also set up in the “Ceylon Daily News” about the same time as the Central Bank was established (1950). This unit facilitated the work of looking analytically at several aspects of the economy and providing an informed basis for public discourse through the medium of the newspaper.

**Times of Ceylon Ltd.**

Six years before his death (in 1950) Wijewardene had sought to extend his newspaper enterprise by bidding for the majority shareholdings of the Times of Ceylon Ltd. which were up for sale in London. However, he was late because a group of Ceylonese had already bought them from the European group that had owned them after the time of the Capper family, which founded the newspaper in 1846. The “Times of Ceylon” had earned a reputation as being the “Planters Paper” in that it catered largely to the interests of the European planting community.

With the change of ownership the newspaper company’s horizons widened. In 1947 it launched a Sinhala daily “Lankadeeepa”, which in a few years became a worthy and vibrant competitor with the ANCL’s “Dinamina” for the growing Sinhala readership. In contrast with the “Dinamina”, which reflected much the same policy as the “Ceylon Daily News”, the “Lankadeeepa” articulated and promoted interests that were much different from those of its sister paper, “The Times of Ceylon.”

The new management of the Times of Ceylon Ltd. did not fancy editorial autonomy as being independent of the company’s policy not only in general but also on specific issues. Consequently, it soon lost the services of a distinguished journalist, Frank Moraes, whom it had appointed as Editor of “The Times of Ceylon.” The pertinent remark he made at a public farewell dinner to him, that “a newspaper is best run by a live editor and a dead proprietor” is symptomatic of the functional constraints that journalists had to contend with then.
The company also lost the services of another capable editor in D.B. Dhanapala, whose perspectives on developing the “Lankadeepa” were at variance with those of the management.

Similar constraints were experienced by Tori de Souza as Editor-in-Chief of the company’s English newspapers, and later by Fred de Silva as the first editor of the “Ceylon Daily Mirror.”

When the company launched an English morning daily, “The Morning Times” in 1954, de Souza as its editor soon realised that the venture was subject to managerial constraints in what the newspaper could articulate and in the outlay on its development. So, he once told his staff more in anger than in desperation “there was a time when editors ran newspapers, now managers are trying to run them!” In four years the newspaper folded up.

In August 1975 the management of the Times of Ceylon Ltd. passed to a body of persons, who within a few weeks of their taking over the administration closed down “The Times of Ceylon,” which had been in existence since 1846. It did so ostensibly to curtail its financial liabilities and in the belief that the viable alternative was its morning daily, the “Ceylon Daily Mirror” which it believed could rival the “Ceylon Daily News.” It turned out that the newspaper was no match for its ANCL rival nor did it ensure the financial viability of the company, which continued to publish “The Sunday Times” and the “Lankadeepa.”

The company’s continuance as a newspaper publishing establishment was in jeopardy. Meanwhile, a group of businessmen whose political affiliations were with the Sri Lanka Freedom Party (SLFP), sought to obtain a controlling interest in the company. To forestall that move the UNP government, which had come to power in the general election of July 1977, intervened under the provisions of the Business Undertakings Acquisition Act No. 35 of 1971. Thereafter the company functioned under a Competent Authority appointed by the government, but the newspapers’ sales and influence declined despite State assistance. Eventually the establishment was closed down in January 1985.

A newspaper group that was in existence at the dawn of Independence and continues to publish to date is the Express Newspapers (Ceylon) Ltd., founded in 1930. Among its shareholders at one time were J.R. Jayewardene and Esmond Wickremasinghe. Its Tamil daily, “Virakesari” was begun in 1930 and its Tamil weekly in 1932. Since 1995 it has published an English weekly, the “Weekend Express.”

CONTROVERSIAL ISSUES

The 25 years between 1948 and 1973 witnessed several public controversies over a wide range of issues that impinged on law, justice, equity and governance respectively. The newspapers provided for a vigorous public debate and took sides, too, on some issues.
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The major controversial issues were:

a) the Free Education Scheme - from about 1943 till 1948
b) medium of instruction in schools - 1945 - 1951
c) Official Language policy - 1945 - 1964
d) Take-over of assisted schools - 1960 - 1961
e) Rubber-Rice Barter Pact with China - 1952
f) Gal Oya Valley development project - 1953
g) Paddy Lands Bill - 1957
h) Bandaranaike-Chelvanayakam Pact - 1956
i) Suspension of Capital Punishment Bill - 1956
j) Repeal of the above Act in November 1959 after the assassination of S.W.R.D. Bandaranaike
k) Nationalisation of bus transport - 1958
l) Nationalisation of port stevedoring and tally services - 1958
m) Nationalisation of the oil companies - 1964
n) Nationalisation of insurance - 1964
o) Cessation of private medical practice for government doctors and the introduction of channel practice - 1964
p) Press Commission recommendations - 1963
q) Newspaper Corporation of Ceylon Bill - November 1964
r) Implementation of the Tamil Language (Special Provisions) Bill - 1966
t) Termination of Employment of Workmen (Special Provisions) Act - 1971
u) Administration of Justice Law - 1973 - 1974
v) Press Council Law - 1973
w) ANCL Law - 1973
x) Four rent laws enacted between 1970 and 1973

The various newspapers opened their columns to the statement of different points of view in articles and letters on these issues. However, editorially each paper indicated what its
particular stance was. At times, within the same newspaper group each language paper adopted a somewhat different line both in the scope of coverage and statement of opinion. Such an attitude came in for criticism on the ground of lack of consistency based on principles. On the other hand, those who defended such varying stances sought to explain their position on the ground that newspaper readerships are not homogeneous in composition and that they reflect different social and cultural interests. They argued that what one section of the same polity or community perceives as a threat to its rights, another section of that community interprets as an attempt to foster equity and whittle down privilege.

It is also pertinent to note that after the general election of 1952 the ANCL newspapers read the mind of the electorate incorrectly. The party or parties they campaigned for in 1956, 1960, 1970, 1977 and 1994 lost the elections. In the last two elections as at the general election of 2000 the ANCL functioned more or less as a stridently politically partisan newspaper group.

The changes that took place between 1948 and 1973 were both rapid and radical. The rout of the UNP in 1956, and the revolutionary changes that followed were not anticipated by the English language mainstream newspapers. It would also appear that they catered to a readership which by and large was not aware of how the rest of the population lived and of the environment of deprivation and disparity of the indigenous language speakers - Sinhala and Tamil.

It is also significant that much of the legislation which the UNP was against while in opposition, was retained when it was returned to power. However, some laws were amended such as the Paddy Lands Act, which was incorporated in the Agrarian Services legislation. Some other laws were not effectively implemented, leaving their loopholes to be exploited. Still other laws remained on the statute book, but their enforcement was tardy or ineffectual.

**Information Department**

A Department of Information was set up in 1950 to keep the public and the press informed of government activities by distributing official news to the press through Ministry Press Officers and Press Conferences. The Department also advised other government departments on publicity matters, supplied publicity material to the country’s diplomatic missions, published journals and brochures and prepared films for showing both here and abroad.

The setting up of a separate department for the diffusion of government information was in recognition of the State’s obligation to keep the public informed of its various activities. However, the information so diffused was minimal and was intended to promote public relations for the government and sometimes for the Minister in charge of the particular subject.
The necessity for the public to be kept informed of government activity did not come from a conviction that the public have a right to information. Rather, there had been an Information Office during World War II. It was discontinued when hostilities ceased. The main wartime function of such an office was to control the flow of information from governmental sources in such a manner that it would not jeopardise the country’s war effort to support the Allies.

A major shortcoming of the Information Department as a provider of news of public interest in governmental activity was the absence of professionalism. Consequently, much of the information that was supplied mainly through the various Ministry Press Officers fell into the category of “sunshine stories” - proposals regarding Ministry projects and job potential. The various processes of development that were taking place in several sectors of the economy, the achievements particularly in health care and provision of education, were seldom interpreted or analysed for the benefit of the public. Handouts in most instances were in official jargon. Meanwhile, the data collected routinely by various departments were compiled and recorded quarterly, bi-annually and annually but were not analysed and interpreted by the Information Department. Some such material as became available to the newspapers from departmental as well as other sources were publicised as news items and feature articles and commented on editorially.

**Newspaper Circulation and Advertising**

During the first two decades after Independence advertisers could rely on the Audit Bureau of Circulation (ABC) for accurate information on newspaper circulation. Such data were necessary for advertising agencies in order to advise clients on the placing of advertisements. The data were also required in order to qualify for the receipt of different types of governmental advertising.

With the ABC ceasing to function, circulation figures were provided by the newspapers themselves as well as by private media survey organisations.

The advertising industry expanded with the growth of media as well as with the expansion of the economy. The symbiotic relationship between media and advertising became pronounced and the space devoted to advertisements in some of the mainstream newspapers was invariably more than 50% of the entire content of the newspapers.

The growth of advertising and the income support derived by newspapers from some of the major advertisements also meant indirect pressure not to address certain social issues or to soft pedal them. Examples are tobacco and alcohol.

The feared threat to the volume of newspaper advertising from the advent of commercial radio in 1950 did not materialise to any adverse extent. This was partly due to the State monopoly also of commercial radio until private broadcasting was allowed in 1993.
Radio

Since its inception in 1925 radio broadcasting had been a government monopoly up to 1993. In its early phase broadcasting was largely a medium of entertainment and a vehicle of cultural diffusion with daily brief bulletins of news. Its audience expansion was largely because of the novelty of the medium and its relative cheapness of equipment.

With the conversion of Radio Ceylon from a government department to the Ceylon Broadcasting Corporation (CBC) in January 1967 the organisation sought to address itself to those tasks for which it has a “potential as a catalyst for social change.”4 The CBC “committed itself firmly to the position that broadcasting must set itself socially relevant goals. It must take upon itself, and has the capacity to shoulder responsibility for helping in the country’s striving for economic improvement.”

This was the perception of its first Director-General Neville D. Jayaweera, in whose view “a sophisticated mass communication apparatus, conscious of its social roles is the answer to the problem.”

Among the priorities the CBC set itself was to train its staff in the skills required for working in the country’s peculiar environment. Accordingly, a Training Institute was set up and a trainer from the BBC, Stewart Wavell, directed it and produced a training manual as well.

Radio had been the subject of five Commissions or Committees of inquiry. The first was headed by N.E. Weerasooria QC, the second by H.A.J. Hulugalle in 1965, and the third by T.B.M. Ekanayake in 1978. Two years later came the Vajirabuddhi Committee on the Reorganisation of the Sinhala Services, and in 1985 the Sarath Perera Committee.

These bodies provided useful fora for the articulation of views and criticisms of the broadcasting services. Consequently, new policies were formulated and several changes were introduced. However, the malaise with broadcasting was correctly diagnosed by Neville Jayaweera himself several years after he had ceased being Director-General of the CBC. In a talk on “Professionalism in Broadcasting” delivered at the SLBC in 1978 he made the following remarks:

“…every time we try to change the consciousness of the people through mass media, not only do we fail to do so, the consciousness of the people changes precisely in the opposite way. That has to do with the nature of social processes and with social attitudes. Give me a society without political platforms, and you can do a perfect job… What we have to understand is the

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nature of that social process and until that happens we would not be in a position to use media as an instrument of social change."\(^5\)

Political meddling, trade unions enjoying political preferment and the appointment to key positions of persons who lack the required competence but enjoy political patronage are among the serious constraints that affect broadcasting in Sri Lanka. Successive governments have used State radio to further narrow partisan purposes and have done so clumsily.

The problem has been compounded in later years by the provisions of the SLBC Act No. 37 of 1966 which enjoin the Board of Directors to follow general or specific directives of the Minister in charge of the subject. With the introduction of private broadcasting in 1993 the listenership has alternatives for both news and entertainment. The advent of television and its availability through private stations as well affects the credibility of the state-run media institutions.

However, the radio as a medium of mass communication in Sri Lanka, available even to poor households, has grown by leaps and bounds during the past 75 years. It is estimated that there are nearly 3.5 million radio receivers. This would imply that over 75% of households each have a radio. Its wide reach has been utilised by advertising agencies to market certain types of commodities in rural areas too.

THE PERIOD 1973 - 2000

The second part of this chapter covers a period during which the constraints that impinge on the functioning of media became more pronounced. It was also a period marked by the introduction of two republican constitutions, which contained, among other matters, guarantees on fundamental rights including that on freedom of speech, statement and publication. However, permissible restrictions on these rights are also spelt out. The 1978 Constitution provides for the justiciability of the guaranteed rights explicitly, whereas the 1972 Constitution did not state so in explicit terms. The proposed Draft Constitution enhanced the scope of some fundamental rights and sought to make the permissible restrictions on freedom of statement more in keeping with those contained in the International Covenant on Civil and Political Rights, which Sri Lanka has ratified.

The greater part of this period was marked by two numerically strong governments - the United Front Government of Sirimavo Bandaranaike, from 1970 to 1977, and the UNP Government that was elected to power in July 1977 and which stayed on until 1994 under the leadership successively of Executive Presidents J.R. Jayewardene, R. Premadasa and D.B. Wijetunge. This strength of numbers, the enormous powers of the Executive Presidency

and the absence of an effective opposition in Parliament made the passage of even harsh legislation easy and dulled the ruling party’s sense of accountability to the polity. Also, its insensitivity to the unfulfilled aspirations of the growing numbers of youth unemployed and their sense of alienation from the mainstream of politics among other factors led to the JVP insurrection of 1971 and 1988-89 and the Tamil youth militancy beginning in 1971 and continuing in greater intensity of violence.

It was also a period characterised by electoral violence, repressive violence by agents of the State, two indemnity laws, criminalisation of politics and corruption in public life.

Press Legislation

The two laws that were enacted in 1973, i.e. the Sri Lanka Press Council Law and the Associated Newspapers of Ceylon Ltd. (Special Provisions) Law stemmed from the recommendations of the Press Commission in 1963. Having examined the structure of ownership of the various newspaper publishing companies, the Commission was of the view that “by reason of the concentration of ownership of the four principal newspaper companies in the hands of four families and a few individuals there is a definite monopoly of the Press.”

The Commission went on to say: “We regret to observe that the Press of this country almost as a whole has not conformed to the general principles of journalism followed in democratic countries. The witnesses who appeared before us charged the Press with the publication of news which was slanted, distorted or fabricated in order to serve the masters who own these newspapers.”

The ANCL law sought to broad base the ownership of the company by setting in motion a legal process by which ownership would be transferred from the small family group to trade unions, co-operative societies and members of the public. The shareholders at the time of the enactment of the Law were permitted to retain up to 25% of the total shares of the company provided that no single shareholder held more than 2% of the total number of shares under the new arrangements. The remaining shares were to vest in the Public Trustee on behalf of the government. He was required on the directions of the relevant Minister to sell the shares held by him to public organisations and members of the public, none of whom, however could own more than 2% of the total number of shares of the company.

However, no directive has been given by the relevant Minister to distribute the shares as prescribed in the law. Instead, the United Front Government of Sirimavo Bandaranaike

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7 Ibid.
used the newspapers of the ANCL in a partisan manner and for propagandist presentation of news. The “officialisation” of news supply resulted in a lack of objectivity and reluctance to be critical of government policies and performance.

The UNP, which had opposed the ANCL legislation when it was introduced, made similar use of its publications when it came to power in 1977 and continued to do so until its defeat in 1994. Both parties used the ANCL in a stridently partisan manner especially in the election campaigns of 1977 and 1994 respectively. Not surprisingly, however, the party, which the ANCL publications supported at the two elections was defeated. Similar partisanship was witnessed during the PA administration from 1994 to 2000 and during the general election campaign.

What was especially obnoxious was the PA Government reneging on its election pledge made in 1994 that it would take action to broad base the ownership of ANCL. It took no action to implement the recommendations of the Sidat Nandalochana Committee report issued in 1994 indicating how the law could be implemented so as to conform to the objectives of the original legislation.

**Press Council Law**

The Press Council Law No. 5 of 1973 has both laudable as well as objectionable features. Its objectives are commendable, but its implementation leaves much to be desired. It is significant that during the past 27 years of its operation over 1,700 cases have been filed before the Council seeking redress for incorrect, distorted or improper publication. Persons and institutions aggrieved by incorrect publication which has not been corrected even after complaint to the newspaper concerned, have obtained redress from the Press Council. The burden of proof having been established by the complainant at the inquiry, the Council can grant redress by ordering a correction, censure of the newspaper or an apology by it. Unlike defamation proceedings in a court of law, which is generally tardy and expensive, this procedure enables the aggrieved party to obtain redress easily.

Another positive feature is the protection of confidentiality of the source of information at inquiries conducted by the Council. However, this protection does not extend to proceedings in a court of law.

Yet another salutary feature is that it provides for the drafting of a Code of Ethics for newspaper journalists. The Code was drafted by a committee of newspaper editors, approved by Parliament and has been in operation since October 1981. The principles enunciated by the Code are comparable with those found in similar codes for journalists elsewhere, although they are not as comprehensive as, for instance, the UK National Union of Journalists Code or the 1992 Press Complaints Committee Code or the professional principles agreed on by the International Federation of Journalists in Bordeaux in 1954.
The Editors’ Guild and the Newspaper Society of Sri Lanka would appear to favour a self-regulatory professional body, which would draw up its own Code. However, such a body and a code although talked about for the past two years or so are not a reality yet.

Meanwhile, some newspapers do not observe ethical norms even as an aspect of professional discipline.

Among the obnoxious features of the Press Council Law are:

a) the composition of the Council, which could have a taint of bias towards the government of the day. Besides, the Law does not require that the Council members should have any special competence, which would enable them to perform the stipulated functions;

b) the provisions of Section 16 of the Law have a restrictive impact on the information process in that even information about Cabinet decisions cannot be published without proper authorisation. This also includes information about proposed legislation. These provisions are at variance with some of the objectives of the Press Council Law itself in that freedom of access to information and its diffusion are subject to restraint;

c) Section 12 of the Press Council Law No. 5 of 1973 creates an offence of contempt of the Council and is punishable by the Supreme Court under section 47 of the Courts Ordinance as if it were an offence of contempt committed against or in disrespect of the authority of that Court;

d) the Council is also empowered to inquire into matters which deal with official secrets. But this term is defined vaguely and broadly in the Official Secrets Act No. 32 of 1955. Therefore, that Act needs to be repealed or drastically amended so that the concept of official secret is carefully and narrowly defined and any transgression thereof should be a matter for the appropriate court rather than the Council;

e) the provision in Section 16 enabling the Council to deal with profane or obscene publication should be amended so that any alleged offender could be tried under the Profane Publications Act No. 41 of 1958 or the Obscene Publications Ordinance No. 4 of 1927 by the appropriate Court. An anomaly in respect of alleged obscenity in newspapers is that the 1983 amendment to that Act brought in a new category of offence, namely production, screening, viewing or possession of obscene video cassettes. But such offences would be triable only by the appropriate Court. In respect of newspapers, however, obscenity is brought within
the purview of the Press Council, whereas obscenity in the electronic media is triable only by a Court of Law.

Other Legal Constraints

While the foregoing two laws enacted in 1973 pertain specifically to newspaper publications, there are several other laws, some general in application and others which constitute constraints on publication by all mass media and not newspapers only. The task of examining such laws affecting media freedom and freedom of information and advising the government on the need for reform and introduction of new laws was entrusted in January 1995 by the then Minister for Media to a Committee, which was chaired by R.K.W. Goonesekere. The Committee issued its report in May 1997 and while one of its 14 recommendations was implemented in September 1997, the rest were referred to a Select Committee of Parliament in February 1998. Its deliberations were not concluded even at the dissolution of Parliament in 2000.

The law that was rescinded in 1997 was the amendment introduced in March 1978 to the Parliament (Powers and Privileges) Act of 1953 whereby Parliament was vested with the power to fine and punish, concurrently with the Supreme Court. The first case under this amendment was that pertaining to a caption mix-up of a picture of the then Minister of Foreign Affairs, A.C.S. Hameed. It resulted in the Editor and Deputy Editor of the “Observer” being each fined for breach of privilege.

A sequel to the case was a four-part article by S. Nadesan QC, in the “Sun” newspaper commenting on the need for a clearly defined procedure if Parliament is to function as a Court on issues of privilege. The five-judge bench of the Supreme Court which heard the privilege matter held that Nadesan had not committed a breach of privilege. Rather, he had genuinely exercised the right of comment on the proceedings and on the legislation as a matter of public interest.

The senior counsel for Nadesan in this case was H.L. de Silva PC, who on another occasion commented that the Privilege Law is harsh and anomalous and needs to be changed. Besides, none of the defences available to a defendant in a defamation suit are available to a person charged with breach of privilege of Parliament.9

The Media Law Reform Committee (MLRC) gave reasons in its report why the other three amendments to the Privileges Act should also be repealed. It is not proposed to recount the reasons in this paper but they may be explained during discussion of this paper should the need arise. The three amendments are:

9 De Silva, H.L. PC, addressing a workshop on Media and Law organised jointly by the Marga Institute and the Asia Foundation, held at the Sri Lanka Foundation Institute, April 1994.
a) 1980 - creation of a new office of wilfully publishing words or statements after the Speaker has ordered them to be expunged from the Hansard.

b) 1984 - protection afforded to the publication of proceedings of Parliament extended to publication of statements made in Parliament even if they amount to contempt of court. This was a sequel to *Hewamanne v. Manik de Silva (Editor, Daily News)* case.

c) 1987 - provision for enhanced punishment to be imposed by Parliament for the offence of breach of privilege.

**Contempt of Court**

Another set of legal constraints arise from the uncertainty of the scope and applicability of the principles pertaining to contempt of court and the sub-judice rule. Consequently, the MLRC has recommended that there be a Contempt of Court Act as in the United Kingdom (1981) or India (1971).

**Censorship and Sixth Amendment**

The MLRC has made detailed recommendations on the issue of censorship, emphasising the need for compliance with Sri Lanka’s international human rights obligations. With one exception, the MLRC is of the view that the Sixth Amendment to the Constitution is a limitation on the freedom of expression.

**Electronic Media**

Three laws relating to the electronic media in Sri Lanka were also examined by the MLRC. They are the Sri Lanka Broadcasting Corporation Act, the Sri Lanka Rupavahini Corporation Act No. 6 of 1982 and the Sri Lanka Telecommunications Act No. 25 of 1981. The MLRC was of the view that the SLBC Act does not provide for achieving independence or impartiality in broadcasting. Political bias is possible in the composition of the Board and in the Minister’s powers to give directives to the Board.

The SLRC Act empowers the Minister to give general or special directives to the Board. Television broadcasting is subject to regulation by the Board and private TV broadcasting requires the approval of the Minister and the Corporation. The MLRC concluded that the existing laws do not contain adequate provisions to ensure freedom of broadcasting in Sri Lanka and independence from political control.
Two fundamental rights applications pertaining to broadcasting heard by the Supreme Court are illustrative of the absence of freedom in broadcasting. The first is of *Wimal Fernando v. SLBC and others*. The case arose out of the action of the SLBC in suddenly stopping its Non-Formal Educational Programme (NFEP) begun in 1994. In February 1995 the programme had begun questioning various Ministers. One afternoon the programme was suddenly stopped.

Wimal Fernando, who was a listener to the programme, went to the Supreme Court on the ground that his right to information as a listener had been denied by the sudden stoppage. The Court (comprising Justices Mark Fernando, R. Dheeraratne and A.S. Wijetunge) held that the petitioner's rights had been violated. It also expanded the scope of the particular article of the Constitution by acknowledging the right of a participatory listener to information.

In the second case, heard in April 1997, the Broadcasting Authority Bill was challenged successfully by a number of petitioners on the ground of inconsistency with Articles 10, 12 and 14(1)(a) of the Constitution. The Supreme Court (comprising Chief Justice G.P.S. de Silva and Justices A.R.B. Amerasinghe and P. Ramanathan) upheld the challenge. The Court held that licensing of private broadcasters should be done by a body independent of government.

The MLRC recommended that there be a separate authority to formulate a broadcasting policy which would, among other matters, respect the plural and multi-ethnic character of Sri Lankan society. It further recommended that complaints of violation of broadcasting freedom should be referred to the proposed Media Council.

**Media Council Act**

The Media Council envisaged by the MLRC would replace the Press Council and would cover the print as well as the electronic media. It would be an independent body without political preferment or other pressure. It would have a majority of media personnel of proven competence and integrity and enjoying the confidence of their peers. It would also include persons of known liberal views, of high intellectual attainment and distinguished in various fields of public activity. As some functions of the Council would be of an arbitral character, some members would need judicial or legal experience.

Lacunae in the Law

Constitutional Guarantees

The MLRC emphasised the need to bring the guarantees of freedom of expression in the Constitution in line with Sri Lanka’s international legal obligations as set out in the International Covenant on Civil and Political Rights (ICCPR).

A Freedom of Information Act

A Freedom of Information Act should make a clear commitment to the general principle of open government in which disclosure of information is the rule rather than the exception. Non-disclosure must be strictly limited to certain types of information, indicating also the duration of secrecy. The law should also provide for exempt categories, which must be specific.

Confidentiality of News Sources

Statutory protection of confidentiality of sources of information of newspapers and other media is a necessary requirement for investigative journalism and the exposure of public scandals, mal-administration and wrong doing in the public domain. Its absence is a serious impediment.

Right of Reply

There is no statutory right of reply covering all media. The Code of Ethics for newspaper journalists recognises the need for reply or correction by persons or institutions aggrieved by incorrect publication. However, there is no statutory right of reply in not only the print media but also in the electronic media. Such a statutory right would be conducive to a greater sense of responsibility in the exercise of freedom of expression and publication.

Criminal Defamation

The MLRC recommended that section 479 of the Penal Code dealing with criminal defamation should be repealed because the possibility of such prosecution could discourage criticism of Ministers and government policies or the statement of political dissent.

If, however, the section is to be retained, the MLRC urged that the decision whether or not to indict be vested not as at present in the Attorney-General but in a judge of the High Court with proper guidelines similar to those in English law, namely:

- there should be a clear *prima facie* case;
the libel must be so serious that it is proper for the criminal law to be invoked; and

the public interest requires the institution of criminal proceedings.

There should also be provision for the accused to be heard against the application for permission to indict.

The Newspaper Society, Editors’ Guild and several journalists’ organisations have expressed their opposition to the retention of criminal defamation. They want the law repealed.

**Expansion of media**

Despite constraints of various kinds the period after 1973 witnessed an expansion of the media. A new newspaper company, Wijeya Newspapers Ltd. was launched in 1979, but it was some years later that it began it publications. A woman’s weekly in English, “Lanka Woman” saw the light of day in February 1984 and enjoys considerable popularity among its widening readership. With the closure of the Times group of publications in January 1985, the new company negotiated to recommence publication initially of the “Irida Lankadeepa” in 1986. The “Sunday Times” followed in 1987, then the “Lankadeepa” in 1991 and the “Midweek Mirror” in 1996. Additionally, it publishes three weeklies in Sinhala.

Meanwhile, Upali Newspapers Ltd. launched an English morning daily “The Island” in 1981, a Sinhala weekly “Irida Divayina” in 1981 and the Sinhala daily, “Divayina” in 1982. In addition, the company publishes four weeklies in Sinhala and two monthlies, one in English and the other in Sinhala.


Tabloid journalism in Sinhala witnessed a robust growth between 1992 and the general election of 1994 with such journals as “Ravaya” and “Yukthiya” being the most popular of a number of radical journals that appeared after the JVP-led disturbances and the threat to media were quelled. Their opposition to the UNP Government that had been in power since 1977 was carried out under the banner of what is called the Free Media Movement.

The period of JVP terror and the last years of the UNP regime also witnessed violence against several media personnel and the brutal killing of a few journalists such as Richard de Zoysa.
Several years earlier two of the country’s leading newspaper establishments were obliged to close down because of economic non-viability- the Times group and the Independent Newspapers Ltd.

**The Advent of Television**

Television began in Sri Lanka in 1979 as a private venture with the launching of the Independent Television Network (ITN). Three years later the state launched the Sri Lanka Rupavahini Corporation (SLRC) and within a short time took over the ITN, which had become non-viable as a private venture. Between 1991 and 1996 four new TV companies became operational - MTV Channel Pvt. Ltd., Telshan TNL, Dyna Broadcasting Co., and ETV Swarnavahini.

The novelty of the medium gave entertainment a wider dimension, but affected radio to some extent and cinema to a greater degree. However, with the introduction of private radio stations in 1993 not only did listener audiences grow but also dependence on state radio alone ceased. Programme variety and plurality of choice increased. With private radio also being allowed to broadcast news the propagandist thrust of State radio was somewhat blunted.

The symbiotic relationship that had prevailed between newspapers and advertising now spread to television as well as to radio. The sophistication of communication technology was evident not only in the print medium but also in radio and television. However, production costs increased and had to be borne partly by advertising sponsorship. A commercial media culture was soon emerging and consumerism spread to rural areas too, through the increase in media audiences.

Private television gave political discourse a fillip with the fora it provided to a broad spectrum of discussants to debate freely and sometimes fiercely a variety of contentious issues.

Nevertheless, the expansion of all media - print as well as electronic - would appear to be tilted towards the provision of more entertainment, at times of dubious quality and deplorable taste. Public service broadcasting does not rank high on the electronic media agenda.

As for print journalism, it is still reactive and event-oriented and often politically partisan.

The new technology that has been harnessed by the communications industry enables media audiences to have easier access to the world outside the Island. Ironically, however, urban audiences’ awareness of how the less privileged among the rural population, in particular the vulnerable sectors affected by deprivation and disparity, live from day to day is not reflected by the media. A metropolitan bias is evident in media coverage, thereby making the information rich richer beneficiaries of the communication process.
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Even 50 years after Independence the country still lacks a clearly articulated media policy based on human rights jurisprudence and a consensual perspective of the public interest as distinct from public curiosity as well as political partisanship. Free, responsible and responsive media must surely take the initiative in articulating such a media policy and in its implementation.
The Judiciary refers to the body of persons who preside over the courts established in the country. For the purposes of this paper, the courts are divided into trial courts and appellate courts.1 Judges of the former, sometimes referred to as the minor judiciary, number many more than the judges of the superior courts. The layman comes into contact most often with the judges of the lower courts and their perception of the judiciary is derived from what happens in these courts. In that sense, they are far more important than the judges of the superior courts, although, unfortunately, this is not usually recognised by the minor judiciary. All proceedings are in public and judges must be careful in what they say or do because it can be reported in the newspapers. They are appointed after they have gained some experience as practitioners by the Judicial Service Commission which consists of the Chief Justice and two other judges of the Supreme Court nominated by him. The Judicial Service Commission also decides on their promotions and transfers. When misconduct and misbehaviour on the part of a judge is reported, it is the Judicial Service Commission that takes action. A judge can be asked to tender his resignation or if the circumstances warrant, his services can be terminated. Many judges eventually find their way to the superior courts or the High Court which now takes an intermediate place between the trial courts and appellate courts. For this reason they are also referred to as career judges. Today a judge can advance his opportunity for promotion to the Court of Appeal by being appointed as Secretary of the Judicial Service Commission. This is because the Constitution says that he cannot revert to his earlier post.2

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1 Attorney-at-Law.

1 For a detailed account of the courts after independence see the writer’s “Changes in Constitutional Government” in Fifty Years of Sri Lanka’s Independence (ed. A.D.V. de S. Indraratne (1998)).

2 Article 113(2).
The selection process used to be informal with young lawyers who had made a mark at the Bar being persuaded to accept a judicial career in lieu of continuing a lucrative practice. A judge had to come from what was considered a good background as they were expected to maintain a proper status with the elites of the public service particularly in the outstations. Of course, the attraction was the prospect of ending up as a judge of the Supreme Court. An unexpected test for them was when the proceedings in original courts changed from English to Sinhala or Tamil in the 1970’s. It was left to them to ensure that the administration of justice did not suffer in the courts. After 1978 although there were more opportunities for judicial appointments with the expansion of the courts, the improved economy in the country meant that judicial office became less attractive and there was a set-back to recruitment. Additional benefits had to be offered as incentives. At present the selection process has been formalised and there is no dearth of applicants.

Since there are no special courses on judicial work for law students, either at the Sri Lanka Law College, the Faculty of Law or the Open University, judges after their selection are given a period of training at the Judge’s Training Institute which is under the Ministry of Justice. More learning is on the job especially from cases and the senior lawyers who appear before them. In addition, there are seminars organised by the Bar Association and other programmes here and abroad arranged by the Ministry of Justice. There is, therefore, a concerted effort to keep judges abreast of new developments in the law.

**APPOINTMENT TO SUPREME COURT**

To be a judge of the Supreme Court when that court was the highest court of the country was the ambition of a career judge. Also it could be said that from the country’s point of view these were very important appointments.

It is convenient to deal with the period 1950 - 1977 first. When a vacancy arose there were usually many persons vying for appointment from the minor judiciary on different basis for calculating seniority. There were others also to choose from - i.e. the Law Officers of the State (Attorney-General and Solicitor-General) who had the first claim, and occasionally members of the Bar. If you came from outside these categories, as in the case of E.A.L. Wijeyawardene, who was the Public Trustee and A.W.H. Abeysundera and H.N.G. Fernando who held the office of Legal Draftsman, you were usually asked to occupy the seat of a Law Officer of the State. These were for very short periods. G.P.A. Silva was in the Attorney-General’s Department but was appointed to the Supreme Court when he was Permanent Secretary, Ministry of Justice.

It was a job for the Prime Minister by convention to see that suitable appointments were made. An appointment to the Supreme Court was not to be made lightly and considerations of confidence based on merit had to prevail. Although a personal preference could play a
part in the selection the Prime Minister could not also ignore the views of the Bar and for
this gave ear to the Minister of Justice.

After the United Front Government of Mrs. Bandaranaike took office in 1970 a change in
the appointment of judges could be noticed which ran contrary to established practice. New
ground was cut when a vacancy was filled by the appointment of Jaya Pathirana from a
provincial Bar in 1972. Justice Pathirana had sat in Parliament as an elected SLFP member
from 1961-1965. Then in 1974 with the passing of the Administration of Justice Law many
new appointments were made from Commissioners of Assize (which at that time included
several former members of the Attorney General’s Department who had been overlooked
for promotion) and members of the Bar who had considerable expertise. Nevertheless, it
was the opinion of many that it was the personal confidence of the powerful Minister of
Justice that had mattered.

A word must be said about the appointment of the Chief Justice which is a prestigious
office. Naturally, the most senior judge of the Supreme Court would expect to fill it. But
there were occasions when this did not happen. The first time was in 1952 when Justice
Nagalingam was overlooked and the then Attorney-General, Mr. H.H. Basnayake QC, who
had previously served in the Supreme Court was appointed. Justice Nagalingam at once
sent in papers for retirement and did not sit in the Supreme Court again. Thereafter, the
principle of seniority was followed although Governments changed, until 1974. When Chief
Justice H.N.G. Fernando retired in 1973 Justice G.P.A. Silva was the most senior judge but
the Government wanted the office to be filled by Victor Tennekoon who had been Attorney-
General, a judge of the Supreme Court and was currently a judge of the Court of Appeal.
Justice Silva was appointed on the undertaking that he would retire at the end of the year,
although he would not have reached the retirement age, to enable the appointment of Victor
Tennekoon as Chief Justice from January 1974. At that time Justice Samarawickrema was
senior to him in the Court of Appeal and Justice Alles in the Supreme Court. With the
abolition of the Court of Appeal in 1973 Justice Samarawickrema reverted to the Supreme
Court.

We may pause at this point to ask if the integrity of judges was affected even if there had
been some favouritism in their appointments. I have dealt with the case of Chief Justice
Tennekoon elsewhere in this paper. As far as other judges of the Supreme Court are concerned,
some indication may be obtained from a landmark judgment. The acquisition of land
belonging to one’s political opponents on some pretext or the other has been the pastime of
one Government or other. This led to aggrieved land owners seeking relief against such
colourable acquisitions. At least they succeeded in delaying the process. In frustration the
Government passed legislation aimed solely at curtailing the powers of the judiciary in
respect of executive action. How successfully Parliament achieved this objective was the
important question that came before the Supreme Court in *Sirisena v. Minister of Lands.* Although this case was decided in 1974, the judgments were reported only very much later. It was important for the Government not to lose this case and especially for the Minister of Justice, Mr. Felix Dias Bandaranaike. Nine judges were nominated to hear the appeal and this included three judges who had found nothing wrong with the provisions of the Act when it was examined in the Constitutional Court at the Bill stage. Except for Justice Pathirana who presided all other judges had been appointed in 1974.

The Government did not win because five judges (Justices Perera, Vythialingam, Ismail, Weeraratne and Sharvananda) held that the provision in the amending Act which prohibited injunctions being given by the District Courts against a Minister in respect of any act done by him in the exercise of his powers, did not cover acts done by him without jurisdiction, *ultra vires* or in bad faith. All judges delivered judgments which for the most part were of a legalistic nature. But two judges saw a broader issue at stake and briefly addressed it in their judgments. According to Justice Pathirana:

> “The amendment seeks to strike a fair balance between the demands and pressures of a planned economy like ours, and individual rights and liberties on the other hand. This is a perennial question that has always agitated legislators viz. how far individual liberties can be accommodated amidst the over-expanding activities of the State in ensuring to the people the larger freedoms like freedom from want, freedom from hunger and freedom of the opportunities of life. This is a problem which affects all countries of all political complexions.”

It is doubtful if confiscation of land could find such justification.

On the other hand, is the response given by Justice Sharvananda:

> “I approach the consideration of the issue in these cases with the anxious care which judges of the court have always given, and I am confident will always give, to questions where it is alleged that the liberty and rights of the subjects have been unjustifiably interfered with. It is well to remember that the jurisdiction of the courts has always been the only refuge of the subject against the unlawful acts of the Executive and its erring officers. Courts exist for the administration of justice and have an inherent power to review the exercise by the Executive of its statutory powers which impinge on the citizen's rights and interests. An independent judiciary to which our Constitution has entrusted the judicial power of the people is at once a guarantee and bulwark of the freedoms and rights of the subjects. The concept of the Rule of Law assumes that the judicial power of the State extends to the review of judicial, quasi-judicial and executive acts and that any restriction of this power of review is a threat to the
Rule of Law. Hence there is a presumption against ousting the jurisdiction of the courts to
determine the extent of statutory powers.”

The Government’s reaction was to nullify the majority view by another amendment.⁶

In another era this question would not even be asked. A good example of judicial independence
is the action taken by Justice R.F. Dias when he read in the newspaper that in a case where
the Supreme Court had dismissed an appeal from a conviction, the Governor-General had
decided to remit the sentence imposed on the accused. The Minister of Justice to whom this
was communicated asked the Magistrate to take necessary action. Justice Dias immediately
called for the record from the Magistrate and put a stop to that. Dealing with an objection
taken by the Solicitor-General to the Court’s jurisdiction Justice Dias said this:

“I entirely disagree with the argument that a Judge of the Supreme Court has no jurisdiction
under Section 356 (of the Criminal Procedure Code) to examine the record in a criminal case
where there is reason to believe that there has been improper executive interference with the
functions of a District Court or a Magistrate’s Court... If that argument is right, the Dominion
of Ceylon would be the only place in the Commonwealth where a Superior Court cannot
consider whether an Executive Officer has exceeded his powers in regard to a directive
communicated to a minor court.”⁷

Further down in the judgment he says after discussing the separate roles of the Executive
and Judiciary:

“In cases where there is ground to believe that the Minister has improperly encroached on the
judicial functions of the court, it is the undoubted right of the Supreme Court to examine the
position, and fearlessly to say so, if there has in fact been any illegal encroachment.”⁷

After 1977 the most dramatic change for the judiciary came with all the judges of the Supreme
Court ceasing to hold office under the transitional provisions of the new Constitution.⁸
Security of tenure so cherished by judges was totally breached. Many judges lost their place
in the new Supreme Court and others were “demoted” to the new Court of Appeal or went
into early retirement. New blood was brought into the Court of Appeal from the Bar, a
process which has since continued. Something similar happened to the judges of the High
Court. Dr. Colvin R. de Silva, a former Minister of Constitutional Affairs, commented:

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⁶ Interpretation (Amendment) Law No. 29 of 1974.
⁷ In re Agnes Nona 53 NLR 106.
⁸ Article 163.
“Dismissal by Constitution, they stand cast out by the President in the same way as employers of old cast out employees they disliked. The only difference is that the President is not even their employer. They were employed by the nation... It is clear why this Government and the President broke the nation’s undertaking of security of office to the Nation’s Judges. Manifestly it was done to clear the way for the President to make his own appointments.”

These changes were also not lost on Chief Justice N.D.M. Samarakoon who made history by being appointed as Chief Justice straight from the Bar. At the inaugural sitting of the new Supreme Court in 1978 he had this to say:

“My brothers and I have been members of the old Supreme Court and would have wished for it an honourable demise and a decent burial but this was not to be. Words have been uttered in another place which seriously affect its hallowed name. What more is in store I do not know.”

These were prophetic words. Appointments to the Supreme Court and the Court of Appeal other than those referred to above during the UNP Government must also be noted. Parinda Ranasinghe, a career judge was appointed Secretary, Ministry of Justice in 1978 and from there appointed to the Court of Appeal. Between 1978 and 1986 there were five appointments to the Court of Appeal from the Bar. In due course, all but one, were appointed to the Supreme Court. In 1989 there were two direct appointments to the Supreme Court - Mark Fernando PC from the Bar and Dr. A.R.B. Amerasinghe, who was Secretary, Ministry of Justice. Two Solicitors-General followed in quick succession - K.M.M.B. Kulatunga PC and S.W.B. Wadugodapitiya PC. The only other direct appointment that took place was in 1996 when much to the surprise of everyone and to the dismay of the judges of the Court of Appeal a former Dean of the Faculty of Law, Colombo University, with no experience at the Bar was appointed. This was also the first time a woman judge was appointed to the Supreme Court.

Filling the vacancy created by the retirement of Chief Justice has seen two deviations, one is the appointment of Chief Justice Samarakoon referred to above. When he retired in 1984 it was strongly rumoured that President Jayawardena wanted him to be succeeded by the then Attorney-General, Shiva Pasupati; but this was prevented and Justice Sharvananda was appointed. In 1989 Chief Justice Sharvananda retired and it was expected that Justice Wanasundera would succeed. But President Jayawardena did not want to appoint him. When the Bar made it clear its solid support to Justice Wanasundera the President resorted to a compromise - he would appoint Justice Wanasundera provided he gave the President a letter of resignation after three months. Justice Wanasundera refused and the post was offered to the next senior judge, Justice Ranasinghe but he did not want to go over Justice

9 “Monkeying with the Judiciary” Logos Vol. 23 No. 2 p.46.
10 Dr. (now Justice) A.R.B. Amerasinghe, The Supreme Court of Sri Lanka - The First 185 years, (1986).
11 See below.
Wanasundera. At this point the President made it known that if Justice Ranasinghe did not accept, may be the appointment would go to a member from the Bar. The judges conferred and it was agreed that Justice Ranasinghe should accept. Justice Wanasundera remained as a judge until his retirement. It was well-known why Justice Wanasundera was overlooked. It was the loss of confidence in him by the President because it was Justice Wanasundera who had almost prevented the highly controversial Thirteenth Amendment to the Constitution from becoming law.

Again more recently the senior judge Mark Fernando who had also acted as Chief Justice in the absence of the Chief Justice was not appointed when Chief Justice G.P.S. de Silva retired. President Kumaratunga appointed instead Sarath Silva PC who was then Attorney-General but had previously been judge and President of the Court of Appeal and a judge of the Supreme court. Looking at the appointments of Chief Justices Samarakoon, Ranasinghe and Sarath Silva and perhaps even of Tennekoon, the question that arises is whether confidence reposed by the President in the appointee has not become an important if not the most important consideration. But if it is a political judgment, it is a most unfortunate trend, unless independence and impartiality asserts itself in the discharge of duties and public confidence is not lost.

Since the practice to appoint from the Court of Appeal to Supreme Court became established, appointments to the Court of Appeal became important. In this connection it has to be mentioned that for some time the Attorney-General has pushed a claim for appointments of middle level officers in his Department to fill vacancies either directly or in some cases by initial appointments to the High Court. This has, of course, affected career judges but the end result is that the Court of Appeal as the first appellate court and also the court for judicial review through writs has been strengthened.

Under the 1978 Constitution the President appoints the judges to the Appellate Courts. It is one of the many appointments that the President is empowered to make. It appears as an absolute power in Article 107 and three judges held that this is a matter left to the sole discretion of the President in *Edward Silva v. Bandaranayake*.12 Four applications were filed by lawyers alleging violation of their Fundamental Rights under Articles 12(1), 14(1)(a) and 14(1)(g) over the appointment of Dr. Shirani Bandaranayake to the Supreme Court. Although three judges who heard the case, as stated above, gave a short answer to the challenge, the other four judges did not agree. Justice Fernando speaking for himself and Justices Amerasinghe, Wadugodapitiya and Wijetunga drew a distinction between the process of selection and the act of appointment. The former precedes the latter and requires cooperation between the executive and the judiciary. The majority opinion was that from the consideration of comity there should be consultations with the Chief Justice before the President makes an appointment. However, it cannot be said that the question was finally

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12 (1977) 1 SLR 92.
decided because the majority rejected the application on the ground that the petitioners had failed to make out a *prima facie* case that there were no consultations with the Chief Justice.\(^{13}\)

The Executive’s interest in the judiciary does not stop at appointing judges. There are occasions after appointment when judges are confronted by the Executive. We turn to some notable instances.

**CEREMONIAL SITTINGS**

The General Election of 1970 brought in the United Front Government of Mrs. Bandaranayake. Felix Dias Bandaranaike who was in the previous Cabinets of Mrs. Bandaranaike was now a prominent personality in the Government, and was entrusted with the task of introducing sweeping legal reforms in keeping with the new Constitution. There was need for an understanding judiciary. It is interesting to find that Justice T.S. Fernando, who was appointed President of the new Court of Appeal (replacing the Privy Council) saying this at the inaugural sitting of the court attended by Ministers and the Speaker among others:

> “We are also encouraged by the presence of distinguished members of the Executive and the Legislature because the administration of Justice has always been an important part of the Government duty and if the draft of the proposed Constitution has correctly outlined the shape of things to come the judges are shortly to exercise not a separate power as recently understood, but only a part of the power of the future National Assembly.”

Mr. Bandaranaike who took the portfolio of justice in 1972 was increasingly to be seen in Hulftsdorp especially at ceremonial sittings. When the Administration of Justice Law was passed in 1973 and the Court of Appeal abolished, the Supreme Court once again became the highest court. A total of 21 judges were appointed to the Supreme Court and in addition, 16 judges were appointed to the High Court. It would not be wrong to think that the new judges (of whom there were twelve in the Supreme Court) had been selected by the Minister. The intrusion of the Ministry of Justice’s hand in the arrangements for the Ceremonial Sitting of the new Supreme Court was too much for Chief Justice Tennekoon who at first had refused to participate. Speeches were made by the acting Prime Minister and the Minister who along with the Leader of the Opposition were present for this important occasion. In a noteworthy speech Justice Tennekoon said:

> “I was happy to hear that Mr. J.R. Jayawardena’s absence was due to the fact that he had a previous important engagement and was not an indication of protest against what is taking place here. For we would like it to be known that we are not the Government’s Court merely

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\(^{13}\) For a comment on the decision see Report on Judicial Independence in Sri Lanka by Lord Goodhart and Justice Bhagwati [Centre for Independence of Judges and Lawyers, 1997, pp.43-45].
because the Administration of Justice Law under which this court came into existence was conceived and made into law by the present Government or because all the judges of this court were appointed together by this present Government. We would like to have the confidence of everyone of the thirteen odd million people of this country irrespective of their political faith, race, religion or community.”

At subsequent ceremonial sittings there were brushes between the Chief Justice and the Secretary to the Ministry of Justice, who was seeking to have a prominent place for himself and was annoyed when this was denied to him. The upshot was that ceremonial sittings came to an end on the instructions of the Minister who took the view that:

“... unless and until rules of court are properly formulated under the Administration of Justice Law, there is really no legal basis for the practice of having ceremonial sittings at all. And these rules of court have to be formulated not according to the wishes of Attorneys-at-Law, but by eleven judges with the concurrence of the Minister and the approval of the National State Assembly.”

It was fitting that after the new Government took office in 1977 there was a ceremonial sitting to wish farewell to Chief Justice Tennekoon. On this occasion Mr. H.W. Jayawardena QC, a former President of the Bar Association, speaking on behalf of the Bar said:

“You belong to that breed of men who have steadfastly stood against any winds that blow, as heavens of refuge to those who might otherwise suffer because they are helpless, weak, outnumbered or because they are not conforming victims of prejudice and public excitement... The courts of this country are the constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution, whatever race, creed or persuasion. No higher duty, no more solemn responsibility rests on a judge than that of translating into living law and maintaining this great guarantee of human freedom. During your tenure of office you not only strived to secure the independence of the judiciary but also recognised the importance of the independence of the Bar...”

THE COUP CASE

The Chief Justice is the acknowledged Head of the Judiciary and, in the case of the Supreme Court, it is his function to constitute Benches to hear cases, without outside interference. In 1915 or 1916 after the riots of 1915 the law was amended empowering the Governor to direct the trial of sedition and offences during times of civil commotion and disturbance by

\[14\] [For this section, I am greatly indebted to the monumental study of Dr. (now Justice) A.R.B. Amerasinghe’s, The Supreme Court of Sri Lanka - the First 185 years (1986)].
three judges of the Supreme Court without a jury. The implications of this was never seen - on what materials and given by whom can the Governor act, to whom does he give a direction, and what would happen if the Chief Justice were to ignore the direction and order a Trial-at-Bar with a jury. At the first Trial-at-Bar under the new provisions some questions were asked as to the validity of the direction but only on the ground that the direction failed to show that the conditions for its issuance was satisfied. By this time the power was transferred to the Minister of Justice.

In 1962 a plot to overthrow the Government by certain senior officers of the services and other senior public officers was foiled and the coup leaders arrested. It was the Government’s decision to have a Trial-at-Bar without a jury and this was preceded by an amendment to Sec. 440A. The amendment was to give the power of nominating the judges to hear the case to the Minister of Justice; and also making both the direction and nomination final and conclusive and not to be called in question in any court. The amendment was given retroactive effect. A direction addressed to the Chief Justice by the Minister, an information by the Attorney-General against the accused persons, and a nomination of three judges, were all made on the same day. When the trial commenced before Justices T.S. Fernando, L.B. de Silva and Sri Skandarajah there was a challenge to both the direction and the nomination on the ground that they constituted an undue interference by the Executive in a judicial function.

The objection to the direction was not upheld because of the ouster clause and the authority of a House of Lords decision (which was subsequently not followed). But the objection to the nomination succeeded on the basis of the doctrine of the separation of powers. The section giving the power of nominating of judges to the Minister was held to be ultra vires the Constitution. According to the Court:

“... The power of nomination is one which has hitherto been invariably been exercised by the Judicature as being part of the exercise of the judicial power of the State, and cannot be reposed in anyone outside the judicature.”

The necessary consequence of this finding was to deprive the judges of jurisdiction to try the accused.

After this order there was a further amendment to Sec. 440A empowering the Chief Justice to nominate the judges and rendering unnecessary a direction of the Minister for holding such trial.

15 Sec. 440A of the Criminal Procedure Code. There was already a provision in Sec. 216 for a Trial-at-Bar with a jury on the order of the Chief Justice.
16 Queen v. Theja Gunawardena, 56 NLR 143.
18 Queen v. Liyanage, 64 NLR 313.
The closing chapter of the Coup case was when after conviction by the Trial-at-Bar it was successfully argued in the Privy Council that the Special Provisions Act showed a legislative plan to secure the conviction of these accused persons only and enhance their punishment which offend the doctrine of separation of powers. As the Privy Council said, “If such Acts as these were valid the judicial power could be absorbed by the legislature and taken out of the hands of the judges.” Both Acts were held to be ultra vires the Constitution and invalid.20

THE JUDGES’ OATH

Shortly before the impeachment proceedings Chief Justice Samarakoon and other judges of the Supreme Court were involved in a peculiar confrontation with the Executive. Judges when they are appointed receive their appointment from the President and at the same time take the oath prescribed in the Fourth Schedule before the President. In 1983 the Sixth Amendment was passed introducing Article 157A which required judges, amongst others, to take another oath, which became the Seventh Schedule. This amendment was passed on 8th August and the oath had to be taken within one month. The amendment did not say before whom the oath had to be taken within one month. The judges took their oath before another judge before 31st August. On September 5th judges were hearing a fundamental rights application when it was brought to their notice that the oath had to be taken before the President. By this time the prescribed period had passed and in terms of Article 165(1) they could be considered to have ceased to be in service or hold office. The judges of both courts communicated their oath - taking to the President. On 12th September the judges found that not only the courts but even their chambers had been locked and barred and armed police guards placed to prevent access to them. There could be only one inference - that the Executive had decided that the judges had ceased to hold office. The same was the case with judges of the Court of Appeal. There is some uncertainty as to who was responsible for this outrageous action, but the next day the guards were withdrawn and the judges were able to function. But on the 15th judges of both courts received fresh letters of appointment and the oaths were administered by the President. Except for the fact that there was a pending hearing the matter might have ended there. But as it was a question had arisen whether the five judges were in office between 8th - 15th September. The question was referred to a Full Bench. The majority held that the judges had complied with the need to take a second oath (required by Article 157A) and in any case, the original letters of appointment continued to be valid and were not superseded by letters of appointment granted on 15th September. To the credit of the Executive after the initial show of force they accepted this position and avoided a serious constitutional crisis. In fact, the President on receiving the communication of the judges, referred the matter before Cabinet and was told that it was for him to take action. Said the Chief Justice:

“There is no doubt that judges had been denied access to the courts and chambers by a show of force. There is also no gainsaying that this act has polluted the

20 Liyanage v. The Queen, 68 NLR 265.
Justice Sharvanananda referred to the “luminous preamble” to the Constitution and said:

“It is a lesson of history that the most valued constitutional rights pre-supposes an independent judiciary, through which alone they can be vindicated. There can be no free society without law, administered through an independent judiciary. It is and should be the pride of a democratic government that it maintains and holds independent courts of justice where even its own acts can be tested.”

Does this not go too far to enunciate the doctrine of infallibility to the Supreme Court? If so, it has been denied by the Select Committee findings referred to below. Ranasinghe J dissenting held that Article 107 set out the procedure for removal of a judge on the ground of proved misbehaviour or incapacity. The Sixth Amendment had provided for a situation in which a judge would “cease to hold office” by operation of law.

These judgments were delivered after the President had decided on the course of action that would not embarrass the judges or cause a rift. No damage was done. At the same time, however, the judges were cast in an unfavourable light. The Sixth Amendment was before them in Bill form and they ought to have known, as constitutional experts, who was the proper person to administer the new oath to them.

We find a parallel situation where judges came in conflict with the legislature under the 1972 Constitution. The Constitutional court created by that Constitution for the purpose of examining proposed legislation in Bill form was required to give its decision within two weeks of the reference. At its very first sitting, the three members of the court (which included two retired judges of the Supreme Court) found that they did not consider this provision in the Constitution as binding on them. This did not please the Government which took steps to prevent further sittings of the court. The question was raised in the National State Assembly (legislature) and angry members criticised the decision and wanted the Assembly to proceed with the consideration of the Bill. An impasse was created with the court standing firm. It was resolved with one member being persuaded to resign. The others had no option but to follow suit and three new members were appointed in their place.

What is interesting is that the 1978 Constitution also gives a time frame for the determination of the Supreme Court on Bills and this is strictly followed. Yet, when considering the

22 Ibid.
23 Ibid.
Thirteenth Amendment to the Constitution the court found itself in the same predicament as the Constitutional Court. Given the number of petitions received, and the number of Counsel who wished to be heard and the constitutional importance of the matter before them, the court, with the consent of all the parties which included the Attorney-General, announced that they would take an extra one week to give their determination. Quite sensibly the Government did not make an issue of it.

**IMPEACHMENT**

Article 107(2) of the Constitution provides for the removal of a judge of the Supreme Court or Court of Appeal for proved misbehaviour by order of the President made after an Address of Parliament. In 1984, 57 members of Parliament signed a Resolution for presentation of an Address to the President requesting the removal of Chief Justice Samarakoon. The Resolution needed to be signed by only one-third of the Members of Parliament to be placed on the Order Paper. The Resolution referred to a speech delivered by the Chief Justice at an Awards Ceremony in a Tutory in which he referred to the July 1983 riots, the Job Bank scheme, the emoluments of the President, disparities in income etc. The speech was reported in the press.

A Select Committee of Parliament was appointed under the existing Standing Orders to inquire and report on whether *inter alia*:

(a) statements attributed to the Chief Justice constitute improper conduct or conduct unbecoming of a Chief Justice;

(b) refer to matters of a political nature or involving political issues;

(c) affect the dispensation of impartial justice;

(d) tend to bring the entire Supreme Court and particularly the office of the Chief Justice into disrepute.

The Committee reported to Parliament that some statements could be considered as constituting improper conduct, others referred to matters involving political issues or controversies, and that these statements were not befitting the holder of the office of the Chief Justice. The Committee was of the view that appropriate action be taken in view of the findings in terms of the Constitution. Two members disagreed and found there was no improper conduct on the part of the Chief Justice.25

As there were doubts whether a Select Committee could be so constituted standing orders were amended by adding Standing Order 78A expressly providing the procedure for impeachment of a Judge. A new Select Committee was appointed under this Standing Order

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25 Parliamentary Series No. 64 of the first Parliament, Fourth Session (9th August, 1984).
and fresh proceedings commenced. The Chief Justice was called on to make a written statement of defence. The Chief Justice did this and was present at the meetings assisted by Counsel. Parliament was proceeding to exercise disciplinary powers over the higher judiciary which, according to the Committee, was the case in other countries.

This inquiry and report brought out many matters of importance to the judiciary. In reply to the Counsel’s argument that the Chief Justice had a right to make this speech and was also protected by the theory of separation of powers, the Committee said that the privileges and immunities of judges ensuring their independence:

“...rests upon not only on constitutional provisions but also depends on the behaviour of the judges themselves. This desired behaviour rests on certain conventions. These are part of tradition, part of practices and part of undertakings which have been established over the years. These standards of behaviour of judges in judicial and extra judicial activities have been commented upon right through the ages. A judge cannot behave like a politician or like an ordinary citizen who is free to make any political speech he likes.”

Taking into account all the circumstances, the Committee with three members dissenting came to the conclusion that the Chief Justice’s speech “constitutes a serious breach of convention and has thereby imperilled the independence of the judiciary and undermines the confidence of the public in the judiciary.” But in their final assessment the Committee found that this was not a breach that amounted to proved misbehaviour. Nevertheless the Committee condemned the speech. The Chief Justice had reached the end of his term of office and retired before the findings of the Select Committee.

These proceedings to impeach the highest judicial officer were unprecedented and more so because the Chief Justice had been picked by the President from the Bar to fill the high office. There was no protest over this appointment because he was a frontline lawyer and also known for sturdy independence. This was evident from the day he took office and kept the President wondering if his choice was correct. In this controversial speech, the Chief Justice expressed his views in a forthright manner on recent happenings in the country and was critical of the Government. In the course of this speech he said:

“I read sometime ago in the ‘SUN’ papers that the President had said that his salary is a pauper’s salary, and that he is living on the poverty line. I am surprised. He is an elected representative of the people. He has all the powers. All the palaces in Nuwara Eliya and Kandy. They are paying a hell of a lot of money to keep him in poverty…”

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27 Ibid.
He said this and was condemned. The round may be considered a draw.

For another example of an admonishing finger being pointed at a judge, though the circumstances were different, we have to go to a time before the period under survey. The Duff House murder case was sensational for many reasons but of concern here is that it led to the resignation of a judge. The evidence could be interpreted as a case of murder, suicide or misadventure. Justice Akbar who presided over the trial charged the jury for a conviction, and the accused was found guilty and sentenced to death. The Privy Council had convincing grounds to allow the appeal and quash the conviction. One of the matters that their Lordships considered though not necessary for that conclusion was whether the charge to the jury was fair, and since doubt had been raised by Counsel appearing for the accused, they took the unusual step of not relying entirely on the record of proceedings but called for the stenographers notes at the trial. In their judgment their Lordships observed that the shorthand note indicated that the writer understood the language of the judge in the sense complained of, “The jury may unfortunately have done the same.” Was this a stricture passed on Justice Akbar? In any case he retired soon after and some would believe that the Governor called for Justice Akbar’s resignation or premature retirement.

Altogether different was the case of Justice M.W.H. de Silva who retired to accept a diplomatic post.

**JUDICIARY AND THE LEGISLATURE**

Parliament enacts laws and in the context of a written constitution questions have arisen as to the limits of law-making power of Parliament. Our courts have been faced with the supremacy asserted by the British Parliament, on the one hand, and the right of courts in the America to strike down laws passed by legislative bodies on grounds of unconstitutionality, on the other. In cases decided under the Soulbury Constitution our judges were not inclined to recognise an unfettered right of Parliament to pass laws. In *Mudanayake v. Sivagnanasunderam* there was a challenge to the Citizenship Act and to an amendment to the Elections Law, but they were upheld. In *Attorney-General v. Kodeswaran*, the validity of the Official Language Act 1956, was an issue and the District Judge was of the view that the Act was unconstitutional. In appeal the Supreme Court decided the case on a preliminary issue and the decision was affirmed by the Privy Council. It was only in the Coup Case that the law was invalidated.

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28 *The King v. Seneviratne* 38 NLR 208.

29 53 NLR 25 (SC), 54 NLR 433 (PC).

30 70 NLR 121 (SC), 72 NLR 337 (PC). The Privy Council did, with perhaps some regret observe that issues of the highest constitutional importance had been raised.
After the insurgency of 1971, the Criminal Justice Commission Act No. 14 of 1972 was passed setting up a Commission of Judges of the Supreme Court to try persons accused of offences committed during that period. An objection was taken that the Act was of no force and effect in law. The Commission consisting of three judges of the Supreme Court ruled that it had no legal power to decide that the Act was invalid.\textsuperscript{31}

The First Republican Constitution of 1972 put at rest any assertion by the judiciary to pass judgment on laws enacted by the legislature.\textsuperscript{32} Without enunciating for the legislature the absolute supremacy of the British Parliament, the Constitution left the constitutionality of laws in the hands of a Constitutional Court at the Bill stage and not after enactment.\textsuperscript{33} When the first Bill came before them, the Court was of the view that in the exercise of its jurisdiction, social, economic, cultural and political objectives of the Constitution must be considered.\textsuperscript{34} In the ANCL (Special Provisions) Bill the Court said that if necessary it would consider matters of common knowledge, matters of common reports, the history of the times and reports of Commissions.\textsuperscript{35} This was a proper approach rather than adopting the theory of courts of law which excludes consideration of matters outside the four corners of a statute.

The Constitutional Court examined the validity of the proposed legislation in abstract and forwarded its advice to the Speaker. The reported decision of the Court show that this function was seriously undertaken. There were quite a few important Bills that were not proceeded with even when the advice was positive.\textsuperscript{36}

The 1978 Constitution also adopted this via media but the function of scrutinising Bills was given to the Supreme Court. The determinations of the Court show that the judiciary has acted independently to ensure that laws are not enacted which contain provisions that are in violation or inconsistent with the Constitution. It is possible to give only a few important instances - Essential Public Service Bill, Third Amendment (enabling President to seek an election after 4 years) Bill, Grant of Citizenship to Stateless Persons Bill, 13\textsuperscript{th} Amendment Bill, Sri Lanka Broadcasting Authority Bill, Provincial Councils Election (Special Provisions) Bill and Postal Corporation Bill.

\textsuperscript{31} Ruling No. 6 of the Criminal Justice Commission.
\textsuperscript{32} S. 48 (2). At the Trial-at-Bar of Amirthalingam in 1976 the High Court held that this section took away the right of the Court to pronounce on the validity of the Constitution itself. The judges also referred to the judicial oath they took whereby they accepted the Constitution as legal and valid. (See Order of the High Court, 10\textsuperscript{th} September 1976).
\textsuperscript{33} S. 55 (2).
\textsuperscript{34} Sri Lanka Press Council Bill 1 DCC1.
\textsuperscript{35} 1 DCC 35.
\textsuperscript{36} Church of Sri Lanka (Consequential Provisions) Bill, Pirivena Education Bill, Places and Objects of Worships Bill, Banking Corporation of Sri Lanka Bill, Temple Lands (Abolition of Service Tenure) Bill.
The judiciary’s powers over legislation do not end here. The power of interpreting laws can lead to disagreement between what Parliament intended and what judges decide is the law. The last word does not have to be with the judiciary because Parliament can nullify a judgment.

We end this section by referring to an unusual confrontation between judges and the legislature.

**SIX JUDGES CASE**

The Special Presidential Commission of Inquiry Law No. 7 of 1978 (SPCI Law) was enacted soon after the UNP Government took office, and set the stage for skirmishes between the judiciary and the executive and parliament. The law was motivated by the desire to take revenge on its erstwhile opponents now in the political wilderness. It provided for the appointment of a Commission by the President to inquire and report on persons guilty of acts of political victimisation, misuse or abuse of power, corruption etc. The Commission was given the power to recommend whether any person should be made subject to civic disabilities as prescribed. The Bill was considered by the Constitutional Court and found not to be inconsistent with the 1972 Constitution.37

The President without delay appointed a Commission of two judges of the Supreme Court (Justices Weeraratne and Sharvananda) and a judge of the Court of appeal (Justice K.C.E. de Alwis). Before the Commission began to function, the former Prime Minister, Mrs. Bandaranaike, anticipating that she would be the subject of inquiry, filed an application in the Court of Appeal for a writ of prohibition to prevent the Commission from proceeding to inquire into her acts or omissions as Prime Minister. A Bench of three judges (Justices Wimalaratne, Vythialingam and Colin-Thome) held that the SPCI Law was not made retrospective in its operation and, therefore, the Warrant issued to the Commission to inquire into her conduct during the period she was Prime Minister was *ultra vires* the law.38

After this the SPCI Law was speedily amended to nullify this judgment of the Court of Appeal and also to transfer the writ jurisdiction or powers of judicial review from the Court of Appeal to the Supreme Court.39 The reason for the Amendment given in the Act was that it was the intention of Parliament when enacting the law to include in the scope of the Commission’s inquiry any period whether before or after the enactment, i.e. the judgment of the Court of Appeal was wrong. Mrs. Bandaranaike did not appear before the Commission

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37 6 DCC 13.


or participate in the inquiry into her conduct, and adverse findings were made against her by the Commission.40

When it became clear that a resolution was going to be passed by Parliament to impose civic disability on her and also expel her from Parliament Mrs. Bandaranaike filed an application in the Supreme Court to quash the findings by writ of certiorari. By the time the matter was argued the resolution was passed in Parliament and the Supreme Court (Justices Samarawickrema, Ismail and Wanasundera) held that Article 81(3) of the 1978 Constitution was a preclusive clause preventing the court from exercising any jurisdiction at this point of time (Bandaranaike v. Weeraratne).41

Close on the heels of this decision was the extraordinary Six Judges Case. While the Commission was continuing to sit, Felix Dias Bandaranaike (FDB) a former Minister of Justice, against whom also adverse findings had been made by the Commission leading to the imposition of civic disabilities filed an application in the Supreme Court seeking writs of quo warranto and prohibition against Justice de Alwis, on the ground of gross misconduct in entering into a financial transaction with Fowzie, whose conduct was the subject of inquiry, making him unable to act as a member of the Commission. No relief was claimed from the other two members although they were made respondents. This application was heard by Chief Justice Samarakoon and Justices Wimalaratne and Colin-Thome. After this application was made the Attorney-General moved to intervene in the proceedings but this was refused.42

After hearing arguments three judgments were delivered. The Chief Justice found the allegations of misconduct unfounded, yet because there was a likelihood that Justice de Alwis’ judgment could be perceived as warped by favouritism, he granted the writ of prohibition against Justice de Alwis from taking further part in the investigation of the conduct of Fowzie only. Justice Wimalaratne found misconduct on the part of Justice de Alwis but thought that a writ of prohibition would amount to a removal of a member of the Commission and that was a power which was executive and vested in the President. He, therefore, was not for granting the writ of prohibition but for a declaration that Justice de Alwis was unable to act in terms of SPCI Law. Justice Colin-Thome found Justice de Alwis guilty of misconduct and allowed the writ of quo warranto against Justice de Alwis and also declared him disentitled from holding the office and functions as a member of the Commission.43 As transpired later the Chief Justice was in some perplexity as to the decision of the Court.

42 Bandaranaike v. de Alwis (1982) 2 SLR 617.
The next stage of the drama was when Justice de Alwis petitioned the President against the judgment of the Supreme Court. Consequent to these representations the Government decided to ask Parliament to inquire into and report to Parliament on the conduct of the proceedings in the case of Bandaranaike v. de Alwis. This was done by a motion moved on behalf of the Minister of Justice and a Select Committee was nominated by the Speaker. This Committee held 21 meetings and heard detailed evidence, oral and documentary. In these proceedings Justice Wimalaratne was represented by Counsel. Apart from the judges, the Attorney-General and Mr. P. Navaratnarajah QC, who appeared for Justice de Alwis in the Supreme Court, gave evidence.

The concerns addressed by Justice de Alwis in his petition to the President arising from FDB’s application to the Supreme Court and the judgment of that Court were -

(a) conspiracy to discredit the Special Presidential Commission of Inquiry of which he was a member;
(b) bias on the part of Justices Wimalaratne and Colin-Thome;
(c) refusal by the Supreme Court to hear the Attorney-General.

This petition was referred by the President to Parliament and the speaker appointed a Select Committee. The terms of reference to the Select Committee, however, added other matters regarding the conduct of the proceedings - whether the papers filed by FDB had been prepared in the chambers of Justice Colin-Thome, how the judgment came to be delivered on a particular day, and the Constitution of Supreme Court Benches. Although not directly in the terms of reference, there was an important question whether the Supreme Court had believed Justices Weeraratne and Sharvananda who had sworn an affidavit.

The conspiracy theory was contrived and calls for no comment except to say that it was not believed by the Committee. The allegation of bias was different and cannot be understood without some knowledge of an important change in the Judiciary after the 1978 Constitution. The Supreme Court before the new Constitution constituted of 19 judges including the Chief Justice. In that court Justice Wimalaratne was 5th in order of seniority, Justice Weeraratne 11th, Justice Sharvananda 14th and Justice Colin-Thome 19th. After a Supreme Court and Court of Appeal were created, seven of the nineteen judges including Justices Weeraratne and Sharvananda were appointed to the Supreme Court. The new Court of Appeal had Justice Wimalaratne as President, and Justice Colin-Thome a judge. K.C.E. de Alwis who was a District Judge was also made a judge of the Court of Appeal. There was initially some uncertainty as to how seniority of judges in the Court of Appeal should be reckoned. At the time the Commission was appointed in 1978 Justice de Alwis appeared in the Law Reports as senior to Justice Colin-Thome. This was rectified and by 1981 Justice Colin-Thome was President Court of Appeal and Justice de Alwis was 4th in seniority. Justice Wimalaratne
was appointed to the Supreme Court in 1980 and Justice Colin-Thome in 1981. Justice de Alwis retired from the Court of Appeal in 1982.

To get back to evidence of bias, apart from a personal grudge alleged by Justice de Alwis against Justice Wimalaratne and some displeasure between himself and Justice Colin-Thome, it was the position of Justice de Alwis that the judges who had been favoured over others by FDB had grievance against the Government both for being overlooked in the appointments to the Supreme Court, and for the invalidation of their judgment on the Warrant in Bandaranaike v. Weeraratne. The judges had to defend themselves before the Select Committee. One judge went so far as to declare that his family were traditional supporters of the UNP. The judges were cleared of the allegation of bias and the finding was that there was no impropriety in their hearing the case against Justice de Alwis.

We come to a more serious matter, that of the affidavit given by Justices Weeraratne and Sharvananda. Justice de Alwis in order to show that there was no impropriety on his part regarding the transaction with Fowzie stated that the decision not to investigate Fowzie was taken by the Commission before the transaction. In this he was supported by an affidavit given by the other two members of the Commission. In the Supreme Court this affidavit was referred to without comment by all the judges, but nevertheless the court or the majority did see some impropriety. When the Select Committee which was now closely scrutinising the three judgments questioned the judges on the affidavit, there were some surprises in store. Chief Justice Samarakoon said, yes, he disbelieved the affidavit. So also Justice Wimalaratne albeit weakly, and Justice Colin-Thome, very strongly. Mr. Navaratnarajah, PC in his evidence agreed that the affidavit had been disbelieved and thought it curious that “Justice Wimalaratne who had described Justice Sharvananda as a perjurer who had sworn a false affidavit sat with him and delivered this judgment.”

Finally, it could be said that the Select Committee faulted the Supreme Court for dispensing with the assistance proffered by the Attorney-General in a case of complexity where the judges themselves were not in agreement. In this they had the support of the Attorney-General. The Report of the Committee shows that even before the Committee the judges could not agree what their decision was.

In the end, the judges (in the Commission and in the Supreme Court which heard the case) failed poorly by having to make explanations, clarifications and protestations to Parliament on their judicial conduct. The Select Committee was sitting over a case argued before the Supreme Court in all its stages leading up to the judgment and ended by proffering advice as to how it could have been done better. The institution of the judiciary suffered.44

It must be mentioned that the action taken by the President was unprecedented and all the subsequent proceedings find no basis in the Constitution, but strangely the judges acceded.

**JUDICIARY AND THE EXECUTIVE**

It is easy for good governance when the judiciary sees eye to eye with the executive. But judges have a responsibility to the people to see that they are not subject to illegal or oppressive action by minions of the State.

**Writ of Habeas Corpus**

This is achieved by the power to issue mandates in the nature of writs against State officers. That great English remedy, the writ of habeas corpus enabled a subject who was unlawfully detained to obtain his release by order of court. Even under the colonial Government the writ was a powerful remedy though rarely used.45

After independence and the enactment of the Citizenship Act and the Immigrants and Emigrants Act, deportation orders served on illicit immigrants were challenged by writs of habeas corpus in several cases.46 These cases do not indicate a willingness on the part of our judges to go beyond the English law. There was hardly a difference in approach when persons were detained under Emergency Regulations, under the Public Security Ordinance and their release was sought by the writs.47

At a later point of time and even after freedom from arbitrary arrest became an entrenched fundamental right in Chapter III of the Constitution and enforced by the Supreme Court, the writ of habeas corpus did not lose its importance. As many writ applications as fundamental rights applications were filed there was a noticeable change of judicial attitude. The liberal approach where liberty of the subject is concerned going beyond English law can be seen in the judgments in *Juwanis v. Latiff*48 and *Leela Violet v. Vidanapathirana*.49 In this way a judicial mechanism was found to deal with the many cases of involuntary disappearances.

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45 See in *re W.A. de Silva* 18 NLR 277 (failed because martial law cannot be questioned). In *re Bracigedle* 39 NLR 193, a celebrated case because of the unusual independence shown by a colonial Chief Justice.


47 See *Hidramani v. Ratnavale* 75 NLR 67, *Gunasekera v. Ratnavale* 76 NLR 316 (but see the dissenting judgment of Wijayatilake J who voiced concern for the liberty of the subject).

48 (1988) 2 SLR 185. See also *Kodippilige Seetha v. Saravanaman* (unreported SC judgment setting aside judgment of Court of Appeal reported in (1986) 2 SLR 228).

49 (1994) 3 SLR 377.
Other Writs

Perhaps the most notable achievements of the judiciary is in the area of executive abuse and misuse of administrative powers. The emergence in English judge-made law of judicial review did not go unnoticed here. English law crafted the judicial review action to deal with the rush of complaints by subjects against bureaucratic decisions. With us the writs of certiorari and mandamus have been invoked and the courts have not been slow to grant them. The development of administrative law in the two countries has been the same. It is no longer law that there should be a judicial or quasi-judicial exercise of power by a Minister or his officials or that legal rights must necessarily be affected. The decisions are too numerous to be referred to in this paper except to say that the principle that officials hold powers in trust and they must not act arbitrarily or unreasonably has been firmly established.

In a bold move the judiciary has insisted that there should be procedural fairness in decision making.\textsuperscript{50}

Constitutional issues of importance began to surface after the Thirteenth Amendment. The dissolution of a Provincial Council by the Governor was successfully challenged by Writ of certiorari in \textit{Mahindasoma v. Senanayake}.\textsuperscript{51} In \textit{Premachandra v. Jayawickrema} the issue was the appointment by the governor of a Chief Minister and on a Reference to the Supreme Court it was argued that this was a political question and judges should refrain from getting into the political thicket. The Court’s answer was that the Governor was exercising a statutory power and it was a justiciable issue.\textsuperscript{52}

Fundamental Rights

Of greater significance than the expansion of judicial review by resort to the ordinary law of writs, is the special jurisdiction exercised by the Supreme Court in cases of infringement of Fundamental Rights. The Court’s scrutiny of executive and administrative action extends from Cabinet decisions or Ministerial decisions to actions of officers in the Government proper and in agencies of the Government exercising State functions or subject to control by the State. A vast jurisprudence has been built around this jurisdiction and space does not permit an examination of the case law here.

In notable decisions the court has assured to the people their fundamental freedoms and their entitlement to fairness in administrative decisions of whatever kind. In so doing the court has been upholding the Rule of Law.


\textsuperscript{51} (1995) 1 SLR 180, affirmed by the Supreme Court in (1998) 1 SLR 333.

\textsuperscript{52} (1994) 2 SLR 90. After the case was remitted to the Court of Appeal, the appointment was quashed (1993) 2 SLR 294.
The Executive-judiciary relationship has come under strain not only in invalidation of administrative decisions but also the disapprobation of such decisions leading to orders for payment of compensation and costs.

CONCLUDING REMARKS

The executive and the legislature are accountable to the people daily and in various ways, and periodically at elections. Media scrutiny of their actions fair or unfair, makes them vulnerable to criticism. In the case of the judiciary it is different for judges are not accountable to the people in the same way as the executive. They can carry on till the age of retirement and fear only complaints to the Judicial Services Commission or correction of their orders and judgments by a higher court. This does not apply to the apex court, the Supreme Court, whose judgements are not subject to any further appeal and cannot be reviewed by a fuller bench for the mere asking. Judges work for the most part away from public glare, and criticism is strictly guarded by the law of contempt. They are protected from questions on their conduct being raised even by the people’s elected representatives the legislature, by Standing Order 78 which requires this to be done only upon a substantive motion.

The judiciary may be the weakest branch of Government but in a democracy it is the deference shown by the executive and legislature that gives it strength. This is necessary for judges to act independently and fearlessly. Public perception of the role of the judiciary is also important. Judges must have the support of the people as they undoubtedly did when not so long ago there was public outrage when the houses of the judges were stoned after a decision against the executive in a fundamental rights case. It was also a citizen who took the initiative in contempt of court proceedings against a Government newspaper.

When this delicate balance changes we must be concerned. The use of a statement made by a MP in Parliament against him in judicial proceedings led to unseemly comments on judges in Parliament. The executive has also on occasions made disparaging remarks on sitting judges which have shocked the people. A well-known journalist writing a column in a Sunday paper sees today’s judiciary in a different perspective. He wants a judiciary freed of executive control and in a position of independence, an institution which would consciously act to defend and refine a democratic freedom.

There must be a reason why the judiciary has attracted this kind of attention. Judges have for long in their judicial work been tension free, enjoying the esteem of the public and more

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53 Fernandopulle v. de Silva (1996) 1 SLR 70.
54 Hewamanne v. de Silva (1983) 1 SLR 1.
than that the respect of the other branches of Government. If ever there were differences they were minimal and under control. For the most part their time was spent on questions of Roman Dutch law and the personal laws or following developments of English Criminal law. Judges did lead a cushy life. Today with a changing economy new areas of law have come into prominence - International Trade and Investments, Copyright, Environment, Development, Technology and International Instruments. All these are important areas for modern Government and any Government must have anxious thoughts of partnership with the judiciary.

Of more urgent concern to the executive and parliamentarians is the enforcement of fundamental rights. Since this is a jurisdiction given exclusively to the Supreme Court judges are not to blame if their orders are not popular with the executive. It is true that the range of executive and administrative actions that are challenged have raised the bogey of Government by the judiciary. It is a point of view that judges must be careful about it the same way that American judges are sensitive to any such suggestion.

What has happened here is that public servants have in large numbers sought relief from the court against what they perceive as unfair administrative decisions. It has spread to personnel in the police and armed forces. For those who come to court this is the only forum where there can be a non-partisan adjudication of their complaints. Although in a different context in an article to the Newsweek titled “Delegating Democracy” the columnist has used the by-line “Governments by litigation have become increasingly popular - It’s bad for both politics and the law.” This solution is to set up suitable administrative structures that have the confidence of the people. If this is not done the trend to “legalise every actual or potential human conflict” will continue.

56 Robert J. Samuel, re News Week of 12th June 2000. Many interesting points of view are expressed like the active role played by lawyers in changing government policy and their interest in legal fees. But the real concern is the conversion of difficult political choices into legal issues which can exclude important social considerations.

The aim of this paper is to study two of the many institutions created by the State to protect and promote the human rights of the people; the Ombudsman and the Human Rights Commission. Since the mere existence of these institutions does not guarantee the rights of the people, this paper will proceed to analyse the actual functioning of the above-mentioned institutions to determine whether they have been successful in fulfilling their mandate.

The Human Rights Commission

Introduction

Act No.21 of 1996 established the Human Rights Commission (HRC) of Sri Lanka as a permanent national institution to investigate any infringement of a fundamental rights declared and recognised by the Constitution, and to grant appropriate relief. The Commission was created amidst much fanfare, optimism and hope. This mood soon changed due to the fact that the Commission began functioning only in 1997, a year after the legislation establishing it was enacted. It had been hoped that the creation of the HRC would herald in a new era in which the human rights of the individual and society would be protected and promoted. Sadly, this has not been the case.

An important limitation was imposed on the Commission’s work under the Act, which only authorises the Commission to investigate infringements of fundamental rights, not human rights. In other words, a distinction has been drawn in the Act between those fundamental rights that are enshrined in the Sri Lankan Constitution, and the much wider range of rights and freedoms guaranteed under international human rights law, which includes the right to

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* Researcher, Law & Society Trust.
life. The use of the term “fundamental right” thus restricts the jurisdiction and mandate of the Commission; it is unable to investigate violations of all human rights.

However, the Act does proceed to define a human right as a “right declared and recognised by the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.” Yet these “human rights” too are narrowly defined which ignores rights enshrined in other international human rights instruments such as, \textit{inter alia}, the Convention Against Torture and the Convention on the Elimination of All Forms of Discrimination Against Women and the . It would be prudent to question why there are two different sets of rights set out and defined in the Human Rights Commission Act. The explanation is simple. The investigative and conciliatory powers of the Commission extend only to “fundamental rights” but its education functions encompass a much broader range of rights, “human rights” as defined in the ICCPR (International Covenant on Civil and Political Rights) and the ICESCR (International Covenant on Economic, Social and Cultural Rights). The Human Rights Commission Act, in keeping with the Constitution, also restricts the Commission’s powers to infringement of rights by executive or administrative action. The actions of private actors are thus ignored.

Another provision that is a cause for concern is section 14(b), which empowers the Commission to investigate an infringement of a fundamental right as a result of an act, which constitutes an offence under the Prevention of Terrorism Act No.48 of 1979. This provision therefore empowers the Commission to investigate violations of fundamental rights due to the actions of “criminal groups, which have resorted to arms to achieve their political goals.” This section appears to target terrorist activities. If exercised by the Commission, this could create the public perception that the Commission is not an independent human rights body. The Commission should at all times not only be, but also be seen to be, independent from the government and the armed forces.

\textbf{The Mandate and Powers of the Human Rights Commission}

The Commission under section 10 has the power to:

(a) inquire into and investigate complaints regarding procedures with a view to ensuring compliance with the provisions of the Constitution relating to fundamental rights, and promote respect for and observance of fundamental rights;

(b) inquire into and investigate complaints regarding infringement, or imminent infringement, of fundamental rights and to provide for resolution by way of mediation and conciliation;

(c) advise and assist the government in formulating legislation and administrative directives and procedures in the furtherance of the promotion and protection of fundamental rights;
(d) make recommendations to the government regarding measures which should be taken to ensure that national laws and administrative practices are in accordance with international human rights norms and standards;

(e) make recommendations to the government on the need to subscribe or accede to treaties and other international instruments in the field of human rights; and

(f) promote awareness of, and provide education in relation to, human rights.

As can be seen the Commission has a broad mandate which, if utilised in a creative manner, would enable it to function effectively and efficiently. Yet of the functions allocated to it, the Commission at present performs only the powers described in subsections (a) and (b) above; in other words, it only exercises its power to investigate and mediate complaints. The Commission, in its annual report for 1997-1998, stated that its main functions are set out in subsections (a) and (b) and in section 11(d).¹ As Amnesty International has pointed out, even these functions have not been fulfilled in an effective manner: for example, the powers of the Commission to investigate torture have rarely been utilised.² Amnesty International has also given examples of cases where the Commission did not inform complainants of the outcome or progress of their cases.

The Commission seems to have virtually ignored the other functions allocated to it. It has taken no action under subsections (c) and (d) of the Act, that of advising and assisting the government in formulating legislation, and making recommendations to the government regarding measures which should be taken to ensure that national laws are in accordance with international human rights norms and standards. The Commission has played no role in assisting the government to formulate new legislation, such as the draft equal opportunity law in 1999, and thus did not utilise a clear opportunity to get involved in a very important process. Since many of Sri Lanka’s legal provisions are discriminatory towards women or other sections of society, and are in dire need of reform, the Commission could examine whether these laws are in accordance with international standards and make recommendations to the government to initiate reform.

The role of advising and assisting the government in formulating legislation is no easy task. As the Commission is already under-staffed and lacks resources, it may be that it is not equipped to perform this demanding role effectively. It would require expertise in many fields, which is probably outside the competence of the Commission’s present staff. Indeed,

¹ Section 11(d) requires the Commission to monitor the welfare of persons detained either by a judicial order or otherwise, by regular inspection of their places of detention, and to make such recommendations as may be necessary for improving their conditions of detention.

the Commission has acknowledged it in its annual report that its staff members are inexperienced and untrained. ³

Section 10(d) of the Act - which is concerned with ensuring that Sri Lanka’s international law obligations are fulfilled and that national law in no way contravenes international human rights practices and norms - is a section of utmost importance, but has not even earned a glance from the Commission. Given that Sri Lanka’s human rights record has not been beyond reproach and that it is yet to ratify several international treaties, it is only to be expected that the HRC should advise the State and encourage it to become a party to treaties, which have enormous impact on the protection and promotion of human rights. The Statute of the International Criminal Court is a case in point. If the Commission were to be proactive it could urge the government to ratify this landmark treaty, which is an important step in ending impunity with regard to human rights violations, both nationally and internationally.

With regard to public education programmes and policies, the Commission currently does not possess such programmes or policies. The Commission in its annual report for the period 1997-1998 accepted that “there was no possibility of implementing a programme at the national level this year. The main reason for this was the lack of experienced staff in the Commission for this purpose.”

At present, the Commission receives on average 30 complaints a day, of which many are not within the ambit of the Commission’s mandate. It has to be pointed out that if a concerted public education campaign that clearly sets out the mandate, powers and functions of the Commission is undertaken it might help reduce the number of complaints that it receives which are outside its purview. As public education is essential to any attempt to promote and protect human rights the Commission is duty bound to undertake this function and fulfill its mandate as per section 10(f).

In addition, the Commission was given other powers to enable it to play a proactive role in the promotion and protection of human rights. The Commission has the power to investigate on its own motion an allegation of the infringement or imminent infringement of a fundamental right; it can also refer matters to the Supreme Court under Article 125 of the Constitution for the determination by the Supreme Court. Yet, it has not done so. In Sri Lanka, where a violent conflict exacerbates the human rights violations faced by people, it cannot be for a lack of subjects to investigate that this function has not been fulfilled. For example, instead of only interviewing suspects and engaging in documentation the HRC should have played a more active role in the investigation into the mass graves in Chemmani.

The Commission also has other specific duties such as monitoring the welfare of detainees, and making recommendations for improving the conditions of detention.\(^4\) The infrequency of visits undermines the objective of the provision, which was meant to be a deterrent to torture in custody. It must be acknowledged that the infrequency of visits should not be attributed to any lack of commitment of the officers of the Commission. The author found that shortage of staff was the main reason, and that several officers were committed and motivated. In addition, according to an Amnesty International report the members of the Commission did not utilise any standard minimum rules to ascertain the welfare of the detainees. Instead, they referred only to the Presidential directives and other safeguards laid down in the emergency regulations, the Human Rights Commission Act, the Constitution and other legal provisions prohibiting torture. The members were said to realise the need for such rules, but had taken no action to compile any at the time of the author’s interview with the Chairman, Mr. O.S.M. Seneviratne. In addition, important measures to protect the welfare of detainees provided within the framework of the Human Rights Commission Act, such as the maintenance of a register of detainees, including a central register, had not been carried out. The Human Rights Task Force which was disbanded in 1997 when the HRC was established used to carry out this task, but the HRC does not fulfil these functions to the extent that the Human Rights Task Force used to.

The Commission also has the power to set up provincial offices and create thematic sub-committees. In 1999, regional officers of the Commission were functioning in 10 locations, but no thematic sub committees had been created to examine particular issues. The annual report stated that the Commission intended to establish an office in Mannar during 1998, but by December 1999 the branch had not been established.

The Act also restricts the power of the Commission to deliver binding decisions; the Commission only has power to make recommendations. In the event the recommendations are not followed, the Commission can make a full report of the facts to the President who shall cause a copy of the report to be placed before Parliament. It has to be conceded that the effectiveness of this is questionable since this procedure has not been utilised to date.

The Appointment and Removal of Members of the Commission

The criteria for the selection of the members of the Commission stipulate only that they must have knowledge of, or experience in, matters relating to human rights. A national human rights commission is the institution entrusted with the promotion and protection of human rights in the country. As such, its members should be individuals with “proven expertise and competence in the field of protecting and promoting human rights”\(^5\) and should

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\(^4\) Section 11(d).

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reflect the ethnic and gender diversity of Sri Lanka. It is imperative that the members be persons who will be able to take the initiative and ensure that the Commission functions in a progressive and proactive manner. Therefore, the selection criteria for the members should be specific and should take the stringent demands of the job into account.

The appointment and removal procedures of the members of the Commission also leave much to be desired. The members are appointed by the President on the recommendation of the Constitutional Council (as envisaged in the proposals for constitutional reform). However, until the Constitutional Council is constituted, the members shall be appointed by the President on the recommendation of the Prime Minister in consultation with the Speaker and the Leader of the Opposition. The members can be removed by the President on certain grounds.

This is not a prudent way to select and discharge members, as it vests power in the hands of politicians, and specifically in the hands of one person. Since the HRC is a State body which is supposed to investigate State violations of human rights, its position is delicate. Therefore, to leave appointment and removal in the hands of one key political figure risks bringing the impartiality and independence of the Commission into question. It also risks leaving the Commission open to political manoeuvring and tampering.

The new set of Commissioners appointed in 2000 consists of 4 male members and one female member, all of whom work part-time. It has to be noted that countries with effective human rights commissions, such as Australia, employ full-time members. Sri Lanka, too, should adopt this method, as the members need to be able to commit time and energy to the Commission. If the Commission is to move forward into the twenty first century, it should also become representative of the whole society. New blood should be infused into the Commission in the form of younger appointees who are properly qualified for these posts, to ensure that new thinking and new dynamism is introduced to the Commission.

**The Structure and Staff of the Commission**

It is evident from the annual report of the Commission that it lacks adequate and trained staff to carry out its mandate effectively. It lacks staff to undertake inspection of police stations and detention camps, to carry out public education campaigns and to investigate complaints. The Commission has only three legal officers who are stationed only at the main office in Colombo.

There are many reasons for the problems experienced by the Commission. It lacks funds to hire additional staff, and also lacks the power to hire its staff. The procedure that has to be followed when hiring new officers is long and tedious and results in delays. The Commission has to follow the procedure relevant to other corporations; it has to forward a report of staff to the Salaries and Cadres Commission through the President’s Office and obtain approval.
The recruitment has to be done according to the rules and regulations relating to the scheme of recruitment.

The minimum qualification required of an officer of the Human Rights Commission is G.C.E. Advanced Level. Although it is obvious that officers of a national human rights commission - who are expected to undertake investigations of human rights violations and engage in mediation - should receive training to perform their functions effectively, the Commission has not included staff training in its proposals for the future. Lack of funds has been pointed out to be the reason for this oversight. The Commission also is not organised into separate divisions to deal with specific matters, on the model of the Australian Commission, for example. However, the Commission is currently developing plans for internal restructuring into separate divisions.

**Funding of the Commission**

Any national human rights commission is in a delicate position: it is a State institution yet it has to investigate violations of human rights by the State. Since it is funded by the State, it cannot be financially independent and it has difficulties in carrying out its functions unhampered by lack of funds. In April 1999 the government in its report to the UN Commission on Human Rights pledged that it would allocate Rs.14,235 million to approximately Rs.25 million to support the planned expansion of the Commission’s activities. Yet, to date this has not been done and the Commission still suffers from a lack of funds. This has also restricted the activities of the Commission to adjudication and has lead it to ignore its other functions such as public education.

**The Annual Report of the Commission**

The Commission published its first and only annual report for the period 1997-1998 in 1999. An annual report of any commission, especially a human rights commission is of paramount importance, as it reflects the commission’s work and working methods. It is, therefore, imperative to examine the contents and structure of the report.

The report is surprisingly short, being only 10 pages, and lacks much vital information, which should have been included. It contains few specific details about the Commission’s work, and is generally very vague about its activities. Although it contains the number of police stations, army camps and detention camps the officers visited, it does not state how many times each camp was visited. It merely states that the officers visited the above mentioned places “often.” The report does not contain an organisational chart, the results of investigations, recommendations issued in major cases or a summary of the work of the regional centres. It is important that the public be made more aware of the work of the regional centres, especially since some of them are situated in conflict areas. If they worked more effectively, they could become an important means of assessing the current state of human rights in those areas.
The whole tone of the report reveals a careless attitude which is most worrying given that this is the national human rights institution entrusted with the task of protecting the rights of the citizens of Sri Lanka. For example, the section on “arrest or taking into custody” states that the fulfilment of the requirements to inform the Commission of the arrest or detention or change of place of detention of any person within 48 hours “were mostly done by the armed forces and the police but in certain cases there were instances where it was not done due to certain reasons.” No numerical data is given of the number of times that the Commission was informed of arrests and detentions, nor of the number of times that the requirements were not followed. The reasons for non-compliance were also not stated and no information was given of the Commission’s response when it discovered cases of non-compliance.

The HRC should at all times function in a very transparent manner. It should endeavour to give the public as much information as possible about its activities and any other relevant information relating to the protection and promotion of their rights. It should ensure that it develops systems for maintaining information on its activities in a manner, which will enable it to report on them in a detailed and timely manner.

**Working with Other Human Rights Institutions, Non-Governmental Organisations and International Human Rights Bodies**

While Sri Lanka can boast of a plethora of human rights institutions, there is hardly any co-ordination between them. The Human Rights Commission Act does not contain any provision which specifies or compels co-operation and consultation with other human rights institutions to avoid conflicts of jurisdiction and promote common policies. The annual report of the Commission does not state whether it had links with or co-operated in any way with any of the other human rights institutions, such as the Ombudsman or the Official Languages Commission. Principle (f) of the methods of operation in the Principles Relating to the Status and Functioning of National Institutions for the Protection and Promotion of Human Rights (Paris Principles) 1992 states that any national human rights commission shall maintain “consultation with other bodies, whether jurisdictional or otherwise, responsible for the promotion and protection of human rights.”

Where co-operation with non-governmental organisations is concerned some progress has been made. The Sri Lanka HRC is part of the Asia Pacific Forum of National Human Rights Institutions which conducted a regional workshop on “National Human Rights Institutions and Non-Government Organisations: Working in Partnership” in Kandy in July 1999. This workshop confirmed the vital role that civil society organisations play in the protection and promotion of human rights and aimed to forge partnerships between national human rights institutions and non-governmental organisations.
The Kandy Programme of Action, which was a check-list of possible areas of co-operation, resulted from this workshop. The Forum Bulletin states that “it will now be for the national institutions and Non Governmental Organisations to work together at the national level to implement the proposals put forward in the Programme of Action.” Although, since the appointment of new members in 2000 the Commission has begun to work with NGOs it has not taken any action to put the Programme of Action into effect.

Conclusion and Recommendations

One of the objectives of the creation of the HRC was to provide the people with a less formal, inexpensive and uncomplicated method of seeking redress for violations of fundamental rights. Yet, the Commission has not evolved as expected. The Commission alone cannot shoulder the blame for this failure. Many factors are involved, including lack of will and action on the part of the government. However, in spite of the hurdles faced by the Commission, it could have progressed under more dynamic and committed leadership.

The following recommendations are proposed:

- The State should develop a set of guidelines to identify appropriate cases for reference to the HRC from the Supreme Court under section 12. Considerations which should be taken into account, include the possibilities of dispute resolution through mediation and conciliation.

- The government should ensure the financial independence of the Commission through adequate provision of funds from the consolidated fund.

- The appointment of members to the Commission should not be by the President in consultation with the Prime Minister, the Leader of the Opposition and the Speaker, but should be by another authority such as the proposed Constitutional Council. In the event of failure to change the method of appointment, the Act should be amended to state that appointment be by the President with the concurrence of the above stated persons.

- The Act should be amended to introduce stricter and more specific criteria for the selection of members. The members should be full-time appointees.

- The Human Rights Commission should have the power to recruit its own staff without having to follow long and tedious procedures.

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The Human Rights Commission should be issued with a copy of the Emergency Regulations as soon as they are passed.

The Human Rights Commission should:

- play an active role in the drafting stage of law making by Parliament;
- take its public education function seriously and initiate a national education campaign to raise awareness of human rights issues generally, and of the indivisibility of human rights in particular;
- explore methods to enable realisation of economic and social rights;
- ensure that the text of the emergency regulations are published in newspapers in all three languages as soon as they are issued;
- initiate prosecution of police or other authorities in instances where they have not complied with the regulations regarding reporting of arrests, as a means of ensuring that the practice of non-reporting is stopped;
- conduct public hearings which would enable interested parties and NGOs to make interventions;
- conduct in-depth studies on pressing and relevant issues and compile public reports;
- publish periodic reports on the state of human rights in Sri Lanka;
- get involved in the preparation of country reports to treaty bodies;
- make public statements about pressing and topical human rights matters;
- provide training for its staff members;
- create separate departments within the Commission to deal with different areas such as mediation, investigation and public education;
- work more closely with NGOs and international human rights bodies to create a support network and to provide the Commission with current information about developments in the human rights field.
THE OMBUDSMAN

Introduction

The Office of the Parliamentary Commissioner for Administration or the “Ombudsman” was introduced by the 1978 Constitution as an informal method by which people could seek redress for violations of fundamental rights. Article 156 of the Constitution directs the Parliament to create a legal framework for the establishment of the Office of the Ombudsman. In 1981 through the enactment of the Parliamentary Commissioner for Administration Act No.17 the Office of the Ombudsman was created. This was amended in 1994 by Act No. 26 which was aimed at expanding the powers of the Office. As with other mechanisms created to safeguard human rights the Office of the Ombudsman too has not performed as effectively as hoped. This paper will outline the legal framework within which the Ombudsman functions and examine the effectiveness of the Office.

The Mandate and Powers of the Ombudsman

Article 156 of the Constitution states that the Ombudsman is “charged with the duty of investigating and reporting upon complaints or allegations of the infringement of fundamental rights and other injustices.” An injustice is said to include “any injustice alleged to have been or likely to be caused by any decision or recommendation (including a recommendation to a Minister) or by any act or omission, and the infringement of any right recognised by the Constitution.” However, the Act of 1981 gives the Ombudsman power only to consider petitions presented by members of the Public Petitions Committee which they believe “discloses an infringement of a fundamental right or other injustice by a public officer, or officer of a public corporation, local authority, or other like institution.” The 1994 amendment to the Act removes this obstacle by allowing the public to communicate directly with the Ombudsman and submit complaints in writing.

Section 11 of the Act prevents the Ombudsman from investigating certain complaints such as those related to the “exercise, performance or discharge of any power, duty or function under the Public Security Ordinance or the law for the time being in force relating to public security” if they do not amount to an infringement of a fundamental right. The Ombudsman is also given the power to investigate “any decision, determination, recommendation, act or omission of the Ombudsman or of any Deputy Ombudsman” if it results in an infringement of a fundamental right. The fact that the Ombudsman is given the power to investigate the

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7 Section 10 (3), Act No.17 of 1981.
8 Section 10 (1), Act No.17 of 1981.
9 Section 3, Act No.26 of 1994.
10 Section 11, Act No.17 of 1981.
11 Section 11 (b) (viii), Act No.17 of 1981.
acts of his/her own office is worrying and is contrary to principles of natural justice. As in the case of the HRC, the Ombudsman too does not possess the power to make binding orders.

If the Ombudsman determines that an infringement of a fundamental right or an injustice has taken place he/she shall “report his determination, together with his reasons therefore, to the head of the institution concerned, and the Minister to whom the department, public corporation, local authority or other institution concerned has been assigned and also to the Public Petitions Committee.”12 Where the Ombudsman determines that “there has been or is likely to be an infringement of a fundamental right or any other injustice, the Ombudsman may in his report make such recommendations as he thinks fit, and in such event, may require the head of the institution to notify within a specified time, the steps if any which he proposes to take to give effect to his recommendations.”13

If the recommendations of the Ombudsman are not taken into consideration and “if within a specified time no action is taken which appears to the Ombudsman to be adequate or appropriate, the Ombudsman shall after considering the observations, if any, made by the Head of the Institution, forward a copy of his report to the President and the Parliament. The Ombudsman shall attach to such report a copy of the observations if any, made by the head of the institution concerned.”14 As is evident the Ombudsman is totally dependent on the relevant departments and institutions to give effect to his recommendations. His only resort is to send a copy of his report to the President and Parliament which to date has had very little effect.

Investigation and Inquiry Procedure and Available Relief

During the course of his investigation the Ombudsman can request for reports from heads of departments and institutions relating to any matter under investigation. Yet, according to the Ombudsman these reports are not sent in time although they are given a minimum of one month. Reminders have to be sent, often more than once, resulting in further delay.15 Investigations are also hampered by the failure of many departments to maintain proper records and inquiries by the Office of the Ombudsman yield “glib responses that records are not traceable or cannot be recovered.”16

12 Section 5 (2), Act No. 26 of 1994.
14 Section 5 (3) (c ), Act No. 26 of 1994.
The Act states that the Ombudsman is not obliged to hold hearings but hearings appear to be the norm where the immediate past Ombudsman was concerned.\textsuperscript{17} Even when a hearing is held “no person is entitled as of right to be present at such an investigation”\textsuperscript{18} but the Ombudsman cannot make any recommendations adverse to any person “unless he had in the course of his investigation given such person an opportunity to be heard in respect of the matter to which such adverse report or recommendation relates.”\textsuperscript{19} Although the holding of hearings is an excellent idea it is not effective in resolving disputes due to the non-cooperation and apathy of government officials.

The Ombudsman stated that some departments send uninformed, inexperienced and relatively junior officers to participate in the inquiries. In addition, these officials do not have the authority to take decisions or give undertakings on behalf of the department which delays the progress of the inquiry even further.\textsuperscript{20} There have even been instances where the officials present at the inquiry failed to present their argument properly and after the Ombudsman gave his determination the department wrote asking for a fresh inquiry.\textsuperscript{21} All this could be due to the fact that public officers appear to be ignorant of the existence and content of the Acts of Parliament which governs the functioning of the Office of the Ombudsman and are unaware that the failure to attend an inquiry or provide information or evidence are punishable offences.\textsuperscript{22}

If the Ombudsman finds that an infringement of a fundamental right or any other injustice has taken place he/she can in his/her report to the head of the institution and the Minister to whom the department, or other institution has been assigned, make recommendations and may require the head of the institution to notify within a specified time the steps that have been taken to give effect to his recommendations.\textsuperscript{23} The recommendation could propose one of the following:

- that the matter be reconsidered;
- the omission be rectified;
- the decision be cancelled or varied;

\textsuperscript{17} Section 15 (3), Act No. 17 of 1981.
\textsuperscript{18} Section 15 (2), Act No. 17 of 1981.
\textsuperscript{19} Section 15 (4) (a), Act No. 17 of 1981.
\textsuperscript{20} \textit{Supra} n. 15, p.95.
\textsuperscript{21} \textit{Supra} n. 16, p.87.
\textsuperscript{22} Report of the Parliamentary Commissioner for Administration for the year 1998, p.66.
\textsuperscript{23} Section 5 (3), Act No.26 of 1994.
the practice on which such decision, recommendation, act or omission was based be altered;
reasons be given for such decision, recommendation or omission.

According to the Ombudsman there are often long delays, sometimes up to six months, in implementing the recommendations. Although in 1996 the President issued a letter to all Ministers asking them to give effect to the recommendations of the Ombudsman, it has had very little effect with the Ministries functioning in very much the same manner and paying no heed to the Ombudsman’s recommendations.24

Staff and Funding

One of the problems faced by the Office of the Ombudsman is the lack of trained and adequate staff. Currently, the Ombudsman’s staff are provided by the Ministry of Public Administration and the All Island Clerical and Allied Services. In addition to administrative and clerical staff the Ombudsman also needs officers with specialised training and have expertise and skills to assist the Ombudsman in carrying out investigations and inquiries. In his reports the past Ombudsman has repeatedly requested for a “separate cadre of staff endowed with a higher threshold level of educational attainment plus a spell of training ...(in) investigative and inquiry skills along with a higher commensurate remuneration.”25 Considering the serious nature of the complaints addressed by the Office of the Ombudsman it is only practical to ensure that proper staff exists to assist the Ombudsman in giving effect to his mandate.

There have been instances where staff who have been transferred out of the Office have not been replaced with the Office being left without even an English typist.26 Since the Office is small and the opportunities for career advancement within the Office is limited it may be advisable to provide them with incentives to motivate them. The Ombudsman should also be given the power to independently recruit staff without being dependent on the Public Administration for the provision of staff. If done so, the Ombudsman will be able to recruit qualified staff to suit the particular needs of the Office.

The Act also provides for the appointment of one or more Deputy Ombudsmen and allows the Ombudsman to delegate to a Deputy any of his powers, duties and functions under the Act except the power to submit the annual report of the Ombudsman.27 To date no Deputies

24 Supra n. 15, p.95.
25 Supra n. 22, p.65.
26 Ibid.
27 Section 8, Act No. 17 of 1981.
have been appointed despite repeated pleas made by the Ombudsman requesting such an appointment.

Till the end of the tenure of the past Ombudsman all investigations and inquiries were handled by the Ombudsman. Considering the number of complaints received by the Office every day it is not surprising then that long delays are experienced by the complainants; for example, in 1998, 279 inquiries were completed in a little over 180 days. The appointment of one or more Deputy Ombudsmen on a geographical basis would not only expedite the process but also provide much greater public access to the office.  

It is important to keep in mind that the objective behind the creation of the Office of the Ombudsman was to provide the public with an informal and quick method of seeking redress. Yet, the government seems to be totally unaware of this fact and has done nothing to assist the Office in fulfilling its mandate.

In his annual reports the Ombudsman bemoans the lack of allocation of adequate funds for the Office. He states that “the insufficiency of funds is indeed a handicap” and points out that the Office is not even properly equipped. In 1998, the office had no computers, no international telephone and telex facilities and possessed only one motor vehicle. It is a fact that the government has many demands on its exchequer and funds are scarce, but in comparison to the lavish spending by several Ministers it is indeed deplorable that the Office of the Ombudsman is left to languish without even a computer. Considering that the Office of the Ombudsman is responsible for looking into complaints of infringements of fundamental rights of citizens by the public sector it would not be unreasonable to ask the government to provide the Office with enough funds to meet its basic needs. The government also uses the same excuse to justify the non-appointment of Deputy Ombudsmen.

Other Factors that Affect the Work of the Ombudsman

In addition to the factors discussed above there are other elements that exacerbate the difficulties faced by the Ombudsman. Ambiguities that exist in the structures of governance and public institutions also contribute to the current state of confusion, which hampers the work of the Ombudsman. For example, the ambiguity which exists in regard to the powers that the authorities in charge of higher educational institutions and those that the University Grants Commission can discharge in respect of non-academic employees working in higher educational institutions leads to the authorities themselves making uninformed decisions which are sometimes ultra vires and results in complaints to the Ombudsman.

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28 Although complaints can be lodged in writing by post the complainants have to travel to Colombo for inquiries.

29 Supra n. 16, p.89.

30 Supra n. 22, p.65.

takes place in the conduct of affairs in certain corporations where Chairpersons exercise executive power although legislation has decreed that only the Director General of the establishment may exercise executive power.\textsuperscript{32}

The Ombudsman has also pointed out that many complaints that were submitted to him were due to the fact that “officials have been niggardly restrictive in interpretations and in the application of measures meant to award social benefits so that the objectives of the legislation have often been defeated.”\textsuperscript{33} One also finds that complainants lodge complaints with many bodies such as the Human Rights Commission, Public Services Commission etc, which leads to each body making different decisions on the same issue. This not only consumes the time of many institutions but also renders it difficult for the concerned authorities to give effect to the recommendations made by these bodies.

The immediate past Ombudsman has regularly presented his reports to the Parliament but the reports have never been discussed or debated which illustrates the lack of political will and want of interest in the functioning of the Office of the Ombudsman. Moreover, the report of the Ombudsman, which is supposed to be freely available to the public are not obtainable from the Government Printing Bureau. The Office of the Ombudsman itself has no copies of the reports and all attempts to purchase them have been unsuccessful due to their unavailability.

**Conclusion**

The failure of the Office of the Ombudsman is an indictment of the public service and government institutions. The Ombudsman can only conduct investigations and inquiries and make recommendations. It is the responsibility of the public service and institutions to give effect to these recommendations and ensure that those affected obtain redress. The effective functioning of the Office of the Ombudsman, therefore, depends not only on the Ombudsman but also on the public service structure. As in the case of other institutions the lack of political will is exhibited by the unwillingness of the government to give support, financial and otherwise to the Office of the Ombudsman. The immediate past Ombudsman is not totally blameless, he too did not explore alternative methods to enhance the effectiveness of the Office. He also did not have any relationship with civil society organisations and the media but limited his contacts to the government sector. It has to be stated that since the term of the previous Ombudsman came to an end in August 2000 an Ombudsman was not appointed till more than eight months later.

\textsuperscript{32} Ibid.\textsuperscript{33} Ibid., p.65.
Recommendations

It is recommended that:

- the public sector and other government institutions be more co-operative and give effect to the requests and recommendations of the Ombudsman;

- section 11 (b) of the Act No.17 of 1981 be amended to reduce the number of subject matters that are beyond the purview of the Ombudsman;

- adequate funds and facilities be afforded to the Office of the Ombudsman. The Ombudsman should be allowed some discretion and independence to raise funds;

- trained and skilled staff be provided to the Office of the Ombudsman;

- the Ombudsman’s report be debated in Parliament;

- one or more Deputy Ombudsmen be appointed either for different geographical areas or for particular issues;

- the Ombudsman establish linkages with civil society groups and the media and adopt alternative strategies such as releasing his annual report at a press conference to highlight the work of the Office of the Ombudsman.
Aspects of fifty years of Law, Justice & Governance in Sri Lanka
“ENGAGING IN PARTICIPATORY LAW REFORM”
THE ROLE OF THE LAW COMMISSION AS 
a legal institution in Sri Lanka

(Dr.) Jayantha de Almeida Gunaratne*

INTRODUCTION
Reflecting on the dynamics of the law and legal institutions over the past half century, it would probably be conceded without contest that the most significant strides in the legal domain of Sri Lanka have been made in the field of Constitutional Reform.

The Soulbury Constitution of 1946 when ‘Ceylon’ (as Sri Lanka was then called) stood elevated, was the basic norm of the independent nation with the coming into operation of the Independence Act of 1947. That it was the basic norm only on paper for the reason inter alia that the nation still owed allegiance to a foreign sovereign in the form of the British Queen became the theme in ushering in the post-Republican Constitution of Sri Lanka in 1972.

As the Constitutional Court which was created under that Constitution observed;

“After over 400 years of foreign imperialist and colonial domination, this country achieved independence as a Dominion within the Commonwealth on 4th February, 1948. Although we saw the sunset of foreign domination, nevertheless the twilight remained, and although we were independent, we still continued to owe allegiance to a foreign sovereign. In short, we were not an independent Republic … Experience

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therefore showed that in many fields of governmental activity the Constitution itself was an obstacle to solving problems of the people.”

To rid, therefore, of foreign dominance in the domestic ethos of the country, the government of the time, in what might be construed as a response to the Socialist Democracy it held out as being wedded to, began to attack through legislation, the very root of the institution of private property; such an attack was reflected in laws such as the Rent Act No.7 of 1972, Ceiling on Housing Property Law No. 1 of 1973 and the Land Reform Law No. 1 of 1972, to name just a few. With the enactment of the Second Republican Constitution in 1978, far reaching changes were effected in the constitutional structures, chief among them being the creation of an Executive Presidency and the Proportional Representation System. In the Human Rights sphere, the fundamental rights chapter stood as a significant improvement on the previous Constitution. Although the institution of private property was not expressly recognised, through legislation, a movement in favour of private ownership was witnessed. The amendments to the Rent Act in 1977 and 1980; amendment to the Ceiling on Housing Property Law in 1988 serve as illustrations.

When one looks at these reforms, a striking feature is that the Law Commission of Sri Lanka had had no say in these changes which were brought about by the legislature. As the years progressed, however, the Law Commission emerged from the shadows to take on a definitive role as a legal institution engaging in the task of law reform with increasing commitment and efficacy. Consequently, it becomes necessary to take a reflective look at the history of the Law Commission, its statutory role in general, and the extent to which it has responded to that role.

In that context, this paper proposes to examine how and what conditions could and should be created to enable the Law Commission to perform its role with regard to law reform in Sri Lanka in a meaningful manner within the broad framework of the human rights discourse.

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2 Law No. 10 of 1977.
3 Act No. 55 of 1980.
5 This paper traces the developments between 1969 and 2000.
HISTORY OF THE LAW COMMISSION

Chairpersons of the Law Commission;

- M.C. Sansoni (1969-1972)
  Retired Chief Justice

- Victor Tennekoon, QC (1978-1985)
  Retired Chief Justice

- C. Moonemalle (1988-1992)
  Retired President of the Court of Appeal

- (Dr.) Justice A.R.B. Amerasinghe (1995 to date)
  Supreme Court judge

The Law Commission, as a legal institution in Sri Lanka, is relatively new. It was first established in 1969 by an Act of Parliament. This Act was itself repealed in 1972. Following the change of government in 1977, the 1969 Act was revived in that same year. The legislation by which the Commission was revived, namely Law No. 11 of 1978, increased its membership from eight to a minimum of eleven and a maximum of fifteen. With a few breaks in between, the Commission functioned from 1978 to 1992.

The terms of the Commissioners having expired in 1992, the Commission was once again re-constituted in September 1994 under the chairmanship of (Dr.) Justice A.R.B. Amerasinghe. The present Commission, which is in its second term of office has eleven members excluding the Chairman with three unfilled vacancies. The Chairman and the members of the Law Commission are appointed by the President of Sri Lanka.

TENURE OF OFFICE OF MEMBERS OF THE COMMISSION

Section 2(2) of the Law Commission Act No. 3 of 1969 provides that: “A Commissioner shall, unless he earlier vacates his office, hold office for such period, not exceeding five years, as may be determined by the President at the time of his appointment, and shall be eligible for reappointment.” Section 2(3) provides that: “A Commissioner may resign his office by writing under his hand addressed to the President.”

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6 Act No. 3 of 1969.
7 Act No. 8 of 1972.
8 Law No. 11 of 1978.
These provisions amply ensure the term of office of members of the Commission and their independence. An analysis of the functions and duties of the Law Commission in the light of the Act would substantiate the view that Section 14(f) of the Interpretation Ordinance (as amended)\(^9\) would have no application to the members of the Commission which emphasises the trust placed in the Commission by the executive head of the country towards the objective of recommending reforms in the law where the need for the same is felt in and among the several segments of society.

**THE ROLE OF THE COMMISSION**

Insofar as the objects, functions and duties of the Commission are concerned, it is the nascent legislation of 1969 that is applicable. Section 3 of the Law Commission Act No. 3 of 1969 (as amended) states that “the objects of the Law Commission shall be to promote the reform of the law...”

Towards the achievement of this broad objective, several powers are conferred and duties imposed on the Commission under Section 4 of the Act. Keeping under review the law (both substantive and procedural), codification of the law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the simplification and modernisation of the law are some of these powers and duties spelt out in Section 4.

**METHODOLOGY ADOPTED BY THE COMMISSION**

In pursuance of the aforesaid powers and duties, the Commission is required to:

- A. receive and consider proposals for the reform of the law which may be referred to it,\(^{10}\)
- B. prepare and submit to the Minister of Justice, from time to time, programmes for the examination of different branches of the law with a view to reform.\(^{11}\)

The Commission’s deliberations are consequently based principally on proposals for reforms sent in by members of the public, interest groups and the several Ministries (and departments under those Ministries) under Section 4(a). Apart from the initiatives taken by individual members of the Commission and the Chairman, the programmes of work contemplated by Section 4(b) could be regarded as the work product of those deliberations.

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\(^{10}\) Section 4(a).

\(^{11}\) Section 4(b).
WORK OF THE COMMISSION – RESPONSE TO ITS STATUTORY ROLE

Early Times

It is a matter for regret that there are no readily available records to ascertain what initiatives the Law Commission had taken in the area of legal reforms during the three years between 1969 and 1972 when it was originally created under the Chairmanship of the former Chief Justice, M.C. Sansoni. From the little material available, it would seem that the Law Commission had recommended reforms in the area of the law relating to suicide, legal education and evidence. Whatever recommendations the then Law Commission may have made, it is evident that they did not find their way to the Statute Book between 1969 and 1972. As noted earlier, between 1972 and 1977 the government did not see a role for the Law Commission as a separate legal institution, as evidenced by the fact that the 1969 Act was repealed in 1972.

Period Between 1978-1992

After its re-establishment in 1978 under the Chairmanship of former Chief Justice Victor Tennekoon, some of the principal initiatives taken by the Commission were in the field of Civil Procedure, Land Reform Law, Land Acquisition, Judicial Review of Administrative Action and Administrative Appeals and Legal Education. While the said initiatives in the areas of Civil Procedure and Land Reform are reflected to some extent in the current statute law of the country, the reforms proposed by the Commission in the area of legal education, which is a specific duty imposed on the Commission did not find favour with the government of the day. Re-structuring of courses for the Bachelor of Laws degree and Attorneys-at-Law examinations and co-ordination between the Faculty of Law of the University of Colombo and the Sri Lanka Law College (without amalgamation of the two institutions) were some of the salient proposals of that Commission. It is indeed a matter for regret that even the report prepared by a Sub-Committee of the Commission on those proposals remains untraceable.

A proposed Draft Act on Judicial Review of Administrative Action met with a similar fate. Specifically laid down (inclusionary) grounds for judicial review; a single petition for judicial review instead of specifying the nature of the writ sought; and simplified procedure for

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13 See section 5 of the Law Commission Act.

14 Report of the Sub-Committee of the Commission, comprising Mr. M.D.H. Fernando (as he then was), Professor T. Nadaraja, present Minister of Constitutional Affairs and Industrial Development, Professor G.L. Peiris, and the late (Dr.) Neelan Tiruchelvam.
naming, substitution and addition of statutory functionaries were some of the highlights of the said Draft Act. It was prepared by a Sub-Committee of the Commission which was specially delegated with that function.\textsuperscript{15}

It is to be noted, however, that the provisions contained in the said draft relating to procedure for naming, substituting and adding statutory functionaries are now reflected in the Supreme Court Rules of 1990.\textsuperscript{16} A proposal for the establishment of a separate Tribunal to hear appeals from administrative decisions was not accepted either.\textsuperscript{17}

On the subject of Land Acquisition, a significant proposal for reform was mooted by one of the members of the Commission.\textsuperscript{18} The issue had reference to “the Section 2 notice” published under the Land Acquisition Act\textsuperscript{19} which declares the intention of the Minister to acquire privately owned land for a public purpose. The prevailing law as judicially interpreted until the aforesaid judicial pronouncement was that the “public purpose” referred to in the Section 2 notice need not be disclosed and the \textit{ipse dixit} of the Minister when he states that a particular land is required for a public purpose is a matter that is not open to question or judicial review.

In \textit{Gamage v. Minister of Agriculture and Lands}\textsuperscript{20} the Supreme Court which functioned as the highest Court of the land after the enactment of the First Republican Constitution in 1972 followed by the Administration of Justice Law No. 1 of 1973, had held that the validity of a decision of the Minister under Section 2(1) of the Land Acquisition Act cannot be questioned in a court of law and that the question whether a land should be acquired is one of policy to be determined only by the Minister.\textsuperscript{21}

The only judicial reservation to this state of affairs had been expressed by the Supreme Court which functioned under the Soulbury Constitution in the case of \textit{Ratwatte v. Minister of Lands}\textsuperscript{22} where Samarawickreme, J. observed:

\textsuperscript{15} Members of the Sub-Committee on Judicial Review of Administrative Action were Mr. M.D.H. Fernando (as he then was), Dr. J.A.L. Cooray, Professor G.L. Peiris and the late (Dr.) Neelan Tiruchelvam with Mr. J. de Almeida Guneratne serving as Research Officer.


\textsuperscript{17} Mr. M.D.H. Fernando (as he then was) functioning as a \textit{de facto} single member Sub-Committee assisted by Ms. Lalani S. Perera (presently Senior Assistant Secretary, Ministry of Justice) and Mr. J. de Almeida Guneratne as Research Officer.

\textsuperscript{18} Mr. M.D.H. Fernando (as he then was).

\textsuperscript{19} Act No. 9 of 1950 (as amended).

\textsuperscript{20} (1973) 76 NLR 25.

\textsuperscript{21} per Pathirana J. at p. 33, \textit{ibid}.

\textsuperscript{22} (1969) 72 NLR 60.
“... I cannot resist the observation that it is remarkable how often over the years it has turned out by some extraordinary coincidence that the public interest appeared to require the acquisition of lands belonging to persons politically opposed to the party in power at the time. It is, therefore, necessary that Courts, while discouraging frivolous and groundless objections to acquisitions, should be vigilant, if it is open to them to do so, to scrutinise acquisition proceedings where it is alleged that they are done mala fide and from an ulterior motive.”

However, the judicial approach in Gamage’s case has been followed as would be evident from several cases decided by the Court of Appeal under the present Constitution, representative of which is the case of Kingsley Fernando v. Dayaratne and Others wherein reference was made, as a matter of course, to the procedure of land acquisitions which “commences upon a decision made by the Minister, in terms of Section 2(1) that land in any area is needed for a public purpose.”

In Gamage’s case, it was also held that, even an order of the Minister under proviso (a) to Section 38 of the Land Acquisition Act - an order made by the Minister that a land is urgently needed for a public purpose - cannot be questioned in a Court of Law. In Fernandopulle v. Minister of Agriculture, however, the present Supreme Court, reversing the earlier position, held that such an order is judicially reviewable.

After examining the decisions in Gamage, Ratwatte and Fernandopulle (along with other decisions) in the light of a growing body of principles in the Commonwealth jurisdictions that the single member Sub-Committee of the Law Commission recommended that it would be in the public interest (as well as in the interest of the private land owner whose land was sought to be acquired) that the law, namely Section 2(1) of the Land Acquisition Act, be amended requiring the Minister to state the public purpose for which the land was sought to be acquired. Although to date, the legislature has not responded to that recommendation, the present Supreme Court in Manel Fernando and Another v. Jayaratne And Five Others has attempted judicially to achieve a long felt need to hold the executive publicly accountable where private property rights are affected. This is reflected in Justice M.D.H. Fernando’s query in the case:

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23 per Samarawickrema J., at p. 63, ibid.
24 (1991) 2 SLR 129.
25 per S.N. Silva J, (as he then was) at p. 735.
26 Supra n. 20.
27 (1979) 2 NLR 115.
28 per Samarakoon CJ, ibid.
29 (2000) 1 SLR 112.
“The Minister cannot order the issue of a Section 2 notice unless he has a public purpose in mind. Is there any valid reason why he should withhold this from the owners who may be affected?”

Justice Fernando’s reflections on the matter are bound to receive serious consideration in future applications in the area of public law relating to the quashing of decisions to acquire privately owned land. While these reflections must rank as a significant stride in the direction of protecting private property rights as a concomitant of the wider area of human rights, the incident itself may compel one to ponder as to the need to have a Law Commission as the primary institution in the country for recommending law reform unless its recommendations find serious response on the part of the lawmakers. But was this a one-off incident? This aspect will be commented upon further after highlighting and attempting an assessment of the Law Commission and the response to its recommendations by the Government during the period 1987 to date.

REFLECTIONS ON THE WORK OF THE LAW COMMISSION

PERIOD BETWEEN 1987-1992

Following the demise of Victor Tennekoon in 1986, the Commission began to function once again from 1987 under the Chairmanship of former President of the Court of Appeal, Justice C.T. Moonemalle.

Section 4(b) of the Law Commission Act No. 3 of 1969 imposes on the Law Commission a duty to prepare and submit to the Minister of Justice from time to time, programmes for the examination of different branches of the law with a view to reform. In pursuance of that duty, a programme of work drawn up by the Commission initially in 1987 contained 18 subjects. The ensuing pages will highlight the said subjects, the nature of the Commission’s deliberations, reasons for the Commission’s decisions and the final outcome of the Commission’s recommendations.

Powers of Review of Courts in Respect of Their Own Decisions

POWERS OF REVIEW OF THE SUPREME COURT

A Sub-Committee of the Commission consisting of four members of the Commission considered whether the courts in general and the Supreme Court in particular, should be vested with a power to review their own decisions. The following issues were identified for study in that context.

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30 At p. 115, ibid.
The Role of The Law Commission

1. The introduction of the powers of review when fresh evidence comes to light after the decision of the Supreme Court.

2. Effect of the power of the President to pardon criminal offenders.

3. Whether powers of review should be given to all Courts.

4. Whether the Court should be given the power to admit such evidence, and

5. Administrative difficulties such as obtaining certified copies from the Court of Appeal in time.

Having studied a Study Paper prepared by the Research Staff on the cases pertaining to this subject, the Sub-Committee submitted its report stating that:

1. Our Civil Procedure Code has deliberately avoided vesting courts with this jurisdiction and a change in the law is not desirable.

2. The existing statutory provisions, especially the powers of the Court of Appeal to receive and admit new evidence and developments in the law, such as, the recognition of the Court’s inherent power to repair an injury done to a party by the Act of Court and the Court’s duty to see that no Court is placed at a disadvantage by an Act of Court, afford substantially similar relief.

The Commission agreed with the decision of the Sub-Committee that it was not necessary to have legislation to invest the Supreme Court with powers to review its own judgments.

Amendments to the Notaries Ordinance

An important step in the examination of title to land is the establishment of the identity of the land and this involves an examination of the most recent survey plan depicting such land and comparison thereof with the other survey plans, referred to in the title deeds relating to the devolution of title to such land. Except in very limited instances, it is not possible to examine or obtain certified copies of survey plans relating to land at or from the Surveyor General’s Office or the Colombo Land Registry. In the case of a survey plan prepared by a private licensed surveyor, if such surveyor is found to be dead and a certified copy or the original survey plan is not available with the owner of the plan depicted on such survey plan or an owner of the adjoining lands, it will not be possible to examine a copy of such plan or obtain a certified copy thereof from a public office.

This is a very unsatisfactory situation and it was brought to the notice of the Law Commission that this has resulted, in certain instances, in land offered as security for credit facilities
from banks and other lending institutions not being accepted as security as the title thereto cannot be established for want of the relevant survey plans, and in other instances, in the land affected by such disability losing its value etc.

With a view to making recommendations to remedy this situation, at least for the future, the Commission considered two proposals, one for the amendment of the Surveyors Ordinance and the other for the amendment of the Notaries Ordinance.

In this connection, issues like the establishment of a Registry of survey plans with the Surveyor General, the provision of access to the plans deposited at such Registry, whether a survey plan would acquire some characteristic of a deed, the question of privilege between a surveyor and client, the possibility of attaching a survey plan to a deed and the acceptability of photocopies were discussed by the Commission.

Although the Commission’s report with the draft Act recommending amendments to the Notaries Act was submitted to the Ministry of Justice in November 1987, to date, no steps have been taken to implement the proposed amendments.

Admiralty

The Admiralty Rules now in operation in Sri Lanka were introduced in pursuance of Ordinance No. 2 of 1891. However, in 1986, a question had arisen as to whether the Admiralty Rules of 1883 were kept alive or not with the repeal of the Administration of Justice Law in 1973. The Law Commission examined the effect of the decision in *Mohamed v. Ayesha* 31 and decided that Admiralty Rules should be introduced under the Admiralty Jurisdiction Act No. 40 of 1983. It was also agreed that the basic rules used at present should be preserved with such amendments as are necessary to meet the present needs. A sub-committee was appointed to consider these rules consequent to which the Law Commission submitted its report and the draft set of rules with the forms to the Ministry of Justice in January 1988. The draft rules attempt to harmonise certain rules with the provisions of the Civil Procedure Code now in operation, and also introduce certain new rules with necessary consequential changes wherever it is appropriate. However, regarding the scale of costs, the Law Commission decided that it should be revised to suit the present economic conditions and that it cannot be done immediately as it needed specialised attention.

Debt Recovery (Substitution of Parties)

A letter from the Executive Director of the Central Bank suggesting certain amendments to the Civil Procedure Code was sent to the Law Commission for its consideration. Since the Commission was unaware of the exact nature and scope of the reform contemplated, the members of the Central Bank Committee were invited to attend a meeting of the Commission.

31 (1986) 1 SLR 314.
The Central Bank requested the Law Commission to consider making provision for substitution in the event of the death of a debtor prior to or after the institution of action. They suggested introducing a provision to cover all debts and not necessarily those covered by contracts. It was emphasised that there is a necessity to introduce amendments to the Civil Procedure Code in order to cover various categories of debts. It was suggested that a new procedure should be evolved not only regarding contractual debts but also to cover those arising from claims for damages.

A Sub-Committee of the Commission was appointed to consider the matter, taking into account the various suggestions made. On the basis of the recommendations of the Sub-Committee, the Law Commission suggested several amendments to the Civil Procedure Code in October 1987. Save for one recommendation, the legislature responded to the proposals of the Commission by amending the Civil Procedure Code.  

**Maintenance**

The Commission decided to send the previous Law Commission’s Draft Act on Maintenance to the Law Faculty of the University of Colombo, Women Lawyers’ Association, the Women’s Bureau and the Bar Association for their recommendations and comments.

The Commission recommended the adoption of a new Act consolidating the provisions that are contained in the Maintenance Ordinance, certain provisions in the Married Women’s Property Ordinance and the Adoption of Children Ordinance. In the Draft Act, the right to maintain will, in each case, be dependent on the means and the circumstances of the applicant and the income of the dependant. The Draft Act casts a duty on the children to maintain their parents who are in indigent circumstances. Also, express provision was made recognising liability on the part of the mother to maintain her non-marital child. The report of the Law Commission along with the Draft Act was submitted to the Ministry of Justice in October 1988.

**Quasi Courts**

A report of the Sub-Committee of the Consultative Committee on Justice, on the subject of Quasi Courts, was sent to the Law Commission for its consideration. The Commission in considering the report of the Consultative Committee was of the view that since such report deals with administrative and policy matters, it was not necessary for the Law Commission to make any recommendations thereon.

**Access to Counsel during Investigation**

It was decided by the Commission to consider recommending legislative provision enabling a lawyer to represent his client before institutions other than Courts, including the right to represent in quasi-judicial bodies...

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32 See, Civil Procedure (Amendment) Act No. 6 of 1990.
be present when his client is being questioned by the police. A Working Paper was prepared on this subject and the following aspects were discussed.

1. Whether the accused/suspect should be able to consult the lawyer in private.
2. Whether the lawyer should be able to participate during the interrogation.
3. Problems inherent in implementing the privilege, and
4. Whether amendments should be made to both the Criminal Procedure Code and the Judicature Act.

A Sub-Committee was appointed to go into this matter and a further Working Paper was prepared on this subject. The Commission made an extensive study of the subject and recommended two amendments to the Criminal Procedure Act, namely,

1. That an arrested person be given a statutory right to retain and instruct a lawyer but that lawyer should not be allowed to participate in the investigation or cause delay, and
2. That statutory provision be made requiring a peace officer arresting a person or to whom an arrested person is handed over, to immediately inform the family of such a person, or where he has no family, any other person nominated by him, of his arrest.


Arbitration

The Law Commission embarked on the task of preparing a new Arbitration Act as it felt that the existing provisions of the law are not comprehensive in providing for the conduct of arbitration proceedings and the enforcement of awards made there under; they do not reflect the progress made in other countries and also the law does not give effect to the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards done at New York in June, 1958, to which Convention, Sri Lanka was a party.

A Sub-Committee was appointed to do the initial work. The Sub-Committee was assisted by the Sri Lanka National Council, International Chamber of Commerce, in the preparation and finalisation of the draft Act.
This draft Act intends to consolidate the provisions contained in the Arbitration Act and the procedural provisions contained in the Civil Procedure Code in regard to arbitration. The draft Act will not apply to an arbitration that is specially provided or regulated by any other law. The draft Arbitration Act and the Report of the Commission thereon was submitted to the Ministry of Justice in November, 1989.

Sale of Land

The Secretary, Ministry of Justice made a request to the Law Commission to make proposals on the subject of sale of land by private land sale companies. A working paper was prepared on the subject of large scale sub division of land for the purpose of housing and the following issues were discussed:

1. The weaker position of the purchaser as against the large scale developer;
2. Whether the property developer should be licensed and whether their licenses should be liable to cancellation in the event of a fraud or malpractice; and
3. The introduction of legislation to control property development.

It was decided by the Commission to write to the Ministry of Justice suggesting the appointment of a Commission to probe the question of fragmentation of land and adequacy of title passed in large scale property development.

Narcotics and Drug Abuse

The Commission considered the amendment of the Poison, Opium and Dangerous Drugs Ordinance of 1935, as amended by Act No. 13 of 1984, particularly in relation to the burden of proof and the punishment of offences. In this regard, the Commission considered a working paper prepared by Senior State Counsel and certain articles on this subject and inter alia discussed the following matters:

1. The unusual nature of the existing provision that the imposition of the death penalty or life imprisonment is left to the discretion of the judge.
2. Quantity being used as a criteria for heavier penalties.
3. The imposition of strict liability for drug offences or whether upon the proof by the prosecution of the fact of possession of drugs by the accused, a presumption against the accused which is rebuttable by him should be provided by law.
4. Whether confiscation of property should be made an additional penalty, and
5. The considerable overlap between some of the existing provisions.

However, the Commission decided to suspend the consideration of this subject on being informed that a specialised committee was examining the same question.

No Fault Compensation


In this regard, the Commission discussed the possibility of providing compensation to victims of motor vehicle accidents without the establishment of fault as the basis of liability; the ability of the State to absorb the costs of the scheme; the introduction of a levy on petrol instead of compulsory Third Party Insurance; whether the State should have a right of recourse against the person responsible for the accident; the establishment of a Compensation Board, like the one under the Workmen’s Compensation Ordinance and whether its decision should be subject to review. Since the matters under discussion involve questions of policy, the Commission wished to have a clear indication of the Government’s willingness to implement a No Fault Compensation scheme and general guidelines on the subject so that further study of the matters involved may be undertaken.

Inheritance Rights of Persons Born out of Wedlock

On a request made by the Secretary, Ministry of Justice, the Law Commission embarked on the above project. A Working Paper was prepared on Inheritance Rights of persons born out of wedlock and the following issues were discussed.

1. Whether non-marital children should enjoy the same rights as children born of wedlock;

2. Whether there should be a recognised difference between a mere casual relationship and long term cohabitation;

3. Whether complete freedom of testation is advisable; and

4. Whether the principles of the Universal Declaration on Human Rights could be applied in the context of a national legal setting.

The Commission agreed that it should consult the Women Lawyers’ Association and legal experts on Kandyan and Muslim Law on this matter before embarking on any proposals for reform.
Bills of Exchange

It was decided by the Commission to incorporate this subject in the programme of work of the Law Commission and a study paper was prepared by the research staff suggesting certain amendments to the Bills of Exchange Ordinance, particularly by reference to the Cheques Act 1957 of England. An Act was drafted amending the Bills of Exchange Ordinance and the draft Act, with a report thereon was sent to interested parties and other related institutions for their views and comments. The Commission received comments on the draft Act from the following institutions:

1. The Central Bank of Sri Lanka;
2. The National Chamber of Commerce of Sri Lanka; and

Administrative Law

The desirability of continuing the Common Law remedies side by side with a unified remedy and the possibility of expanding the petition of review to include declaratory actions within its scope are some of the areas the Commission considered. The Commission also considered recent developments in England permitting cross examination; admission of fresh evidence in a wider category of circumstances and to do away with the distinction between error of law and error of fact.

Civil Procedure

The Commission continued deliberations on urgent amendments to the Civil Procedure Code suggested by the previous Law Commission. The Amending Acts No. 9 of 1991 and No. 14 of 1993 could be attributed to the recommendations made by the Commission.

Disposal of Productions

The Commission considered methods of disposing productions in cases where articles such as timber and vehicles are seized so as to prevent deterioration and destruction of such productions. Offences under the Forest Ordinance received particular attention in this connection, in particular, the question of the release pending the conclusion of the trial, of motor vehicles used in the commission of an offence under the Forest Ordinance.

Regarding the disposal of vehicles used in the commission of offences under the Forest Ordinance, prior to the conclusion of the trial, the suggestion was made to release the vehicle to the registered owner on his depositing cash security to the satisfaction of the Court. If the same vehicle is used again in connection with the commission of another offence under the
Forest Ordinance, it was recommended that a cash deposit should again be taken similarly on an application for the release of the vehicle.

Upon conviction, all cash deposits shall forthwith be forfeited to the State irrespective of the ownership of the vehicle. If the registered owner does not apply to have the vehicle released within 3 months of the vehicle being produced in Court, the Court shall then, any time before the conclusion of the trial, sell the vehicle and deposit the proceeds to the credit of the case. In case of the sale of the vehicle, the Registrar of the Court shall have the authority to sign the necessary transfer in favour of the purchaser.

Powers of Attorney

The Powers of Attorney Ordinance makes provision for the registration of powers of attorney and the cancellation and revocation of such registered powers of attorney.

The Commission suggested the introduction of new provision in the Powers of Attorney Ordinance to require a power of attorney in respect of any instrument required by the law of Sri Lanka to be notarially executed and where such a power of attorney is executed abroad, that the same should be executed before any of the persons mentioned in section 85 of the Evidence Ordinance.

The Commission, noting that the cost of publication is very high, suggested that the requirement in the Powers of Attorney Ordinance, of publication of notices of revocation in the Government Gazette and in the newspapers, should be deleted.

1995 to Present Times

Following its reconstitution at the end of 1994, the Law Commission under the chairmanship of (Dr.) Justice A.R.B. Amerasinghe submitted its programme of work for 1995-1996 which was laid before Parliament by the Minister of Justice in terms of Section 6 of the Law Commission Act No. 3 of 1969 (as amended). The said programme of work contained twenty two subjects.

The Commissioners considered the subjects listed in the programme of work of former Law Commissions which were outstanding as well as to the suggestions made by the several members of the Commission in the preparation of its first programme of work. The ensuing pages will highlight the said subjects, the nature of the Commission’s deliberations and the reasons for the Commission’s recommendations.
RECOMMENDATIONS OF THE LAW COMMISSION WHICH HAVE BEEN ENACTED AS LEGISLATION

Amendment to the Civil Procedure Code

Section 524(1) of the parent enactment had provided as follows:

“Every application to the District Court to have the will of a deceased person proved shall be made on petition by way of summary procedure, which petition shall set out in numbered paragraphs the relevant facts of the making of the will, the death of the testator, the heirs of the deceased to the best of the petitioner’s knowledge, the details and situation of the deceased’s property and the grounds upon which the petitioner is entitled to have the will proved; the petition shall also show whether the petitioner claims as creditor, executor, administrator, residuary legatee, legatee, heir, devisee or in any and what other character.”

By an amending Act bearing No. 14 of 1993, reference to “the heirs of the deceased to the best of the petitioner’s knowledge” in the section was deleted.

This amendment appears to have been prompted by the fact that, in the case of a will, where beneficiaries are named, it would be redundant to require the heirs to be named. However, if that was the reason for the said amendment, it would be overlooking the case of a testator who bequeaths specific items of property to his named beneficiaries in the will while omitting to deal with some of his properties in the will in which event, it would be necessary to name the heirs in an application for letters of administration, resulting in a situation requiring two separate applications, one for probate and another for letters of administration in respect of the same deceased’s estate. Consequently, the Commission felt the need to restore the reference “to the heirs of the deceased.”

Act No. 38 of 1998 has given effect to the recommendation of the Commission.

Evidence (Special Provisions) Bill

Re: Computer Evidence

In the light of technological advances made in developed parts of the world, an Evidence (Special Provisions) Bill had been prepared based on proposals made by a Committee of the Computer and Information Technology Council of Sri Lanka (CINTEC) for the reception of computer evidence. At the outset, the Commission examined the Evidence Ordinance as it presently stands in regard to whether computer evidence could be accommodated and received. Section 11(b) of the Evidence Ordinance which provides that “facts not otherwise relevant are relevant if, by themselves or in connection with other facts, they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable” received particular attention in this context.
Having examined decisions such as *R v. Abu Baker*\(^{33}\) where an electrically recorded speech made in a police officer’s hearing subsequently reproduced by means of an instrument called the Webster Wire Recorder and *R v. Karunaratne*\(^{34}\) which involved evidence of a telephone conversation in the form of a document which purported to be a transcript of the tape-recorded conversation, the tape recorder itself being played in Court, the Commission, in the light of developments in other developed countries recommended the introduction of special legislation to facilitate the admissibility of information produced by computers or computer related devices.


**Judicature (Amendment) Bill**

**Re: Commercial High Court**

At the request of the Ministry of Justice, the Commission suggested amendments to the Judicature Act No. 2 of 1978 with a view to creating separate Courts in order to expedite the hearing of commercial cases. The said amendments find statement in the High Court of the Provinces (Special Provisions) Act No. 10 of 1996.

**The Human Rights Commission Bill**

A forum to resolve disputes in a conciliatory atmosphere where violations of fundamental rights are alleged without having to resort to the Supreme Court under Article 126 of the Constitution or Article 140 of the Constitution in the first instance, had been a much felt need for sometime. A Bill designed to achieve these objectives submitted by the Ministry of Justice and some of the recommendations made by the Commission presently find expression in the Human Rights Commission Act No. 21 of 1996.

**Amendments to the Debt Conciliation Ordinance No. 39 of 1941 (as amended)**

Taking into consideration, the practical reality that Notaries, as a practice, write few mortgages and conditional transfers and instead write absolute transfers, the debtors (property owners) being oblivious to this dubious practice, the Commission, based on a Working Paper prepared by a single member of the Commission,\(^{35}\) proposed amendments to the Ordinance, empowering the Debt Conciliation Board to inquire into the real nature of the transaction without being hindered by the provisions of the Prevention of Frauds Ordinance and the Evidence Ordinance.

\(^{33}\) (1953) 54 NLR 566.

\(^{34}\) (1966) 69 NLR 10.

\(^{35}\) (Dr.) J. de Almeida Guneratne, member of the Commission.
Another significant feature in the proposed reforms was the conferring of power on the Board to order such interest as it deems reasonable in effecting a settlement or issuing a certificate notwithstanding the established rule that interest cannot exceed the amount borrowed as principal.

The Commission’s recommendations are reflected in the Debt Conciliation (Amendment) Act, No. 29 of 1999.36

Although some members had initial reservations in conferring such a discretionary power on the Board, it was agreed that such a provision if sparingly exercised, would amount to striking a more meaningful balance between the debtor who seeks refuge in the Debt Conciliation Statute which is *prima facie* a piece of socialist legislation and the creditor who finds the sanctity of the agreement he had entered into being dispensed with. Moreover, having regard to the fact that the functions of the Board are quasi-judicial in nature, the proposal empowering the Board to order such “interest as appears to the Board to be reasonable, having regard to all the circumstances of the case” was thought to be an adequate safety valve in as much as any decision of the Board would be amenable to the writ jurisdiction of the Court of Appeal under Article 140 of the Constitution of Sri Lanka where the rule of *Wednesbury reasonableness*37 could be invoked by an aggrieved party.

**The New Maintenance Act**

There has been considerable agitation for several years for a more comprehensive Maintenance Act that would address pressing areas. After deliberating on issues identified in a Working Paper of the Commission38 and having had regard to expert views expressed on the subject39 the Commission recommended the recognition of joint liability of both parents to maintain their child; the case of needy major children (between the ages of 18 to 25); liability of parents to maintain dependant disabled offsprings of whatever age; replacement of the word ‘illegitimate’ with the term ‘non-marital’ and consequentially the case of the non-marital child to be treated as far as practically possible with that of a legitimate child. The Maintenance (Amendment) Act No. 37 of 1999 has taken in the said recommendations of the Commission.

36 See Section 6 of the Debt Conciliation (Amendment) Act No. 29 of 1999 amending Section 33(b) of the parent enactment.

37 (1948) 1 KB 227.

38 Presided over by the Chairman himself, Mr. Ranjith Abeysuriya PC, Mr Shibley Aziz PC and Mr J. de Almeida Gunaratne.

39 Vice Chancellor of the University of Colombo and Professor of Law, Savitri Goonesekere.
Amendment to Section 48 of the Judicature Act

Section 48 of the Parent Act conferred a right on any party to any partly heard action or prosecution except on an inquiry preliminary to committal for trial to have the case heard *de novo* before a succeeding judge. The succeeding judge had a discretion in the matter only if such a party made no demand for the case to be heard afresh. The Commission felt that the right given to a party in a civil action or proceeding unnecessarily contributes to the laws delays. Consequently, while preserving the right to demand a fresh prosecution to an accused in any criminal prosecution, the Commission recommended that the succeeding judge ought to have discretion in civil matters, which would have to be exercised judicially in keeping with the principles applicable to the exercise of judicial discretion.

The Commission’s recommendations have been given effect to in the Amending Act No. 27 of 1999.

Proposed Community Based Corrections Bill

It is universally accepted that, socio-economic costs of incarcerating offenders who could still be useful to the community are unwarranted. The concept of community based correction orders addresses this social problem. Although the concept was adopted in Sri Lanka by the Administration of Justice Law No. 44 of 1973 and following its repeal, later continued under the Code of Criminal Procedure Act No. 15 of 1979 and amended by Act No. 49 of 1985, the desired results had not been achieved. As a survey carried out by the Ministry of Legal and Prisons Reform in 1990 had revealed, a total of only 357 community service orders had been made by as few as four Magistrates and one High Court judge.

The need to prepare periodic reports on the progress of Community Service sentences and consequent paper work impinging on the time of Court; the duty cast on the Court to monitor the implementation of Community Service Orders in addition to the passing of sentences; the lack of proper infrastructure and personnel and the need to educate judges on the use of Community Service Orders had been identified by the Ministry as some of the causes for the under-utilisation of Community Service Orders. Having studied a report of a sub-Committee of the Commission in the light of the aforesaid Ministry survey and a special study done by the Chairman of the Commission himself who had noted the appropriateness for Sri Lanka of the laws and procedures in the State of Victoria, Australia, the Commission proposed new legislation on the subject.

The appointment of a Commissioner for Community Based Corrections; a duty cast on Court coupled with the exercise of discretion taking the nature and gravity of the offence into consideration in sentencing; after considering a Pre-sentence Report submitted by the Commissioner for Community Based Corrections; Consent of the offender to be regarded as mandatory before making a Community Service Order; conditions to be attached to such orders; grounds for variation and suspension of such orders; and consequences of breach of
such orders, were some of the principal features in the Commission’s proposed legislation. The Commission’s recommendations have been enacted into law in Act No. 46 of 1999.

A New Bail Act

Figures of remandees languishing in jail for long periods awaiting trial are escalating by the day. This is not only an erosion of individual liberty but also results in needless cost to the State. For these and other reasons, the Commission resolved that the underlying principle should be “bail as the rule and refusal as the exception” as observed by the Indian Supreme Court.40 Addressing these aspects, the Commission on the basis of a Report prepared by a Sub-Committee41 of the Commission, recommended the enactment of a new Bail Act. The principal features contained in the Commission’s proposals may be recounted as follows:

a. A Magistrate refusing bail being required to state his reasons therefore;

b. Provisions to do away with the undue insistence of cash bail and to have regard to the means possessed by the suspect;

c. Where an accused has attended Court on summons that he should be enlarged on his own recognisance or undertaking;

d. In “bailable offences”, the suspect’s right to be released on bail and not to be held in custody at all;

e. While allowing an outer limit of twelve months for an accused to be held in custody, that period to be extended only by three months periods going up to a maximum of twelve months only at the intervention of the Attorney General;

f. In as much as on the procedural law of the country, it is only after a person has been arrested, been detained in jail or is about to be so detained by an order of Court that he can apply for bail, the concept of anticipatory bail was recommended, to obviate the possibility of an innocent person’s liberty and freedom of movement being jeopardised on flimsy and frivolous grounds at the instance of unscrupulous, malicious and irresponsible complaints.42


41 Mr. Ranjit Abeyesuriya PC, member of the Commission.

42 See amendment to section 438 of the Criminal Procedure Act of India effected in 1973, where this concept has been recognised.
The Commission, for its part, in making the aforesaid recommendations considered it timely and necessary that they should be made in its commitment to the presumption of innocence which is still the golden thread that runs through the fabric of the country’s criminal justice system. The enactment of the Bail Act No. 30 of 1997 on the initiative taken in Parliament by the Minister of Justice in response to the Commission’s proposals must rank as a conscious commitment on the part of the Government in improving the content of human rights in the country.

Proposal for an Evidence (Special Provisions) Bill

On representations made by a former President of the Court of Appeal, the Commission noted that the law in Sri Lanka made no provision to regard as prima facie evidence in a civil action where a conviction or acquittal had been made relating to the same facts. This was in contrast to the Civil Evidence Act of 1968 in England which makes provision to that effect.

This aspect had been judicially observed in a decision of the Court of Appeal of Sri Lanka. The Commission was of the view that, should provision similar to that contained in the English Act is adopted, it would also contribute to the minimising of laws delays. Although not adopting the representations made to it in toto, the Commission proposed legislation recommending that, a conviction in a High Court or a Magistrate’s Court affirmed in appeal where an appeal is taken should be admissible in evidence in a subsequent civil action and that the fact of the conviction should be prima facie evidence in a subsequent civil action of the commission of the offence unless the contrary is proved.

It is learnt that a Bill is under preparation by the Legal Draftsman in regard to the Commission’s recommendations on the subject.

Juvenile Justice Administration and Children’s Rights

On the basis of a study made by a Sub-Committee of the Commission, the Commission submitted to the Ministry of Justice two comprehensive reports entitled ‘The Existing System of Juvenile Justice Administration’ and ‘Shortcomings, and Substantive and Procedural Laws Relating to Children.’ In its first Report, the Commission made several recommendations after identifying areas that require reform in the light of the general objectives of the United

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43 Professor G.L. Peiris.
44 Justice S. Wijeratne.
45 CA/704/82 (f) per Wijeratne J and Wijetunge J (Court of Appeal Minutes of 16.6.1989 - unreported).
46 (Dr.) Justice Shirani Bandaranayake, Mr. Ranjit Abeysuriya PC, (Dr.) J. de Almeida Guneratne and Ms. Ruana Rajepakse, all members of the Commission served on the Sub-Committee with Mr. Ananda Amaraweera, Assistant Secretary to the Commission serving as Secretary to the Sub-Committee.
The Role of The Law Commission

Nations Convention on the Rights of the Child to which Sri Lanka is a signatory and a Report prepared by an expert on the subject.\textsuperscript{47}

a. To do away with certain anomalies in the terminology used to define categories of juveniles;

b. The decisive nature of, and the difficulties encountered in, establishing the age of juveniles;

c. The need to ensure the segregation of juveniles from adult detainees at all stages of the criminal process;

d. The jurisdiction of juvenile courts and the procedures to be adopted by them;

e. Legal representation/protection for juveniles involved in the legal process;

f. The need for a Code of Juvenile Justice Procedure;

g. The classification and conditions of places of detention of juveniles;

h. The need to develop non-custodial measures for the treatment of juveniles in conflict with the law;

In the Report on Substantive and Procedural Laws Relating to Children, the Commission considered a study submitted by the Lawyers for Human Rights and Development and made several recommendations as warranting reform \textit{inter alia} in the following areas;

a. Offences Against Children with particular emphasis on the showing of and making available to children, pornographic films and confiscation of material used for such purposes; parents and guardians neglecting children and third parties subjecting children to cruelty; the increase of age of consent for sexual offences; minimum sentences for rape as distinct from grave sexual abuse;

b. Provisions Relating to Child Labour with particular emphasis on a minimum age for employment of children, child labour prosecutions and children in domestic employment;

c. Strengthening Law Enforcement; towards which end, the Commission recommended the recognition of all child abuse cases as cognisable offences and child abusers to be kept in custody till the conclusion of the trial; the

\textsuperscript{47} Dr. Vijaya Amaresekera.
Aspects of fifty years of Law, Justice & Governance in Sri Lanka

...recognition of a child’s right to legal representation; legal assistance; and a right of appeal against conviction.

d. Strengthening Judicial and Administrative Response to Child Rights, towards which end the Commission recommended training programmes for judges; segregation of children in need of care and victims of child abuse; need for inquiry in regard to child’s needs prior to committal by court.

e. Rehabilitation of Child Victims:

It is heartening to note that the Legal Draftsman has prepared a Draft Bill to amend the Children and Young Persons Ordinance incorporating several of the Commission’s recommendations contained in the aforesaid two Reports. However, several recommendations made by the Commission such as the enactment of a Juvenile Justice Procedure Code do not find statement in the said Draft Bill.

RECOMMENDATIONS OF THE LAW COMMISSION WHICH HAVE NOT MET WITH POSITIVE RESPONSE BY THE LEGISLATURE

Proposed Bill on Freedom of Information

The right of the public to have access to Government-held information is justified on several grounds. Being mindful of this democratic right in the citizen in whom, as the Constitution concedes, sovereignty resides, the Commission thought it fit to embark on the need to propose reforms in the area of access to information. A Sub-Committee of the Commission prepared a Report on the subject having paid due regard to the legal position in the U.S.A., several Commonwealth countries, provisions in the ICCPR (International Covenant on Civil and Political Rights) which Sri Lanka has ratified, and relevant statutes of Sri Lanka which appeared to impinge on access to information. In conformity with the practice of the Commission to consider issue papers prior to its deliberations, these issue papers were considered on legal and policy matters which focused on legal regime selection, information access guidelines and enforcement regime selection. Although the Commission published notices in the newspapers and called for public representations, it must be mentioned that the public response was disappointing. Nevertheless, having considered the few public responses and the members’ own views, the Commission recommended the enactment of an Access to Official Information Act prompted by the following considerations:

a. The current administrative policy appears to be that all information in the possession of the Government is secret unless there is good reason to allow public access. This policy is no longer acceptable in view of the reasons adduced above.

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48 Mr. Lalanath de Silva, member of the Commission.
b. On the other hand, law reform which allowed for the principle that all information in the hands of the Government should be accessible to the public unless there is good reason to make it secret would also be inappropriate.

c. The Commission feels that, while we should progressively advance towards the establishment of an open access to information regime at a future date, Sri Lanka should currently adopt a regime that clearly defined what information was secret and establish guidelines in respect of the exercise of discretion by Government officials for giving access to other information.

d. The right of access to information in the custody, control or possession of Government should be limited to those who are or are likely to be affected by decisions made, proceedings taken and acts performed under statute law. The question of allowing access to other Government information should, at this stage, be left to the discretion of relevant ministers under whom the Government agency concerned functions. That discretion should not be exercised by the ministers on a case by case basis but on a general basis. Case by case decisions should be taken by the head of the agency concerned.

e. The Commission developed a number of exceptions under which information that might otherwise be accessed may be denied. These include the all important “defence” and “foreign policy” exceptions as well as “privacy”, “law enforcement” and “finance and taxation.”

f. The Commission also decided to resort to the device of scheduled Government institutions to address questions of State privilege and administrative preparedness. The proposed reforms will apply only to the Government institutions set out in a schedule to the Act. Other institutions may also be set out when gazetting such institutions.

g. The Commission decided to recommend an enforcement regime that allows the Supreme Court to review denials of access or inadequate access. However, where denial and restriction of access is due to the “intra-agency memoranda” exceptions, the Law Commission feels that a more informal review should be allowed through the Parliamentary Commissioner for Administration (Ombudsman).

h. Much of the details have been left to regulations, making the rule making process more flexible and readily adaptable to changing situations. Regulations will have to cover issues relating to fees for searching and copying, language of access, transfer of information requests, mandatory time limits for compliance, review procedures, etc.
The substance of the Draft Bill recommendations may be viewed by the media and proponents of the right to freedom of information as restrictive. However, if the recommendations of the Commission are viewed with such critical spirit, the Commission itself would have no quarrel in as much as the Commission’s recommendations have been prompted not only by the fact that it is addressing a bureaucracy steeped in traditions of secrecy and/or privilege against disclosure of information but also by a public and more so by the media community which has failed to take the role of the Law Commission as the primary law reform agency of the country more seriously in failing to respond to the call made by the Commission for their own representations.

These are the considerations the Commission has had to grapple with when it struck a via media in making recommendations with a fervent hope that, by adopting a restrictive approach, at least, it would lead to a gradual and cumulative reform of this area of the law. As expected, “the restrictive or conservative” approach of the Commission has not escaped criticism,\(^\text{49}\) it is indeed a matter for regret that, as the same writer observes, the “Law Commission Report languishes on some bureaucrat’s desk with no hope of resurrection.”\(^\text{50}\)

**Proposed Bill to Amend the Rent Act No. 7 of 1972**

Deriving inspiration from the dual objectives stated in the Constitution of Sri Lanka, namely “the realisation by all citizens of an adequate standard of living … including adequate … housing …”\(^\text{51}\) and “the rapid development of the whole country by means of public and private economic activity…”\(^\text{52}\) The Commission has proposed through amendments to strike a meaningful balance between the rights of landlords and tenants *inter se*.

The principal proposals made by the Commission after deliberating on the basis of a Working Paper prepared by a single member committee of the Commission\(^\text{53}\) are summarised as follows;

a. The Rent Amending Act No. 55 of 1980 took out of the operation of the Rent Act *inter alia*, residential premises occupied by the owner on January 1, 1980 and let on or after that date.

Taking note of the distinction drawn between the concept of “owner” and “landlord” in the context of landlord-tenant relations, the Commission saw nothing in principle that should prevent the criterion of “owner-occupied on


\(^{50}\) ibid.

\(^{51}\) Article 27(2) (c) of the Constitution of Sri Lanka, (1978).

\(^{52}\) Article 27(2)(d), *ibid*.

\(^{53}\) (Dr.) J. de Almeida Guneratne, member of the Commission.
January 1, 1980” being extended to a case of “landlord occupied.” The proposed amendments were designed to give effect to this. The Commission’s research and investigations revealed many instances where the owner or landlord was not in occupation as at January 1, 1980; the relevant date prescribed by Act No. 55 of 1980 for purposes of taking a premises in question out of the operation of the Rent Act but might have obtained possession of the premises in consequence of a decree of court or other lawful means. The Act as it presently stands would not operate to take such premises out of the operation of the Rent Act. Given the thinking behind the amending Act of 1980, the Commission felt that it is only fair to extend that rationale to the case under consideration.

b. **Protected Sub-tenancies**

At present, the law is not clear whether a sub-letting by a tenant without the consent (in writing) of the landlord could be used to ground a cause of action by a *bona fide* purchaser of a tenanted house (viz. a person who buys a tenanted house without prior knowledge of the sub-letting). The Commission noted that this invariably leads to unnecessary and protracted litigation. It was felt that this could be avoided if such sub-tenancies are registered at the relevant land registry or with the appropriate Rent Board if such a Board has been constituted for the relevant area. If such registration reveals that the subletting has been done with the prior consent of the landlord at the relevant time, the sub-tenant will be protected. If not, the new purchaser would be entitled to use the fact of sub-letting to ground a cause of action for ejectment.

c. **As a direct response to the philosophy reflected in Article 27(2)(d) of the Constitution of Sri Lanka, the Commission proposed an amendment to the existing Act that would encourage land owners (particularly small holders) to build more houses with a view to improving the country’s housing stock. At the same time, the Commission was conscious of the somewhat radical nature of the proposed amendment in that it will take out of the operation of the Rent Act (as it presently stands) the protection afforded to tenants against eviction. The Commission felt that an adequate balance between the institutions of the landlords and tenants could be struck if the payment of reasonable compensation is made a condition precedent to the institution of ejectment proceedings based on the requirement of premises in question for purposes of development. Accordingly, the Commission has proposed the postponement of the issue of writ of execution until the fulfilment of that condition.**

d. **By Law No. 10 of 1997 amending the Rent Act, it was provided that, a writ of execution of decree would issue upon the Commissioner of National Housing informing Court that “alternate accommodation” has been found for a tenant**
against whom a single house owner-landlord of a house, the authorised rent of
which is below the sum of Rs 100/=, has obtained judgement on the ground of
reasonable requirement. By interpreting “alternate accommodation” to mean
“suitable alternate accommodation” the Commission felt that, the Supreme Court
in *Mowjood v. Pussenediya*,\(^{54}\) taking into consideration as it did, certain subjective
factors, perhaps based on a “socio-communal” plane, as reflected in the said
judgement, have however resulted in an injustice to a owner-landlord who has
obtained a judgement in his favour for ejectment of the tenant, thus setting at
nought, the intention of the legislature reflected in Law No. 10 of 1977. In that
background, the Commission felt the need to effect a compromise between a
owner-landlord, a judgement-creditor on the one hand and a tenant, presumably
mesmerised by “socio-communal” fears. After addressing these competing
concerns, the Commission thought it fit to recommend the postponement of
execution of writ by two years in a case where an owner-landlord obtains a
judgement in his favour or upon the owner-landlord depositing a sum of money
equivalent to ten years of the authorised rent.

e. **Transmission of Succession of Tenancy**

Section 36 of the Rent Act (as it presently stands) and as judicially interpreted,
enables not only the immediate successor of the original tenant (upon his death)
to succeed him as tenant but also all successive successors of such immediate
successor who under the Act is ‘deemed to be the tenant.’ The Commission felt
that to burden a premises in this way in perpetuity is unfair. The Commission
also took note of the compelling views expressed on this matter as reflected in
decided cases.\(^{55}\)

However, in order to cater for certain eventualities which are not altogether improbable, the
Commission proposed also a qualification to the proposed amendment.

**Fair Administrative Procedure Guidelines**

This initiative has direct reference to what is envisaged in Section 4(9) of the Law Commission
Act. Guidelines for fair administrative procedure in the form of a Code were modelled on
those provided for complying with tender procedures in Government transactions
incorporating the ideas of fair procedure in action and rules of natural justice, judicially
developed over the years. After studying an issue paper prepared by a single member sub-
Committee of the Commission,\(^{56}\) the Commission proposed several guidelines to cover four
principal areas relating to public administration;

\(^{54}\) (1987) 2 SLR 287.

\(^{55}\) See *Jayawickreme v. Gunesekera and Others*, CA/533/88, C.A. Minutes of 19.03.96 (unreported).

\(^{56}\) Mr. Lalanath de Silva, member of the Commission.
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a. Regulations and Standing Orders – under which head, the Commission has proposed that, in addition to other regulation making requirements imposed by law, every administrative agency should be obliged to prescribe by standing orders, the general course and method of its operations and the methods by which the public may obtain information or make requests (in the form of rules of practice).

b. Inquiry Procedure – under which head, the guidelines were proposed for Governmental officials to follow whenever they are required to make decisions which may culminate in affecting rights, interests and obligations of a person or class of person.

c. Licenses and permits – several administrative authorities are authorised by law to issue, renew, cancel or suspend licences and permits covering many subject areas. Guidelines in regard to the issue of such licences and permits were prepared so that, as far as possible, a general uniform procedure be adopted by the several authorities.

d. Public Access to Regulations, Standing Orders etc. – it was felt that, administrative agencies must make available to the public all regulations, standing orders, written statements of policy and procedures adopted by them other than matters involving internal management. The Commission felt that, through these procedures, a desirable standard of administrative accountability to the public could be achieved.

Amendments to the Muslim Marriage and Divorce Act No. 13 of 1951

The existing procedures laid down in this Act was viewed by the Commission as causing delay and hardship in recovering arrears of maintenance. Accordingly, the Commission has prepared amendments to Sections 64 and 66 of the Act to rectify the present situation.

Proposed Bill on Mutual Assistance in Civil and Commercial Matters

The existing regime for the service of judicial process and the taking of evidence abroad is both archaic and unsatisfactory to meet modern demands. Accordingly, having adopted a proposal submitted by a single member sub-committee,\(^{57}\) the Commission proposed new legislation to provide for the rendering of mutual assistance in Civil and Commercial matters between Sri Lanka and other countries deriving inspiration from the Hague Convention on service abroad of judicial and extra-judicial documents and the taking of evidence aboard in Civil and Commercial matters.

\(^{57}\) Mr. K. Kanag-Iswaran PC, member of the Commission.
Proposed Amendments to the Citizenship Act No. 18 of 1948 as amended by Act No. 45 of 1987

The Commission has noted that the Citizenship Act dealing with “citizenship by descent” permits transmission of Sri Lankan citizenship only through paternal antecedents. The 1948 Act is a pre-1978 enactment. The 1978 (present) Constitution of Sri Lanka ensures freedom from gender-based discrimination. However, the 1948 Act has survived on account of Article 16(1) of the Constitution. It is one of the Directive Principles of State Policy that the State shall endeavour to ensure the full realisation of the fundamental rights and freedoms of all persons. This is buttressed by the declaration that, the State shall ensure equality of opportunity to citizens, so that no citizen shall suffer any disability on the ground of inter alia, sex. Furthermore, through the “Women’s Charter”, the Government has pledged itself to take all appropriate measures including legislation for the purposes of assuring to women “human rights and fundamental freedoms on the basis of equality with men.” Apart from these considerations, a study made by the Commission revealed that the existing law has been found to cause many practical difficulties for Sri Lankan women who marry foreigners. Even if they subsequently divorce, separate or become widowed but resident in Sri Lanka, they are unable to bring up the children as Sri Lankan citizens. Thus, quite apart from such children’s choice of citizenship, they are prejudiced in such vital matters as education, health and employment.

For these reasons and in the light of the fact that similar initiatives have been taken in other countries as well, the Commission proposed that the Citizenship Act be amended to recognise gender equality in the transmission of citizenship by descent. The Commission also recommended as an incidental proposal that the age limit of twenty one years be reduced to eighteen to harmonise with the Age of Majority Act No. 17 of 1989.

Reforms on the Law Relating to the Prevention of Cruelty to Animals

Upon a strong case being made out by an Association called the “Gal-gawa Mithuro” led by its president expressing their concern with regard to the existing state of the law relating to the protection afforded to animals, the Commission at the outset addressed its mind to the competing values involved in the said issue, namely the religious and socio-economic values. A preliminary observation made by the Commission in this regard was the strong complaint

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58 See sections 4 and 5 of the Act.
59 Article 12(2) of the Constitution. Also, the principle of equality enshrined in Article 12(1).
60 Article 27(2)(a) of the Constitution of Sri Lanka.
61 Article 27(c) of the Constitution of Sri Lanka.
62 Ms. Ruana Rajapakse, Attorney-at-Law, member of the Commission.
63 See for example, the Citizenship (Amendment) Act No. 34 of 1992 of India.
64 (Hon.) Mr. Oliver Weerasena (High Court judge).
made in regard to the indiscriminate slaughter of buffaloes bringing these animals close to extinction, following the repeal of the Buffaloes Protection Ordinance of 1920 by Act No. 29 of 1958. The Commission also noted that unlike in the Animals Act No. 29 of 1958 which empowers the Minister to make regulations, *inter alia*, for the regulation of slaughter of animals, the Prevention of Cruelty to Animals Ordinance of 1907 makes no similar provision. Taking these matters into consideration, the Commission, while recommending the reintroduction of the Buffaloes Protection Ordinance, proposed the conferring of regulation making power on the Minister in the Prevention of Cruelty to Animals Ordinance, to ensure the prevention of cruelty to animals in general.

**Proposed Amendments to the Code of Intellectual Property Act No. 52 of 1979**

Section 182 of the Code of Intellectual Property Act confers a right of appeal to the District Court from a decision of the Registrar of Patents and Trade Marks. It was noted, however, that the law does not prescribe any procedure for such appeals. Several instances were brought to the notice of the Commission where confusion and protracted arguments in Court have ensued as a result thereby contributing to laws delays. Consequently, the Commission proposed that Section 182 be amended imposing a time limit of thirty days to lodge an appeal by means of a petition setting out the facts and circumstances of the case and the grounds of appeal to be signed by the appellant or his registered attorney. The Commission also proposed that, the procedure regulating such appeals shall be in accordance with Rules prescribed by the Supreme Court in terms of Article 136 of the Constitution of Sri Lanka and that until such Rules are made, the rules applicable to applications for Revision made to the Court of Appeal shall apply *mutatis mutandis.*

**Amendments to the Industrial Disputes Act**

Following a seminar on Industrial Law organised by the Commission with the sponsorship of the Asian-American Free Labour Institute, attended by participants representing workers, employees and the Government, the Commission made several representations in the field of Industrial Law, the chief among which was the need to empower Labour Tribunals with provision to implement or enforce their own orders.

**Other Subject Areas Examined by the Commission**

Apart from the above, the present Commission during its first period in office has examined and made recommendations for reform in respect of several other areas as well. These include the observations made by the Commission on Civil Law and Procedure, Court Administration and Criminal Law and Procedure which suggested several improvements to the prevailing

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65 Some members of the Commission, however, had reservations in regard to the proposal that the petition of appeal could be signed by the petitioner or his registered attorney in view of the concept of ‘recognised agent’, in District Court actions as contained in sections 24 to 27 of the Civil procedure code as judicially interpreted.
administration of justice system,66 observations on the draft amendments to the Workmen Compensation Ordinance No. 19 of 1934,67 observations on the amendments to the General Marriages Ordinance and the Kandyan Marriage and Divorce Act referred to the Commission by the Ministry of Public Administration,68 observations on the proposed office of a Banking Ombudsman to obviate undue advantages conferred on foreign investors over local entrepreneurs presumably proposed by the Sri Lanka Export Development Board, views on the Registration of Title Bill which has been subsequently enacted into law by Act No. 21 of 1998,69 recommendation for the recognition of a scheme for “no-fault accident insurance.”70 observations of the Commission on the Draft Constitutional Provisions relating to matters concerning the Administration of Justice71 and observations on a proposal for legislation relating to Medical Termination of Pregnancy72 which the Commission made after having discussions with representatives of the National Committee On Women.

ASSESSMENT OF THE WORK OF THE COMMISSION AND THE LEGISLATIVE RESPONSE THERETO

Suggesting reforms for the sake of reform is not warranted. Law reforms and the Law must address the conflicting interests in society and evolve a means by which a balance must be achieved between these conflicting interests.

As pointed out by the present Chairman of the Law Commission (Dr.) Justice A.R.B. Amerasinghe: “it is of importance that law reform should be participatory, so that the recommendations of the Commission will reflect the expectations of the community in general and stake-holders in particular.”73

These have been the guiding principles behind the efforts of the Commission. The foregoing pages of this paper have recounted the work of the Commission since its re-establishment in the year 1978. While most of the recommendations made in the pre-1995 period have failed to evoke legislative response, it must be said that, the Government and the legislature have been more responsive to the initiatives and recommendations made by the present Law

66 Directed mainly at minimising laws delays.
67 Giving more meaning to the relief a workman has already been declared entitled to.
68 Which the Commission advised should be postponed until a more extensive study of the subject is undertaken.
69 The Commission itself having had several reservations in regard to the provisions of the Bill.
70 Mandatory payment of compensation to victims of road accidents (a subject taken over from the previous Law Commission’s studies).
71 See amendments proposed by the Law Commission on Matters Concerning the Administration of Justice (The Draft Constitution).
72 Majority of the members of the Commission were totally opposed to the proposal on any ground.
73 See Note by the Chairman as a preface to the Law Commission’s Programme of Work – (1997-1999).
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Commission. Yet, there are several subject areas recommended by the Commission in respect of which the legislature has not responded to. It will be noted that, in all its recommendations, the Commission has been sensitive to and mindful of competing interests involved. Bearing these aspects in mind, it is proposed to make some concluding remarks on the role of the Law Commission as a legal institution in the context of the human rights discourse.

IMPORTANCE OF INCREASED PUBLIC PARTICIPATION AND A ROLE FOR INSTITUTIONS OF CIVIL SOCIETY

New legislation is initiated regularly by the respective Ministries. Though the Law Commission remains the statutorily acknowledged primary law reform institution in the country, it is seldom that the Commission is asked to examine private member Bills as well. While the Attorney General would be examining such Bills for their constitutional validity and the Ministry of Finance for their financial implications, the Ministry of Justice would presumably be looking at other legal implications of such Bills. Section 4 of the Law Commission Act certainly does not contemplate a role for the Law Commission at the stage of such Bills, unless a particular request is made to the Commission.

Consequently, a heavy responsibility is cast on the Commission “to keep under review the law both substantive and procedural with a view to its systematic development.” It is here that the public and public interest groups must play a more active role in striking an alliance with the Commission. The Commission is required to “receive and consider any proposals for the reform of the law which may be made or referred to them …”

It is to be deplored that even in such key public interest issues such as the proposed Freedom of Information Act and the proposed amendments to the Rent Act, public participation was found to be almost negligible, notwithstanding a public request by the Commission for representations. The explanation could only be that there is a lack of public awareness as regards the role of the Law Commission. The creation of that awareness must be undertaken by the Commission itself as well as by the several institutions of civil society. Although, judging by the recent responses on the part of the public to the ongoing programme of work of the Commission published in the national newspapers some progress towards that end has been achieved, the involvement of institutions of civil society is still found to be lacking.

74 Section 4 of the Law Commission Act No. 3 of 1969 (as amended).
75 Section 4(a), ibid.
76 See annexure I.
GUIDING PRINCIPLES BEHIND THE WORK OF THE COMMISSION

As mentioned earlier, the Commission has been sensitive to and mindful of the competing interests involved in its initiatives and recommendations. These initiatives and recommendations were made by addressing the competing interests involved, addressing the interests of groups of persons in society which demand concern and sometimes addressing difficulties arising in the administration of justice system itself.

ADEQUACY OF LEGISLATIVE RESPONSE TO THE COMMISSION’S RECOMMENDATIONS

The Constitutional Court under the First Republican Constitution of Sri Lanka (1972) which had been established to declare on the constitutionality of Bills had once noted that “The functions and duties of this Court begin and end there” and that the legal competence of the National State Assembly to proceed with a Bill in whatever form was not a matter for the Courts. Unlike the Constitutional Court which was possessed of the trappings of a judicial body, the Law Commission is only a recommendatory body. Its functions and duties begin and end with the framework of the Law Commission Act of 1969 and it is not for the Commission to lament that some of its recommendations have not been implemented.

This is where the public and institutions of civil society could play an active role should they find that any salutary recommendations of the Commission have not been carried out. It will be noted, inter alia, that the Law Commission’s recommendations for a Freedom of Information Act, a Fair Administrative Procedure Code and the Amendments to the Citizenship Act to secure gender equality have not yet met with any legislative response.

JUDICIAL HINTS ON LEGAL REFORM - THE COMMITMENT OF THE LAW COMMISSION

Insofar as the Commission is concerned, its role becomes more accentuated when the legislature falls lax and fails to respond to judicial agitation for reform. It has been more than 75 years since Bertram CJ hinted at some changes to the Registration of Documents

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77 For example, the interests of debtors (as a class) against creditors (as a class) in the amendments to the Debt Conciliation Ordinance and landlords and tenants in the proposed amendments to the Rent Act.

78 As for example, the proposed amendments made to the Maintenance Act and reforms on Juvenile Justice Administration, children being the focus.

79 Recommendations in regard to measures to minimise laws delays reflected in the proposed amendments to the Civil Procedure Code and the Judicature Act and the recommendation to empower labour tribunals to implement their own orders.

80 The Constitutional Court decision in the Local Authorities (Imposition of Civic Disabilities (No. 2) Bill, Constitutional Court Decisions, (1978).
Ordinance in Anohamy v. Haniffa. It took the legislature more than 25 years to amend the scale of costs in civil actions after Gratien J had expressed the need for the same. Hampered by the Privy Council decision in Nakkuda Ali v. Jayaratne Justice T.S. Fernando in Hassen v. Controller of Imports and Exports in the year 1966 lamented that he “would welcome the day …” for a change in the law in the context of decisions of administrative officials affecting the rights of citizens. Even when the change came, it was through a progressive judicial development culminating in the decision in Jayasena v. Punchiappuhamy in the year 1980.

More recently, in 1993, the Supreme Court, after observing certain difficulties faced by a plaintiff in ascertaining the proper (judicial) territorial forum when instituting action against a corporate body, noted that: “Section 9 (of the Civil Procedure Code) appears to need legislative clarification.”

Still more recently, Muthusamy Gnanasambanthan v. Chairman, REPIA made apparent the need for making Supreme Court Rules under Article 136 of the Constitution lest an aggrieved party, though putting an impugned decision in issue thereby making it a part of the record in the case, would be denied relief in an application for writ in view of the prevailing state of the law in the context of Administrative Law.

Taking cognisance of judicial hints for legal reform is expected to be a special project of the Commission in its current period of office. Whether the Commission functioning with eleven part time Commissioners and three unfilled vacancies is equipped to respond to all these demands recounted above is a matter which must receive some consideration.

CONCLUSION
An attempt was made to capture the role of the Law Commission as a legal institution in the context of a broad human rights discourse. It is for the public to judge and assess whether the Commission has lived up to its statutory role and responsibility cast on it, to judge and assess whether the Commission has been “aware of the main theoretical and empirical issues...
relating to the study of the law as affecting society from both ends,”\(^{88}\) that is, from the perspective of the people in general and from the point of view of the rulers.\(^{89}\)

The continuing viability of the Law Commission of Sri Lanka would certainly depend on the perception of the public and civil society in regard to its initiatives and the response on the part of the Government to its recommendations. While a duty is cast thereby on the Commission to engage in truly participatory law reform, a corresponding obligation devolves on the public and civil society to take initiatives and move the Commission so that the fabric of our society could be improved and enriched through progressive law reform in areas where they are most needed.

An initial step towards that end could be achieved in the form of a positive and committed response by the public and institutions of civil society to the ongoing programme of work set down for consideration by the Commission\(^{90}\) for a fresh dialogue in regard to the Commission’s recommendations which have failed to invoke a legislative response viability. Needless to say, the viability and usefulness of the Law Commission as a legal institution in the human rights discourse would depend on such a response.


\(^{89}\) Reflected in the Commission’s thinking in relation to a Freedom of Information Bill.

\(^{90}\) See annexure 1.
The Role of The Law Commission

ANNEXURE 1
Programme of work 2000-2004 and nature of ongoing work of the Commission

A. Subjects carried into the current Programme of Work from the Programme of Work for 1997-1999

1. Commercial Law
   Mr. K. Kanag-Iswaran PC

   The law relating to commercial matters has acquired a greatly increased importance in Sri Lanka and there are a number of matters in the laws relevant to the Sale of Goods and Hire Purchase which have to be upgraded to be in line with the laws of foreign countries.

2. Wills Ordinance
   (Dr.) J. de Almeida Guneratne

   In the course of studies made in relation to the proposed new Maintenance Act, the Commission felt that there were a number of issues relating to the Wills Ordinance which need consideration.

   In particular, amendments to Section 2 of the Wills Ordinance, revival of the concept of legitimate portion in the classical Roman Dutch law, liability of a parent’s estate in regard to the maintenance of minor children.

3. Land Acquisition and State Lands Recovery Possession
   (Dr.) J. de Almeida Guneratne

4. Motor Vehicle Accident Compensation
   Chairman

   The Law Commission made recommendations for a scheme of No-fault Motor Vehicle Accident Compensation. Since some policy decisions had to be made, the Commission had requested formal approval in principle before making more detailed recommendations by insurance organisations.
Aspects of fifty years of Law, Justice & Governance in Sri Lanka

B. Subjects identified by Mr Lalanath de Silva from the proposals received by the Law Commission from the public in response to newspaper advertisements.

- Amendments to the Motor Traffic Act
  Chairman

  Note: a delegation of the Motor Traders Association met the Law Commission to urge the need to amend the Motor Traffic Act due to several shortcomings in the enforcement of the existing laws and regulations.

- Proposals for higher penalties for illicit distillation of liquor and drug trafficking.

- Offensive Weapons Act and the need to impose higher penalties for the possession of unauthorised weapons.

- Restitution and compensation to victims of crime.

1. Payment of compensation:
   a. to a person affected by the offences or to his next of kin, following a conviction in the criminal courts;
   b. to the accused where a criminal court declares that the complaint was frivolous or vexatious.

2. Increasing the punitive powers of a Magistrates’ Court from the present limit of imprisonment not exceeding two years and a fine of Rs 1500/-.

3. Facility of obtaining copies of statements of the notes of police officers by:
   a. accused in a criminal case;
   b. a witness, of his own statement, in a criminal case;
   c. a person who contemplates filing a private prosecution in the Magistrate’s Court in terms of Section 136(I)(a) of the Code of Criminal Procedure Act No. 15 of 1979.

4. Further changes to Section 419 and 420 of the Code of Criminal Procedure Act No. 15 of 1979 as amended by Act No. 11 of 1988 – to make them more effective in relation to ‘Memorandum of Admissions’ and ‘Further Proof of Matters admitted unnecessary.’
The Role of The Law Commission

- Amendments to the Rent Act
  Mr. P.A.D. Samaresekera PC, Mr. Nihal Jayamanne PC and Dr. J. de Almeida Guneratne

  NB. Concerns of landlords and tenants

- Regulation of Lawyers’ Fees
  Mr. M.S. Aziz PC

- Amendment of Recovery of Loans by Banks (Special Provisions) Act
  Mr. K. Kanag-Iswaran PC

  It is proposed to consider granting of rights of “parate execution” to finance companies in view of the fact that they have now to be registered and are monitored by the Central Bank after the amendment to the Finance Companies Act No. 78 of 1988 by Act No. 23 of 1991. A study will be made to find out whether this could be achieved by amending the Recovery of Loans by Banks (Special provisions) Act No. 4 of 1990 to include Finance Companies.

- Divorce Law Reform
  Mr. Nihal Jayamane PC

  A new Divorce Act to be proposed setting down the substantive and the procedural rules applicable to actions for divorce and judicial separation and to other related matters such as maintenance, alimony, welfare of children, settlement of property and the right to occupy the family home.

- Laws’ Delays
  Dr. Jayatissa de Costa

C. Other Subjects Approved by the Law Commission

- Amendments to the Civil Procedure Code
  Mr. P.A.D. Samarasekera PC and Mr. Nihal Jayamanne PC

  It was agreed to identify the specific matters which would include pre-trial procedures and matters relating to proof of documents and to make recommendations to speed up proceedings under the Civil Procedure Code to eliminate delays.
Proposed by
Dr. Jayatissa de Costa

1. Sections dealing with the production and proof of documents in the Civil Procedure Code, the Evidence Ordinance and certain decided cases interpreting these sections have caused enormous difficulties to litigants and the lawyers alike. For instance, merely because the opposing party says “subject to proof,” the proof of such documents shall necessarily delay the action. On the other hand, some rules pertaining to the production of documents have also caused unnecessary problems. It is proposed to suggest certain amendments to facilitate the simplification of the production and proof of documents in this regard.

2. Section 755(1) of the Civil Procedure Code stipulates every notice of appeal shall be signed by the Appellant or his Registered Attorney but certain decided cases indicate that it must be signed by the Registered Attorney. It is proposed to remove this anomaly by amending Section 755(1).

**Amendments to the Constitution**

1. Examination to be made on the feasibility of proposing Constitutional amendments to empower a single judge of the Supreme Court to deal with certain matters. It was agreed that matters such as fixing dates of hearing, applications for extensions of time to file pleadings and affidavits should be disposed of by a single judge. The question of whether a bench of two Judges should be sufficient to deal with not only leave to proceed applications under Article 126 but also applications for Special Leave to Appeal is also being considered.

2. The need for Supreme Court Rules to dispense with the established requirement in Administrative Law in writ applications, to cite the particular officer making the impugned decision if the decision itself forms part of the Record.

**Amendments to Election Laws**
Mr. Nihal Jayamanne PC and Dr. Jayatissa de Costa

A study will be undertaken by the Commission to make recommendations to amend Election Laws of the country. This is to cover the entire area of elections.
The Role of The Law Commission

Dr. J. de Alemida Guneratne


2. Amendments in the context of Sections 123 and 124 of the Evidence Ordinance: Principles relating to the concept of public interest privilege in the light of recent trends in the Commonwealth and the U.S.A.

D. Subjects Approved and Receiving the Attention of the Commission

- Sentencing Policy.
- Study of Case Management and the Judicial Administrative System.
- Prevention of Crime and Treatment of offenders.
- Criminal and Civil Justice System.

The Chairman has tabled a copy of the Review of the Criminal and Civil Justice System Executive Summary sent by the Law Reform Commission of Western Australia.

Mr. P.A.D. Samaresekera PC (Civil Law) and Mr. Ranjit Abeysuriya PC (Criminal Law) agreed to study it and suggest some areas of the law that could be taken up by the Law Commission as projects for the research work of the Commission.

E. Research Projects Already Commenced and Receiving Further Consideration

- Animal Welfare Legislation
  A request has been made to the Law Commission by several NGO’s for new Animal Welfare legislation, stating that the existing laws are archaic and outdated and it should be amended or replaced by modern legislation considering the acceptance of the rights of all living creatures and advances made by other countries in providing legislative protection for animals. The matter is being examined in the light of religious and socio-economic values.

- Discrimination Against Children Born Out Of Wedlock
  A proposal has been sent to the Law Commission by the Ministry of Justice on this subject which is presently receiving the consideration of the Commission.
• Media Law
Further Consideration of Representations of the Editors Guild of Sri Lanka on reform of the regulatory framework relating to the media.

F. Other Current Research Projects
• Arbitration Rules.
• Organised Crime (including money laundering).

G. Note by the Chairman, Law Commission

The Law Commission of Sri Lanka was first established in 1969 under the Law Commission Act No. 03 of 1969. Section 4(b) of the Act imposes on the Law Commission a duty to submit, from time to time, programmes with a view to making recommendations for reform of the law.

This is the third programme of work prepared by the present Commission since it was reconstituted in 1994 and first since the re-appointment of the same Commissioners for the second consecutive year in 1999.

In keeping with the recognised desirability of the Commission’s sensitivity and responsiveness to current community needs and aspirations, in the preparation of its programme of work in terms of Section 4 (b) of the Law Commission Act, the Commission through newspaper advertisements, invited members of the public to identify and make recommendations on matters pertaining to the law, including subsidiary legislation, specially provisions requiring attention on account of insufficiency, irrelevance, anomaly, ambiguity or needless complexity.

The Commission acts on the basis of its announced programme of work as well as on the basis of ad hoc references made to it by the Ministry of Justice and other Ministries and Government Departments, with the assistance of briefs prepared by individual members of the Commission or by its Sub-Committees assisted by the Commission’s very small professional staff or on the basis of reports of Sub-Committees assisted by outside experts. Whether the working papers are prepared by the members of the Commission or by experts assisting it, the work has been pro bono and without charge. As noted in earlier reports of the Commission, substantial financial assistance is required if the Commission is to move on to higher levels of activity on wider planes. The fact that there has been a significant volume of work that the Commission has been able to accomplish has been due to the obvious dedication and high sense of commitment of its members.
INTRODUCTION

The judiciary, now indisputably a part of “candid democratic governance” is mandated by virtue of its constitutional role to act disinterestedly in order to advance social welfare and bring about distributive justice. Only the most politically or intellectually blinkered individual can assert otherwise. But can this same obligation be equally and unreservedly laid on the legal profession? Or is it unreasonable to impose such a duty to “justicise” law on lawyers as opposed to judges, or indeed, to suppose that the legal profession has the capacity to take on such a burdensome task? Some analysts have agreed that the balance of responsibility in this sense, cannot be even. Thus, in this equation, how do we fit in the duty of the legal profession to society over and above the obligation of each individual lawyer to attend conscientiously and diligently to his or her briefs? It is undisputed, after all, that public accountability can lie only if such a duty is to be found.

Some jurists have been stern in their expectations. V. R. Krishna Iyer, a former judge of the Indian Supreme Court renowned for his adroit manipulation of legal language, once termed the cornerstone of any legal system to be “the integral yoga of justicing and lawyering.” His reasoning was simple.

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“The bench and the bar must be mutually accountable and must fulfil the people’s expectations since these two are the accredited constitutional mechanisms for the delivery of justice. If the bench or the bar chooses to indulge in grave vices and when exposed, bark and bite, it will unwittingly become its own grave digger.”

But does this equation assume too much? Answers to this question have changed colour through the years. Traditionally, English common law encouraged a “hard headed and pragmatic” attitude to lawyering. The lawyer was expected to apply himself or herself to the problems brought by clients without pausing to explore or speculate upon what the law was about; what was or should be the role of the law or the lawyer in society or whether it was capable of responding to contemporary needs. There were lawyers with a philosophical bent but they were rarities like John Austin.4

In many of the countries that inherited the British common law traditions, this belief in legalism persisted. The “mystique of the law” was sanctified and the “winner takes it all” concept was promoted with the fiction of a compulsively neutral judge adjudicating between parties of equal strength, even though the reality was anything but so. Again, this resulted in the perpetuation of an adversarial system that postulated only two solutions in any given dispute submitted for adjudication - for plaintiff or defendant. As one analyst rightly remarked, “this made litigation what the game theorists have described as a zero-sum game.”5

The focus then shifted from regarding rules of law as simply something to be accepted as part of the natural order of society to the examination of every aspect of the legal system, the legislative and judicial processes, the working of the legal profession, the nature and functioning of law in all its aspects in relation to society and its relevance to contemporary needs. These were considered to be legitimate and indeed, pressing fields of study.6

With this, old notions of law and what the law should achieve also changed. South Asian legal systems such as India, Pakistan and, even to a certain extent, Bangladesh, which modelled themselves on inherited notions of antagonistic or adversarial litigation, underwent fundamental revision. The law was openly pronounced to take into account the social continuum. Both judges and lawyers resorted to philosophy, history, sociology and psychology, resulting in decisions that creatively interpreted the law in favour of social justice. Justice was declared to be the foremost human right and the first constitutional promise.7

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4 The Relevance of Jurisprudence, Lloyd, 5th ed. p. 3.
6 Supra n. 4.
7 Supra n. 3.
In India where these changes were most noticeable, they did not result in the breakdown of that legal system. Nor did the reforms render it impossible for government to function, though an exuberance in this direction has now caused the Indian Bench and the Bar to re-examine just how far should the revolution proceed. But the emphasis on social justice remains and the Indian legal system continues to be all the more vibrant for it.

Importantly, this South Asian transformation of formal legal systems to “living law”, to use a well worked but still pungent phrase, did not come about by judges alone. Instead, the reawakened judiciary in those heady days had a dedicated constituency through a vigorous social action bar including socially conscious lawyers and public interest groups together with an investigative press and an interested public. But for this constituency, the relentless activism of the Indian judges might well have been self-destructive.

In contrast, in analysing the public accountability of the official and unofficial Bar during the past fifty years in Sri Lanka, this paper presents the dilemmas of a legal system where a critical meeting of the Bench and the Bar has been far less clear cut with consequent profound effect on the manner in which the law has progressed.

It is from this premise that this paper will discuss public accountability of the legal profession in Sri Lanka, both with regard to general issues of pressing concern in society and in reference to specific exercise of discretion by the Attorney General as the chief law officer of the State. It will so do necessarily entering the “political thicket” of controversy at times but without which reference, this writer believes, any examination of the legal profession and its consequent impact on the manner in which justice has been realised in this country during the past fifty years would be sadly incomplete.

THE UNOFFICIAL BAR – MATTERS OF CONCERN

The Sri Lankan legal profession came into being by the Royal Charter of Justice of 1801 which required a licence from the Governor to practise as an Advocate or a Proctor. The Supreme Court of Sri Lanka was empowered in 1835 to admit as Advocates or as Proctors of the Supreme Court “persons of good repute and competent knowledge and ability.”

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8 It is beyond the scope of this paper to discuss these cases, most interestingly among them however are the judicial decisions dealing with the right to go abroad (Satwant Singh Sawhney v. D. Ramarathanan, AIR, 1967, SC 1836), right to privacy (Govind v. State of MP, Cri LJ, 1111), the right not to be held in fetters (Sunil Batra v. Delhi Administration, AIR 1978, SC 1675), the right of an indigent person to have legal aid (MH Hoaskot v. State of Maharashtra, AIR 1978, SC 1548), the right to a speedy trial (Hussainara Khatoon v. Home Secretary, State of Bihar, AIR 1979, SC 1360), the right against public hanging (AG of India v. Lachma Devi, AIR 1986, SC 467). For a fairly recent and balanced analysis of PIL in the Indian and Australian jurisdictions, see Judicial Activism, Michael D. Kirby (Justice of the High Court of Australia, President, International Commission of Jurists), The Commonwealth Law Bulletin, July and October, (1997).

9 Supra n. 2.
This terminology was kept alive by Section 16 of the Courts Ordinance No. 1 of 1889 which empowered the Supreme Court to admit “persons of good repute and competent knowledge and ability.” The Administration of Justice Law No. 44 of 1973 removed the distinction between Advocates and Proctors and Section 33 of that law empowered the Supreme Court to admit and enrol as Attorneys-at-Law, persons of “good repute and of competent knowledge and ability.” Subsequently, the Administration of Justice Law itself was repealed by the Judicature Act No. 2 of 1978, which continued to bestow the same powers of admittance of Attorneys-at-Law on the Supreme Court “in accordance with the rules for the time being in force.”

For all those “of good repute and of competent knowledge and ability” who are admitted as attorneys-at-law, two concerns are vital: the proper fulfilling of his or her duties and responsibilities to clients, the court, the legal profession and society, and the securing of the independence of the legal profession. Without a doubt, the attainment of the second imperative is fundamental to the proper fulfilling of the first.

Incidentally, it is of interest to note that a lawyer cannot profess to be selective about his or her client on the basis that the client is unpopular either in personal terms or in reference to the action that is sought to be brought or defended. Rule 5 of the Rules of Etiquette for Attorneys-at-Law prescribed by the Supreme Court states that “An Attorney-at-Law may not refuse to act on behalf of a party or person in any matter or proceeding before any court, tribunal or other institution established for the administration of justice or in any professional matter at his or her professional fee. Provided however, an Attorney-at-Law may refuse to act on behalf of a client in special circumstances which in his opinion would render it difficult for him to maintain his professional independence or would otherwise make acceptance of such professional matter incompatible with the best interest of the administration of justice.”

The professional responsibilities of lawyers is well traversed ground. In the seminal book on the subject in Sri Lanka, the rationale underlying the responsibilities of lawyers with reference to formal law reform is set out in relatively uncomplicated terms by Dr. A.R.B. Amerasinghe, Justice of the Sri Lankan Supreme Court.10

Dr. Amerasinghe acknowledges that by reason of his (her) special education, training and experience, it is the lawyer who has

a. the best opportunity to observe the workings and discover the strengths and weaknesses of the law and legal institutions and to know when and why the law is working badly, and

b. the special competence to put it in order. He (she) is an integral part of the machinery of justice.

For these reasons, he makes the very pertinent observation that a lawyer has greater responsibilities than a private citizen and he (she) should, therefore, lead in seeking improvements to the legal system. This would include improving access to justice by education and reducing what has been termed “the subtle phenomenon of psychological inaccessibility to justice.” Otherwise, the consequences will only be prejudicial to the lawyers themselves for it will result in the deterioration of the reputation of the legal system in the eyes of the public.

As noted by the American Bar Association in its Report of the Joint Conference on Professional Responsibility in 1958:12

“The lawyer tempted by repose should recall the heavy costs paid by his profession when needed legal reform has to be accomplished through the initiative of public spirited laymen. Where change must be thrust from without upon an unwilling Bar, the public’s least flattering picture of the lawyer seems confirmed. The lawyer concerned for the standing of his profession will, therefore, interest himself actively in the improvement of the law. In so doing, he will not only help to maintain confidence in the Bar but will have the satisfaction of meeting a responsibility inhering in the nature of his calling.”

These concerns are echoed in the United Nations Basic Principles on the Role of Lawyers (1990) and the 1983 Montreal Universal Declaration on the Independence of Justice which specifically confer public duties on lawyers. The latter, in particular, obliges lawyers to educate the public about the principles of the rule of law, the importance of the independence of the judiciary and of the legal profession and to inform them about their rights and duties and available remedies. This responsibility remains even more imperative in developing countries and with regard to the “poor and marginalized” sections of society.

In addressing the second and far thornier issue regarding the independence of the legal profession, these instruments target formal associations of lawyers and specifically require Bar Associations to ensure the independence of the legal profession and, as a necessary corollary, the independence of the judiciary.13 Interestingly, however, recent international legal assemblies reaffirming and expanding these instruments go further, imposing definite duties on lawyers as well as formal associations in this respect. Thus, it is declared to be a

11 Ibid, pp. 52, 55.
13 Centre for the Independence of Judges and Lawyers (CIJL) Bulletin, No. 12, Section IV.
canon of professional responsibility that a lawyer champion the Rule of Law and mobilise public opinion against (unjust) laws and derogations of established fundamental rights and liberties. In this context, if any government systematically and consistently violated the principles of the Rule of Law, it is the duty of every lawyer and Bar Association, Bar Council and representative professional association to counter such violations. Equally, it is incumbent on the entire legal fraternity to mobilise its resources peaceably for the restoration of the Rule of Law.  

Now, we proceed from theory to reality. At the 19th Biennial Conference of the International Bar Association held in New Delhi in October 1982, challenges facing the Nepali Bar were itemised by Bharat Upreti, Secretary, Nepal Law Society in a manner that is of immediate interest to the Bar in Sri Lanka as well. These are as follows:

a. Lawyers are, as a whole, occupied only in their individual practice and are not concerned about the larger issues of social justice.

b. Lawyers are involved in dilatory practices inside and outside court which result in the denial of justice and the deterioration of the reputation of the Bar.

c. Lawyers charge high fees when they lack the required professional competency and quality.

d. Lawyers are involved in bribing officials involved in the process of decision making involving even judicial officers in the minor judiciary in order to secure a particular result in their case.

e. Lawyers use undesirable ways and means to solicit clients.

f. There is noticeable deficiency in the information concerning the services that a lawyer can offer.

g. The legal profession is reserved for upper and middle class families and there is lack of organised support for those who join the Bar from outside these structures.

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16 Socio-legal activists would probably express dissent with the wording of this particular concern which seems to imply that charging high fees is, in fact, justifiable, where there is professional competency and quality, a question that is undoubtedly relevant in a profession which is notorious for its charging of prohibitively high fees by counsel of undoubted ability.
Through the past fifty years, the challenges facing the Sri Lankan Bar have been many. The influx of numbers into the profession has meant that within the legal profession, there prevails what could be kindly referred to as the “survival of the fittest” mentality. A rigidly hierarchical legal profession has impacted in a particularly negative sense on women lawyers. A 1996 BASL (Bar Association of Sri Lanka) study of women lawyers showed that only a minority of women lawyers work as private practitioners in the law courts. Out of forty six women interviewed, only four women worked as Counsel, thirteen women as instructing attorneys while twenty nine women fell into both these two categories. Economically and socially underprivileged lawyers and those from remote areas have also been equally affected. Meanwhile the “crowding” of the legal profession has resulted in the professional lawyer of today being very different in a sense from his or her predecessors who were well versed not only in the formal law but in subjects like philosophy and history which enabled a holistic approach to a legal problem. Modern day lawyers have, as is indeed acknowledged by them, neither the time nor the inclination for wider social interests, fostering inevitably a preoccupation with the black letter law. Senior members of the Bar have acknowledged the consequent negative impact on the legal system:

“We ourselves are captives of a system which is archaic and incapable of fulfilling public expectations. We are taught that justice is procedural, which it partly is and yet, the public it serves procedurally demands justice of a more substantive kind. Do we really need hundreds of pages of rules and annotations to resolve a dispute between two people? Should we not tame and refine the means which have become an end in itself? Is it not time to experiment with new rules and new systems? If the medical profession has not been afraid over the century to experiment with life to find better ways to save it, can the legal profession reasonably resist experimenting with new systems of justice in order to find better ways of delivering it. The time has come to look within and to rediscover the high and noble ideals of this profession. And when that happens, we may discover that we are all, the legal profession and the public, on the same side.”

It is manifest, however, that this self-discovery of the country’s legal profession is now no closer to realisation than it was then. Regrettably, fifty years after independence, there is still the need to make the law accessible to the ordinary people whom the law is, after all, meant to serve, which is defined as the “greatest unfulfilled responsibility of the Bar.”

It is here that the first question of public accountability arises. This paper will address two concerns in this regard with the necessary caveat that many other structural problems affect

17 Address of Faisz Mustapha PC on “Has the Sri Lankan Bar Achieved its Objectives?” at the National Law Conference, 1997.

the administration of justice in this country. Inarguably, however, the twin problems of law’s delays and legal aid impact most directly on the question of public accountability vis-à-vis the legal profession.

The vexed problem of law’s delays has, of course, occupied a considerable amount of paper and space at national law conferences. More recently, the “chronic delay and frustration” in a typical civil litigation was succinctly summed up by a President of the Court of Appeal in the following manner:

“…our system reflects excessive judicial passivity in an adversarial, undisciplined legal procedure with limited availability of versatile alternatives to a protracted trial… a few days ago, my brother judges and I analysed our case flow statistics. The number of final civil appeals as at the end of June was 5,906. We found that while 91 civil appeals were disposed of in June, 115 new civil appeals were instituted in the same month. Up to the 20th of July, while 30 appeals were disposed of, 59 new appeals had been instituted and the number of pending civil appeals on that date was 5,935. The institutions far outnumber the disposals.”

Law’s delays has also been focused upon as a primary concern facing the legal profession in the country by a visiting team of observers from the International Commission of Jurists in 1997.

The long-term consequences of this exploding caseload on the legal system is obvious as was pointed out by one senior lawyer at a National Law Conference in 1997.

“The members of the Bar and judiciary have only one mandate and that is to serve the public, but we can do so only so long as we continue to have their confidence. With increasing delays and galloping costs of litigation, the public may well perceive recourse to the law to be a barren and sterile exercise and the legal profession as somewhat redundant.”

The Bar Association was accordingly called upon by this speaker to resolve that:

a. great emphasis be placed on educating lawyers about the potential for alternative methods of conflict resolution;

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21 Supra n. 17.
b. the rules of professional conduct be modified to place an obligation on lawyers to inform the clients of the alternatives to litigation; and

c. steps be taken to enhance public awareness of the alternatives to litigation.

These objectives, laudable as they are, remain confined to paper in this country. Lawyer guided mediation and negotiation, which does not threaten or diminish the work of the legal profession, has been held out to be the only workable compromise but even here, no sustained initiative has worked this concept into existing legal procedures.

On the other hand, other legal systems have been more fortunate. While the American Bar has successfully lobbied for substantive reforms which compel recourse to alternative methods of dispute resolution rather than automatic adjudication, the Labour Government in England has set into motion similar changes in legal procedures following a report of Lord Woolf, the Master of the Rolls. The Canadian Bar Association has also made similar recommendations.22

The Sri Lankan Bar has meanwhile failed to realise or remedy yet another consequence of the inherited adversarial legal system in this country. This is the inability of vast numbers of individuals to afford the costs of litigation, thus making access to justice a pressing question and negating the effect of the fundamental rights chapter in the Constitution.

As observed as far back as in 1960:

“... our Parliament will shortly declare by Statute, the fundamental rights of citizens. Equality before the law of all persons, rich or poor, will doubtless be one of those rights. This would be a reality only if some form of organised aid is also established in this country. Almost all the witnesses who appeared before us agreed that the existing legal aid facilities are inadequate. They stressed the crying need for an organised form of legal aid in Ceylon... Legal assistance is very expensive. Besides, there is a vast number of persons who fear to go to courts, whether to enforce their legitimate rights or defend themselves against untenable claims simply because to do so, they will need money and may involve them in a great deal of unforeseeable expense. This is the kind of disability which, though it immediately and directly affects only the individuals concerned, harms the community even more. It encourages wrong doing in others.”23

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22 Justice A.R.B. Amerasinghe, in the 1999 Professor Ediriweera Sarachchandra Memorial Oration.

These concerns remain relevant 40 years later. As noted by members of the Bench and Bar in their writings,24 the present system of legal aid has been confused with the provision of “free legal aid.” This is reflected by the fact that current schemes of legal aid run by the Bar Association and the Legal Aid Commission have an income related cut-off point to qualify for aid which bypasses vast numbers of individuals whose income may be marginally higher than the cut-off point but are still not high enough to absorb costs of actual litigation.

From this discussion, we proceed to more contentious issues involving the very credibility of the Sri Lankan legal profession itself. Since independence, the Bar in this country has engaged, at times, in head-on confrontations with the State involving the life and liberty of its members. The classic example, of course, is the situation that prevailed in 1987-90, during the JVP youth insurrection where at least 10 lawyers were killed for attending to their professional duties while the total number of lawyers killed both by the paramilitaries and the JVP during that period, amounted to at least twenty. Then, the Bar Association assumed an activist role, expressing shock and horror over the murder of lawyer Wijedasa Liyanarachchi, whose death took place in police custody. The Bar en bloc and irrespective of political differences, decided to boycott the ceremonial sitting of the Supreme Court in the new Courts Complex. Later, as the killers of Liyanarachchi were not brought to book, it was decided that no member should appear for any police officer until the matter was settled and the killers charged in court. The report of the Bar Association of Sri Lanka for 1989-90, acknowledges the events of that period thus:

“At the end of such a year of turbulence in the affairs of State and our profession, we are happy to see the profession stronger, its independence strengthened and its position as a bulwark in defence of the Rights of Man recognised even more.

This report will place on record that the Bar Association of Sri Lanka was required to foster and preserve the Rule and the Rights of the Citizen in this country, as well as to hold high the honour and dignity of the legal profession. Our aim was to be just by all members of the profession and also take the necessary steps to protect their personal lives and liberty and their freedom to practise their profession in keeping with the high standards of the Bar.”

Given its stand in those times, none would grudge the Bar these accolades. In turn, the Bar was accorded its due place by those in the helm of power, so much so that on occasions, the executive at that time went out of its way to acknowledge this fact.25


25 Notably, then President Ranasinghe Premadasa who followed the resolutions of the Bar Association in appointing President’s Counsel. At one point, when one of his Ministers referred to the Bar Association as being a terrorist association, he compelled the Minister to publicly apologise to the Bar, *The Sunday Times*, 5th July, 1998.
But what of other occasions when the independence of the Bar and the independence of the judiciary was sought to be infringed? As has been rightly conceded:

“The independence of the judiciary is a matter of vital concern to the Bar and the people. There cannot be an independent Judiciary without an independent and fearless Bar just as much as there cannot be an independent Bar without an independent Judiciary.”

This paper will not endeavour to discuss each and every instance in the history of this country when the judiciary came under threat from the executive and the responses of the Bar in those situations. However, a few examples will suffice to illustrate the theme of this paper - that the public accountability of the legal profession in “justicising the law” assumes particular significance in the context of judicial independence and that in the absence of such an accountability, the damage done to the legal system itself becomes incalculable.

Within the last fifty years, Sri Lanka has seen a convoluted playing out of Bench-Bar relations. On occasions, this interplay has been particularly strong as evidenced in the 1970s when executive attempts to politicise the judiciary were met with strong opposition from the Bar. Perhaps the most striking of these well documented instances was when the judiciary and the Bar united to protest against “invitations” being sent out by the then Minister of Justice Felix Dias Bandaranaike on the inauguration of the Supreme Court under the 1972 Constitution. In other instances, the legal profession might have been bolder as a powerful executive president transformed the face of the country’s political system and trespassed without conscience on the preserves of an independent judiciary by “reconstituting” the appellate judiciary under the 1978 Constitution, allowing judges to be personally intimidated when unpopular decisions were delivered and bringing a sitting Chief Justice before Parliament for remarks made in public that were critical of the government.

The late 1980s and particularly the 1990s saw, however, the gradual development of an interventionist Bar and a concerned Bench preoccupied with issues of social justice and effectively working the fundamental rights chapter under the Constitution. Rights focussed interventions into governance became as a matter of course though this assumption of judicial authority, hampered as it was by restrictive constitutional provisions, did not come anywhere


27 Report of the Select Committee Parliamentary Series No. 71 of 1984 into allegations of improper conduct on the part of Chief Justice Neville Samarakoon. The comments made by Samarakoon CJ were found to be a serious breach of convention but not judicial misbehaviour. The Select Committee proceedings against Samarakoon CJ was roundly condemned by civil rights activists nationally and internationally as an interference with the independence of the judiciary.

28 For a case of particular interest concerning the Bench and the Bar, see Edward Silva v. Bandaranayake, (1997) 1 SLR 92 in which the appointment of a thirty seven year old woman academic to the Supreme Court bench was challenged by members of the Bar.
near the upsurge of public interest litigation that India experienced from the late 1970s. Regardless, as tensions exacerbated between the executive and the judiciary following unpopular authoritative judicial pronouncements, the inability of the legal profession to absorb and control the political fall-out became clear. This profound breach of faith on the part of the Bar occurred ironically enough, not so much in 1988-89 where the country saw unparalleled disruption of normal life and unprecedented violence directly affecting lawyers. Rather, it was in the ostensibly calmer but morally more crippling years from the late 1990s.

Thus, in the 1990s, President Chandrika Kumaratunge and her Ministers engaged in intemperate and inaccurate criticism of selected Supreme Court judges following particular judgments delivered by the Court. While judges’ houses were not stoned this time around, the effect of such executive anger was nonetheless devastating. The Bar, however, was silent. During this period, the legal profession notably activated itself in matters involving the independence of the Bench and the Bar only in late 1998 when a judge of the High Court was summarily arrested by senior officers of the Criminal Investigation Department. His arrest was later ruled by the Supreme Court to amount to a violation of his fundamental rights. On this occasion, lawyers in general and the Sri Lankan Bar Association in particular, intervened against the arrest and intimidation of the High Court judge, calling upon President Kumaratunge to interdict the relevant police officer and appoint a commission of inquiry, which request was not heeded by the executive.

But this pattern of extraordinary inactivity on the part of the country’s legal profession is best seen in the contrasting manner in which the Bar responded to crucial appointments to the post of Chief Justice of the country at different periods of time. This paper discusses two particular instances where the attitude of the Bar to executive annoyance with independent judicial thinking was singularly contrasted. Thus, the Bar in the eighties, irrespective of personal political affiliations, unitedly opposed executive departure from time honoured convention in appointing the senior most judge of the Supreme Court as the Chief Justice.
when clear political considerations dictated the decision of the executive.\textsuperscript{33} By contrast, however, facing a similar situation in the late nineties, the Bar preferred a problematic silence to valour and worse, in some instances, openly campaigned in favour of a pro-executive appointment.\textsuperscript{34} The difference in the attitude of the Bar was marked despite the fact that the breach of convention in the nineties was in a much more worrying context than at any other time in the past.\textsuperscript{35}

Proceeding from this standpoint, one may well ask as to what really distinguishes the past from the present as far as Sri Lanka’s legal profession is concerned? A corrosively politicised Sri Lankan Bar in recent times provides an easy answer to this question. The issue can be simply put. Every lawyer, as every other citizen in this country, undoubtedly has the right to profess private political views. Equally, there have been lawyers in the past identified with the government but that has not prevented them from taking an independent stand on matters of national concern.\textsuperscript{36} But an unabashed crossing of this private-professional divide over the years has resulted in detriment to the profession itself. What other profession in the country has, for example, groups of its members forming themselves into organisations that support one political party or another?\textsuperscript{37} Promises of activist interventions to “depoliticise” the Bar held out at particular times have not had sustained force.\textsuperscript{38} Instead, with an increasingly obdurate Kumaratunge Presidency succeeding to its second term of office, the Bar has come to acquiesce in the formation of an insecure political culture resentful of intellectual

\textsuperscript{33} When then President J.R. Jayawardena refused to appoint the senior most judge of the Supreme Court R.S. Wanasundera as the Chief Justice following the retirement of the incumbent Chief Justice, S. Sharvananda in 1989 in the context of Justice Wanasundera’s judicial opposition to the Thirteenth Amendment to the Constitution.

\textsuperscript{34} When the senior most judge of the Supreme Court M.D.H. Fernando was similarly passed over by President Chandrika Bandaranaike Kumaratunga and Attorney General Sarath N. Silva appointed as Chief Justice on the retirement of former Chief Justice G.P.S. de Silva in 1999. This was in the wake of a strongly independent stand taken by Justice M.D.H. Fernando in a number of judgements challenging executive action. i.e. \textit{De Silva & Others v. Jeyaraj Fernandopulle and Others}, (1996) 1 SLR 22 and \textit{Karunatilleke v. Dayananda Dissanayake, Commissioner of Elections}, (1999) 1 SLR 157. See also page 53 of the ICJ Report, (supra n.20) which remarks on the now infamous liquor licences cases where the Supreme Court held that the automatic non renewal of licences by the Kumaratunga administration in 1994 to supporters of the previous government violated their fundamental rights.

\textsuperscript{35} The appointment of Attorney General Sarath Silva as Chief Justice was in the midst of his predecessor former Chief Justice G.P.S. de Silva directing an inquiry committee consisting of two judges of the Supreme Court to look into allegations of abuse of power while in office by Attorney General Silva, involving the conduct of a district judge and a magistrate. Two motions for the disenrolment of Mr. Sarath Silva as an Attorney-at-Law had been presented to Court at the time the appointment was made.

\textsuperscript{36} As commented upon by senior lawyer and former Principal Law College, R.K.W. Goonesekere to The Sunday Times, February 16, 1997.

\textsuperscript{37} Including notable instances in 1997 when formal deliberations of the Bar Association were disturbed by the bawdy recital of poems or ‘palkaviyas.’

\textsuperscript{38} Interview with President, Bar Association, Romesh de Silva, \textit{The Sunday Times}, 23\textsuperscript{rd} February, 1997.
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independence and judicial strength. Correspondingly, its public image and its capacity to take on the role of a strong actor in protecting entrenched constitutional values has weakened, as was apparent in its ineffectual interventions in the year 2000 when the Kumaratunge government attempted to push through a Third Republican Constitution amidst dubious political and legal maneuvering. Thus, we have the engagement of “mighty opposites” so manifest in India, for example, through an active if not activist Bar and the Bench, averted by a hairbreadth in Sri Lanka to the undoubted relief of the executive but with deleterious consequences to the people. In time, this will amount to nothing short of an intellectual reducing of the Sri Lankan legal system in the South Asian sub continent. The historical responsibility that the Sri Lankan Bar Association as well as the leaders of the Bar will be called upon to shoulder in this respect is onerous.

THE OFFICIAL BAR (THE ATTORNEY GENERAL’S DEPARTMENT) – MATTERS OF CONCERN

As far back as in 1969, commenting on the nature of the English Attorney General, it was perceptively observed that “the basic requirement of our constitutional arrangements are that however much of a political animal he may be when dealing with political matters, he must not allow political considerations to affect his actions in those matters in which he has to act impartially and even in a quasi-judicial way.”

The “hybrid” nature of the chief law officer of the state in accommodating these qualities of judicial detachment and political partisanship has been the subject of much discussion in England. The debate necessarily touches the fundamental issue of the independence of the office of the Attorney General and as to whether the Attorney General should wield an absolute discretion in his or her decision making, the nature of which cannot be inquired into by the courts.

The reason why this has become a matter of “great constitutional principle” is obvious. As remarked by Lord Denning MR in the celebrated decision of the Court of Appeal in Gouriet v. Union of Post Office Workers:

“To every subject in this land, no matter how powerful, I would use Thomas Fuller’s words over 300 years ago ‘Be you never so high, the law is above you.”

39 Proposals of the Bar Association rushed in an urgent communication to President Kumaratunge on 5th August, 2000. The proposals contain no reference to the manner in which the Draft Constitution incorporating controversial last minute amendments in the Transitional Provisions, was attempted to be steamrolled through Parliament and the courts without regard to Public accountability. The proposals were also criticised subsequently for being inadequate in substance. The Sunday Island, 20th August, 2000.


41 (1977) 1 All E.R. 696.
This paper will, therefore, examine the question of the public accountability of the Attorney General in Sri Lanka within the framework of the constitutional status and the public eminence accorded to the office. The study will be with reference to debates focusing on similar questions in the legal systems of the United Kingdom and Israel.

THE OFFICE OF THE ATTORNEY GENERAL – ITS EVOLUTION AND INDEPENDENCE

The precise nature of the office of the Attorney General in Sri Lanka has been exhaustively examined in two judgments of the Court of Appeal\(^{42}\) and of the Supreme Court\(^{43}\) in 1981 in the now celebrated case of *Land Reform Commission v. Grand Central Limited*, which analysed the right of the Attorney General and State Counsel to appear in court for litigants in their private capacity and concluded that there was no such right.

In the Supreme Court, Samarakoon CJ, delivering the judgment, put the matter very bluntly when he pointed out that the Attorney General is the Chief Legal Officer and adviser to the State and thereby to the sovereign and is in that sense an officer of the public. He is the Leader of the Bar and the highest Legal Officer of the State and as such, has a duty to the Court, to the State and to the subjects to be wholly detached, wholly independent and to act impartially with the sole object of establishing the truth. That image will certainly be tarnished if he takes part in private litigation arising out of private disputes. No Attorney-General can serve both the State and private litigant. Thus:

“...(the Attorney General) cannot shed his office as and when the circumstances suit him. The law does not permit the Attorney General to play Jekyll and Hyde. He had taken his oath of office as required by the provisions of the Constitution. Once an Attorney-General, always an Attorney-General until he relinquishes office” (per Samarakoon CJ in the Supreme Court)

This unique nature of the Attorney General as one of the very few, if not the only officer appointed under the Constitution, who in the exercise of the functions and duties attached to the office, comes into direct contact with all three organs of government, the Parliament, the President and the Courts (per Ranasinghe J in the Court of Appeal\(^{44}\)), had evolved in a very distinct manner from the past. Thus, as pointed out by Bonser CJ in *Le Mesurier v. Layard*:

“The present Attorney General is the lineal successor of the old Advocate Fiscal and just as in the old days, actions against the Government were brought against the Advocate Fiscal as representing the local ‘Fisc’ or Treasury, so they may now be brought against the Attorney General.”

\(^{42}\) (1981) 2 SLR 147.

\(^{43}\) (1981) 1 SLR 250.

\(^{44}\) (1898) 3 NLR 227.

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Here, a dismissed officer of the Civil Service sued the Attorney General not in his personal capacity but as representing the government of Ceylon. It was held that the Attorney General was the correct party defendant, if the party sued was the Government of Ceylon. As time went on, the Advocate Fiscal was changed to ‘Kings Advocate’ and then to ‘Queen’s Advocate.’ Ordinance No. 1 of 1883 made the formal title change to the Attorney General of Ceylon with the change taking effect from 1884.

At this time, he was a member of the inner Cabinet, was responsible for the drafting of legislation, had supervisory authority over the minor judiciary and also practised law in the courts.

Significant reforms of this office took place in Ceylon following the Report of the Special Commission on the Constitution (1928) under the Chairmanship of Rt. Hon. The Earl of Donoughmore. The Commissioners comment on the position of the Attorney General in the following manner:

“…the Attorney General will be the Legal Advisor to the Government with the full status of Minister and so able to participate in the deliberations of the Board of Ministers and of the Council. He will be responsible for advising the Heads of Departments and the Executive Committee on such matters as may be referred to him, as for example, the examination of contracts and the preparation of legal documents.”

The Donoughmore Constitution of 1931 shifted the Attorney General out of the ‘inner cabinet’ and thus out of active political involvement. The institution of criminal prosecutions and civil proceedings on behalf of the Crown was the duty of the Attorney General’s Department while the Legal Secretary was assigned, inter alia, the tasks of the administration of justice and the drafting of legislation. The primary legal role of the Attorney General was emphasised further in the Soulbury Commission Report which contains the genesis of the modern Attorney General. Thus, the Commissioners recommended that:

“…the Attorney General should be charged with the duties now carried out by the Legal Secretary under this heading. We envisage that, under the Constitution we recommended, Ministers will require legal assistance in

a. the day to day running of their departments;

b. the passage of Bills through Parliament, specially at the Committee stage;

c. the interpretation of existing law and in departmental matters which may involve legal proceedings; and

d. matters of high constitutional policy, on which the Cabinet as such may require advice.”
The Commissioners recommended the appointment of a Minister of Justice to deal with the subjects then allocated to the Legal Secretary and also recommended that under the new Constitution, the Attorney General and the Solicitor General should not lose their status as public servants and become Ministers. They also recommended that the provision of legal advice to the Governor General should, in future, be a duty of the Attorney General.45

What is of importance, however are the following observations of the Soulbury Commission:

“We would therefore make it amply clear that in recommending the establishment of a Ministry of Justice, we intend no more than to secure that a Minister shall be responsible for the administrative side of legal business for obtaining from the Legislature financial provisions for the administration of justice and for answering in the Legislature on matters arising out of it. There can, of course, be no question of the Minister of Justice having any power of interference in or control over the performance of any quasi-judicial function or the institution or supervision of prosecutions.”

As regards legal advice to Ministers under the new Constitution, the Commissioners recommended that the question relating to the interpretation of existing law and departmental matters which may involve legal proceedings would continue to be referred to the Attorney General or the Solicitor General. They also recommended that advice on matters of high constitutional policy, on which the Cabinet as such may require advice could be given by the Attorney General, provided that the recommendation as to his non-political status was accepted.46

“…in view of the ease with which the duty of advising the Governor General in these matters may be turned on political ends, we would express the hope that the Minister would hesitate to tender to the Governor General advice contrary to the recommendations he had received from the Attorney General, the Permanent Secretary and other non-political advisors.”47

Unlike the Soulbury Constitution which proceeded on the two cardinal principles of the independence of the judiciary and an independent public service, the 1972 Constitution diminished the authority of the judiciary and politicised the public service. This change in the constitutional environment reflected on the office of the Attorney General. The office was situated under the Ministry of Justice and moved away from its earlier status of a distinct

45 Soulbury Report, p. 105.
department entrusted with the task of rendering non-political advice to the rulers of the day. Analysts have noted that this change in the role and status of the Attorney General has had a long term impact on the independence of the office.48

The 1978 Constitution, which is the prevalent constitutional document, continued to accord a very specific constitutional role to the Attorney General; the appointment by the President of the Republic (Article 54); the taking and subscribing of the oath (or affirmation) set out in the 4th schedule before entering upon the duties of his office (Article 61); duties with regard to published bills (Article 77); the right to be heard in all proceedings in the Supreme Court in the exercise of the Supreme Court’s jurisdiction in respect of constitutional matters, of bills both ordinary and urgent, of the interpretation of the constitutional provisions relating to fundamental rights, of the expressions of opinions at the request of the President of the Republic and of the Speaker and of election petitions (Article 134).

While the authority of the Attorney General accordingly is considerable, the manner of his or her appointment remains by the executive alone. There is no security of tenure given to the office unlike in the case of the superior judiciary, though the Draft Third Republican Constitution of 3rd August 2000 provides for a marginally improved mechanism of appointment whereby the Attorney General is appointed with the approval of the Constitutional Council comprising representatives of both the government and the opposition (Draft Article 124). Guaranteeing the security of tenure of the chief law officer of the State remains a priority concern, given that a pervasive politicisation has detracted from the eminence of the office, a fact indeed acknowledged as such by past holders of the office.49 It is also of interest that up to date, no woman has held the position of the office of the Attorney General in Sri Lanka.

PUBLIC ACCOUNTABILITY OF THE ATTORNEY GENERAL

To what extent are the statutory powers of the Attorney General reviewable by the courts?

In practice, the Attorney General appears for the State and State officers before superior courts at the hearing of appeals and applications for the issue of writs. The powers of the Attorney General in civil and criminal law are considerable. In civil law, all actions by or against the State are filed by or against the Attorney General. Section 461 of the Civil Procedure Code requires that before any action is filed against the Attorney General, a Minister, Secretary or a public officer, a month’s notice of action should be given. This is to give the Attorney General the opportunity of considering whether the claim is justified, and


49 Former Attorney General, Thilak Marapana, The Sunday Times, 28th August, 1994; former Attorney General, Shibley Aziz, The Sunday Island, March 1996. It is generally acknowledged that political interference with the office of the Attorney General increased from the eighties.
if so, the claimant may be granted relief without the necessity of his having to resort to litigation.

In criminal law, the Attorney General has a plethora of powers under the Criminal Procedure Code, which, in brief, are as follows;

- the power to determine whether a trial in the High Court shall be by jury or otherwise (Section 161 as amended by Act No. 11 of 1988);
- the power in respect of summary offences to either forward an indictment directly to the High Court or to direct the Magistrate to hold a preliminary inquiry under Chapter XV (Section 393 (7) as introduced by Act No. 52 of 1980);
- the power to exhibit information for a Trial-at-Bar by three judges of the High Court sitting without a jury (section 450 (4) as amended by Act No. 21 of 1988 and Section 393);
- power to grant sanction to institute certain prosecutions (Section 135(i));
- power to decide the Magistrate’s Court having jurisdiction to try a case in case of doubt (Section 135);
- power to transfer criminal proceedings by fiat in writing from one Court or place to another at his discretion (Section 47(i) of the Judicature Act);
- power to prosecute offenders in both the High Courts and the Magistrate’s Courts except in the case of purely private cases instituted under Section 136(i)(e) (Section 193, Section 191(I) and Section 400(I));
- power to tender pardon to an accomplice (Section 256(1) and Section 257);
- power to call for the record from the High Court or the Magistrate’s Court in any case whether pending or concluded (Section 398(1));
- power in the case of concluded non-summary inquiries (Sections 395(1), Section 396, Section 399 and Section 397(1));
- power to terminate proceedings in the High Court by entering a ‘nolle prosequi’, (Section 194(I));
- power to sanction an appeal from an acquittal in the Magistrate’s Court (Section 318);
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- power to appear for the State in all criminal appeals (section 360); and
- power to direct and assist investigations.

The Attorney General is also granted certain powers with regard to Emergency Regulations issued under the Public Security Ordinance (PSO) No. 25 of 1947 (as amended). Under the Prevention of Terrorism Act (PTA) No. 48 of 1979 (as amended), he has the power to consent or refuse bail to an accused indicted and remanded. (Section 7(1) of the PTA)

The Attorney General is vested with a special duty to assist the Court to reach the correct decision after balancing the rights of the State and the public interest. The function of an officer of the Attorney General’s Department is thus different from members of the unofficial Bar:

“A prosecuting counsel stands in a position quite different from that of an advocate who represents the person accused or represents a plaintiff or defendant in a civil litigation. Crown Counsel is a representative of the State; his function is to assist the jury in arriving at the truth. He must not urge any argument that does not carry weight in his own mind or try to shut out any legal evidence that would be important to the interest of the person accused. It is not his duty to obtain a conviction by all means but simply to lay before the jury the whole of the facts which comprise the case and to make these perfectly intelligible and to see that the jury are instructed with regard to the law and are able to apply the law to the facts.”

Traditionally, the discretion of the Attorney General in English law, and in other legal systems as well, has been judicially considered to be beyond review or subject to review only where the decision in question has been absolutely perverse. Thus, in commenting on the power of the Attorney General of England to enter a ‘nolle prosequi’ whereby criminal proceedings are effectively brought to a halt, Viscount Dilhorne in Gouriet v. Union of Post Office Workers, said that:

“He may stop any prosecution on indictment by entering a nolle prosequi. He merely has to sign a piece of paper saying that he does not wish the prosecution to continue. He need not give any reasons. He can direct the institution of prosecution and direct the Director of Public Prosecutions to take over the conduct of any criminal proceedings and he may tell him to offer no evidence. In the exercise of these powers, he is not subject to direction by his ministerial colleagues or to control and supervision by the courts.”

51 (1978), A.C. 435.
The case in point demonstrated very well the reluctance of the English courts to go beyond the discretion of the Attorney General. It concerned a relator action, in which the Attorney General is called upon to assert civil public rights at the instance of a private individual or organisation which cannot bring the action.52

Here, the refusal of the Attorney General to proceed in an action brought by a private citizen to restrain a threatened breach of the criminal law by trade unions was challenged in court. The Court of Appeal presided over by Lord Denning MR held that an injunction could be granted at the suit of a private plaintiff. The House of Lords, however, disagreed in strong terms and upheld the exclusive right of the Attorney General to act in the public interest. The case was also characterised by acrimonious differences of opinion that prevailed on this issue between Lord Denning in the Court of Appeal and the House of Lords with regard to which piquant comments in retrospect have been offered by the Master of the Rolls.53

In other instances where the English courts have considered the issue of discretionary prosecutorial decisions, it has been stated that:

“(he) is called upon to make a value judgement. Unless his decision is manifestly such that it could not be honestly and reasonably arrived at, it cannot in our opinion, be impugned.”54

Trends towards a relaxation of this principle of judicial non-interference in English law have, however, been evident since of late. This is so particularly in respect of prosecutorial authorities who depart from pre-existing policies or guidelines in the exercise of their discretion.55 In one case, in particular, the English courts have indicated that if the applicant is able to establish that the Attorney General or any of the police officers against whom the complaint was made had been guilty of abusing the process of court or acting in an oppressive manner towards the individual, the court would have the power to dismiss the charge though this power would be exercised in the most exceptional circumstances.56 Welcoming these signs of a judicial willingness to scrutinise the evidence on which a decision of the Attorney General is based, commentators have hoped that the courts might extend this willingness to acknowledge that the discretion of the Attorney General is not unfettered.

One analyst, for example, has no qualms in asking as to why should mandamus not be available to order the Attorney General to prosecute or to give his consent for others to

52 The expanding scope of locus standi in English law has raised the question whether the need for relator actions will be reduced. (Wade, Administrative Law, Seventh Edition, p. 607).
53 Lord Denning, The Discipline of the Law, p.137.
54 Raymond v. the Attorney General, (1982), 2 W.L.R. 849.
prosecute, under statutes affording him exclusive control over the initiation of proceedings such as the Race Relations Act or the Official Secrets Act. Thus, persons suffering actual harm following inflammatory and regular racial invective against them by an organisation, the leaders of whom the Attorney General refused to prosecute, might assert that his refusal was based on political or general considerations and might seek mandamus to compel the determination of their application according to the intention of Parliament in enacting the Race Relations Act.57

While this is the position in English law, Israeli law has proceeded even further in ensuring the public accountability of the Attorney General. The Israeli legal system envisages the Attorney General in a manner very similar to Sri Lankan law. Thus, the Attorney General is the head of the legal services of the government and as such, he (or she) presides over the litigious branch of the government and represents the State in all courts and all matters including criminal, civil and administrative. He has the power to institute or to stay all criminal proceedings. His nomination is by the Minister of Justice subject to approval by the Senate and is in general, a highly respected and professional lawyer who is expected to exercise his powers independently of the government.

In early decisions of the Israeli courts,58 it was held that judicial intervention would be warranted only if the decision of the Attorney General was clearly contrary to the benefit of the public and was *mala fide*. These high standards of satisfaction, however, yielded to the court interpreting the strict meaning of *mala fide* in a more relaxed manner, in the process stating that the court would interfere in prosecutorial decisions if they are tainted by improper motives, arbitrariness, discrimination and where there is a material or grave distortion of reason.59

This stand then changed to an even more liberal attitude on the part of the Israeli Supreme Court, which saw no difference between the Attorney General and other public officials. Both were enjoined to exercise their discretion with fairness, honesty, reasonableness, without arbitrariness and discrimination and by taking into account relevant considerations only. In the absence of these criteria, the Attorney General could be taken to task by the courts.60 Subsequent decisions of the Israeli courts, indeed went on to actually exercise this power and not merely announce it in the form of a principle. Thus, in two cases in particular, after examining the basis on which the Attorney General had exercised his discretion, the Israeli Supreme Court reversed the decision of the Attorney General not to prosecute, ordering that

prosecution commence in the first instance\textsuperscript{61} and directing that the case be sent back to the Attorney General for review in the second.\textsuperscript{62}

The reasoning of the Israeli Supreme Court has been echoed in Canada\textsuperscript{63} and the Bahamas.\textsuperscript{64} In Canada, in particular, expert committees have been set up to lay down guidelines for the exercise of prosecutorial discretion by the Attorney General.\textsuperscript{65}

Meanwhile, many African jurisdictions are now increasingly beginning to recognise the need to secure the political neutrality of the Attorney General’s office and to ensure judicial oversight of the powers of the Attorney General in appropriate circumstances.\textsuperscript{66} In all these systems, the use and abuse of the prosecutorial powers of the Attorney General in areas of criminal law, public nuisance and realtor proceedings are notable. Both the Zimbabwean High Court and the Kenyan High Court have decided that the immunity from liability afforded to the Attorney General is limited and qualified. It is only applicable if he acts reasonably and without malice and without culpable ignorance or negligence.\textsuperscript{67} His discretion must moreover be exercised in a quasi-judicial way and not arbitrarily, oppressively or in a manner contrary to public policy.\textsuperscript{68}

In Sri Lanka, the nature of the prosecutorial discretion of the Attorney General was considered in one fundamental rights application brought before the Supreme Court in 1998. Here, the editor of the ‘Ravaya’ (a Sinhala weekly newspaper engaging in critical reporting on government misconduct and corruption) came before court alleging that he had been successively indicted for criminal defamation by the Attorney General “… indiscriminately, arbitrarily and for collateral purposes and without proper assessment of the facts.” In the circumstances, he pleaded that his fundamental right to equality (Article 12(1)), his fundamental right to freedom of speech and statement including publication (Article 141(a)) and the fundamental right to engage in his lawful profession (Article 14(10)(g)) had been violated. The Supreme Court did not grant leave to proceed in this case.\textsuperscript{69}

\textsuperscript{61} Tzofan & Others v. Chief Military Attorney & Others, (1989), 43(3) P.D. 718.

\textsuperscript{62} Ganor & Others v. the Attorney General & Others, (1990), 44(2) P.D. 485.


\textsuperscript{64} Commission of Police v. Carlos Tiberio Rubino Triana & Others, Supreme Court, 3\textsuperscript{rd} April, 1989, Commonwealth Law Bulletin (CLB), (1990), p. 49.


\textsuperscript{67} N. v. Minister of Justice, (1989) (1) Z.L.R. 96 (HC).

\textsuperscript{68} Githunguri v. Republic of Kenya.

Under prevalent Sri Lankan law, criminal defamation as defined in Section 479 of the Penal Code, is punishable under Section 480 and triable summarily by the Magistrate’s Court or directly by the High Court. Section 135(1)(f) of the Criminal Procedure Code mandates that no prosecution for criminal defamation could be instituted except with the sanction of the Attorney General. However, a later section (section 393(7)) allowed the Attorney General an alternative procedure of directly filing indictment in the High Court and directing the institution of non-summary proceedings “having regard to the nature of the offence or any other circumstance.”

Considering these powers, the judgement of the Court by M.D.H. Fernando J (with Wadugodapitiya J and Bandaranayake J agreeing) articulated certain general principles. The primary question, in the opinion of the Court, was whether a decision of the Attorney General to grant sanction to prosecute or to file an indictment or the refusal to do so could be reviewed. Answering this question in the affirmative, the Court discussed first the circumstances in which the discretion to grant sanction could be reviewed, concluding that such a power of review existed where the evidence was plainly insufficient, where there was no investigation, where the decision was based on constitutionally impermissible factors and so on. Similarly, the discretion of the Attorney General to file indictment under Section 393(7) of the Criminal Procedure Code was after “… the nature of the offence or any other circumstance” had been duly considered. In other words, the decision of the Attorney General had to be guided by statutory criteria and could not be arbitrary. Moreover, there must be some distinct public interest and benefit as for instance where the alleged defamatory statement is likely to disrupt racial or religious harmony or to prejudice Sri Lanka’s international relations or to erode public confidence in the maintenance of law and order or in the administration of justice.

The Court asserted accordingly that the Attorney General’s power to file (or not to file) indictment for criminal defamation is a discretionary power that is neither absolute nor unfettered. It is similar to other powers vested in law in public functionaries. They are held in trust for the public, to be exercised for the purpose for which they are conferred and not otherwise. Where such power or discretion is exercised in violation of a fundamental right, it can be reviewed by the Supreme Court under the exercise of its fundamental rights jurisdiction. It is relevant also that the Court stated that the pendency of proceedings in another court would not bar the exercise of this constitutional jurisdiction of the Supreme Court but would be a circumstance that would make the court act with greater caution and circumspection.

The State argued that one indictment against the petitioner by the Attorney General was justified as it affected public confidence in the law enforcement process by alleging that the Inspector General of Police had abused his authority by interfering with the investigations into a case of sexual abuse of children. Court accepted this argument. With regard to the other indictment, the Court found a lack of proper investigation and certain lapses on the
part of the officers of the Crown in respect of one allegation in the impugned ‘Ravaya’ article. This was held to be a lapse on the part of those responsible for the investigation and not the Attorney General. The investigators had, however, not been made parties. Neither was the Petitioner’s case presented on the basis of a defective investigation. The Attorney General could not, therefore, be held to be accountable in this instance as well.

While this judgement of the Supreme Court is useful for the general principles it laid down, it is evident that the Court preferred to apply the “exceptional circumstances” test in actually intervening to set aside the decision of the Attorney General. This is seen in the extreme examples drawn by the Court as instances where interference with the discretion of the Attorney General in granting sanction could be justified. Similarly, the reasoning of the Court was that the faulty investigations on the part of the officers of the State could not be visited on the Attorney General. The contra argument to this would be that in cases involving violations of fundamental rights, the liability would be that of the State regardless of whether blame could be laid at the door of the investigating officers or the prosecuting officers. If a wrong prosecution had been launched, the primary responsibility remained with the State, as represented in the instant case by the Attorney General. The fact that the Court preferred not to proceed so far accords with the laying down of very high standards of “culpable ignorance or negligence” on the part of the Attorney General in order to justify intervention by court. This is reinforced by the assertion of Court that errors and omissions by the Attorney General cannot themselves be proof of discrimination or a breach of the freedom of statement. Whether such high standards ought to be maintained or more liberality adopted along the lines of the Israeli jurisprudence remains a moot point where the accountability of the Attorney General is concerned in Sri Lanka.

CONCLUSION
The legal profession is entrusted with the dual responsibility of upholding the Rule of Law while ensuring that the law itself would not oppress the society which it governs. By virtue of this peculiar burden, it is axiomatic that the legal profession should be held accountable to the public eye in all its actions. In so doing, it would do none better than to remember that:

“of all the qualities which are expected of us, the supremely important values are those of moral integrity and fairness, a conscientious attention to a client’s cause, a never ending quest for perfection in the exercise of our professional skills and an indomitable courage in the face of improper pressures that conflict with our duty … Let us remember that the Law has no life independent of the lawyers who function within it. And if we lawyers through our own weaknesses and lack of serious concern permit a decline in professional standards, it will assuredly cast a blight upon the whole system of the administration of justice.
that will lead to its eventual rejection by the people for whose benefit it has been established. That would indeed be a tragedy for everyone for we would then have lost a great deal that is of immense value.”

In the besieged and faltering society of today, lawyers have a duty individually and collectively to ensure that justice is done in a wider sense over and above his or her professional responsibilities. This duty is traceable to very definite legal imperatives and has clear reference to modern international instruments relating to the legal profession. Public accountability necessarily flows from this duty. Thus, not only is the Bench and the Bar, the two accredited constitutional mechanisms for the delivery of justice, but the lapsing of one inevitably negates the vitality of the other. Sri Lanka exemplifies this very stark truth.

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70 Address by former Chief Justice G.P.S. de Silva at the Convocation of the Bar Association of Sri Lanka, 27th March, 1993, quoting the words of H.L. de Silva PC.

* P.D. – Law Reports of the Supreme Court of Israel (in Hebrew).
INTRODUCTION

On 4th February 1948, Sri Lanka was granted independence with dominion status. A period of nearly 52 years have now lapsed since independence. This article, in the main, provides a broad sketch of the salient features of and the changes needed in commercial law to keep pace with the rapidly evolving world of commerce. Originally, English Law, from which our law is largely derived, was applicable to commercial law of the Island. On independence this pattern did not change. Thus commercial legislation in Sri Lanka has tended to follow to a very large measure the company law in England. The first few years after Independence did not see any substantial change in the existing commercial law of the country.

Before we proceed any further, it is necessary to define the term “commercial law.” Commercial law is a growing subject with the changing circumstances of trade business and commerce. That means commercial law as the law of trade business and commerce, looks to facilitate the commercial practices of the business community and as those practices change and develop often to accommodate modern technology, the contents of commercial law may change and develop with them. With the increasing complexities of the modern business world the ambit of commercial law has enormously widened. This branch of law comprises many different spheres of commercial activities and is generally understood to include inter alia, the laws relating to companies, partnership, contracts, sale of goods, banking, negotiable instruments, insurance, insolvency, carriage of goods, arbitration and intellectual property.

This paper is not intended to deal with all the above branches of law comprising commercial law because it is not possible to do so in a paper of this nature. The aim of this article is to give an elementary account of the most prominent aspects of companies, partnerships, security

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laws, viz. law relating to Stock Exchange, law relating to banking and arbitration, being the branches of commercial law of ever increasing complexity. These areas play an important role in the economic life of the country and the laws applicable to them deserve study on that ground alone because in recent years these areas of laws have gained importance as key areas of the economy. Companies and partnerships deserve a careful and detailed analysis, as they are the only options of organisational form that are available to business people where multiple owners want to create a business.1

The policy of economic and trade liberalisation, promoting foreign investments, export-led industrialisation and private sector developments have been important features of the economy of Sri Lanka since the late 1970’s. Accordingly, the laws relating to these economic restructuring policies should be directed to reach such objectives and should be formulated to meet the needs of the modern commercial world in providing stability and promoting economic development. Thus it is necessary, in this context, to create a legal framework for private sector development including the promotion of foreign investment.

LAW RELATING TO COMPANIES

Company law deals mainly with the formation, management and control of companies, financial and other disclosure requirements, external fund raising and winding up. The greatest challenge in writing about company law is that it is a very large subject with a dynamic and exciting body of law which is of enormous practical and commercial importance. This area of law enables people to use the corporate form as a service to those who wish to take advantage of artificial entities with separate legal personality which they can control and put into legal relationships without being directly responsible for them.

The influence of English law in this branch of Sri Lanka is strong and thus English Law will be referred to clarify certain principles of the law which were or still are a feature of our legal system. The Joint Stock Company concept was introduced to Sri Lanka (then Ceylon) by the Civil Law Ordinance No. 5 of 1852, which provided, *inter alia*, that the law relating to corporations in Great Britain would apply to similar organisations in Ceylon. Therefore, during the period from 1853-1861, the then Joint Stock Company Law of Great Britain applied to Ceylon. The Joint Stock Companies Ordinance of 1861 was the primary legislative document enacted in Ceylon and was modelled on its predecessor in Great Britain. The second company legislation in Ceylon was passed in 1938. The Companies Ordinance of 1861 and its subsequent ordinances relating to Joint Stock Companies were repealed by this legislation, Companies Ordinance No. 51 of 1938. This was passed on the lines of the English Companies Act of 1929. Subsequently, the Companies (Amendment) Act No. 15 of 1964 was enacted.

1 Business people in other jurisdictions such as UK conduct their activities and strive to accomplish their goals through a variety of organisational forms - Companies, Partnerships and Limited Partnerships. The availability of these options for operating a business is even greater in the USA. They are corporations, and Limited Liability companies.
In 1982, the Companies Act No. 17 was passed and came into operation on 2\textsuperscript{nd} July 1982. This was based on the Companies Act of 1948 of England subject to some minor changes, which were adopted to satisfy the peculiar business conditions in this country.\textsuperscript{2} The 1982 Act remained in force for nearly two decades. In other countries such as the UK, new legislation was enacted every few years to keep in line with changing commercial trends. The reform of Sri Lankan law was long overdue. A number of weaknesses and omissions in the law had come to light. The Minister of Trade and Commerce appointed in the early 1990s an advisory committee to review the law relating to companies and suggest proposals for law reform. It is understood that a draft bill was prepared by this committee based on these proposals to revise Sri Lankan Company Law.

As noted earlier, significant changes took place since the mid 1970s in the economic perspectives with the ushering in of an open economic policy by the government in power. In order to encourage foreign investment, the law relating to companies should seek to promote economic efficiency by providing for the protection of investment with a stable investment environment, which enhances the confidence of investors.

There now exists a draft of a new Companies Act. The recommendations in this draft, made by the committee which drafted the law include the total reform of the company law. The present draft contains some interesting changes and amendments. A study of the present Sri Lankan company law and the new draft can never be completed without reference to the law of England, which is still very much in force.

In Sri Lanka companies could be created in four different ways:(a) a company limited by shares;(b) a company limited by guarantee;(c) a company limited by both shares and guarantee; and (d) unlimited companies. There is another classification, which depends on the number of shareholders, called private, public and peoples companies. It must be noted that the new draft of the Companies Act suggests the recognition through regulations of single member private limited liability companies. It is therefore not necessary to have an artificial member to exist as in many private companies which, in actual fact, have a sole proprietor but where, for example, a spouse holds a nominee share to fulfil the present two member requirement.\textsuperscript{3}

\textsuperscript{2} A separate section was introduced for Insider Dealing which was later repealed by, and incorporated in the Securities Council Act No. 36 of 1987. The Companies (Amendment) Act No. 33 of 1991 made some amendments to the above 1987 Act.

\textsuperscript{3} In English law, since the \textit{Solomon’s Case} (1897 A.C. 22) it has always been possible to form a “one man” company. In response to the Twelfth EC Company Law Directive, the Companies (single member Private Limited Companies) Regulations 1992 (SI 1992 / 1699), since 15\textsuperscript{th} July 1992 it has been possible for one person to sign the memorandum and incorporate a private limited company. Thus notwithstanding section 1 of English Companies Act 1985, which states that two persons are required to incorporate a company, a new subsection (3A) inserted into the English Companies Act 1985, allows one subscriber for a private limited company.
The provision incorporating this new development is included in section 4(2)(a) of the proposed Sri Lankan company law. However, since severe criticism has been levelled at introducing single member companies, a safeguard has been imposed prescribing certain limits to the operation of this new concept. The proposed section provides:

“A Company may have one shareholder only, if that shareholder is a body corporate, and where the single shareholder is a natural person the nominee shall be a body corporate.”

Under the present system to create a new registered company it is necessary to prepare the company’s constitution contained in two documents called the Memorandum and Articles of Association. The separation into two documents emphasized that the matters in the Memorandum were fundamental and under the 1856 Act (UK) unalterable, which was the same for Sri Lanka, whereas the Articles could be altered by the company. However, at present all the provisions in the Memorandum can be altered with specific procedures prescribed for each type of alteration, so that no distinction exists between the two documents.4

The preparation of documents for the registration of a new company requires careful consideration and specialist knowledge. Thus persons wishing to incorporate companies have to employ legal advisers. This process is both expensive and complex. Business people are concerned about financial matters such as the cost of complying with the registration requirements. Thus, the creation of companies ought to be made as cheap and straightforward as possible. People might be discouraged from creating new companies, if they feel that the law on creating them is unsatisfactory due to unexpected costs, obstacles and delays. It must however be stressed that although the above relaxing provisions should be enjoyed by private companies, and where a company does not comply with the law, in order to protect the society the intervention of the legislature is really necessary.

Thus it is clear that companies are expensive to be established due to this process of incorporation which involves certain documents including the constituent document being lodged with the Registrar of Companies. The purpose of registration is to ensure publicity and thereby transparency. Any member of the public has the right to inspect the company’s constituent instruments. It is suggested by the draft Act that a company could be incorporated with a single form called the “application for incorporation” which sets out the key details such as the name, whether limited or unlimited, etc. Standard Articles of Association set out in the Companies Act would apply. Although the draft provides a model set of articles, any company is entirely free to choose any alternative articles. No doubt the business community will warmly welcome this relaxation.

4 This was introduced by the Joint Stock Companies Act 1856 (UK). Before that, under the Joint stock Companies Act 1844 (UK), a company was required to have only one document called the deed of settlement.
It has become increasingly popular for businesses to be carried on by companies since it confines the shareholders’ risk to the amount of capital they have invested in the company and not put the whole of their personal assets in jeopardy. Among these a large proportion of companies are private companies as it provides the most advantageous machinery for operating a small business. Thus, the economic importance of private companies is immense and they undoubtedly add impetus to the tremendous growth in business activity.

Clearly, since the vast majority of registered companies are intended by their promoters to be private companies, it would seem appropriate for private companies to dispense with those irrelevant and inappropriate impositions which derive from company statutes and judicial precedent. The disadvantage of having to comply with some of these inappropriate impositions may heavily outweigh the advantages conferred by the incorporation. The draft Companies Act put forward many proposals to grant certain concessions in relation to private companies. According to the definition in the 1982 Act, a private company is required by the company’s Articles to include restrictions on the transfer of the company’s shares. This requirement is not embodied in the proposed draft. Moreover, the English Law limitation on a company’s membership to 50 is no longer there, and this will be given statutory force under the new regime in Sri Lanka.

Without doubt, the most significant concession made to private companies is the dispensation from keeping an “interests register” with the sanction of a unanimous resolution of its shareholders. Shareholders for their part are quite happy to dispense with this troublesome requirement. Despite certain legislative concessions granted to private companies by the proposed draft which are not enjoyed by public companies, the draft fails to inject some much needed relaxation. This may preclude the use of such companies as business vehicles for many small entrepreneurs. One may level a severe criticism that by granting some of these legislative concessions to private companies it might result in losses to the government, the public and the shareholders who are outside the sphere of company’s management. It is appropriate to note at this point that much of the burgeoning laws and regulations apply equally and invariably to private companies as well as to public companies. There are considerable number of protections aiming towards shareholders. Only those provisions that are found to be irrelevant and inappropriate in regard to private companies should be dispensed with. Certainly the encouragement of new businesses is an important aspect of current governmental economic policy and private companies as business vehicles provide the most advantageous machinery for a great many small entrepreneurs.

The draft Act needs to concentrate on providing a legal framework that promotes economic efficiency. People might be discouraged from creating new companies if they feel that the law governing them is unsatisfactory.

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5 In English Law private companies are released from the statutory requirement of filing copies of annual financial statements with the Registrar of Companies. Thus companies were permitted to keep their financial affairs secret in the same way as sole traders and partnerships.
Section 55 of the present Companies Act of 1982 provides that a company may not provide anyone with financial assistance for the purchase of its own shares. This is a long established principle in English Law and has been given statutory authority since the Companies Act of 1929 and retained in subsequent legislation until 1981.

The reason for this prohibition is that it may constitute a misuse of company funds and threaten the assets of the company. As described by Denis Keenan:

“The prohibition is to defeat the asset stripper who might, e.g. acquire shares in a company by means of a loan from a third party so that he came to control it and once in control could repay the loan from the company’s funds and then sell off its assets leaving the company to go into liquidation with no assets to meet the claims of creditors.”

However the proviso to the above section permits such grants where: (1) companies which in their ordinary course of business lend money for various purposes; and (2) providing money to employees of the company to purchase fully paid shares.

There has been some doubt under English Law whether it was worth retaining these prohibitions, because some legitimate commercial transactions also were threatened by illegality by virtue of this rule. It was also realized that this rule was stricter in English Law than in other jurisdictions such as in the United States and Canada.

Section 74D of the proposed draft, while prohibiting the providing of financial assistance, has relaxed the law in the following situations and a company may give financial assistance:

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6 Smith and Keenan’s Company law for students, 10th edition at page 148.

7 In English Law there are two important statutory exceptions to the general prohibition on the giving of financial assistance. This law is contained in sections 151-158 and is designed to bring UK companies in line with United States and other continental companies. The first exception applies to both public and private companies and is contained in section 153 of the Companies Act 1985 (UK). This section provides that a company is not prohibited from giving financial assistance if it’s principal purpose in giving that assistance is not to give it for the purpose of any such acquisition or the giving of the assistance for the purpose of the acquisition is but an incidental part of some larger purpose of the company. In either case, the assistance must be given in good faith in the interests of the company. The second exception to the general prohibition on the giving of financial assistance applies to private companies only. By virtue of section 155 (1) of the Companies Act 1985 (UK), a private company is able to give financial assistance of any kind subject to certain conditions and strict procedure spelt out in the Act. Accordingly, a private company can give assistance in the same circumstances as a public company. In addition as private companies are not affected by the principal purpose rule, they could provide assistance as the sole purpose and object of a particular exercise, provided the assistance is given in good faith and in the interests of the company (see section 155 to 158 of the Companies Act of 1985 (UK).
for the purpose of or in connection with the acquisition of its own shares if the board has previously resolved that:

a. giving the assistance is in the interest of the company;

b. the terms and conditions on which the assistance is given are fair and reasonable to the company and to shareholders not receiving that assistance; and

c. immediately after giving the assistance, the company will satisfy the solvency test.

Section 74E of the proposed draft further provides the transactions not prohibited by section 74D and this wording is identical with that of section 153 of the Companies Act of 1985 (UK), as discussed above. However, there is no distinction between a private and public company as exists in English Law.

The most innovative change brought about by the new draft is the provisions in regard to the concept of doctrine of *ultra vires*. In company law the general principle of the common law was that a company which is incorporated for some specified objects, stated in its Memorandum of Association cannot do anything outside the powers specified in the objects clause in the Memorandum. Pursuing an object which fell outside the scope of its object clause is *ultra vires* and void, devoid of all legal effects, incapable of ratification even by a unanimous vote of the company’s members. This court ruling was very unpopular with the commercial community, both the business community and the commercial enterprises as it impeded the progress of commerce and is inconvenient and a hindrance to normal business activities. The most troublesome aspect is the injustice it can cause to third parties. If a third party enters into an *ultra vires* contract with a company, that party cannot enforce it against the company. If they have supplied goods or performed services under such a contract, they cannot obtain payments, and if they have lent money, they cannot recover it. This resulted in third parties incurring heavy losses. Section 3 of the Companies Act of 1982 required a company to state its objectives in the Memorandum. Also the statutory requirement embodied in section 4 makes the *ultra vires* doctrine still vital in Sri Lankan law. Section 13 of the proposed draft provides that the Articles of Association may state the objectives of the company. Thus, the persons forming a company have the choice of including the objectives of the company in the Articles. If the Articles do not have objectives or express restrictions or express prohibitions on the exercise of powers by the company, then the doctrine of *ultra vires* will have no application. On the other hand, if the company has objectives or express restrictions etc., on the exercise of its powers, the company will still be capable of acting beyond its constitutional powers. However, the traditional consequences will not flow, so as to protect people who deal with companies from having their transactions repudiated. The fact that acts are *ultra vires* will, however, still be important in internal disputes in the company.
Expressed briefly, the new provisions are aimed at preventing a plea of *ultra vires* from having untoward results in disputes between the company and third parties. Put simply, the company has full legal capacity. The proposed provision 17(2)(a) still permits the plea of ultra vires to be raised in inter-company disputes. Thus, whilst the external effects of *ultra vires* will be abolished, the internal aspects of the rule will remain. However, some of the more important provisions set out in the English Companies Act 1989 following the recommendations of Prentice Report, is untouched by the proposed draft and thus is not in conformity with the English law.8

In addition, a high degree of freedom has been left to companies to draft their Memorandum and Articles. When drafting the Articles, the position generally is that the Articles confer wide powers on the Board of Directors and this can lead to a diminution of the powers of the shareholders. Although this is necessary to enable companies to operate more efficiently in an increasingly complex environment, it has to be recognized that shareholders and creditors need further protection. Thus, the regulation of the internal operation of companies should be reflected in changes to company law.

The foregoing discussion dealt with some of the main features introduced by the proposed draft. However, all the principles and novel features of the new draft are too numerous for inclusion in this article. Some of these features include the minority buy out rights, minority shareholder bringing a derivative action, the abolition of the doctrine of constructive notice, the expansion of directors’ duties and their liabilities. The draft aims at giving greater flexibility to companies and at the same time prescribes stricter norms in the field of raising capital, internal management, company accounts, audit and disclosures. This draft will produce a highly controversial report and it appears to have made significant progress in response to global competitive conditions. Although there are striking similarities in most of the key features, the rules laid down in the proposed Act are different from the rules relating to the same subject prevailing in England. The fact that the proposed Act is not intended to be a servile copy of the English Act can be regarded as a welcome step in the right direction because commercial law is not an abstraction, it is a tool for its users, whose needs will vary from place to place according to national practices, tradition and the level of sophistication of its business and financial institutions.

To sum up, it is still too early to make any judgment on the impact and effectiveness of the proposed Act. These developments will undoubtedly improve the position in Sri Lanka and can be regarded as a fundamental step forward. However, this Bill has been in storage for a long time and it is uncertain when it will come into force.

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8 Under section 322 A, transactions with the directors of the company or its holding company are voidable by the company if they are *ultra vires*, and once again the contents of the objects clause will be relevant there.
LAW ON PARTNERSHIPS

It is not the purpose of this section to embark on a detailed study of the creation, operation and extinction of a partnership or to explore in greater detail the advantages and disadvantages of the partnership organisation. However a brief study of the basic principles in relation to partnerships in modern times will be helpful in understanding the need for its regulation.

Partnerships are found in small as well as large businesses. It is true that partnerships have declined for a number of reasons with private companies taking over the commercial world for small businesses. However a revival of partnerships have been witnessed in recent times. They can be easily formed, the cost of forming a partnership is relatively low and in addition, they provide the freedom to operate on any terms which are agreed to by the partners. The increased and inconvenient formalities and lesser flexibility associated with the formation of registered companies have led small businesses to return to partnerships. Hence their stability will be of great benefit to the economy in which they operate.

The Partnership Act 1890 (UK), section 1(1) defines ‘partnership’ in the following way:

"Partnership is the relation, which subsists between persons carrying on a business in common with a view of profit."

Like companies the history of partnership legislation in Sri Lanka also starts with section 3 of the Introduction of Civil Law Ordinance No. 5 of 1852 which provides that Law of England is to be observed in relation to the law of partnership except when altered or modified by express enactment.

The first statute - the Partnership Ordinance No. 21 of 1866 - contained only seven provisions introducing certain amendments to the law of partnership and became the law on 24th December 1866. Prevention of Fraud Ordinance No. 7 of 1840 compelled the registration of a partnership deed.

Section 18(c) of the Prevention of Fraud Ordinance provides:

"No (Promise) contract (bargain) or agreement unless it be in writing and signed by the party making the same or by some persons thereto lawfully authorized by him or her is in force or avail in law... for establishing a partnership where the capital exceeds Rs. 1000/-.

The consequences of non-compliance with this section are the disability of the partners and of the firm to take legal action. In other words, if a partnership is established without a written agreement where the initial capital exceeds Rs. 1000/- a partner of such a partnership cannot bring a suit to enforce a right arising out of that partnership.
However, there is an exception provided by the section itself. Third parties may sue partners or persons acting as such and offer in evidence circumstances to prove a partnership existing between such persons and parol testimony (oral evidence) may be given concerning transactions by or the settlement of any account between partners. Thus, this restriction does not equally apply in relation to third parties when they seek to enforce rights against a partnership; such action is maintainable even though it is in relation to a partnership established without the requirements in section 18(c) of the Prevention of Frauds Ordinance.

Thus, it is clear that the law relating to partnership prevailing in England shall continue to be the law in Sri Lanka except for the provisions provided by Ordinance No. 21 of 1866 and Ordinance No. 7 of 1840. These are the only statutes in force in Sri Lanka on partnership. No statute on partnership has been enacted in Sri Lanka since independence and our law on partnership is determined in accordance with the English Law for the time being. Hence, a study of the law on partnership in Sri Lanka must be made with reference to the legal position in England.

Although the concept of partnership has existed for several centuries, the partnership law as we know it today originated in the English Common Law. The partnership law in England is contained in the Partnership Act 1890.9 There has been no amendment to the Partnership Act of 1890 and thus the partnership law in UK has undergone very little change. Also, this Act of 1890 was not intended to be a complete and self-contained code on the subject of partnership. As a result, the law of contract, agency and equity and also the cases dating before the Partnership Act are still important in certain circumstances such as the law relating to the nature of partnership, dealings with third parties etc. As the Act had codified the case law on partnership up to 1890, these cases are examples of what the Act was seeking to achieve and presumably has achieved. Section 46 preserves all equitable and common law rules applicable to partnerships where the partnership law has in fact developed except so far as they are inconsistent with the express provisions of the Act. However, there are no provisions in the Act on administering partnership assets in the event of death or bankruptcy or in relation to goodwill.

The Act of 1890 does not however provide the answers to the most fundamental questions in the areas of both common law and equity such as the liability of a partner to account for his share of an unauthorized profit, the liability of partners for torts done by others, etc.

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9 This Act has been the basis for a number of Partnership Acts in Commonwealth countries.
Geoffrey Morse, a specialist in this field, in his book entitled ‘Partnership Law’ stated that, “by modern standards this Act is a short one with short sections.” He further points out when comparing the Act of 1890 with Companies Act 1985, it is like man and ape, though they are cousins the relationship is sometimes difficult to imagine. Comparing the Partnership Act of 1890 with the Companies Act 1985 the former differed from the latter in various respects. For example, section 19 of the Partnership Act allows a partner to give oral evidence of a course of dealing the result of which could be to overturn the written terms. In other words, the rights and duties of partners, contained in the partnership agreement can be varied by their express or implied consent inferred from a course of dealing.

Partnerships are governed by either:

(a) the terms of the particular partnership agreement or deed that has been specifically drafted for the purposes of the business; or

(b) if no Partnership Agreement has been drafted, the provisions of the Partnership Act 1890.

The Act does not say how a partnership must be established. However, it should be borne in mind that if the parties have agreed to be partners, then they would be. According to the definition persons who carry on a business in common with a view to profit are partners, even if they have not expressly agreed to be. This means that a partnership, which is a voluntary association, can be formed orally, in writing or inferred by the conduct of parties. No forms or registrations are necessary to establish a partnership although a written contract may be desirable to clarify the relationship of the partners. A written contract can avoid confusion, disputes and litigation later. The position in Sri Lanka is different. As explained earlier, according to the Prevention of Fraud Ordinance, in certain circumstances the partnership agreement has to be in writing and the failure to adhere to this requirement may result in partners being denied access to courts.

In the case of forming a company, there is a system known as incorporation or registration, where certain documents must be lodged with the Registrar of Companies. On the contrary in the case of a partnership the partners can decide whether to adopt a partnership agreement or not.

From the foregoing discussion it is evident that no formal agreement is necessary to establish a partnership and the mere fact that two partners carry on business together may be sufficient to indicate that a partnership in fact exists. Indeed, a partnership may exist in law while the parties concerned may be unaware that they are in fact partners. Although the intention to form a partnership is necessary, it has been decided in a large number of cases that the intention can be implied by the conduct of the parties. In other words, there can be situations

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10 (Third edition) on pages 3 and 4.
where persons are engaged in some form of a joint business activity without realising that they have, in law, entered into a partnership and that they may incur unexpected liabilities and duties. Thus, the question is how can a partnership be established. The definition in the Partnership Act contains three elements:

(a) that there are two or more people;

(b) carrying on (which implies some degree of continuity) a ‘business’ (which is defined by section 45 of the Partnership Act to include every ‘trade, occupation or profession’ and section 1(2) of the Partnership Act excludes companies);

(c) with a view of making a profit.

Also a partnership may arise in law, by the operation of the principle of ‘estoppel.’ Thus if a person holds himself out or allows himself to be held out as a partner, he may incur the liabilities of a partner.

Black’s Law Dictionary,\(^\text{11}\) defines a partnership as:

“A voluntary contract between two or more competent persons to place their money, effects, labour, and skill or some or all of them in lawful commerce or business, with the understanding that there shall be proportional profits and losses between them.”

This indicates that problems may arise in a partnership where infants, insane persons, or those under other legal disabilities desire to become partners. The capacity to enter into a partnership is governed by the ordinary law of contract.

Under English partnership law the firm does not have separate legal recognition. As Farewell CJ remarked in \textit{Sadler v. Whiteman}\(^\text{12}\)

“In English Law a firm as such has no existence; partners carry on business both as principals and agents for each other within the scope of the partnership business; the firm name is a mere statement, not a legal entity, although for convenience... it may be used for the sake of suing and being sued. It is not correct to say that a firm carries on a business; the members of a firm carry on business under the name or style of the firm.”

\(^\text{11}\) (4th edition).

\(^\text{12}\) (1910) 1 KB 868 at 889 CA.
In this respect partnerships are clearly distinguishable from companies, and the latter has always been recognized as an entity, separate and distinct from its composite members. However, in some other jurisdictions such as the USA and Scotland, a firm is a legal person distinct from its partners. In essence, in terms of status, it lies midway between the English firm and a corporate body; it is a ‘quasi-corporation’ possessing many, but not all the privileges which the law confers upon a duly constituted company.

In general, each partner is personally responsible for the liabilities of the firm. If the assets of the partnership are inadequate to pay the creditors the personal assets of individual partners may be sequestrated to satisfy their obligations. This element of unlimited liability imposes an unwelcome burden on a partner who enjoys substantially greater personal wealth than the other partners.

The Act of 1890 does not provide the answers to the most fundamental questions posed in the modern context. Moreover, this Act is now over 100 years old and in most respects is not appropriate for modern conditions and to respond to the demands of a growing and complex economy. The constraints of the Act were not seen particularly significant in the early part of the 20th Century when partnerships generally operated on a smaller, localised scale. However, with technological development, an increasing number of partnerships started operating in various countries irrespective of national boundaries. In an increasingly complex environment, the above Act has ceased to be relevant. Thus, reform in this area has been a long felt need even in the UK. However, reform in the UK in this regard has been piecemeal and this has led to very unfortunate results. Legislative tinkering here and there will not create a satisfactory atmosphere for partnerships and will never achieve a high level of popularity in business circles. The law of partnerships needs to be totally restructured as the existing provisions are outdated and inadequate in the present context. Thus to clarify and modernize the laws of partnership, the regulatory authorities may have to consider in toto the present regulatory and legal framework in this regard instead of introducing ad hoc and piecemeal laws and regulations.

13 Business Names Act, regulating the use and disclosure of firm names and the Insolvency Act 1986, as applied by the Insolvent Partnerships Order 1994 concerning the insolvency of the firm and or the partners. Thus we must find the laws relating to the partnerships from many sources.

14 USA and UK Legislatures have permitted the creation of a business form that offer taxation advantages similar to partnerships, yet extend limited liability to the owners of the business. This forms the limited partnerships. Business managers want an infusion of capital into a business yet are reluctant to surrender managerial control to those contributing capital. Investors wish to contribute capital to a business and share in its profits yet limit their liability to the amount of their investment and be relieved of their obligation to manage the business. The limited partnerships serve these needs. The limited partnerships have two classes of owners: general partners, who contribute capital to the business, manage it, share profits and possess unlimited liability for its obligations; and limited partners, who contribute capital and share profits, but possess no managerial powers and have liability limited to their investments in the business.
LAW RELATING TO SECURITIES

Stock exchange laws are also widely regarded as an important economic and confidence indicator which, in turn, affect business expectations and certainty. An understanding of the laws with respect to securities in Sri Lanka is therefore fundamental. The first legislation in Sri Lanka to regulate securities is the Securities Council Act No. 36 of 1987. Prior to this, securities were governed by the provisions of the Sri Lankan Companies Act of 1982. Since then there has been only one amendment to the securities exchange law, i.e. Securities Council (Amendment) Act No. 26 of 1991.

In our country the majority of the population is far from affluent. Therefore, it is necessary to protect them from misrepresentations and abusive stock market practices such as price manipulation. The stock market practices should be designed to acquaint investors (give potential investors sufficient information so that they can make intelligent investment decisions) with the laws designed to protect them. A clear understanding of security regulations is essential if managers of these markets are to avoid liability, both civil and criminal. Registration requires the disclosure of relevant information so that investors can appraise the merits of a security. To that end, investors must be given a prospectus which contains the necessary information. The Act prohibits false and misleading statements and gives investors the right to sue for any losses incurred. However, whereas in other jurisdictions these provisions relating to disclosure are duly enforced, in Sri Lanka, there has never been a reported case where these provisions have been applied.

Financial flows are being increasingly mediated through the capital market. In contrast to the rapid expansion of the securities market our law reflects some deep-rooted structural weaknesses in the regulatory framework. The government must identify the inherent problems affecting the securities market. Our legislation is not sufficiently effective in coping with abuses such as insider trading and market manipulation. The law should be amended far more comprehensively for ensuring fairness in securities transactions. Reforms should, inter alia, include definitions of securities (including bills of exchange and promissory notes), the improvement of the disclosure system, proper implementation of provisions relating to insider trading, provisions covering fraudulent and unfair acts and an increase in penalties.

LAW ON BANKING

Banks and financial institutions which form our financial system perform an important business function by offering various services such as deposit taking, lending and exchange services to the people of this country. Thus, the role such institutions play in our economic system is important. Major changes have been effected in the banking sector both at national and international levels. Numerous commercial banks and their branches have appeared on the scene. New financial services and instruments such as electronic banking, tele banking,
ATMs, SWIFT systems, issue and use of credit cards etc. have emerged and the paper based payment system has been substituted substantially by electronic fund transfers. Technology has been a major driving force of the changes in the banking sector all over the world. Information technology makes financial functions better and faster by providing improved data collection, calculation etc.

The law pertaining to banking has been growing fast. Over the years there has been a dramatic boom in banking activities. There has been a significant growth in banking and financial services in Sri Lanka as well. Changes and growth in this sector have given rise to an urgent need to review and reform the law and regulatory framework relating to banking and the financial sector. However since the days of independence, unlike in many countries, legislative intervention in the banking sector has been rare in Sri Lanka, as is the case in other areas of commercial law.

The Civil Law Ordinance No. 5 of 1852 introduced into Sri Lanka the English Law relating to banking. The Civil Law Ordinance of 1852 was succeeded by Ordinance No. 22 of 1866 which confirmed the introduction of English Law of Banking to Sri Lanka. Although the law relating to banking in Sri Lanka is mainly based on English Law, there are a number of Acts that are applicable to banks. These are too numerous to consider here and only the salient features of the most important statutes will be discussed. The Bills of Exchange Ordinance No. 25 was enacted in 1927. It was in most respects modelled on the British Bills of Exchange Act (1882) which codified the law relating to cheques and other bills of exchange.

The Debt Recovery (Special Provision) Act No. 2 of 1990 as amended by Act No. 9 of 1994 provides for the recovery of debts. However loans are restricted to sums over one hundred and fifty thousand rupees (150,000/-). It is necessary to widen the ambit of the Debt Recovery Laws and remove legal obstacles in this regard. Providing loan facilities to the public and private sector is an important function of banks. Banks will be enthused to provide credit but their foremost concern would be their recovery. The major drawback in our banking system is the risk and uncertainty associated with recovery of loans. This has resulted in a significant reduction in extending credit to people and has had a serious effect on the economy which by no means is healthy. The safety of their funds should be the primary concern of banks as only financially viable banks can serve their clients efficiently. Thus, it is essential to provide facilities which enable banks to approach civil courts for recovery of their dues speedily and expeditiously and this in turn will help the banks to expand their lending.

Although there are several statutes implemented on a relatively informal basis there is no comprehensive legislation on banking which can improve the banking system as a whole. There is no doubt that legislative changes and fundamental reforms of banking laws are necessary in order to encourage the efficiency and stability as well as to improve the quality of banking institutions in an effort to ensure their smooth functioning. With the rapid growth
in international trade and capital inflows, the need for a successfully functioning and efficiently operating banking system is even greater. New avenues will have to be explored and at the same time traditional banking practices will have to be adapted to meet the modern needs. With the globalization of financial businesses, it is now vital that financial systems works in an orderly, efficient and effective manner.

Outdated technology is also a serious drawback as the trend across the world is for banks to move away from traditional banking functions. In order to bring our banking system to international standards, and to provide a wide range of banking services in an efficient and profitable manner, the utilization of new technology is necessary. Also these modern technological tools will be much cheaper and far more powerful than existing outdated technology. Therefore, it is necessary to identify the weaknesses and drawbacks which our banking sector is suffering from. It is clear that the existing laws on banking have proved to be insufficient for the changing financial environment. Accordingly, far reaching banking sector reforms should be implemented to meet future challenges. Overcoming this serious deficiency is an urgent issue that must be constructively addressed.

When considering the new legislative framework, it is necessary to take into account the protection of depositors and the maintenance of an orderly credit system. It is appropriate to abolish the present banking law altogether and introduce reforms to provide the necessary framework for banking institutions to contribute to the economic growth in a better way. Thus in order to provide a proper legal and regulatory framework for banking and financial instrument it is necessary to review and reform the existing legislations such as The Banking Act of 1988, The Monetary Law Act of 1949, Recovery of Loans by Banks (Special Provisions) Act of 1990, The Bills of Exchange Ordinance of 1927, Exchange Control Act of 1953. Also it is vital that our banking system is made compatible with those overseas so that the system is easily accessible to both domestic and foreign banking institutions.

**ELECTRONIC COMMERCE**

Electronic Commerce is a strategy in the new era which uses technology to manage business and commerce in a professional manner. It has become an essential feature of the new global economy and plays a very important role in the 21st century. It has opened up new vistas for business and has changed the way business and commerce are conducted. Also novel systems and methods have been developed to achieve business objectives. Although information technology and business was not so closely related before, with the development of e-commerce, a new dimension of trade and commerce has emerged. Electronic commerce has begun to transform business and commerce in many fundamental ways and enables whole new ways of satisfying the needs of businessmen and customers in various stages such as advertising, searching, ordering, payment and delivery. With the globalization of the market place there are continuous changes in the market, the market place can be entered
from any where, which can take its users any where. Diverse range of products and services are traded through the internet.

The benefits of e-commerce such as the reduction of paper work, increased efficiency and competitiveness, cost savings etc. are so compelling, that the need to use information and communication technologies for business and commerce is increasingly felt. To take advantage of avenues in technology and to compete effectively in the rapidly changing domestic and international market place the number of existing businesses, banks companies etc. are using e-commerce tools to redesign their traditional process and to restructure and to reorganize them selves.

The last two decades have seen a spurt in the growth of the use of e-commerce within Sri Lanka. Business community within Sri Lanka use the internet and e-commerce in promoting and expanding their activities through new and cost effective methods which has resulted in enhancing the growth of their businesses. Most Sri Lankan business organizations operate at entirely new levels of effectiveness in finding and interacting with customers, communicating with trading partners, developing new products and markets, carrying out their trade transactions, both domestic and international etc., by means of electronic data interchange and other means of communications which in turn has created new jobs and new careers. The technology also creates new opportunities for crimes.

Other than the Evidence (Special Provisions) Act No. 14 introduced in 1995, there are no information technology or e-commerce laws in the country yet. Many countries such as England, Australia, Singapore, Malaysia have enacted cyber legislations. There is a concern in many other jurisdictions in providing a strong legal framework to facilitate e-commerce.

As the electronic documents substitutes paper documents with digital methods of authentication instead of the traditional signatures, these electronic documents should have a legally binding effect. Also issues relating to security of transactions, confidentiality of messages and integrity of data etc. should be addressed when making a legal framework. Thus there is an urgent need for clear policies, rules and principles and a framework that will encourage the use of new technology while protecting the public safety and national security.

Electronic commerce has brought a new dimension to commercial law. With the rapid expansion of the internet and e-commerce the right commercial and legal environment is crucial. In order to understand and to apply the tools of e-commerce effectively and to find solutions for our society, measures are required to establish a suitable legal environment. People involved in business and commerce need an environment in which business transactions can be electronically conducted safely and securely. This calls for fundamental changes in the legal, commercial and economic framework in Sri Lanka. The role of the government is to provide a strong legal framework for e-commerce, ensuring that domestic
and international trade, privacy problems, intellectual property issues such as patents and copy rights, prevention of frauds, consumer protection etc. are all addressed properly.

**Electronic Banking**

The rapid changes made in the sphere of information technology plays a major role in the field of banking and finance as well. These technological changes improve the operational efficiency and strategic effectiveness of the banking industry in the changing environment arisen due to process and influence of globalization, financial liberalization etc. The banks worldwide are pursuing electronic banking with vigor.

Many banks in Sri Lanka with the new development of information technology activities, have been exposed to fundamental changes during last two decades. They have successfully implemented massive restructuring programs to revamp and re-orient their banking and financial systems. Heavy investments are made in computerization and in upgrading of systems. Using this modern technology our banks are keen to introduce their innovative products and services to their customers to satisfy their new demands and expectations. Majority of bank transactions are being conducted electronically and electronic settlement of payments is well established.

Although electronic banking has spread out vastly in the Sri Lankan banking industry and many banks today are adapting rapidly to the electronic banking environment, Sri Lanka does not have any laws regulating electronic banking. Thus the legal regime is an essential to accept the electronic fund transfer system and to regulate the electronic environment in banking.

**LAW ON ARBITRATION**

Disputes are inevitable whether in business or in every day life. What is important is the existence of a successful and effective process of resolving those disputes with an adequate method of obtaining relief. The commercial community, facing an increase in claims in their commercial activity and transactions, need to make sure that there exist ways to resolve their disputes without jeopardizing their businesses. Arbitration is an important and attractive method of dispute resolution and is an alternative to judicial resolution.

It is a universally accepted view that litigants are always losers. Prior to the enactment of the Arbitration Act No. 11 of 1995, our legal system preferred litigation over arbitration as a means of resolving disputes. However, litigation is often time consuming and expensive. Business people are fed up with the cost, delay, stress and the risk of litigation. The business may not recover from the prospect of litigation which may spell a financial disaster for it.
Arbitration is the process that can be utilized by the parties to a dispute as an alternative to litigation in a speedy, flexible, efficient and economical way. This saves litigation cost and the time that have to be spent in resolving disputes. The goal of arbitration is to obtain a quick resolution of the dispute.

In arbitration, disputing parties submit their dispute to a neutral and impartial third party or to a panel of arbitrators under an agreement called the compromise. The arbitrator listens to the opposing parties to the dispute and renders the decision. The arbitral award is final, binding and enforceable in a court of law, and has the general effect of excluding the jurisdiction of the courts on the matter referred to arbitration. The Sri Lankan law on arbitration permits an appeal of an award only on the most limited grounds embodied in section 32 of the Act. As a practice, a law court will almost never overturn an arbitral award unless the award is against the public policy of Sri Lanka.

The modern trend clearly favours arbitration for commercial disputes and has been widely accepted as the best method to resolve such disputes. A number of arbitration cases arise from disputing parties agreeing to arbitrate, not litigate. Parties to a contract, who anticipate possible disputes and wish to avoid the expenses associated with the litigation process can agree to settle their disputes through arbitration. Thus, they insert a binding arbitration clause in their commercial contracts to resolve disputes. In the present context arbitration has become very important in resolving commercial disputes, as in major projects, as it is neither feasible nor practical to litigate each dispute that arises. As explained earlier, the basic advantages of arbitration are speed, low cost, informality and the prospect of a decision by a person with knowledge and experience in business affairs which can preserve business relationships that are usually destroyed in the acrimony of litigation. Arbitration may satisfactorily resolve a dispute in a fair and dignified manner and permit the business to continue avoiding delay, costs, and other risks associated with litigation.

As the foregoing discussion noted, Sri Lanka has given the highest priority to attracting foreign investments. It is necessary for Sri Lanka to have an appropriate and feasible legal framework capable of resolving commercial disputes. It is equally important to provide a similar framework for the settlement of investment disputes, both state-state mechanisms and investor-state mechanisms which provide an expeditious, cheap and just means of resolving disputes in an effort to encourage investment.

There is no doubt that the provisions contained in the Sri Lanka Arbitration Act are designed to provide a mechanism to achieve a just, fair and equitable award which will be acceptable to the parties to the dispute.
CONCLUDING COMMENTS

There are various issues which are yet to be addressed in the proposed Companies Bill and further improvement are needed; for example, relaxing some of the rigid requirements relating to private companies, which will lead to a greater increase in the number of such companies. It is hoped that this Bill will be enacted soon without waiting for the positive features to become outdated.

It was evident that the English Partnership Act does not purport to be a comprehensive code covering all aspects of partnership law. Rather, the statute must be read in conjunction with case law, which gives the legislation a greater meaning. Moreover, it is unclear to what extent the English Law on partnership is still in force.

A further matter for concern relates to the lack of adequate regulation and supervision of the stock exchanges and securities markets. This is an important consideration for large scale businesses, as increased investor confidence through more effective protection of investors leads to more funds being available to large companies. Many developments have taken place in England and other jurisdictions which have a bearing on Sri Lankan law. Our law must respond to these developments.

Some of the existing laws on banking which were designed for the domestic sphere have become insufficient to cope with newly emerging problems. Changes have taken place from time to time, both nationally and internationally. It is appropriate to make legislative amendments to these existing laws or enact new laws where necessary in order to accommodate new financial products and electronic technology, which are playing an increasingly important role in this sector.

The foregoing review highlighted that the general business environment in this country is not favourable for commercial transactions. There are many disturbing elements such as lack of certainty, extremely varied and complex laws which hinder foreign investments and create a major setback to economic growth. Overcoming these serious deficiencies is an issue that must be urgently addressed. This process will not be simple and problems will inevitably arise. Looking at the experience of other countries would be relevant here. Prudent safeguards, the removal of existing obstacles, generating new attitudes and practices and sound commercial principles are of paramount importance.

It is generally regarded that the political and economic climate for foreign investments in Sri Lanka is sound and that the future prospects for foreign investments are encouraging. Thus investor confidence should be strengthened by the changes in the legal sphere. Government has recognized the need to address the above issues. Commercial Law Reform Project of the Ministry of Justice, funded by the World Bank, have appointed a technical group to provide expert resources required for the implementation of an appropriate
commercial law reform programme. Following are the areas which legal reforms and legislative changes are envisaged by the technical group in order to facilitate private sector led economic growth in Sri Lanka:

(i) Sale of goods;

(ii) Partnership Law;

(iii) Financial instruments and services;

(iv) Product liability and Consumer Protection; and

(v) Information Technology Law

Furthermore, it has become evident to the technical group, the necessity to amend some other laws, such as the Intellectual Property Law.

Much will depend on the success of these reforms and the necessary amendments to commercial law are awaited with interest.
Early Years of International Trading

During the colonial period Sri Lanka followed a fairly liberal trade strategy and was well integrated with the global trading environment. For example, during 1883-1913 the world economy grew at a high level, and at that time Sri Lanka was able to reap benefits from growing world trade.¹ Moreover, international trade during colonial times gave a kick-start to banking and insurance business in the country. Although the production structure was not diversified, the trading system did bring in considerable gains to the Sri Lankan economy.

Soon after Independence international trading was seen from two different perspectives. First, taxes on international trade were seen as an important revenue source for other socio-economic development activities. Second, there was a move by the government to increase the control of international trade among indigenous people by implementing the policy of “Ceylonisation of trade.” This policy was implemented to rectify what the politicians saw as a major ownership distortion created by the colonial economic management system. These policies had both positive and negative impacts on the economy, and have been well documented in the existing literature.² While the positive impacts such as sustaining welfare programmes from trade taxes and providing opportunities for local traders to participate in international trade are recognised as beneficial, the negative impacts such as squeezing the

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¹ See Lal and Rajapatirana, 1989.
profits of plantation companies and thereby reducing investments, and disturbing ethnic relations by favouring one community over another had an adverse impact on the Sri Lankan socio-economic system.

**Controlled Trade Regime: 1956-1977**

The mid-1950s witnessed a deterioration in the terms of trade which adversely affected the earnings from the plantation exports. The country became vulnerable to external shocks. This led the political establishment to think in terms of diversifying the production structure. With the change of government in the mid-1950s, Sri Lanka witnessed a concerted effort in industrialisation with the State assuming a key role in the economic development process. The preparation of the Ten Year Plan for the country also indicated that controls and restrictions would be imposed to guide the economic development strategy. For example, quantitative restrictions on international trade were necessitated by the Ten Year Plan.

The period from mid-1950s to mid-1960s saw the intensification of controls and restrictions on the trade regime. Industries were established in areas where Sri Lanka did not possess a comparative advantage. International trade had a marginal role in influencing the development strategies of the country. There was a partial liberalisation exercise during 1965-1970 but it was hardly influential for Sri Lanka to develop according to its comparative advantage.³

It was in the 1970-1977 period that Sri Lanka witnessed the most restricted trading regime in the post-independence era. The government not only engaged in importation of most goods but also in their distribution. Importation and distribution were combined by creating State monopolistic institutions such as the State Trading Corporation, State Pharmaceutical Corporation, Building Materials Corporation, and so on.⁴ This was done with the intention both of preserving foreign exchange and having a control over prices. The prevalent thinking at that time was that there would be a drain on foreign reserves if the private sector was given a free hand in importation. The government either squeezed the profit margin or subsidised and sold below the import price for the consumers’ benefit. Restricted trade policy was well harmonised with the import substitution industrial strategy prevalent/operational at that time. The trade investment nexus was not very important, as Foreign Direct Investment (FDI) was not welcome.

There were also no legislative impediments for State activities and the private sector accepted its restricted position with frustration, so much so, that the Trade Chamber movement in the country was hardly active. Basically, the State was the engine of growth and the private sector was encouraged only in selected areas but under a restrictive trade regime. Even exporting was to some extent controlled by State institutions such as Consolexpo, State

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³ See, for instance, Cuthbertson and Athukorala, 1991.

⁴ See Kelegama, 1998a.
Gem Corporation, JEDB (Janatha Estate Development Board), etc. Trade supporting institutions such as banks and insurance agencies were also mostly under State control during this period.

**Liberalised Trade Regime**

1977 saw the liberalisation of the economy. Trade liberalisation played a major role in the overall liberalisation exercise. Supporting institutions such as the EDB (Export Development Board), PTC (Presidential Tariff Commission), etc., were created but there was a lag between opening the trade regime and placing the institutional structure to overlook the trade regime. Consequently the disruption from the adjustment process was considerable, especially, the severe blow on some viable import substitution industries.

Long and Medium-term rigid planning was abandoned and a five year rolling plan was put into operation. Industrialisation was to be supported by FDI which was welcomed with open arms. The then Prime Minister went to the extent of stating “let the robber barons come.” There was no industrial strategy as such and basically, the trade policy became also the industrial policy until about 1989. Neither was there a competition policy till 1987. Industries were allowed to start and operate freely in the liberalised trading environment so much so that it was rumoured at that time that the Prime Minister did not want to have a Ministry of Industries. Most State trading organisations that had a monopoly position had to face competition from the private sector and many of them became unprofitable by the early 1980s.

The Foreign Direct Investment strategy of the government had an overpowering influence over the trade regime. To support the FDI flows institutions such as the GCEC (Greater Colombo Economic Commission) and FIAC (Foreign Investment Advisory Committee) were created. Those investors that qualified for GCEC status (later BOI [Board of Investment] status) were entitled to duty-free imports, off-shore borrowing facilities, etc. Initially, GCEC status was confined only to foreign investors, however, after the early 1990s, this status was extended to domestic investors who satisfied pre-defined investment and export criteria. An important component of the overall legal framework relating to foreign investment was the Investment Protection Agreements and Double Taxation Relief Agreements which the government entered into with most of the industrialised countries. Basically, the institutional framework for FDI was put in place to exploit the trade investment nexus.

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7 See Kelegama, 1992.

8 See Kelegama, 1997.

9 A guarantee against the nationalisation of foreign assets without compensation was provided under Article 157 of the new Constitution of Sri Lanka, which was adopted in 1978.
Exclusive investment transactions were signed (or came to an understanding) during the late 1970s and 1980s with large multinational companies such as Prima, Nestle, and Boker Tate. Some of these agreements had spillover effects on the trade regime and also adversely impacted on long-term competition in those production sectors in the future years. (See paragraph on ‘Investment Agreements Influencing Trade Policy on page 190)

Although there were macroeconomic management problems and policy slippage from 1977-mid-1980s the industrial progress was impressive relative to the pre-1977 period. In the mid-1980s the liberal trade regime had facilitated a diversification of the export structure (see Table 1, p. 200) while also changing the markets for Sri Lankan trade. The EU and USA became major export markets, and Asia became major sources of imports with Japan and India playing a lead role (see Table 2, p. 200). This is in contrast to the pre-1977 regime where the UK was a major export market and most socialist countries were the main suppliers of imports under the bilateral pacts. FDI played a major role in invigorating industrial exports. FDI-led industrial exports increased from 35 per cent in 1979 to nearly 65 per cent in the late 1980s. The diversification into industrial exports was a sure-fire way for Sri Lanka to minimise the Singer-Prebisch threat of ever worsening terms of trade.

Soon after the mid-1980s there was some rethinking on the trade regime. Trade liberalisation slowed down in the early eighties due to macroeconomic management problems resulting from an ambitious public investment programme. Industrial development was lop-sided, export diversification was slow (see Table 3, p. 200) and regional disparities became visible. The government took several measures to address these problems. Studies were conducted on the tariff structure by the PTC whose report came out in 1988. The government felt that it was high time to introduce competition policy in order to have smooth entry for new industries. For this purpose, the Fair Trading Commission Act No. 1 of 1987 was put into operation. The government also felt that an Industrial Strategy was required to rectify the shortcomings of the industrial structure and to gear the sector to face the future challenges. An Industrialisation Strategy was announced in 1989 for the implementation of which the Industrial Promotion Act No.46 of 1990 was enacted. This Act suggested the formation of three bodies; viz., (a) Industrialisation Commission, (b) Industrial Advisory Committee, and (c) Regional Industry Body. These were basically formed to give policy direction to Industrialisation.

Although there were institutions already in place like the Industrial Development Board that could have been modified to suit the needs of the open economy, it was thought that new bodies should be created. Politics of the early 1990s made the Industrialisation Commission come under the Secretary to the Treasury instead of the Secretary to the Ministry

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12 See Athukorala and Rajapatirana, 2000.
of Industries. Some of the sections pertaining to price controls of the Fair Trading Commission Act were transferred to the Industrial Promotion Act, so that competitive pressure could be induced by tariff manipulation rather than through control of prices.

The early 1990s saw the advent of the second wave of liberalisation. Trade was again further liberalised but a number of noteworthy features appeared in this package. These included further liberalisation of Foreign Direct Investment, under which 100 per cent foreign equity ownership was permitted in most sectors except a reserved list which included areas such as money lending, pawn brokering, etc. Portfolio capital related to the share market was also liberalised. To facilitate FDI, the GCEC and FIAC were merged into one organisation with the formation of the Board of Investment in 1992. As stated, the BOI status was extended to local investors who satisfied pre-determined export and investment criteria. These changes were governed by the new Investment Policy Statement of 1990. A Privatisation programme was also initiated as part of this policy package which made inroads to the trade regime (See paragraph on privatisation programme influencing the Trade Regime, p. 191). During the 1990s also there was considerable policy slippage in the overall macroeconomic environment.

Table 4 (p. 201) shows the contribution of the two waves of liberalisation to increasing exports and imports as a percentage of GDP from 1980 onwards. By 1999, exports and imports as a ratio of GDP amounted to 92 per cent indicating that Sri Lanka has integrated well to the international trading system compared to the pre-liberalisation period.

Table 5 (p. 201) shows that after liberalisation in 1977, imports have been more prominent in the trade regime compared to exports. The increase in imports was characterised by a change in composition with investment and intermediate goods accounting for 80 per cent of imports in 1999 compared to 38 per cent in 1960 (see Table 6, p. 201). This is a reflection of greater capacity utilisation and expansion of industries. The composition of consumer goods in the import goods basket has substantially reduced after liberalisation. The post-liberalisation export pattern has been characterised by high import intensity. This is not a permanent feature of FDI-led export expansion. “It is mostly a reflection of early stages of export-led FDI participation and the nature of the prevailing investment climate in Sri Lanka.”

In all years after 1977 Sri Lanka has been encountering a trade account deficit in the balance of payments. Private and official transfers to the country have substantially cushioned the trade deficit. In recent years, the current account deficit of the balance of payments as a percentage of GDP has fluctuated around 4 per cent.

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13 See Dunham and Kelegama, 1997b.

14 See Athukorala and Rajapatirana, 2000. For example, the garments industry – Sri Lankan export leader – is highly import dependent due to the early stages and the prevailing investment climate (Kelegama and Foley, 1999).
INTERNATIONAL TRADE ISSUES IN SRI LANKA

Investment Agreements Influencing Trade Policy

There have been a number of investment agreements or understandings in good faith by the government of Sri Lanka with various foreign companies such as Prima (for flour), Boker Tate (for Sugar), Nestle (for Milk), Caltex (for Lubricants), Shell (for LP Gas), and so on. These agreements that were signed by undermining the Fair Trading Commission and related bodies have dictated the tariff policy on the trading side and also acted to throttle competition in the domestic market. It has been argued by the government that the exclusive monopoly status was granted to these companies for a number of reasons: (a) to attract initial large-scale investment so that immediate modernisation of the company takes place, (b) since the Sri Lankan market is small, there are problems of reaping economies of scale in a competitive environment, hence an exclusivity is required for making super profits for reinvestment, (c) in a war damaged economy where uncertainty governs the investment regime, there has to be an “extra package” to attract well-known investors, and so on. The merits of these arguments can be subject to debate.

The Ministry of Finance totally overlooking the Ministry of Agriculture and the Ministry of Industries came into these agreements with some adverse impacts on the production sectors in the economy. For flour, sugar and milk overall tariff reduction according to government budgetary proposals since early 1980s had been dictated by the investment agreements. The exclusive protectionist period for wheat flour will remain till 2004. These agreements impeded the efficient functioning of the trade investment nexus in the open economy. Moreover, it is harder for new comers to come into the market after the period of exclusivity because during the period of exclusivity some of these companies established a network that makes operations difficult for a competitor. This fact will be highlighted later from the experience of the Shell gas company.

Related to the theme of exclusivity is “extra incentives” for additional investment. Additional incentives are offered by the BOI to encourage FDI and promote particular sectors. While such incentives have encouraged some new investors, they have also distorted the level playing field and the ownership pattern of trade. For example, an investor that enjoys BOI status is able to pay a higher price for a local input thus depriving a non-BOI investor the privilege for similar inputs. Moreover, due to ineffective monitoring there have been a number of cases where items imported duty free under BOI cover have leaked to the domestic market thus distorting competition in the domestic market. Clearly, the extra incentive regime has affected the neutrality of the trade regime. The checks and balances for the extra incentive regimes have been weak leading consequently to the misuse of the system.

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There is an urgent requirement for a comprehensive study on the role of “extra incentives” given the fact that in addition to not being very successful in attracting reputed multinational companies, they have created problems such as revenue erosion for the government and the abovementioned distortions. According to Athukorala and Rajapatirana (2000: 123-124) the Sri Lankan experience with FDI inflows indicates that the

“…overall investment climate is more important ... than the availability of investment incentives, no matter how attractive such incentives are... Multi-national enterprises from developed countries usually place greater emphasise on political and policy stability in their site selection.”

Privatisation Programme Influencing the Trade Regime

With privatisation of state-owned enterprises a major impediment to trade liberalisation and a source of policy reversal was weakened, if not removed. But several state monopolies were privatised without a proper regulatory framework in place, e.g. Ceylon Oxygen, Oils & Fats Corporation, Lanka Lubricants, etc. Exclusive rights in the market were granted to these companies without proper safeguards. For instance, the Fair Trading Commission (FTC) received a complaint in 1993 on abuse of monopoly power by Ceylon Oxygen. It was alleged that the company had signed exclusive deals with big organisations for the supply of oxygen to discourage a competitor called Industrial Gas Ltd. coming to the market. The FTC declared this as an anti-competitive practice but when the company appealed against this decision, the Court gave the judgement against the FTC. Likewise, there were allegations that the owners of the Oils and Fats Corporation were engaging in anti-competitive practices in the poultry feed industry.

In 1994, Lanka Lubricants received exclusive status on tariffs for importation of required items for producing lubricants, exclusive distributional outlets by the Ceylon Petroleum Corporation, and total restriction on other lubricant oil producers operating till 2004 (later revised to 2000), etc. Many competitors such as Castrol, BP (British Petroleum), Esso, Mobil, etc., were keen to capture the Sri Lankan market but this was prevented in the mid 1990s by the exclusive contract of Caltex with the government of Sri Lanka. This privatisation formula had an adverse impact on international trading of lubricants in the local market.

Another example is the privatisation of the Gas Company where Shell was given exclusive status in the market till December 2000. A regulatory agreement was put into operation by the PERC (Public Enterprise Reform Commission) overlooking the FTC. The Department of Internal Trade (DIT) was appointed to monitor the agreement but it had little say on the matter because it was not the body responsible for overlooking anti-competitive practices. During the exclusive period the company constructed a gas pipeline to the Colombo Harbour thus excluding others in the future having the privilege of loading gas directly from the Port without compensating Shell Company. Moreover, price increases up to 30 per cent was
effected to cover losses due to increase in international prices and domestic inflation. It was difficult to be too strict with Shell Company operations because the government was keen that it expands activity to cover a large chunk of the population.

**International Trade and Fair Trading**

Whenever the FTC felt that the competitive pressure in the economy should be increased by tariff reduction, it communicated the decision to the Ministry of Industries, which took the final decision under the Industrial Promotion Act No.46 of 1990. For example, when soap price was increased by soap manufacturing monopoly, the FTC decided to allow cheap imported soaps to enter the market and the Ministry of Industries put this decision into practice. However, the FTC was marginalized when certain decisions were taken in regard to market exclusivity for foreign investors associated with the privatisation programme.

In the early 1990s, after the 2nd wave of liberalisation was unleashed, there was a need to undertake a review of the Fair Trading Commission Act and a need for a realistic assessment of the capacity of the FTC to implement competition policy and to monitor unfair trade and monopolistic practices. The Law and Society Trust initiated a study and its main recommendations were: (a) avoid duplicity in the FTC and DIT and take steps to merge the two institutions; (b) give more teeth to the Fair Trading Act in RBPs (Restrictive Business Practices); (c) separate the investigative functions from the quasi-judicial functions; and (d) it should have powers to act on anti-competitive practices created by international transactions. The recommendations were presented to the government of Sri Lanka and were accepted by the government and a decision was made to merge the two institutions and create a new Consumer Protection Authority. However, the legal draft for the proposed Act went far beyond what were recommended in the Law & Society Trust report and gave more powers to the Minister in charge of Trade to impose price controls on essential items. Several meetings were held among the Chambers, legal draftsman’s department and NGOs on the draft Act and a number of reservations were expressed. After considering the representations by the Industrial Association of Sri Lanka and the Chambers the draft Act is to be considered for further revision.

Related to competition is the smooth entry and exit of factors of production. Trade liberalisation has taken place at a faster rate than reforms in the other markets. Reforms in the factor markets have proved to be cumbersome. Since the late 1980s, the problems of labour laws have been discussed, but reforms have been slow due to strong Trade Union pressure. Such lag in reform has had an adverse impact on industry. For example, the textile sector was exposed to global competition by reducing tariffs to zero in 1998. It was expected that the textile industry will do the necessary adjustments and modernise itself to face the

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16 See Kelegama and Cassie-Chetty, 1993.
competitive pressures. However, this adjustment never became an easy exercise in the presence of rigid labour laws, especially the labour exit governed by the Termination of Workmen Act No.45 of 1971. Thus, the government had to offset the competitive pressures resulting from tariff reduction by offering subsidised loans to the textile sector effectively reversing the initial policy.

Adjustment at the firm level can be facilitated by smoother exit strategy for labour and capital. Legislative changes in this area have to go hand-in-hand with trade liberalisation strategy as otherwise the trade policies will not produce the desired results. In fact, the government will encounter much resistance to further trade liberalisation in such an environment. In regard to labour the tripartite dialogue among the employers, trade unions, and the government has produced some satisfactory results. In fact, some constructive recommendations of the Employers’ Federation of Ceylon have already been accepted by the Trade Unions. In regard to capital, the proposed new Companies Act has new laws to deal with bankruptcy that would facilitate smoother exit of capital. But to facilitate this there is a need for specialised insolvency practitioners whom enterprises may be encouraged to consult before rehabilitation becomes impossible.

Despite more than two decades of liberalisation, Sri Lanka still maintains price controls on certain commodities and services like pharmaceutical, flour, transport, and electricity. Pharmaceutical prices are controlled in most developing countries for the benefit of poor people. Although controls on other prices prevail for the consumer’s benefit, it has adverse impacts on the incentive structure for increasing production or expansion of services. This is because while the input prices are based on the market, the output prices are suppressed from the market level thus squeezing the profit margins. The government should seriously consider further liberalising and increasing competition in the flour, electricity and transport markets. Prices will then automatically come down.

State corporations do not come under the FTC Act. Thus they can resort to pricing acts according to the requirements of the government. A case in point is the Petroleum Corporation. The Petroleum Corporation normally does not pass on the decline in international prices to the consumers. Instead, the existing price is maintained to obtain the windfall revenue gains to the government. On the other hand, when there is a price increase the Petroleum Corporation passes on the increases to the consumer to maintain the existing revenue flows. Clearly, international trade in some areas is thus still earmarked for revenue generation. The Law & Society Trust report recommended that all State corporations should also come under the new Consumer Protection Authority. However, this recommendation has not been considered for obvious political reasons, perhaps the primary reason being that by implementing the proposal State corporations will no longer serve the politicians as employment generating institutions.
Institutions for International Trade

Many bodies/institutions that came to serve the needs of the closed economy managed to survive without any useful role in the open economy. For example, the government’s Department of Commodity Purchase, which purchases sheet rubber for export to China under a bilateral trade agreement, functioned allegedly informing the public of daily cocoa prices, whereas sales to China under the Agreement ceased in 1979 when trade was liberalised. Likewise there are bodies - that are legacies of the controlled regime - that attempt to assume a new identity and perform a dubious role in the open economy.

Gradual liberalisation of the economy and the resulting competitive pressure has led to closing down institutions such as the PMB (Paddy Marketing Board), and marginalizing FCD (Food Commissioner’s Department), Marketing Department, and so on. But suitable replacements for these institutions have not emerged in the market thus causing problems to both producers and consumers. On the other hand, those institutions that are not directly exposed to competitive pressure survive even when there is no role to perform. The vested interests in these institutions carve out some role to perpetuate their survival. There is a serious need to initiate a study on the relevance of certain State bodies in the market economy. By closing those down the government will not only be doing a service to the private sector but also to the government itself by saving a large budgetary allocation for a more productive task.

The Ministry of Trade also has to carry affiliated institutions with it from time to time such as Shipping, Cooperatives, Food, etc. When shipping needed focussed attention in connection with Port Development, it was de-linked from the Trade Ministry. Especially during the controlled regime the Food Department, cooperatives and shipping were closely interconnected. Increasingly with the liberalised economy the trade regime became closely interrelated to industrial development and the development of certain areas of the agriculture sector. In fact, in developed countries such as UK, trade and industry come under one Ministry. (In some other countries such as Australia, international trade comes under the Ministry of Foreign Affairs). Depending on international trade’s influence over various sectors it would be sensible to combine the concerned sector with trade in one Ministry. If this is not feasible politically, then an effective coordination mechanism between the Trade Ministry and the related sector should be worked out. This is all the more important as trade is the main determinant of comparative advantage of a nation.

International Trade in the Post-WTO Era

WTO came into operation on 1st January 1995. Sri Lanka’s preparatory work in order to be compatible with the WTO is slow but steady. The total elimination of MFA (Multi-Fibre Agreement) in 2005 has been a matter of concern since Sri Lanka’s apparel exports have

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17 See Kelegama, 2000a.
International Trade

been highly dependent on the quotas. It is only a few garment exporters that have managed to establish themselves in the non-quota market. As the quota phase-out has been back-loaded to 2005 and the quotas have been increased during the phase-out, most garment exporters have not bothered to make the necessary adjustment to face a quota free trading environment.

Increasingly the WTO is attempting to link trade with trade-related and non-trade related factors. Already trade has been linked to investment by the TRIMs (Trade-Related Investment Measures) agreement, and to intellectual property by the TRIPs (Trade-Related Intellectual Property) agreement. Both these agreements have come into criticism in developing countries. For example, TRIMs require national treatment for foreign investors and excludes any local content regulation for foreign investment. TRIPs allows patenting of the process as well as the product thus preventing reverse engineering for cheaper production. These two agreements are very much in favour of protecting the interests of big MNCs (multinational corporations). Moreover, complying with most WTO agreements is not easy for the governments of developing countries because the procedures are cumbersome.18

The attempt by the WTO to link trade to non-trade issues has come in for severe criticism by developing countries. A case in point is labour and environment. There is a covert attempt to nullify the comparative advantage of most developing countries by developed countries by bringing in labour and environment standards into the WTO agenda. Most developing countries such as Sri Lanka possess cheap labour and reasonable environment standards. By making such countries comply with labour and environment standards stipulated by Western countries, the competitive position of exports is effectively nullified. Developing countries see these as a new form of non-tariff barriers and have argued that labour and environment issues should be addressed by the concerned UN bodies and not by linking them to trade. At present, these two items have still not been included in the WTO rules and regulations but remain in the agenda.

Sri Lanka’s compliance with WTO rules and regulations is progressing smoothly except in a few areas such as sanitary and phytosanitary conditions, Codex compliance under Agreement on Agriculture, etc. New intellectual property legislation has been prepared for enactment, however, there is also a need for a new Act for protection of new plant varieties (plant breeders’ rights).

International Trade and Regionalism

During the period of the controlled trade regime the bulk of the international trade was governed by bilateral trade agreements.19 The only regional arrangement that operated during

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18 See Kelegama, 2000c.
19 See Kelegama, 1998a.
Aspects of fifty years of Law, Justice & Governance in Sri Lanka

that time was the Bangkok Agreement and the supporting mechanism of the Asian Clearing Union. There were hardly any gains from this regional arrangement for Sri Lanka.

With the long drag of the Uruguay Round (1986-1993) and the emergence of the EC (European Community) in the mid-1980s, regionalism gathered momentum around the world. With this wave of regionalism, Sri Lanka got absorbed to the SAARC (South Asian Association for Regional Cooperation) process in the mid-1980s, to the IOR-ARC (Indian Ocean Rim Association for Regional Cooperation) and BIMSTEC (Bangladesh, India, Myanmar, Sri Lanka, Thailand Economic Cooperation) in 1997. Although SAARC started in the mid-1980s, international trade came under the SAARC process only in the mid-1990s after SAPTA (South Asia Preferential Trading Arrangement) came into effective operation. Preferential trading in SAARC has not delivered impressive results despite completing three rounds of negotiations. IOR-ARC and BIMSTEC are not preferential trading systems, the former functioning under the “Open Regionalism” framework and the latter under a “Sectoral Cooperation” framework. The gains to Sri Lanka from both these arrangements have been minimal.20

The recently signed (1998) Indo-Lanka Bilateral Free Trade Agreement has more prospects for Sri Lanka than the above three regional arrangements. Sri Lanka benefits from cheaper Indian intermediate and investment goods under the Agreement thereby reducing the production cost of Sri Lankan tradables and increasing their competitiveness. However, Sri Lankan consumer goods will have to compete with equivalent Indian goods. Those consumer goods that are not in a position to compete with Indian goods are included in the Sri Lankan negative list. For example, all Sri Lankan agricultural goods are in the negative list. Sri Lankan exports are mainly consumer goods, which have to compete with similar products in the Indian market. Product differentiation, value addition, and piggy backing with Indian firms are key ingredients that constitute the strategy of entering the Indian market.21 Two crucial export items of Sri Lanka, viz., tea and garments are governed by a quota with 50 per cent duty concession to the Indian market.

The Agreement is not free from problems, especially in the Indian market where tariffs other than the normal ones operate. The message from the experience so far is the following. Sri Lanka needs well-trained international negotiators on trade agreements. Moreover, frequent assessment meetings through an institutional mechanism such as the Indo-Lanka Joint Commission are essential. Hidden tariffs such as auxiliary custom duties, surcharges, State taxes, etc., problems at the ports of entry, problems with regard to enforcement of rules of origin, etc., that are impeding Sri Lankan exports to the Indian market could be ironed out only at such meetings. And for these meetings to result in concrete outcomes, effective negotiators have to be present. The negotiators should at least be knowledgeable

21 See Kelegama, 1999.
of basic concepts such as “trade creation” and “trade diversion”. They should be able to make a thorough assessment of the new border tariff structure. Training for international trade negotiators is a must in the modern day world.

CONCLUDING REMARKS

Sri Lanka being an island found it very difficult to insulate itself from international trade during the pre-colonial as well as during the colonial period. The anti-colonial struggle had a built-in element of patriotism, distancing the colonial powers, and being self reliant as far as possible. And the first generation of politicians acted as “benevolent social guardians” with all good intentions. There was an intense distrust of “western economies” and international trade, which was seen as a means of enriching already rich nations at the expense of the poor. These feelings and views were manifested in the post-independent trade regimes from 1956-1977. Since 1977 once again integrating with the world trading system became the policy and it has remained so till today.

Recent studies have shown that the prior phase of import substitution industrialisation in Sri Lanka was not necessary for export success.\textsuperscript{22} As shown, post-1977 FDI played a major role in export-led industrialisation in Sri Lanka, which supports the above finding. Athukorala and Rajapatirana (2000) make the following points: (a) Total factor productivity has improved after liberalisation and Sri Lanka ranks favourably among other developing countries, and (b) Overall, as a late-comer to export-led Industrialisation, despite setbacks, Sri Lanka’s story is a satisfactory one. In other words, despite policy slippage and ad hoc policy making Sri Lankan industrial gains have been impressive. It is true that trade policy is a very powerful tool that can most often over-ride policy slippage and dictate the industrial growth and development. But whether the trade policy induced industrial gains were broad-based and adequate to exploit the industrial potential of Sri Lanka is subject to debate in the context of what is stated in the Sri Lankan industrial policy statements of 1989 and 1995.\textsuperscript{23}

In the modern day world international trade is the driving force of the economy. To obtain maximum benefits from it trade policies have to be fine tuned with reforms in the factor markets (viz. capital and labour). In other words, tariff reforms have to be carefully tailored to the on-going legal reforms for smoother capital and labour exit. It has also got to be fine tuned with the international rules and regulations stipulated by the WTO. New intellectual property laws, anti-dumping legislation, competition policies, etc., have to be compatible with WTO regulations while at the same time safeguarding domestic interests. In the modern day world, information technology (IT) is playing a key role in international trade where the Internet has made a suppliers’ market into a buyers’ market. E-Commerce has also increased the speed of transactions. All these new developments indicate that the IT sector may have

\textsuperscript{22} See Athukorala and Rajapatirana, 2000.

\textsuperscript{23} See, for instance, Kelegama, 2000b.
to be governed by new legislation. For example, Malaysia has cyber legislation and these laws govern the activities of the multi-media super corridor. Sri Lanka has only now initiated some work in this area.

Sri Lanka cannot afford to depend on the low-labour cost competitive advantage alone. This advantage should be strengthened by increasing labour productivity and using various other measures in order to maintain and consolidate Sri Lanka’s gains from international trade. In the early 1990s it was argued by mainstream economists that the comparative advantage of a nation has to be strengthened by gaining the competitive advantage. Considerable effort was made in the 1990s for carving a competitive edge by adding value to products and capturing niche markets. In the late 1990s efforts were also made to improve the competitive advantage by industrial clustering. In early 2000, it could be said that the competitive advantage should be strengthened by introducing new policy instruments to face the challenges from both the IT revolution and the WTO rules and regulations. From the IT side, e-commerce has to be built-in and computerisation of Customs and trade data bases should take place rapidly, and from the WTO side, Sri Lanka should work on areas such as improving labour and environment standards as they act as factors in the competitive equation. The “early gains” in these areas can go a long way in giving the competitive edge in international trading.

In the context of competitiveness, it is vital to ask to what extent the taxes such as GST, National Security Levy, etc. influence international trade. These taxes are applicable for most imported inputs and for industries that are of an import substitution nature. Especially at times when the cost of working capital is high, these taxes should be considered for temporary removal and alternative revenue sources found, in order to retain the competitive edge of Sri Lankan products. Even for non-BOI export companies these taxes can be a hindrance for competitiveness. Once an export market is lost it is difficult to regain it in the modern day world.

On the domestic front several measures are required to make international trade more efficient. The argument for exclusivity for some FDI and foreign investment associated with the privatisation programme may need to be reconsidered after Sri Lanka’s experience with certain multinational companies. It appears that Sri Lanka has put into practice the doctrine of “let the robber barons come” at any cost. The role of the new Consumer Protection Authority (the Act was presented to the Parliament in June 2001) vis-à-vis the PERC, BOI, and other high-powered institutions may have to be well defined so that medium term competition in certain sectors is not undermined in the economy.

Meanwhile, aspects of commercial law which have a negative impact on international trade may need review. Already there has been various reform in the commercial law area, for example, a new Arbitration Act was adopted in 1995 and a commercial court was established to deal with commercial disputes. Moreover, public procurement procedures have also been
revised to suit modern day trading practices. But there still remain loose ends that need tightening to minimise the negative effects of legislation on international trade.\textsuperscript{24}

As the Sri Lankan economy gets more and more integrated with the global economy, the role of various trade related institutions also needs to be re-defined. Institutions such as the EDB has to become more demand-driven, BOI needs some international branches, CWE and the Food Department will have to play the role of ensuring food security at times of crisis while abandoning whatever monopoly status they enjoy in importation or distribution of some food items, and the State Trading Corporation should confine itself to importing only sensitive items that are not open to the private sector. Other bodies such as the State Handicraft Department, Tea Board, etc., which are nothing but legacies of the closed economy period may need closing down.

With regional and bilateral trading occupying a portion of international trade, trade negotiations are on the increase. Sri Lanka had the experience of encountering countervailing duties and embargoes in the US market for its garments in the 1990s. Already there are two cases related to Sri Lanka in the WTO Dispute Settlement Body (coconut powder exports to Brazil and monopoly of Sri Lanka Telecom). There are more negotiations to come in tariff reductions under the Bangkok Agreement, SAPTA, Global System of Trade Preferences (GSTP), and others. All these matters need up-to-date negotiating skills, trained commercial lawyers, competition experts, etc. The World Bank sponsored commercial law reform project has a component on legal education and the Law Faculty has revamped its syllabus in commercial law accordingly. This project has to be consolidated. It is by addressing all these issues that Sri Lanka will be able to gain maximum advantages from international trade and become the trading hub of the Indian Ocean.

\textsuperscript{24} See, Nanayakkara (2001).
### TABLE 1:
Composition of Exports: 1950-1999 (Selected Years)

<table>
<thead>
<tr>
<th>Year</th>
<th>Agriculture (a)</th>
<th>Industrial</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>1950</td>
<td>93.7</td>
<td>n.a</td>
<td>6.3</td>
</tr>
<tr>
<td>1960</td>
<td>90.5</td>
<td>n.a</td>
<td>9.5</td>
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<tr>
<td>1970</td>
<td>91.7</td>
<td>n.a</td>
<td>8.3</td>
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<tr>
<td>1980</td>
<td>61.8</td>
<td>33.0</td>
<td>5.2</td>
</tr>
<tr>
<td>1990</td>
<td>36.3</td>
<td>52.2</td>
<td>11.4</td>
</tr>
<tr>
<td>1999</td>
<td>20.9</td>
<td>77.0</td>
<td>2.4</td>
</tr>
</tbody>
</table>

Note: From 1948-1960 agriculture exports include tea, rubber and coconut kernel products, while minor agricultural crops have been categorised under other exports. 
Source: Central Bank of Sri Lanka.

### TABLE 2:
Two Largest Export and Import Markets for Sri Lanka: 1950-1999 (Selected Years)

<table>
<thead>
<tr>
<th>Year</th>
<th>Two largest export markets</th>
<th>Two largest import markets</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(as a percentage of exports)</td>
<td>(as a percentage of imports)</td>
</tr>
<tr>
<td>1950</td>
<td>Europe - 34.4</td>
<td>USA - 21.3</td>
</tr>
<tr>
<td>1960</td>
<td>Europe - 37.0</td>
<td>Asia - 13.1</td>
</tr>
<tr>
<td>1970</td>
<td>Europe - 45.8</td>
<td>Asia - 19.9</td>
</tr>
<tr>
<td>1980</td>
<td>Europe - 27.6</td>
<td>Asia - 20.1</td>
</tr>
<tr>
<td>1990</td>
<td>Europe - 30.3</td>
<td>USA - 24.8</td>
</tr>
<tr>
<td>1999</td>
<td>USA - 38.8</td>
<td>Europe - 33.5</td>
</tr>
</tbody>
</table>

Source: Central Bank of Sri Lanka.

### TABLE 3:
Composition of Industrial Exports: 1950-1999 (Selected years)

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Agriculture</td>
<td>93.7</td>
<td>90.5</td>
<td>91.7</td>
<td>79.3</td>
<td>42.4</td>
<td>37.7</td>
<td>21.8</td>
<td>21.9</td>
</tr>
<tr>
<td>Industry</td>
<td>n.a</td>
<td>n.a</td>
<td>2.0</td>
<td>14.2</td>
<td>48.6</td>
<td>54.2</td>
<td>75.4</td>
<td>77.0</td>
</tr>
<tr>
<td>Textile and garments</td>
<td>0.3</td>
<td>2.1</td>
<td>30.5</td>
<td>31.81</td>
<td>48.7</td>
<td>48.7</td>
<td>52.7</td>
<td>48.7</td>
</tr>
<tr>
<td>Petroleum products</td>
<td>0.9</td>
<td>9.0</td>
<td>6.3</td>
<td>5.2</td>
<td>2.2</td>
<td>1.6</td>
<td>1.6</td>
<td>1.6</td>
</tr>
<tr>
<td>Other</td>
<td>0.9</td>
<td>3.0</td>
<td>11.8</td>
<td>17.2</td>
<td>24.5</td>
<td>22.7</td>
<td>22.7</td>
<td>22.7</td>
</tr>
<tr>
<td>Mineral products</td>
<td>n.a</td>
<td>n.a</td>
<td>0.9</td>
<td>4.8</td>
<td>4.3</td>
<td>4.6</td>
<td>2.3</td>
<td>1.4</td>
</tr>
<tr>
<td>Other (a)</td>
<td>6.3</td>
<td>9.5</td>
<td>5.4</td>
<td>1.7</td>
<td>4.5</td>
<td>3.6</td>
<td>0.6</td>
<td>0.9</td>
</tr>
</tbody>
</table>

Note: Includes re-exports. 
Source: Central Bank of Sri Lanka.
TABLE 4:

Exports and Imports as a percentage of GDP: 1950-1999 (Selected Years)

<table>
<thead>
<tr>
<th>Year</th>
<th>Exports as a percentage of GDP</th>
<th>Imports as a percentage of GDP</th>
<th>Exports and imports as a percentage of GDP</th>
</tr>
</thead>
<tbody>
<tr>
<td>1950</td>
<td>5.89</td>
<td>4.40</td>
<td>10.29</td>
</tr>
<tr>
<td>1960</td>
<td>4.93</td>
<td>5.27</td>
<td>10.20</td>
</tr>
<tr>
<td>1970</td>
<td>3.54</td>
<td>4.03</td>
<td>7.57</td>
</tr>
<tr>
<td>1980</td>
<td>20.65</td>
<td>39.84</td>
<td>60.49</td>
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<td>1990</td>
<td>61.50</td>
<td>83.35</td>
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</tr>
<tr>
<td>1999</td>
<td>40.13</td>
<td>51.49</td>
<td>91.62</td>
</tr>
</tbody>
</table>

Note: Up to 1990 GDP at 1982 factor cost prices are used and for 1999 GDP at 1996 factor cost prices are used. Source: Central Bank of Sri Lanka.

TABLE 5:

Composition of Exports and Imports: 1950-1999 (Selected Years)

<table>
<thead>
<tr>
<th>Year</th>
<th>Exports as a percentage of total exports and imports</th>
<th>Imports as a percentage of total exports and imports</th>
</tr>
</thead>
<tbody>
<tr>
<td>1950</td>
<td>57.25</td>
<td>42.75</td>
</tr>
<tr>
<td>1960</td>
<td>48.31</td>
<td>51.69</td>
</tr>
<tr>
<td>1970</td>
<td>46.78</td>
<td>53.22</td>
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<td>1980</td>
<td>34.14</td>
<td>65.86</td>
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<tr>
<td>1990</td>
<td>42.46</td>
<td>57.54</td>
</tr>
<tr>
<td>1999 (a)</td>
<td>43.80</td>
<td>56.20</td>
</tr>
</tbody>
</table>

Source: Central Bank of Sri Lanka.

TABLE 6:

Composition of Imports: 1950-1999 (Selected Years)

<table>
<thead>
<tr>
<th>Year</th>
<th>Consumer goods</th>
<th>Intermediate goods</th>
<th>Investment goods</th>
</tr>
</thead>
<tbody>
<tr>
<td>1950</td>
<td>51.0</td>
<td>10.1</td>
<td>38.9</td>
</tr>
<tr>
<td>1960</td>
<td>61.0</td>
<td>20.3</td>
<td>18.1</td>
</tr>
<tr>
<td>1970</td>
<td>55.4</td>
<td>20.0</td>
<td>23.6</td>
</tr>
<tr>
<td>1980</td>
<td>29.9</td>
<td>45.7</td>
<td>24.0</td>
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<tr>
<td>1990</td>
<td>26.4</td>
<td>51.8</td>
<td>21.7</td>
</tr>
<tr>
<td>1999</td>
<td>19.7</td>
<td>52.8</td>
<td>27.5</td>
</tr>
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Source: Central Bank of Sri Lanka.
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Is there anyone out there who is watchful in the public interest?

A BRIEF EXAMINATION OF PRIVATISATION AND THE IMPORTANCE OF REGULATORY REGIMES

Chanaka de Silva*

It was not so long ago that the government was a very dominant force in the area of commercial activity of this country. The strong presence of the government was perceived as being essential in this area of activity in order to ensure the availability and distribution of the necessary goods and services to the members of the public and the equitable distribution of wealth amongst the various sectors of society. In this background, the policy of the government was to expand its tentacles into various commercial enterprises and to act as a manufacturer, distributor, provider of services and utilities, and the regulator of activities in the commercial arena.

In this background, the government made its presence felt in the area of commercial activity with a series of “nationalisations” that was carried on. This process commenced in the 1950s and continued until the mid-1970s. Accordingly, ventures such as public transport and port services were amongst the first group of industries to face nationalisation. This was followed by the nationalisation of the petroleum and insurance industries. This process of nationalisation was pursued with vehemence even into the 1970s. During this era, one of the boldest steps in nationalisation was taken: the estate sector, which was the main export income earner of our country and the mainstay of our economy, was subjected to nationalisation. The government also conferred upon itself the general power to acquire compulsorily any business undertaking.¹ Under these powers the government compulsorily

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¹ See The Business Undertakings (Acquisition) Act No. 35 of 1971.

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acquired several business undertakings including certain business undertakings relating to gas and insurance.

Further, in pursuance of its policy, the government established several entities to carry out various commercial enterprises. This was done both by making specific legislation for the establishment of such enterprises and by the government conferring upon itself the general power to establish various commercial enterprises. As a result, a number of large commercial establishments were functioning under the government by the late 1970s. By this time the government was carrying on every conceivable commercial activity; banking, manufacture, distribution, trading, provision of utilities are just a few. It even ran hotels and restaurants.

Before long, however, both the government and the people began to feel the strain of the over-reaching and all-embracing presence of the government in the commercial arena. Very often goods and services provided by the State entities were in short supply. Rationed supplies were the order of the day. Long queues outside most of these establishments were a common sight. Even when goods and services were provided without interruption they were considered to be substandard. The productivity of these enterprises were low; they were poorly managed and were largely inefficient. Most of them survived on government subsidies and the burden of providing for and maintaining these large entities by the government budget was heavy. This state of affairs was a major factor that contributed to the defeat of the then government at the general elections held in 1977.

It was against this background that, by the late 70s and the early 1980s, a re-examination of the policy relating to the role of the government in the commercial arena took place. This resulted in a drastic change of the policy of the government. From a policy of the government being the dominant entrepreneur in the market place, it changed to one of “Public – Private Partnership,” where the private sector came to be recognised as the “main engine of growth.” This consequently led to the government seeking ways and means of divesting itself of the large commercial enterprises it had embarked upon and to actively promote private sector investment in the economic activity of the country.

Initially the divestiture program of the government took the form of outright sales of identified assets of certain enterprises of the government. The shortcomings of this approach were quickly noticed by the government. Quite clearly, this process did not enable the disposal of an entity or part thereof as a going concern and, therefore, did not enable the realisation of

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4 E.g. Sale of the Nylon Plant belonging to the Ceylon Petroleum Corporation.
the full value of the enterprise. Consequently, in 1987, the Conversion of Public Corporations or Government Owned Business Undertakings into Public Companies Act No. 23 of 1987 was enacted. This could perhaps be called the first step towards a structured divestiture program by the government.

This Act provides for the conversion of a Public Corporation or a Government Owned Business Undertaking or a part thereof into a Public Company. In terms of the Act, all shares of such company are issued to the Secretary to the Treasury who holds them for and on behalf of the government. Upon the establishment of the Company, all property, rights, liabilities, powers, privileges, contracts and interests of the Corporation or Business Undertakings vest absolutely in the Company. Interestingly, however, all officers and servants of the Corporation or Business Undertaking do not automatically become officers and servants of the Company. Provision has been made in this Act for the payment of compensation to all officers and servants who are not offered employment in the Company.

Thus, the provisions of this Act enable the conversion of a Public Corporation or a Government Owned Business Undertaking into an entity which is capable of being divested easily but still has the ability to carry on the business activity hitherto carried on by the pre-existing entity. This is a tremendous advantage over the previous types of ‘asset sales’ which were effected, since these companies could now be divested as an ongoing business enterprise.

During this time, however, the divestitures were carried out in a very ad-hoc manner. No specific governmental body was in charge of this program and whenever the government decided to divest an enterprise or a portion of such enterprise, the government appointed committees called “Divestiture Committees.” These committees usually consisted of public officers and functioned under the Ministry of Finance. Thus, one of the major criticisms levelled against this program at this stage was the manner in which the divestitures were handled by these committees and the lack of transparency and accountability in handling such divestitures. It was against this background that the Special Tasks Force for the Implementation of the Program of Public Enterprise Reform was appointed by the President on 1st March 1995 which replaced the Divestiture Committees.

The next constructive step taken in the path of the divestiture program of the government was the establishment of the Public Enterprises Reform Commission, which occurred in 1996. The powers and duties assigned to the Public Enterprise Reform Commission include:

a. to carry out surveys and studies to ascertain and determine the public enterprises which require to be reformed;

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5 See section 3 of Act No. 23 of 1987.

6 Vide – section 3(2)(c) of Act No. 23 of 1987.

7 The Public Enterprises Reform Commission of Sri Lanka Act No. 1 of 1996.
b. to formulate a framework for a sustainable and stable public enterprise reform strategy;

c. to make recommendations to the government, on the selection of public enterprises for conversion into public companies under the Conversion of Public Corporations or Government Owned Business Undertakings into Public Companies Act No. 23 of 1987;

d. to make recommendations to the government on the sale or disposal to the public, of shares in, or assets of, companies registered under the Conversion of Public Corporations or Government Owned Business Undertakings into Public Companies Act no. 23 of 1987; and

e. to act as the agent of the government, in Sri Lanka or abroad, for the purposes of any matter or transaction, if so authorised.  

It is in this background that the Public Enterprises Reform Commission is now handling the divestitures of the government. Thus, it could now be said that a fairly reasonable process has been set in place to carry out the divestitures. The Public Enterprises Reform Commission, as set out above, has been statutorily entrusted with certain functions in respect of this process and can, therefore, be held accountable for their actions. The question, however, arises as to whether this is all that is necessary to be concerned about in a divestiture or in the implementation of the privatisation program of the government. In order to find an answer to this question one has to examine the privatisation policy of the government more closely.

Upon a closer examination of the policy of privatisation of the government, one can discern that this policy is not limited to the mere disposal of enterprises hitherto carried on by the government but is more broader than that. The government is actively encouraging and soliciting the participation of the private sector in areas of commercial activity in at least three different ways.

- In certain instances the government has divested enterprises that were carried on by it. Examples of such situations are the privatisation of Lanka Lubricants Limited and of Colombo Gas Company Limited (presently called Shell Gas Lanka Limited).

- In other instances the government has entered into joint ventures with the private sector and has handed over the management and control of the business activities

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8 Vide - section 5 of the Act No. 1 of 1996.
of the enterprises owned by the government to the private sector. Examples of such situation are the sale of shares of Air Lanka Limited to Emirates Airlines and of Sri Lanka Telecom Limited to Nippon Telephone and Telegraph Limited with the grant of the right of management to the purchasers.

- In some other instances the government has curtailed further investment in areas of commercial activity that they are still engaged in and are actively encouraging and soliciting the private sector to make new investments in such activities and to carry on such activities in competition with the government entities. Examples of such situations are the investment made by South Asia Gateway Terminals Limited in the expansion of the container terminal at Queen Elizabeth Quay in the Port of Colombo and the investments made by several private companies in thermal power generation.

What then is sought to be achieved by this policy of privatisation? Surely, it cannot be the mere raising of funds for the government coffers and the reduction of government expenditure. The Public Enterprises Reform Commission itself has answered this question. According to the Commission, “It is important to realise that privatisation is a means to an end. It is a means to improve our living standards, foster technological progress, create employment and take our nation into a more prosperous tomorrow.” It further states that “We can expect a dramatic improvement in the products and services offered by privatised ventures. Investments made in the right technology and the application of new methods and skill will bring new standards of quality and efficiency to the market place.”

Thus, the answer is clear. It is, in fact, the improvement of the quality and standards of products and services, the improvement of the availability of products and services, the elimination of the inefficiencies that existed in the government enterprises. In other words, the improvement of the living standards of society. If this is the objective that is sought to be achieved by the privatisation policy of the government, the mere formulation of a process to carry out the divestiture is woefully inadequate to achieve this. Much more is required.

The Public Enterprises Reform Commission itself admits this. It states that the mandate of the Commission “is to make privatisation work for Sri Lankans today and for generations to come.” It further states that “Every privatisation is a carefully considered decision that takes into account the interest of all sectors of society; the general public, the state employees, the consumers, the suppliers as well as the country’s overall economic vision.”

9 Page 44, Privatisation: What it means to you - published by the Public Enterprises Reform Commission.
10 Page 9, Privatisation: What it means to you - published by the Public Enterprises Reform Commission.
Thus, it becomes quite clear that when a privatisation is carried out, it is essential to consider what its effects are going to be in the future. It is in this light that the transaction leading to a privatisation should be structured. It is especially necessary to pay careful attention to these matters when special rights such as exclusivity or monopoly rights are going to be given to the privatised entity. Further it becomes necessary to consider a host of other issues before structuring such a transaction. Is there a legal framework within which the privatised entity can function? Is there a legal framework within which such special rights can be exercised? How will the privatisation affect the consumer? Do the consumers have sufficient rights to protect themselves from undue exploitation? How will the privatisation affect the competitors or others who wish to enter into the market? How can they enforce and protect their rights? Are there sufficient standards in place to ensure that a product or service of an acceptable quality is delivered to the consumer and can their observance be compelled? In short, is there a legal framework to ensure that the privatised entity is properly regulated?

Thus, a privatisation is not a simple issue of packaging and selling. These are important issues not only for society but also for the privatised entity itself. Often, its very ability to survive will be dependent on it. Accordingly, it is not surprising that South Asia Gateway Terminals requested the government to set up a Port Competition Regulator within an agreed period of time.

Looking at the divestitures that have been carried out so far, one cannot help but wonder whether these aspects have been given adequate consideration before the transactions were finalised. In the case of several divestitures, the privatised entity has been granted a monopoly status or exclusivity in relation to the activity that is carried on by such enterprise. For instance, Lanka Lubricants Limited was granted the monopoly for the supply of lubricants in Sri Lanka. Shell Gas has been granted the monopoly for the supply of LP Gas in Sri Lanka. Similarly, Sri Lanka Telecom claims to have monopoly in respect of international telephony. Little attention appears to have been paid as to how these monopolies could be regulated.

In the case of Shell Gas, much controversy has arisen with regard to the price increases that have been affected over a relatively short period of time. There is a general perception among the consumers that the price increases are unwarranted and excessive whilst Shell Gas itself claims that these increases are absolutely necessary in the context of the current world oil prices. No satisfactory mechanism is in place to objectively determine this matter. This enrages the consumer on the one hand, whilst it is quite damaging to the company, on the other.

Similarly, in the case of Sri Lanka Telecom, an instance where the transfer of shares itself was effected in a very smooth and efficient manner, a controversy has now arisen with regard to its rights vis-à-vis other Telecommunications License holders. Sri Lanka Telecom claims that it has a monopoly or the sole right to provide International Telephony by virtue
of an amendment effected to its License at the time of the transfer of its shares, whilst some other License holders claim that they too have right to provide International Telephony in terms of their Licenses (which have been granted prior to the amendment of the SLT License) by using a different technology. This dispute has given rise to a number of legal actions between these parties and they are currently pending before court. This situation could easily have been avoided if the Licenses granted to these parties were specific and contained the necessary definitions. It is unfortunate that even though a Regulator exists in the Telecom sector, this matter has yet not been resolved.

These are, undoubtedly, lessons to be learnt. It is only a matter of time before another wave of privatisations takes place. This time round, however, it is very likely that they are in areas that have a greater impact on social life such as electricity, water, sewerage, banking and insurance. In fact, even at this time, Expressions of Interest have been invited for the divestiture of 51% of the National Insurance Corporation Ltd. It is essential that due consideration be given to the regulatory issues outlined earlier and that they are properly addressed, before such privatisations are effected. Where necessary, legislation needs to be introduced particularly in relation to safeguarding and enhancing the rights of the consumer. It is heartening to note that at present, a Bill for the establishment of a Consumer Protection Authority is in existence.

In this connection, one must bear in mind that the mere passage of legislation is not sufficient for the due regulation of the market place. It is necessary that persons who are appointed to implement such legislation are competent to fulfil their duties. Since areas such as consumer protection, anti-competition regulation and the regulation of monopolies are new to our legal culture, it is essential that the persons who are entrusted with the task of implementation of the legislation be adequately trained in such areas. It is also essential that such persons are capable of commanding the confidence of all parties whose interests they are expected to look after and who may be affected by their decisions. It is equally important for the government to have the will to permit such persons to carry out their functions independently, so long as such persons are acting lawfully, whether their actions are to the liking of the government or not. It is only then that the primary object of privatisation can be successfully achieved.
INTRODUCTION

The identification of what actually constitutes a tax is not something that is always free from doubt. According to Morse, Williams and Salter, a tax is “a compulsory levy imposed by an organ of government for public purposes.”\(^1\) The legal significance of this definition lies in the element of compulsion (as opposed to being a payment which is purely voluntary in character). Benjamin Franklin once remarked that “nothing was certain except death and taxes, but for some people the latter may help to delay the former.”\(^2\)

Taxation is never popular with persons who are liable to pay such tax. Adam Smith in his work, *The Wealth of Nations*, first published in 1776, sets out four canons that, in his opinion, led to better taxes: (i) people should contribute taxes in proportion to their incomes and wealth; (ii) taxes should be certain, not arbitrary; (iii) taxes should be levied in the most convenient way; and (iv) the costs of imposing and collecting taxes should be kept minimal.\(^3\) Taxation is essentially an intrusion upon the autonomy of the individual but is a price that has to be borne in order that one can remain as a member of civilized society.

Taxes have been imposed by monarchs from ancient times to fund their various endeavors. In fact, the *use* - the precursor to the modern trust - was a devise adopted to avoid feudal

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3 Cited in Morse *et al.*, *supra*, n. 1, at p. 5.
dues. This is alluded to by Simpson⁴ who observes, in the context of English land law, as follows:

“The profits of feudalism became to an increasing degree Crown profits, and on the death of a landholder a special inquiry, the inquisition post mortem, could take place in which a special official, the escheator, sought to discover what was due to the Crown. By the time we reach the Tudor period mesne lordships had become uncommon, whilst at the same time the technique of evading incidents had reached a perfection which a modern income tax practitioner might well envy. The effect and purpose of the Statute of Uses (1536) was largely to prevent this evasion, and in the late sixteenth and early seventeenth centuries the collection of the feudal revenues of the Crown was brought to heights of efficiency never before attained.”

It had been an accepted practice, even among the monarchs of ancient Sri Lanka, to raise revenue in the form of taxes. This tradition was continued by the Portuguese, the Dutch and the British. For instance De Silva,⁵ referring to the collection of the Fish Tax in Ceylon under the British occupation observes:

“Fish is plentiful in Ceylon, especially along the coast, and, in accordance with the ancient system of taxation, Government had always taken a portion of what was caught.”

Consequently, the tradition of taxing subjects in order to raise revenue was nothing new to independent Sri Lanka.

Income tax was first introduced into Sri Lanka in 1932 consequent to the recommendations of the Woods Commission (1926) and the Huxham Report (1929).⁶ The levying of a tax on income in Sri Lanka was rather belated because such a tax had been imposed in England as far back as in 1799.⁷ Legal effect was given to the imposition of income tax in Sri Lanka by the Income Tax Ordinance No. 2 of 1932. In terms of this Ordinance the exemption limit for the year of assessment 1931/1932 was Rs. 4,800/-.

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Prior to independence, the Income Tax Ordinance was amended on 21 occasions; between 1948 and 1968 it was amended on 23 occasions. In 1963 the Inland Revenue Act No. 4 of 1963 was introduced and, until 1985, this enactment was amended on 15 occasions. In 1979 the Inland Revenue Act No. 28 of 1979 came into operation and this enactment has since been amended on an annual basis. The Inland Revenue Act No. 38 of 2000 was enacted in August 2000 and current income tax legislation is contained in this statute.

The increasing complexity of modern tax legislation, the lack of information regarding changes to the law, and the strengthening of the powers possessed by the Inland Revenue Department has resulted in civic society demanding that tax legislation must respect individual rights - despite the fact that such legislation may have been introduced with the objective of advancing community goals.

This article seeks to examine current income tax legislation, from a human rights perspective, so as to assess the extent to which human rights norms have been able to safeguard individual rights. For this purpose, it will sometimes be necessary to examine the legislative history of certain statutory provisions, albeit, in the post–independence period of Sri Lanka.

**THE RECOGNITION OF SPOUSES AS SEPARATE TAXABLE ENTITIES**

The Inland Revenue Act No. 28 of 1979, recognised for the first time that the husband and wife were separate taxable entities. This marked a movement away from the aggregation principle - recognised in previous tax legislation. This important development resulted in the recognition of the economic contribution made by the wife to the family. Additionally, it had the effect of empowering the woman as the law finally recognised that, for tax purposes at least, she had equal worth. It underscored the importance attached to the fundamental human right of equality before the law.

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8 For instance, it was the writer’s personal experience that copies of the Inland Revenue Act No. 38 of 2000, enacted by Parliament in May, were not available at either the Government Publications Bureau or the Inland Revenue Department even in September 2000.

9 See, e.g., section 25 (2) of the Income Tax Ordinance No. 2 of 1932 (Cap. 242) as amended by section 7 of Act No. 36 of 1951 wherein it is stipulated that if the husband and wife are assessed separately the incomes of the husband and wife shall be aggregated for the purpose of the allowances from assessable income. According to section 24 (Cap. 242) the income of a married woman, during the subsistence of her marriage shall be deemed to be part of the assessable income of her husband.
THE DUTY TO GIVE REASONS

The duty to give reasons for a decision is widely acknowledged as one of the hallmarks of good administration. It is also recognised as an aspect of a fair trial.10 Galligan,11 referring to the link between reasons, fair treatment and procedural fairness, observes as follows:

“The fundamental principle that people should be dealt with according to authoritative standards constitutes a good strong case for procedures requiring reasons. That principle should be supplemented by the notion that a person is entitled to a reasoned decision being made and the reasons being disclosed.”

Some countries, such as Australia, for instance, have accorded statutory recognition to the right to receive reasons.12 In Sri Lanka the right to receive reasons implicitly enjoys fundamental right status.13

English administrative law, however, has been slow to recognise the duty to give reasons. This is because, absent a statutory obligation to give reasons, the common law does not superimpose such a requirement.14 However, recent judicial decisions indicate a trend in the direction of requiring that administrators do provide reasons for their decisions so as to promote openness, candour and good administration in the process of decision-making.15

The Supreme Court of Sri Lanka has recognised the importance attached to the duty to give reasons even in the absence of a statutory duty to do so.16 Thus, in Karunadasa Fernandez, J., outlining the rationale underpinning the duty to give reasons, made the following observation:

“Article 12(1) of the Constitution now guarantees the equal protection of the law. In the context of the machinery for appeals, revision, judicial review, and the enforcement of fundamental rights, giving reasons is becoming, increasingly,
an important ‘protection of the law’ … for if a party is not told the reasons for an adverse decision his ability to seek review will be impaired.”

Where taxpayers are concerned, however, the duty to give reasons springs neither from a common law obligation nor implied constitutional postulate but, on the contrary, from an express statutory provision to this effect.

The duty to give reasons prior to rejecting a return was originally imposed by section 96(C)(3) of the Inland Revenue Act No. 4 of 1963 (as amended). This obligation was subsequently re-imposed by section 115(3) of the Inland Revenue Act No. 28 of 1979, and section 134(3) of the Inland Revenue Act No. 38 of 2000.

The fact that an obligation is cast upon the Revenue to give reasons prior to the rejection of a return has been repeatedly judicially recognised. In *Fernando v. Ismail* the respondent, a taxpayer, submitted a return which was rejected by an Assessor with the consequent effect that the amount claimed as expenses by the taxpayer was drastically reduced. The taxpayer sought a writ of certiorari from the Court of Appeal to quash the assessment on the footing that the Assessor had not communicated his reasons in writing for rejecting the return. The Court of Appeal granted the relief sought but the Inland Revenue appealed to the Supreme Court. A five judge bench of the Supreme Court decided, by a majority, that the duty to give reasons, in writing, was a mandatory requirement of law and the failure to do so on the part of the Assessor rendered invalid his decision to reject the return.

It was the contention of the State that the taxpayer had been less than honest when furnishing his return and that the reason for rejecting the return was patent. Samarakoon, C.J., was, however, of the view that falsity was a conclusion arrived at by the Assessor: it was arrived at by a process of reasoning based on the data that was available to the Assessor. What the section made mandatory was that reasons should be stated rather than the mere disclosure of a conclusion derived by a process of reasoning. The Assessor was, however, at liberty to indicate his conclusion in addition to his reasons, if he desired to do so, but was precluded from confining himself to his conclusion alone.

Examining the rationale underpinning the statutory obligation to give reasons, Samarakoon, C.J., observed as follows:

“The primary purpose of the amending legislation is to ensure that the Assessor will bring his mind to bear on the return and come to a definite determination whether or not to accept it. It was intended to prevent arbitrary and grossly

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18 [1982] 1 SLR 222.
unfair assessments which many Assessors had been making as ‘a protective measure’. An unfortunate practice had developed where some Assessors, due to pressure of work and other reasons, tended to delay looking at a return till the last moment and then without a proper scrutiny of the return, made a grossly exaggerated assessment. The law, I think, enabled the department to make recoveries pending any appeal on such assessments. The overall effect of this unhappy practice was to pressurize the taxpayer to such an extent that he was placed virtually at the mercy of the tax authorities. The new law was a measure intended to do away with this practice. Under the amendment when an Assessor does not accept a return, it must mean that at the relevant point of time he has brought his mind to bear on the return and has come to a decision rejecting the return. Consequent to this rejection, the reasons must be communicated to the Assessee. The provision for the giving of reasons and the written communication of the reasons, contained in the amendment is to ensure that in fact the new procedure would be followed. More particularly the communication of the reason at the relevant time is the indication of its compliance. The new procedure would also have the effect of fixing the Assessor to a definite position and not give him latitude to chop and change thereafter. It was therefore essential that an Assessor who rejects a return should state his reasons and communicate them.”

Thus, Samarakoon, C.J., laid great stress upon the importance attached to the duty to give reasons because, in his view, the said duty was an important right that warranted protection.

In New Portman Ltd. v. Jayawardene, the Court of Appeal accepted the position that the duty to give reasons, prior to the rejection of a return, was an essential pre-requisite. The absence of adequate reasons, prior to the rejection of the return, was fatal to the validity of the decision made by an Assessor. It was the court’s view that the obligation to give reasons for rejecting a return was not affirmatively satisfied by the mere provision of general reasons. What was required was that the reasons provided should be adequate and intelligible so as to satisfy the statutory obligation to give reasons for a decision. The communication of the conclusion derived by an Assessor without disclosing his reasoning fell short of the statutory postulate in respect of the duty to give reasons.

In Wijewardena v. Kathiragamar, the petitioner applied for a writ of certiorari to quash additional assessments made. It was also contended, on behalf of the petitioner, that there was non-compliance with the duty to give reasons when rejecting the return. It was held by the Court of Appeal that the communication of reasons for rejecting a return was now a

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mandatory requirement of law and had to be done at or about the time an assessment was made on an estimated income. Perera, J., expressed the view, however, that, in the instant case, there was substantial compliance with the law and, consequently, the course of action adopted by the Assessor was not unlawful.23

The importance attached to the duty to give reasons is well recognised in our law because it has been accorded fundamental rights status. This process right is now recognised as being subsumed within the wider right to equality.

More recently, however, there has been a disturbing trend, albeit by statutory fiat, which in effect whittles down the importance attached to the duty to give reasons. Section 134 (6) of the Inland Revenue Act No. 38 of 2000, provides as follows:

“Nothwithstanding the provisions of subsection (5), where the Court annuls any assessment, on the grounds that the provisions of the proviso to subsection (3) have not been complied with, it shall be lawful for an Assessor to make, where necessary, a further assessment in place of the assessment so annulled.”

This subsection has the effect of giving an Assessor the power to override the court in circumstances where the court has expressly stated that an assessment should be annulled for failure to comply with the duty to give reasons. It gives an Assessor the right to make an assessment, outside the possible operation of a time bar, with the necessary consequence that the taxpayer who has succeeded in persuading a court of law to annul an assessment ends up with a pyrrhic victory.

The subsection ensures that the Assessor is provided with an opportunity of taking a second bite of the cherry. Consequently, if he or she does not adduce sufficient reasons to sustain his/ her assessment before a court of law and if such assessment is, therefore, annulled by court order, the Assessor is at liberty to try again.

The subsection is vague and ambiguous and also unfair. In the first place, it does not indicate whether the power of annulment that it refers to is being exercised by a court in the exercise of its prerogative writ jurisdiction or, in the alternative, whether such a power is being exercised in a case stated from the determination of the Board of Review. In the latter case, it would appear to be a travesty of justice to permit an Assessor to make a fresh assessment. In the former case, it would appear that the court would annul an assessment only if it feels that the Assessor has been acting unlawfully. Therefore, to permit such an Assessor to make a fresh assessment offends one’s sense of justice.

23 Ibid, at p. 314.
RETROACTIVE TAX LEGISLATION

It is widely acknowledged, at least in all liberal democracies, that retroactive legislation is inconsistent with international human rights standards.\(^{24}\) The rule against retroactivity is regarded as an important aspect of the rule of law. Hayek, referring to the connection between the rule of law and the rule against retroactivity, states as follows:

“Stripped of all technicalities this means that government in all its actions is bound by rules fixed and announced beforehand - rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one’s individual affairs on the basis of this knowledge.”\(^{25}\)

Consequently, Sri Lanka’s Constitution accords fundamental rights status to the presumption against retroactivity where penalties are to be imposed by law.\(^{26}\) Unfortunately, there has been a disturbing trend, in recent times, leading to a situation whereby Sri Lanka has enacted fiscal legislation so as to operate with retrospective effect.\(^{27}\)

It is significant to note that retroactive legislation is regarded as being inconsistent with the rule of law.\(^{28}\) Additionally, tax legislation must be interpreted in a manner that is compatible with the presumption against retroactivity in order to comply with the requirements of fairness. This is because a taxpayer cannot be expected to order his affairs in ignorance of what the law requires. The core issue involved, in this context, is that of legal certainty. If the law is uncertain in regard to its scope and ambit, if the obligations imposed by law are to be known only \textit{ex post facto}, then, it can hardly be contended that such a law is consistent with the ideals of the rule of law (if that statement is to be used in a substantive sense).

Lon L. Fuller,\(^{29}\) explaining the importance of the rule against retroactivity, particularly, where tax laws are concerned, states:

\(^{24}\) See, e.g., article 11 (2) of the Universal Declaration of Human Rights; article 7 (1) of the European Convention on Human Rights.


\(^{26}\) See, article 13 (6) of the Constitution of Sri Lanka wherein the presumption against retroactivity is embodied. It should be noted that, although, it is widely believed that article 13(6) applies only to penal legislation, it is submitted that fiscal legislation would be subsumed within this article since penal consequences will necessarily follow if a person fails to fulfil his or her fiscal obligations. See also Felix, Shivaji, ‘Retroactive Tax Legislation: A Cause for Grave Concern?’ (2001) 9 \textit{Sri Lanka Tax Review} 25.

\(^{27}\) For instance, the provisions of the Inland Revenue Act No. 38 of 2000, enacted in May 2000, applied with effect from 1\textsuperscript{st} April 2000. See also section 20 of the Goods and Services Amendment Act, No. 26 of 2000, which specifically states that the enactment is to be of retrospective effect.


\(^{29}\) Fuller, Lon L., \textit{The Morality of Law}, Yale University Press, 2\textsuperscript{nd} edn., New Haven, 1969, at p. 60.
"Tax laws are not just like other laws. For one thing, they enter more directly into the planning of one’s affairs. Moreover - and much more importantly - their principal object is often not merely to raise revenue, but to shape human conduct in ways thought desirable by the legislator. In this respect they are close cousins to the criminal law. The laws of property and contract neither prescribe nor recommend any particular course of action; their object is merely to protect acquisitions resulting from unspecified activities. Tax laws, on the other hand, coax men into, or dissuade them from, certain kinds of behavior and this is often precisely their objective. When they thus become a kind of surrogate for the criminal law, they lose, as it were, their primitive innocence. … The purpose of the law may have been to induce men to enter transactions of the kind that would yield these very gains. When a tax is later imposed on gains arising from these transactions, men are in effect penalized for doing what the law itself originally induced them to do."

Thus, Fuller is convinced that retroactive tax legislation cannot be justified because of the unfairness that would result to the taxpayer. Retroactive tax legislation, like retroactive criminal law, is inconsistent with the morality of law.

Sri Lanka’s courts have repeatedly observed that the rule against retroactivity should not be jettisoned unless there are clear and unambiguous statutory provisions to the contrary. In Appuhamy v. Brampy, Wood, Renton, J, referring to the nature of the rule against retroactive legislation, said:

"Statutes are not to be held to act retrospectively unless a clear intention to that effect is manifest or the matter in issue relates to procedure alone."

In Bandaranaike v. Weeraratne, Wimalaratne, J, referring to the same principle, observed:

"In the absence of express words or even of language from which an intention that the law should apply to past transactions could be gathered, the surrounding circumstances must point distinctly and unmistakably to an intention that the law should have that effect."

The problem with recent tax legislation, however, is that the legislature has expressed itself in clear, unambiguous terms, indicating that the statute is to have retrospective operation. In such circumstances, the courts have no option but to accept such laws as valid due to Parliament being conferred with the necessary competence to legislate retrospectively.

30 (1913) 16 NLR 59 (S. C.), at p. 60.
From a taxpayer’s point of view, however, retrospective legislation can never be justified unless it deals only with procedure. If the effect of such legislation is substantive in operation, as opposed to being merely procedural, then, it seeks to impose an intolerable burden on the taxpayer. A taxpayer determines his levels of investment, savings and consumption based upon his appreciation of the extent of his tax liability. Additionally, a businessman will determine his mark up on cost after making an adequate allowance for profit net of tax. The ordinary citizen is likely to be of the view that retroactive tax legislation is unjust and unacceptable. As Fuller points out,

“If the ex post facto criminal law is heinous because it attaches a penalty to an act that carried no punishment when it was done, there is an equal injustice in a law that levies a tax on a man because of an activity that was tax-free when he engaged in it.” \(^{32}\)

In the circumstances, retrospective tax legislation is grossly unfair and inequitable because it results in uncertainty in relation to the extent of a person’s tax obligations.

TAX AMNESTIES

Tax amnesties have been offered, from time to time, in order to induce more people to comply with their fiscal obligations and to induce delinquent taxpayers to turn over a new leaf. However, the question arises as to whether such amnesties have the potential to violate the constitutional postulates of equality vis-à-vis the other law abiding taxpayers.

In 1978 the Supreme Court had occasion to pronounce upon the constitutionality of a Tax Amnesty Bill\(^ {33}\) in the light of the fundamental rights of equality before the law and equal protection of the law as provided by Article 12 (1) of the Constitution. A five judge bench of the Supreme Court, in its determination, observed:

“In view, however, of the provisions of Article 15 (7) of the Constitution and the permitted restriction of the exercise and operation of the fundamental rights in the interest of meeting the just requirements of the general welfare of a democratic society, we think that the purpose of this Bill justifies the restriction, if any, of the fundamental rights of equality.”\(^ {34}\)

Thus, although tax amnesties may be justified from the point of view of government policy they are, in effect, a restriction upon the citizen’s fundamental right to equality. The effect of

\(^{32}\) Fuller, Lon L., *The Morality of Law*, supra, n.29, at p. 59.

\(^{33}\) This was enacted as Tax Amnesty Act No. 5 of 1978.

an amnesty is that the honest taxpayer gets nothing for willingly complying with tax legislation, while the tax evader is given the opportunity to start off again on a clear slate. Tax amnesties are, therefore, justified on policy grounds and, on such grounds, may derogate from individual rights.

THE EXEMPTION OF EMOLUMENTS OF PUBLIC SECTOR EMPLOYEES

The argument has often been advanced that the conferring of tax exemptions on public sector employees, whilst their private sector colleagues are taxed on their emoluments from employment, is inconsistent with the constitutional postulates of equality. This is a matter which received the attention of the Taxation Commission.\textsuperscript{35} The Taxation Commission, examining the rationale underpinning the tax exemption, observed:

\begin{quote}
"The rationale advanced for this exemption, when it was first introduced, was that the salaries of these categories of employees were much lower than those in the private sector, particularly for employees with similar qualifications and shouldering similar responsibilities in the managerial and professional grades. They were also not in receipt of the many benefits and perquisites, which their counterparts in the private sector enjoyed. As an alternative to increasing the salaries of persons in the professional and managerial grades to a level equivalent to those in the private sector, the government exempted public sector salaries from income tax."\textsuperscript{36}
\end{quote}

Pointing out that the exemption could no longer be justified, the Commission, in its report, published in 1990, stated as follows:

\begin{quote}
"Most witnesses appearing before us were of the view that the present position was iniquitous and unjustifiable. In respect of government and corporation employees the salary disparities have been narrowed with the implementation of the recommendations of the Administrative Reform Committee, while the salaries of employees of the State Banks are comparable to those paid to their counterparts in other commercial banks. The inequity is compounded if both spouses are in receipt of exempt income. Further, the exemption of the salary makes it difficult to submit other income to the proper marginal tax rate. Psychologically, the perception among the public that public servants go about taxing their fellow citizens, while themselves being immune from tax, is not conducive to loyalty and compliance."\textsuperscript{37}
\end{quote}


\textsuperscript{36} Ibid, at para. 12.44.

\textsuperscript{37} Ibid, at para. 12.45.
Consequently, the Taxation Commission recommended that the tax exemption conferred upon public sector emoluments be removed and that they be made taxable. Successive governments have, however, failed to adopt these recommendations.

If it is government policy to tax emoluments from employment, then, it is submitted that, irrespective of the source from which the income is derived, persons who are in receipt of similar levels of income must be taxed equally, as done in many countries. The failure to do so is contrary to the notion of equality before the law.

**TAX HOLIDAYS AND EXEMPTIONS**

The indiscriminate granting of tax holidays and exemptions can also be inconsistent with the constitutional postulates of equality. The Taxation Commission (1990) recommended that tax holidays and exemptions be either scaled down or eliminated. The Taxation Commission, referring to this matter, observed as follows:

“Tax holidays and exemptions not only erode the tax base but also provide opportunities for tax avoidance through shifting of incomes from a taxed to an untaxed source. At a macro level, they lead to economic distortions and impair economic performance by encouraging the diversion of resources from areas in which they generate the largest economic benefit into areas which yield the maximum tax savings to the investor. We find that, by and large, they have distorted the tax system. … It is our considered view… that the elimination or scaling down of the whole tax incentive framework would redress at least some of the inequities of the tax system, and help offset the reduction in tax revenue, stemming from our proposed personal tax reforms.”

Consequently, the granting of tax holidays and exemptions had a tendency of placing a heavier burden on those who do not obtain such benefits. It results in some firms and individuals being conferred with a cost advantage, and hence a competitive advantage, denied to their rivals. In the circumstances, it appears that the conferring of such tax holidays and exemptions is *prima facie* discriminatory and violative of the constitutional postulates of equality.

**SEARCH AND SEIZURE**

The Department of Inland Revenue has been conferred with extensive powers in respect of conducting searches and seizing the property of tax defaulters and/or evaders. The power in respect of search and seizure is considered important by the Department of Inland Revenue.

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so as to prevent tax evasion. Large-scale tax evasion has the effect of being unfair on the honest taxpayers and places a heavier burden on them. The Taxation Commission was of the view that tax evasion had a significant impact upon the fiscal system. It made the following observation in its report:

“The incidence of tax evasion and avoidance in Sri Lanka gives cause for great concern…. The prevalence of large scale tax evasion has adverse consequences on the operation of a sound economy. Whilst the most immediate consequence is the loss of revenue, in the long run such evasion tends to reduce the built-in-elasticity of the tax system. Also, to the extent that the tax evaded income is spent on goods and services, it may generate inflationary pressures and raise the prices of real property.”

The Taxation Commission also observed that if tax evasion was widespread, then, it was capable of distorting the objectives of a fair tax system. It further observed:

“The concept of a fair tax system is based essentially on the ability to pay principle which enjoins that (a) the rich and higher income earners pay more taxes than the middle and lower income earners and (b) equals be treated equally. The high incidence of evasion and avoidance amongst the rich and higher income groups results in a complete negation of the ability-to-pay principle. They would bear a relatively lower tax burden than the middle and lower income groups. Where tax evasion and avoidance are widely prevalent, very rarely would people with comparable levels of income pay the same taxes.”

Thus, whilst acknowledging that the incidence of tax evasion must be minimised, it must also be stressed that draconian fiscal legislation, with wide powers of search and seizure, tends to be contrary to currently accepted international human rights norms (such as those concerning fairness and due process).

For instance, section 161 (1) of the Inland Revenue Act No. 28 of 1979, confers the power upon any officer, appointed for the purpose of the Act, to search any building or place so as to obtain information and to seize any articles which may be useful for the purpose of proceedings under the said Act. Section 161 A confers upon the Commissioner General of Inland Revenue or any authorized officer for that purpose, with the power to search business premises. The power conferred by the aforesaid sections are both wide and extensive and they have been frequently exercised.

41 Ibid, at para. 31.2.
Yet, it is surprising to note that the statutory provisions relating to searches conducted by the tax authorities have not come up for interpretation by the Sri Lankan courts. The Supreme Court has held, in a non-tax context, that a search without credible information, based upon a mere hunch or suspicion, is unlawful and could, therefore, amount to a denial of the constitutional right to equality before the law. The fact that there has been no litigation regarding the manner in which the powers of search and seizure have been exercised by the Department of Inland Revenue does not indicate that such power has been used with caution and responsibility. On the contrary, it could also mean that taxpayers have been unable and/or unwilling to vindicate their constitutional rights.

By way of comparison it is interesting to note that in England the Inland Revenue has had extensive powers of search and seizure conferred upon it under and in terms of section 20C of the Taxes Management Act 1970. In terms of this section it is possible for the Revenue, when they have a reasonable suspicion that a serious fraud is being committed, to apply to a Circuit Judge for a warrant to enter premises and search and seize any items which may be of relevance as evidence. Outlining the rationale underpinning the section, Lord Denning made the following observation:

“The reason was, no doubt, the vast extent of frauds upon the Revenue. It is said that hundreds of millions of pounds are lost to revenue by reason of these frauds. In order to try and discover the miscreants- and prosecute them - Parliament gave a power of search in very wide terms. It was operated successfully in a dozen or more cases without challenge.”

However, English judges have ensured that the statutory provision permitting search and seizure of documents is not abused. The courts have exercised their supervisory jurisdiction over the Revenue in a number of applications for judicial review.

R. v. Commissioners of Inland Revenue, ex parte Rossminster, the applicants for judicial review challenged the lawfulness of search warrants issued, on the basis, inter alia, that the warrants did not specify the offence suspected but were drawn in general terms. The Divisional Court dismissed the application for judicial review. On appeal, however, the Court of Appeal decided that the appeal should be allowed. Lord Denning, M.R., outlining the rationale for the court’s decision, said:

43 This amendment to the Taxes Management Act 1970 was incorporated through the Finance Act 1979.
“No one would wish that any of those who defraud the Revenue should go free. They should be found out and brought to justice. But it is a fundamental in our law that the means which are adopted to this end should be lawful means. A good end does not justify a bad means. The means must not be such as to offend against the personal freedom, the privacy and the elemental rights of property. Every man is presumed to be innocent until he is found guilty. If his house is to be searched and his property seized on suspicion of an offence, it must be done by due process of law. And due process involves that there must be a valid warrant specifying the offence of which he is suspected: and the seizure is limited to those things authorised by the warrant. In this case, as I see it, the warrant was invalid for want of particularity: and the search and seizure were not in accordance with anything which was authorized by the warrant. It was an illegal and excessive use of power.”

The House of Lords, however, allowed the appeal made by the Revenue and reversed the decision of the Court of Appeal. It was the opinion of the House of Lords that the applicants had failed to establish, in their application for judicial review, that the officers of the Inland Revenue had acted unlawfully or in a manner that was \textit{ultra vires}.

In more recent times, English courts have been conferred with an opportunity of examining the legality of the Revenue’s actions when a search had been continued despite the fact that an injunction had been obtained restraining such a search. Whilst conceding that the Revenue’s power of searching for and seizing evidence was, indeed, important, Buxton, J., was of the view that the manner in which such a power was exercised should have been more closely supervised. Buxton, J., was also of the view that the conduct of the Revenue, in the instant case, would border on contempt. However, in the light of the apology tendered by the Revenue, the court did not consider it necessary to take any further action on this matter.

Thus, it is important that the power of search and seizure conferred upon the Inland Revenue must be used with caution. Such a power, if abused, can result in a great deal of inconvenience to the taxpayer. Additionally, the exercise of such a power represents an encroachment upon the liberty of the subject. It is, therefore, important that proper procedures are adopted prior to the exercise of such powers. The search of business premises must not be done on an arbitrary basis nor must it be undertaken based on a hunch or speculative expectation. There

\textit{Ibid.} at p. 695.
\textit{Ibid.} at p. 1216.
must be a *prima facie* case to indicate that a tax fraud is being committed and that the search is warranted for the purpose of gathering further information. The search must never be the first stage in the process of investigation but must be undertaken at a more advanced stage of an investigation.

The power of search and seizure, if not properly exercised, has the potential to induce tax officers to be corrupt, leading to a lack of impartiality in the process of decision-making with the inevitable consequence that there will be an erosion of public confidence in the system. It is also important that searches are conducted on the basis of objective criteria so as to ensure that taxpayers are not harassed resulting in a denial of the rights of due process.

INSTITUTIONAL FRAMEWORK

The Inland Revenue Act, No. 38 of 2000 provides a number of safeguards so as to protect a taxpayer from being subject to an arbitrary or capricious assessment. Section 136 of the Act makes it possible for an aggrieved Assessee to make an appeal to the Commissioner General of Inland Revenue. An Assessee who is dissatisfied with the determination of the Commissioner General of Inland Revenue can make an appeal to the Board of Review under and in terms of section 138. It is also possible for the Commissioner General to refer a matter directly to the Board of Review under and in terms of section 139.

It is possible for any party, aggrieved by the determination of the Board of Review, to appeal on a question of law, by way of case stated, to the Court of Appeal. Any party dissatisfied with the determination of the Court of Appeal can, under and in terms of section 141(8), appeal to the Supreme Court.

CONCLUSION

Revenue collection is an area that has the potential to violate individual rights inasmuch as the imposition of a tax results in an encroachment upon the liberty of the individual. Yet, a modern welfare State cannot do without raising revenue by way of taxation.

However, it is also of importance that the State accords respect to fundamental human rights. The community need that requires the collection of Revenue does not outdo the need to accord respect for human rights. The process of revenue collection must, therefore, pay due regard to the relevant human rights norms (particularly those involving due process and respect for individual autonomy) that are widely observed in all liberal democracies so as to ensure that the rule of law is observed.
A GENERAL OVERVIEW OF THE NATIONAL INTELLECTUAL PROPERTY REGIME IN SRI LANKA SINCE INDEPENDENCE

D. M. Karunaratne*

INTRODUCTION

Intellectual property as a concept encompasses a set of legally enforceable rights emanating from intellectual creations, i.e. creations of the human mind. Therefore, the law relating to intellectual property concerns such creations and their protection and management.

Intellectual property is considered to be a form of property, with some unique features of its own. It shares several of the characteristics associated with “property” as denoted in general in the law of property which is one of the major areas of substantive civil law. For example, intellectual property is an asset and has a monetary value. It can, like any other form of property, be owned, transferred, sold or licensed. The proprietor of intellectual property has the right, subject to certain restrictions, to use and alienate his intellectual property and to restrain others from encroaching upon his rights. Intellectual property is a kind of intangible property as it may not be identified or defined by its own physical parameters. However, to be protectable, it must be expressed in a discernible form or way.

Intellectual property is traditionally divided into two sections, namely, industrial property and copyright. Industrial property embraces the rights relating to areas such as inventions, industrial designs, trademarks and protection against unfair competition. The rights relating to literary and artistic works fall under the category of copyright while the rights relating to performances of performing artists, phonograms and broadcasts are called related rights or neighbouring rights.

It is proposed in this presentation to highlight briefly the important aspects of intellectual property law in Sri Lanka since independence including prospective legal reforms.

PRE-INDEPENDENCE

Sri Lanka is a land of history, rich in innovative and knowledge based activities which are largely manifested by historical remains such as literary and artistic works, architectural structures and irrigation systems. However, we do not find any evidence as to the existence of legal norms relating to “creations of human mind” in the domestic legal history until the Western concept of intellectual property was introduced to Sri Lanka during the British colonial rule. The influence of the English law in Sri Lanka, compared with some other British Colonies, was not far reaching, but some areas of the English law entered the domestic legal system mainly through legislation and judicial activism.1 The law of intellectual property is one such area. The British Inventor’s Ordinance of 1859 was made applicable to Sri Lanka and the first Sri Lankan patent was granted on 12th January 1861. This law was replaced by the Patents Ordinance of 1906, which was based entirely on the English Patent Law. The English Law of Trademarks was introduced to Sri Lanka in 1888 under Ordinance No. 14 of 1888 and the first trademark was registered on 1st January 1889. The Merchandise Mark Ordinance of 1889 (Chapter 151) made provisions relating to fraudulent marks on merchandise. The Trademarks Ordinance (Chapter 150) of 1925, which was enacted in line with the English Trademarks Ordinance of 1919, replaced Ordinance No. 14 of 1888. The Design Ordinance (Chapter 153) which provided for the registration of designs was passed in 1904. The English Law of Copyright was applied per se in Sri Lanka including the English Copyright Act of 1911. A statute called the Copyright Ordinance was enacted in 1912 to supplement the said English Copyright Act of 1911. There were some other statutes in existence in Sri Lanka relating to intellectual property such as the Patents, Designs, Copyright and Trademarks (Emergency) Ordinance (Chapter 157) and the Patents, Industrial Designs and Trademarks (The Neuchatel Agreement) Ordinance (Chapter 156).

UPON INDEPENDENCE

The first few decades of independence did not see any substantial change in the existing intellectual property law and administration. The statutes introduced during the colonial period were operative without any change or improvement except for three minor amendments introduced to the Trademarks Ordinance in the years 1949, 1952 and 1953. The Ceylon Independence Act of 1947 expressly made the British Copyright Act of 1911 applicable to Sri Lanka.2 The provisions of these statutes were always interpreted in the light of the English legal norms. The most active area of the law, compared to other areas, was the Trademarks

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The Intellectual Property Regime

Almost all the reported judicial decisions on intellectual property were in this field of law. The statutory law introduced during the colonial period lasted until a new intellectual property legal regime was enacted in the year 1979.

NEW REGIME

An effective system of Intellectual Property became a pressing need in the recent past, especially in the context of the liberalised economic policies of the country in the late 1970s. Consequently, the present law - the Code of Intellectual Property Act No. 52 of 1979\(^3\) was enacted and implemented. Modelled on a draft prepared by the World Intellectual Property Organisation (WIPO), the Code has incorporated internationally recognised principles and concepts of intellectual property in the light of local conditions and requirements. It not only attempted to cater to the requirements of the emerging economy of the country, but also to honour Sri Lanka’s international obligations in the field of intellectual property by updating and modernising the law in line with domestic needs and international conventions such as the Paris Convention for the protection of Industrial Property and the Berne Convention for the protection of Literary and Artistic Works.

The Code was enacted to revise, consolidate, amend and embody in the form of a Code, the law relating to copyright, industrial designs, patents, trademarks and unfair competition and to provide for better registration, control and administration thereof. It is divided into eight parts. They relate to administration, copyright, industrial designs, patents, marks, trade names and unfair competition, offences and penalties and miscellaneous (which includes application to and proceedings before the Director and the Court and the Minister’s power to make regulations, the Intellectual Property Advisory Commission and the Intellectual Property Fund).

The Code repealed in total all the existing statutes relating to intellectual property in Sri Lanka.\(^4\) Although based on the WIPO model law for developing countries, the Code has not totally deviated from the former law of intellectual property in Sri Lanka. For example as Rodrigo J. stated in *Suby v. Suby Ltd.*\(^5\) the Code has not substantially altered the law as far as deceptive similarity of a mark is concerned. It should be observed that this opinion is equally applicable to several other areas of intellectual property law in Sri Lanka.


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3  Hereinafter referred to as “the Code.”
4  Sections 190-191. See Regulations made under the Code published in Gazette extraordinary No. 60/20 of 31.10.1979.
Administrative System

The Code provides for some fundamental matters relating to the administration of intellectual property including the establishment of a new Intellectual Property Administrative System. An Intellectual Property Office named “the Registry of Patents and Trademarks” was established for the first time in Sri Lanka in 1982. Earlier, the administration of intellectual property came under the official purview of the Registrar General and then the Registrar of Companies. The Registry of Patents and Trademarks was renamed “the National Intellectual Property Office of Sri Lanka” (NIPOS) by the provisions of the Code of Intellectual Property (Amendment) Act No. 13 of 1997. This Office is headed by an Official called “the Director of Intellectual Property.” According to the scheme of recruitment the said officer has to be an Attorney-at-Law by profession. The functions of the Director of Intellectual Property relating to Industrial Designs, Patents and Marks are quasi-judicial in nature and are subject to appeal to a Court of Law.

OBJECTS OF INTELLECTUAL PROPERTY PROTECTED UNDER THE CODE

The Code offers protection to the rights relating to inventions, trademarks and service marks, industrial designs and literary and artistic works. In addition, it protects trade names and provides for the protection against unfair competition.

Patents

Patents are granted for patentable inventions which may be, or may relate to, a product or process in a field of technology. An invention is patentable if it is new, involves an inventive step and is industrially applicable. The following, notwithstanding that they are inventions within the legal definition, are not patentable: discoveries, scientific theories and mathematical methods; plant or animal varieties or essentially biological processes for the production of plants or animals, other than micro-biological processes and the products of such processes; schemes, rules or methods for doing business performing purely mental acts or playing games; methods for the treatment of the human or animal body by surgery or therapy, and diagnostic methods practised on the human or animal body.

The right to a patent belongs to the inventor or inventors. An invention made by an employee or pursuant to a commission belongs to the employer or to the person who commissioned

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6 See part I of the Code.
7 Section 59.
8 Sections 60, 61 and 62.
9 Section 59 (3).
10 Section 64.
the work provided that the parties have not agreed otherwise.\textsuperscript{11} A patent is valid for 15 years from the date of granting.\textsuperscript{12} After two years from the said date, the patent must be renewed each year until the expiration of the said period of 15 years.\textsuperscript{13}

\textbf{Industrial Designs}

A design is protected if it is new and not scandalous or not contrary to morality or public order or is not likely to offend religious or racial susceptibilities.\textsuperscript{14} Any composition of lines or colours of any three-dimensional form, whether or not associated with lines or colours, that gives a special appearance to a product of industry or handicraft is deemed to be an industrial design.\textsuperscript{15} A new industrial design means an industrial design which had not been made available to the public anywhere and at any time whatsoever through description, use or any other manner before the date of an application for registration of such industrial design or before the priority date validly claimed in respect thereof.\textsuperscript{16} The right to obtain the registration of an industrial design belongs to its creator or his successor in title.\textsuperscript{17} A design created by an employee or pursuant to a commission belongs, unless otherwise agreed by the parties, to the employer or to the person who commissioned the work as the case may be.\textsuperscript{18} The registration of a design is valid for a period of five years and renewable for two more consecutive periods of five years.\textsuperscript{19}

\textbf{Marks}

A mark implies a trademark or service mark.\textsuperscript{20} A trademark means any visible sign serving to distinguish the goods of one enterprise from those of other enterprises whereas a service mark means any visible sign serving to distinguish the services of one enterprise from those of other enterprises.\textsuperscript{21} The exclusive right to a mark under the Code is acquired by registration.\textsuperscript{22} The registration of a mark may be granted only to the person who has first

\begin{itemize}
\item Section 66.
\item Section 80.
\item Section 80.
\item Section 26.
\item Section 27.
\item Section 28.
\item Section 29.
\item Section 31.
\item Section 42.
\item Section 97.
\item Section 97.
\item Section 97.
\item Section 98(1).
\end{itemize}
fulfilled the conditions of a valid application or who can validly claim the earliest priority for his application.\footnote{Section 98(2).} A mark may consist, in particular, of arbitrary of fanciful designations, names, pseudonyms, geographical names, slogans, devices, reliefs, letters, numbers, labels, envelopes, emblems, prints, stamps, seals, vignettes, selvages, borders and edging, combinations or arrangements of colours and shapes of goods or containers.\footnote{Section 98(3).} The grounds for refusing to register on objective grounds and third party rights are set out in sections 99 and 100 of the Code. Those grounds are common to many jurisdictions. Descriptiveness, non-distinctiveness, intrinsic and extrinsic deceptiveness, violation of the provisions relating to unfair competition, indication of source or appellation of origin and contravention of morality or public order are some of these grounds.

The admissibility of a mark and registrability of a mark, although inter-related, are two different concepts. The admissibility of a mark is determined by the provisions of sections 99 and 100. The concept of registration embraces both admissibility and formal requirements of a valid application.

The registration of a mark expires after a period of ten years from the date of registration.\footnote{Section 114(1).} The date of registration is considered to be the date of application.\footnote{Section 114(2).} The registration may be renewed for consecutive periods of ten years.\footnote{Section 115.}

**Unregistered marks**

It is interesting to note that the Code does not totally deny protection to unregistered marks. It has attempted to protect the interests of the owners of unregistered marks to some extent.\footnote{Sections 100(1) (b), (c), (d) & (e) and 142. See *Sumeet Research & Holding Ltd., v. Elite Radio & Engineering Co. Ltd.*, (1997) 2 SLR 393.} The use of a mark, even though not registered in Sri Lanka, may play an important role in safeguarding the interest of the owner of such mark. Section 142 protects the unregistered marks within the framework of unfair competition. In *Sumeet Research & Holding Ltd., v. Elite Radio & Engineering Co. Ltd.*,\footnote{Ibid.} it was held that a victim of an act of unfair competition (who may be the owner of an unregistered mark) can invoke the jurisdiction of the court against the registered owner of a mark and the registration of a mark does not give the owner a license to engage in acts of unfair competition. Moreover, it is arguable that the remedies for infringement as recognised by the Code and the common law action for passing off which can safeguard the rights of the owners of the unregistered marks co-exist in the
The Intellectual Property Regime

law of Sri Lanka. Some judicial decisions, although made under the repealed Trademarks Statutes, are supportive of this proposition.\textsuperscript{30}

The concept of passing off which is an economic tort, attempts to protect the legitimate business interests of enterprises in the competitive world of business. It has been judicially expressed that nobody has any right to represent his goods as the goods of somebody else.\textsuperscript{31} Lord Diplock has once identified the elements of a passing off action as follows:

\begin{quote}
\textit{(1) a misrepresentation (2) made by a trader in the course of trade, (3) to prospective customers of his or ultimate consumers of goods or services supplied by him, (4) which is calculated to injure the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequence) and (5) which causes actual damage to a business or goodwill of the trader by whom the action is brought or (in a quia timet action) will probably do so.} \textsuperscript{32}
\end{quote}

The defendant can be held liable even though his conduct was honest or innocent.\textsuperscript{33} It should be noted that the passing off action is well established in the domestic legal system.\textsuperscript{34}

\section*{Trade names}

A trade name, which means the name or designation identifying the enterprise of a natural or legal person, is protected in Sri Lanka whether or not it is registered. A name is admissible as a trade name unless it is contrary to morality or public order or is likely to offend the religious or racial susceptibilities or is likely to mislead the public or the trade circles as to the nature of the enterprise identified by the trade names. Any subsequent use of a trade name by a third party which is likely to mislead the public is unlawful.\textsuperscript{35}

\section*{Collective marks and associated marks}

The Code recognises both collective marks and associated marks. As far as the legal protection is concerned they are equal to the individual marks.\textsuperscript{36} A “collective mark” means any visible sign designated as such and serving to distinguish the origin or any other common characteristic of goods or services of different enterprises, which use the mark under the control of the registered owner. Where an application is made for the registration of a mark

\begin{footnotes}
\item[31] \textit{Reddaway v. Banham} (1896) AC 199 - 204.
\item[33] \textit{Baume v. Moore} (1958) RPC 226.
\item[34] \textit{Kapadia v. Mohamed} (1918) 22 NLR 314.
\item[35] Section 139.
\item[36] Section 112 and Chapter XXVIII.
\end{footnotes}
Aspects of fifty years of Law, Justice & Governance in Sri Lanka

identical with or so closely resembling a mark of an applicant already on the register for the same goods or description of goods as to be likely to mislead or cause confusion if used by a person other than the applicant, such a mark may be registered as an associated mark.

Protection against unfair competition

The concept of unfair competition is a new addition to the legal system of Sri Lanka. The Code offers legal protection against any act of competition contrary to honest practices in industrial or commercial matters. It sets out a list of acts of unfair competition, which is not exhaustive, including all acts of such a nature as to create confusion by any means whatsoever with the establishment, the goods, services or the industrial or commercial activities of a competitor. As Fernando J. observed in the *Sumeet Research and Holding Ltd.* case it is sufficient if what was done was in fact unfair in relation to the real competitor, whoever he was. Industrial property rights and the protection against unfair competition are not totally unrelated. The link between the two may be seen in certain cases. For example, the interests of the owner of an unregistered mark or of a trade name may be protected under the law of unfair competition.

The law of unfair competition

“... originated in the conscience, justice and equity of common law judges... It is a persuasive example of the law’s capacity for growth in response to the ethical, as well as the economic needs of society. As a result of this background, the legal concept of unfair competition has evolved as a broad and flexible doctrine with a capacity for further growth to meet changing conditions... There is no complete list of the activities, which constitute unfair competition. The general principle, however, evolved from all of the cases is that commercial unfairness will be restrained when it appears that there has been an appropriation, for the commercial advantage of one person, of a benefit of property right belonging to another...”

Prior to the implementation of the Code the concept of passing off was in operation in our legal system as part of the common law. The question whether the remedy of passing off is, despite the provisions relating to unfair competition, still operative in our legal system has not so far been examined by court. It is arguable that the concept of unfair competition encompasses the law relating to passing off. However, passing off is a common law principle.

37 See section 100(1)(e), section 142 and *Sumeet v. Elite Radio*, Supra n. 28.


39 See Section 100(1)(e) and *Sumeet v. Elite Radio*, Supra n. 28.

The Intellectual Property Regime

whereas the concept of unfair competition is a statutory creation. As mentioned above, our courts have held that the remedy of passing off remains intact in spite of statutory remedies. The Code has not expressly excluded the common law rights relating to marks.

In term of section 142(3) of the Code, any person or association of producers, manufacturers or traders aggrieved by any act of unfair competition may institute proceedings in Court to prohibit the continuance of such act. This section further states that the provisions of Chapter XXXII of the Code relating to infringements are applicable, mutatis mutandis, to such proceedings. Chapter XXXII deals with, among other things, application to, and proceedings before, the Director and the Court. In view of the provisions of section 142(3) it appears that a victim of an act of unfair competition can seek the judicial intervention for an order prohibiting the continuance of such act. It is debatable whether or not the victim can claim damages. Section 142(3) does not refer to damages whereas section 179 contained in Chapter XXXII does not refer to the acts of unfair competition. Section142(3) provides:

“Any person or association of producers, manufacturers or traders aggrieved by any of the acts referred to in subsection (2) may institute proceedings in court to prohibit the continuance of such act, and the provisions of Chapter XXXII relating to infringements shall apply, mutatis mutandis, to such proceedings.”

The said section 179 which provides for infringement proceedings states:

“... where the registered owner of an industrial design, patent or mark proves that any person is threatening to infringe or has infringed the said industrial design, patent or mark, as the case may be, or is performing acts which make it likely that infringement occur, the court may grant an injunction restraining any such person from committing or continuing such infringement or performing such acts and may award damages and such other relief as to the court appears just and appropriate.”

Copyright

The rights of the authors of original literary, artistic and scientific works are protected in Sri Lanka. The Sri Lankan Courts have followed the English legal principles in the interpretation of the domestic law. For example, in Wijesinghe Mahanamahewa and others v. Austin Canter the Court of Appeal following the decision in University of London Press Ltd. v. University Tutorial Press Ltd. (1916) 2 Ch. D 601, held that the originality relates to the statement of thought and that the statement need not be original nor in a novel form. The only requirement

41 Part II of the Code.
42 Supra n. 2.
is that the work must not be copied from another work and it must originate from the author. What is protected under copyright is not the idea but the manner in which the idea is expressed. The law does not confer protection to a hoarder of facts as well. The Code enumerates a list of works protected as literary, artistic and scientific works including writings, audio-visual works, musical works, works of drawing and painting, photographic works and works of applied arts. A recent amendment introduced to the Code has included computer programs as literary work in the list of protected works. The list is not exhaustive. Derivative works such as translations, adaptation or other transformation of protected works, collections of works which constitute intellectual creations and works derived from Sri Lanka folklore are also protected as original works.

A work is protected automatically by operation of law. Registration or any such other formal requirement does not exist in Sri Lanka. Copyright protection in Sri Lanka extends to a wider area covering:

(a) works of authors who are nationals of, or have their habitual residence in Sri Lanka;

(b) the works first published in Sri Lanka;

(c) all works, by virtue of a treaty entered into by Sri Lanka are to be protected as well as Sri Lanka’s folklore.

The law also recognises certain statutory limitations to copyright including “fair use” which covers the areas such as the use of copyright works for educational and research purposes and non commercial private use. Section 23 of the Code provides that no copyright, or right in the nature of copyright shall subsist otherwise than by virtue of part II of the Code or of any other enactment made replacing the Code whereas section 24 declares that the provisions of the part II of the Code do not affect any rights acquired under the common law or any other law before the Code was enacted.

Related Rights

The concept of related rights embraces the rights of performers, producers of sound recordings and broadcasting organisations. The Code makes provisions only in respect of the rights of the producers of sound recordings. Section 20 of the Code states that the lawful maker of

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44 *Vasantha Obeysekera v. A.C. Alles*, CA No. 730/92 (F), CA Minutes on 22.03.2000.


46 Article 14 of the TRIPs Agreement.
any sound recording has the exclusive right to reproduce or authorise the reproduction of
the sound recording for a period of 50 years from the first publication of the sound recording.

**RIGHTS OF OWNERS**

The owner of a patent has, subject to certain statutory restrictions, the exclusive right to
exploit the invention, to assign and transmit the patent and to conclude licence contracts.
Any of the acts referred to above cannot be performed without the consent of the owner of
the patent.47

The registered owner of an industrial design has the exclusive right

(a) to reproduce and embody such industrial design in making a product,
(b) to import, offer for sale, sell or use a product embodying such industrial design,
(c) to stock a product embodying such industrial design,
(d) to assign and transmit the registration and
(e) to conclude licence contracts.48

The registered owner of a mark has, subject to relevant statutory provisions, the exclusive
right to use the mark, assign or transmit the registration of the mark and conclude licence
contract.49 Third parties are precluded from any use of a mark or a sign resembling it in such
a way as to be likely to mislead the public. The Code of Intellectual Property (Amendment)
Act No. 40 of 2000 has expanded the scope of the rights of the owners of trademarks. In
view of the decision of the Supreme Court in *Stassen Exports Limited v. M.S. Hebtulabhoy
Co. Ltd.*50 the enterprises could apply the trademarks of others to their own goods meant for
export. Section 4 of the said amendment has introduced a new subsection to section 117
which provides:

“The application (whether by way of printing, painting or otherwise) or the
affixing in Sri Lanka by a third party, of a mark or any sign resembling such
mark in such a way as to be likely to mislead the public, on or in connection

47 Section 81.
48 Section 44.
49 Section 117.
50 SC Appeal 20/89 (F), unreported.
with, goods in respect of which such mark has been registered (whether such goods are intended for sale in Sri Lanka or for export from Sri Lanka) shall be deemed to be an act prohibited under subsection (2).”

The Code also protects both economic rights and moral rights of the authors of literary, artistic and scientific works. The economic rights include the right to reproduce the work, to make a translation, adaptation or any form of transformation of the work and to communicate the work to the public whereas the moral rights encompass the right to authorship and the right against distortion. The economic and moral rights are generally protected during the life of the author and for 50 years after his death.

Licence Contracts
The registered owner of a patent or design can enter into a contract, which is called a “licence contract” by which he grants to another person or enterprise a licence to exercise his rights to the patent or the design. The owner of a mark can grant by way of a licence contract, the right to use the mark for all or part of the goods or services in respect of which the mark is registered. The law provides, inter alia, the form and record of licence contracts, rights of license, nullity of a licence contract, cancellation of a licence contract, licence contracts involving payments abroad and expiry, termination and invalidation of a licence contract. The owner of copyright has the right to grant licences to exercise his economic rights to the work.

Renunciation and Nullity
The registered owner of a patent, mark or design may renounce or surrender the registration by declaration in writing signed by him or on his behalf and submitted to the Director who will, on receipt of the declaration, record it in the Register and publish the same in the Gazette. The Court has the power and jurisdiction to declare the registration of a patent, design or mark null and void on any of the grounds as declared by law.

Assignment and Transmission
The application for registration or the registration of a patent, mark or design may be assigned or transmitted. Any person becoming entitled by assignment or transmission of such application or registration may apply to the Director in the prescribed manner to have such

51 Sections 10 & 11.
52 Chapters IX, XVII & XXV.
53 Section 10.
54 Chapters X, XVI & XVIII.
55 Chapters VIII, XVI & XXIV.
assignment or transmission recorded in the Register concerned. It will not be so recorded unless, in the case of an assignment, it is written and signed by or on behalf of the contracting parties. Such assignment or transmission has no effect against third parties unless it is recorded in the Register. The owner of a copyright can transfer his economic rights and not moral rights.\textsuperscript{56}

\textbf{Review of the decisions of the Director}

The decisions of the Director are subject to review by the High Court of the Western Province and then the Supreme Court.\textsuperscript{57} It is common in any intellectual property system to provide for procedure relating to internal appeals. If no satisfactory solution can be achieved through the intellectual property office, the parties are entitled to seek the intervention of Court. In Sri Lanka, any person aggrieved by any decision or order made by the Director under the provisions of the Code may appeal therefore to the Court. In any such appeal the Court has the same discretionary powers as are conferred upon the Director under the Code.

\textbf{Some other areas of judicial intervention}

As mentioned above, the Court has power, on an application made by an appropriate party, to declare the registration of a patent, design or mark null and void. The intervention of the Court may also be sought in respect of the cancellation of licence contracts. Only the Court is empowered to remove any registered mark from the Register on non-user and transformation of a mark into a generic name. The Magistrate’s Court has the jurisdiction to issue search warrants in the cases of infringements. Moreover, the Court is vested with the power to order the rectification of the Registers.

\textbf{Priority}

An applicant for the registration of a mark, industrial design or patent can claim, for his application, priority of an application earlier made by him or his predecessor in title in a convention country under the “Paris Convention for the Protection of Industrial Property.”\textsuperscript{58} The priority must be claimed within a period of one year for patents and six months for trademarks and industrial designs from the date of such earlier application. Under the conventional arrangements for priority, for example, a Sri Lankan applicant who has made a patent application in Sri Lanka can make a patent application for the same invention in another member State of the ‘Paris Convention’ within a period of one year from the date of domestic application claiming the date of domestic application as his date of application in such member State of the ‘Paris Convention.’

\textsuperscript{56} Sections 11(4) & 18.

\textsuperscript{57} See High Court of the Provinces (Special Provisions) Act No. 10 of 1996.

\textsuperscript{58} See sections 34, 73 and 103.
INFRINGEMENT AND ENFORCEMENT

The Code recognises a series of statutory offences involving the infringement of intellectual property rights. These offences are declared to be cognisable and bailable within the meaning of the Code of Criminal Procedure Act No. 19 of 1979. Infringement of copyright, industrial designs, patents and marks, false representation regarding industrial designs, patents and marks, and unlawful disclosure of information relating to patents are some of such offences. A person who is found guilty of an offence may be punished with a fine or imprisonment or both.

Such infringement may also result in civil litigation whereby the respondent may be restrained by an injunction and ordered to pay damages to the affected party. The Code provides for remedies in civil action falling into 3 categories - infringement proceedings by the registered owner of a mark, patent or design or the owner of the copyright, infringement proceedings by or at the request of the licensee and declaration of non-infringement. Importation of goods in violation of the rights protected under the Code is prohibited and governed by the provisions of the Customs Ordinance.

The Code also makes provisions with regard to evidentiary and procedural matters, description of a mark in pleading, rules on giving of evidence, issue of search warrant and disposal of goods seized, costs of actions and period of limitation.

Some attempts have been made recently to streamline the civil litigation system in relation to intellectual property by establishing a special court for intellectual property and simplifying the appellate process. Under the provisions of section 186 of the Code, only the District Court of Colombo had in the first instance civil jurisdiction over intellectual property. In terms of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996, the High Court of the Western Province now exercises the first instance jurisdiction over intellectual property. The appellate process is simplified by permitting to challenge the orders or decisions of the High Court of the Western Province only in the Supreme Court. However, it should

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59 See part VI.

60 Section 179.

61 See John Goswell and Company Ltd. v. Sivaprakasam (1910) 15 NLR 33, especially for expert evidence; Sahib v. Muthalip (1932) 34 NLR 231, especially for the nature of evidence in a matter of confusion; Lever Brothers v. Pilliah (1937) 39 NLR 332, especially for infringement, and passing off; Subbiah Nadar v. Sokkalal Ram Sait (1946) 47 NLR 241, for infringement; Wijesinghe Mahanamaheva and another v. Austin Canter, supra n. 2, especially for infringement of copyright; Stassen Exports Ltd. v. M.S. Hebtulabhoy and Company Ltd. (SC Appeal No. 20/89F) and M.S. Hebtulabhoy & Co. Ltd. v. Stassen Exports Ltd. (1989)1 SLR 189.

62 Section 166.

63 Chapter XXXII.
be noted that the provisions of this Act are not free from criticism for lack of clarity. The High Court of the Western Province has held that it does not have jurisdiction, in terms of the provisions of this Act and the gazette notification No. 943/12 dated 1-10-1996, in respect of any matter of Intellectual Property, if the party or parties to the action do not reside within the jurisdiction of the Court or if the cause of action has not arisen or the contract sought to be enforced was not made within the jurisdiction of the court.  

INTERNATIONAL OBLIGATIONS

Sri Lanka has become a member of several international instruments on Intellectual Property. They are:

- The Paris Convention for the protection of industrial property (since 1952),
- The Madrid Agreement for the repression of False or Deceptive Indication of Source on Goods (since 1952),
- The Nairobi Treaty for the Protection of Olympic Symbol (since 1984),
- The Patent Cooperation Treaty (since 1982),
- The Berne Convention for the Protection of Literary and Artistic Works (since 1959),
- the Universal Copyright Convention (since 1983),
- The Convention establishing the WIPO (since 1979),
- the Agreement on TRIPS under WTO System (since 1995) and the Trademark Law Treaty (since 1996).

Being a member of these conventions Sri Lanka has attempted to discharge its international obligations on Intellectual Property and promote cooperation on Intellectual Property with the international community. It is the latest tendency of the international community to simplify and harmonise the Intellectual Property law throughout the globe in order to develop a more user-friendly Intellectual Property environment. Sri Lanka is actively participating in this process and has moved in this direction by becoming a member of the Trademark Law Treaty which is designed to simplify and harmonise the procedural law of trademarks and service marks.

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TOWARDS THE FUTURE

A few years ago, Sri Lanka had one of the most modern intellectual property laws in the developing world. However, this era has passed and the existing law is lagging behind the laws of many developing countries and emerging economies of the world. It is, therefore, necessary to overhaul and streamline the law to meet the challenges posed by the modern technological environment and current knowledge-based activity. The possible new trends in the intellectual property regime in Sri Lanka take different forms. They may be roughly categorised as follows for convenience.

Corrective Measures

Several provisions of the Code need reconsideration and corrective measures. A few examples may be mentioned. The law of copyright needs to be totally restructured as the existing provisions are outdated and inadequate in the present context. An industrial design is registered without substantive examination. This has facilitated fraudulent activities causing unwarranted problems for genuine creators and owners of industrial designs. It is, thus, necessary to improve the law relating to industrial designs. The provisions relating to the trademarks have some long-standing weaknesses as well. For instance, the period within which an appeal may be made from a decision of the Director to the Court and the procedure applicable to such appeals are not provided for. The existing procedural rules have some serious negative impacts on the trading and economic activities of the country. The dilution of trademark rights demands careful attention. The enforcement process including the proof of actual damages and detection of actual violators of the rights are not free from difficulties.

New norms

The introduction of new norms to the Intellectual Property Law would be introduced mainly under three circumstances - namely,

(i) The requirements under the TRIPS Agreement

(ii) Other international and bilateral obligations, and

(iii) Improving the existing law in the light of the domestic needs.

The TRIPS requirements

Both industrialised and developing countries have entered the 21st century with somewhat uniform law of intellectual property as provided under the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) under the Uruguay Rounds of Trade Negotiations. Being a party to the TRIPS agreement, Sri Lanka is required to change the
domestic law to be in line with its international obligations by 1st January 2000. The TRIPS Agreement has 3 major features:

1. Establishment of minimum substantial standards of protection for each of the categories of intellectual property rights such as patents, trademarks, industrial designs, layout designs of integrated circuits, geographical indications, new varieties of plants, trade secrets and copyright including computer programs, compilation of data and other materials and the rights of the performers, producers of phonograms and broadcasting organisations.

2. The enforcement of such rights including applicable procedure and remedies available.

3. Making applicable the integrated dispute settlement mechanism that will emerge from the Uruguay Round.

Moreover, the TRIPS Agreement sets out general provisions and certain elementary principles such as national treatment and most favoured nation’s treatment for the acquisition and maintenance of intellectual property rights. The term “national treatment” generally means that each member must accord to the nationals of other members treatment no less than that it accords to its own nationals with regard to the protection of intellectual property. “Most favoured nation treatment” means that with regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a member to the nationals of any other country must be accorded immediately and unconditionally to the nationals of all other members. It also provides for transitional arrangements and institutional arrangements. In respect of the minimum standards of protection of intellectual property rights, the agreement has been developed on the major international conventions administered by the World Intellectual Property Organisation such as the Paris Convention, the Berne Convention, the Rome Convention and the Treaty of Intellectual Property in respect of Integrated Circuits. The legal norms governing the following areas have to be newly introduced into the Sri Lanka law under the TRIPS Agreement.65

Copyright and Related Rights

The law relating to copyright protects the interests of the creators of original literary and artistic works by giving them property rights over their creations; the law of related rights or neighbouring rights protects the legal rights of persons, natural or legal, who either contribute to making such creative works available to the public or produce works which show creativity or technical and organisational skill sufficient to justify recognition of a kind of property right. The term “related rights” embraces three kinds of rights - rights of the performing

artists, rights of the producers of sound recording, and the rights of broadcasting organisations. As mentioned above, the existing Sri Lankan law on copyright is not comprehensive enough and needs reform covering, *inter alia*, the recently emerged areas in the light of information technology. New provisions have to be made in respect of related rights. However, it should be noted that section 20 of the Code makes provisions for the protection of the makers of sound recording.

**Undisclosed Information**

The protection of undisclosed information - technical information related to manufacture of goods or provision of services or business information which includes the internal information which an enterprise has developed so as to be used within the enterprise - is receiving world-wide recognition. Undisclosed information is protected if it:

(i) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;

(ii) has commercial value because it is secret; and

(iii) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.66

**Layout Designs of Integrated Circuits**

The TRIPS Agreement requires Sri Lanka to introduce a law for the protection of layout designs of integrated circuits. An integrated circuit means a product, in its final or intermediate form, in which the elements, at least one of which is an active element, and some or all of the interconnections are integrally formed in and/or on a piece of material and which is intended to perform an electronic function.

A layout design is synonymous with “topography” and means the three-dimensional disposition, however expressed, of the elements, at least one of which is an active element, and of some or all of the interconnections of an integrated circuit, or such a three dimensional disposition prepared for an integrated circuit intended for manufacture.67

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66 The TRIPS Agreement - Section 7.
Geographical Indications

A geographical indication, like Ceylon Tea, is generally defined as an indication which identifies a good as originating in a territory, region or locality where a given quality or other characteristics of the good is essentially attributed to its origin. Such geographical indications must be protected to prevent the use of such indication which would mislead the public as to the geographical origin of the goods. The existing Sri Lankan law does not protect such indications and, therefore, the introduction of new provisions is required.\(^{68}\)

Protection of New Plant Varieties (Breeder’s Rights)

In terms of the provisions of the TRIPS Agreement, Sri Lanka is bound to protect new varieties of plants (breeder’s rights) either by patents or by an effective *sui generis* system or by any combination thereof.\(^{69}\) The existing patent law of Sri Lanka prohibits the patenting of plants. The International Convention for the Protection of New Varieties of Plants (the UPOV Convention) is an international instrument which establishes minimum standards for the protection of plant breeder’s rights. The protection is accorded to plant varieties that are distinct, novel, uniform and stable. The standards of protection under the UPOV principles are lenient than those of under the patent system. The protection of plant breeder’s rights will also be a useful mechanism for the countries that are not willing to grant patents for plants and other living organisms. Sri Lanka is at liberty to choose the form of its law for the protection of plant varieties—patent, *sui juris* system or combination thereof. It is not obligatory for Sri Lanka to follow the norms of the UPOV Convention in case Sri Lanka decides to have a *sui juris* system of protection. The TRIPS Agreement dose not require any member to comply with the UPOV Convention.

Rental Rights

The concept of rental rights is another new area which needs attention. Under the TRIPS requirements, Sri Lanka is bound to introduce legal provisions giving the authors and their successors in title the right to authorise or prohibit the commercial rental to the public of original or copies of their copyright works at least in respect of computer programs and cinematographic works.\(^{70}\)

\(^{68}\) The TRIPS Agreement - Section 3.

\(^{69}\) Article 27.

\(^{70}\) Article 11.
Other Areas

There are other areas of the existing law which require changes under the TRIPS Agreement. For example, the valid period of a patent which is at present 15 years from the date of grant must be made a minimum of 20 years from the date of application for the patent.

Other International and Bilateral Obligations

Being a member of the Trademark Law Treaty, Sri Lanka is under obligation to harmonise its procedural law relating to trademarks with the provisions of the Trademark Law Treaty. Even though the present Trademark Law as set out in the Code and the regulations made there under, is in line with the provisions of the Trademark Law Treaty to a greater extent, the introduction of new norms such as a multi-class application system and harmonised international forms is necessary. The Regulations made under the Code provide for the classification of goods and services for the purposes of registration of marks. This classification is based on the Nice classification of goods and services for the purposes of registration of marks. The present law recognises only the single class application system.

The US - Sri Lanka bilateral agreement on the protection of Intellectual Property Rights also requires the introduction of certain new norms such as certification marks. A certification mark is a mark indicating that the goods or services in connection with which it is used are certified by the proprietor of the mark in respect of origin, material, mode of manufacture of goods or performance of services, quality, accuracy or other characteristics.

IMPROVING THE EXISTING LAW IN THE LIGHT OF THE DOMESTIC NEEDS

In view of certain current developments in the domestic environment involving intellectual property, the improvement of existing norms and practices has become essential. A few such areas may be briefly referred to as follows.

Collective Administration of Copyright

Under the existing law and due to various other circumstances, the holders of copyright find it extremely hard to enforce their rights due to various reasons including the cost of litigation. Furthermore, the domestic legal system lacks an expeditious mechanism to protect and

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71 Section 80(1) of the Code.
72 Section 80(1) of the Code.
73 Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks.
74 Regulation No. 20.
75 Ratified on 20th September 1991.
enforce their rights. The collective administration of copyright would be a fairly satisfactory answer to this issue. The collective administrative system enables the owners of copyright or performing rights to form collective societies to administer their rights as organised groups and not as individuals. The present law contains some vague provisions relating to collective administration of copyright but they have failed to produce desired results.\textsuperscript{76} A system of collective administration which would benefit both the holders of rights and the users of such rights should, therefore, be developed.

**Agents**

The profession of intellectual property agents does not exist in the law of Sri Lanka, even though it is a well-recognised profession in many countries - both industrialised and developing. They generally attend to matters relating to Intellectual property, mainly trademarks and patents and represent them before the Intellectual Property Office and other relevant agencies. The lawyers and secretarial firms mainly act as intellectual property agents in Sri Lanka. However, there are some agents in Sri Lanka handling intellectual property matters even without the basic knowledge of intellectual property law and practice. This situation is prejudicial to the rights of their clients and undermines justice. Thus, it is time for Sri Lanka to pay due attention to this issue and rationalise the profession of intellectual property agents.

**Enforcement**

Enforcement of Intellectual Property Law is another area which needs immediate attention. The recent attempts to introduce a somewhat expeditious enforcement mechanism as provided in the High Court of the Provinces (Special Provisions) Act have failed to achieve the desired objectives mainly for the reason that the Act at present has no island-wide application due to non publication of the required gazette notifications. The delay and cost of litigation is counter-productive to the process of economic development. Thus, the existing enforcement mechanisms, both civil and criminal, should be re-organised to achieve efficiency and cost-effectiveness. New provisions are required to promote countermeasures by customs officials against exportation and importation of goods in violation of intellectual property rights.

**NEW AND EMERGING ISSUES**

The development of Intellectual Property Law is closely associated with the development of human creativity in general, and the development of technology in particular. As a result, emergence of new issues in the law is a constant process and a common occurrence. Some of the newly emerged or emerging issues which demand due attention may be briefly referred to as follows.

\textsuperscript{76} Section 2 of the Code.
Information and Communication Technologies

New developments in information and communication technologies have given birth to several new issues in intellectual property law particularly in the fields of copyright and related rights. Those developments such as interactive digital networks and digital delivery, databases and computer generated works have posed many challenges to the law and administration of Intellectual Property. Intellectual Property Rights are also of central importance in maintaining a stable and effective environment for the development of electronic commerce including the issues relating to domain names, protection of well known marks and dispute resolution. The advent of new uses of works such as computer storage and retrieval, cable transmission, satellite transmission, reprography, home taping and rental have also resulted in the development of new norms. The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (both of 1996) have attempted to address some of these issues and to update the international protection of copyright and related rights in response to the challenges posed by digital technology, in particular by global networks such as the Internet. They contain, inter alia, the provisions which aim at preventing unauthorised access to and use of works such as books, music, songs and films on the internet or other digital networks. Sri Lanka is not a party to these two treaties but the embodied principles cannot be easily ignored. At the same time, many other issues such as protection of audio-visual performances, protection of the rights of broadcasting organisations and protection of data are emerging. It has become critically important today to study new issues and monitor the impact of digital technology, particularly of global networks such as the Internet on the areas such as law of copyright and related rights and e-commerce. In the modern environment of information and communication technologies, the methods of protection and management of rights have become dramatically complicated demanding new solutions.

Biotechnology and bio-diversity

Biotechnology concerns living organisms like plants and animals and non-living material like seeds and enzymes. Biotechnology and bio-technological inventions will have a significant impact on human life and society in the years to come because they relate mainly to the fields of medicine, food, energy and environment. The patentability of the inventions in the field of biotechnology is a controversial issue.

The protection of bio-diversity and genetic resources have become another popular subject today. The control of so-called bio piracy as well as the use of intellectual property in the protection of genetic resources are some of the issues that have received worldwide attention.
Traditional Knowledge

Traditional knowledge may encompass the knowledge held, developed and passed on from generation to generation by a particular nation, community, or sometimes a family. It covers a broader range of subjects, activities and practices such as art, literature, music, craft and designs, environment, plants, animals, medicine and methods of treatment including rituals and useful properties of fauna and flora relating, *inter alia*, to medicine, food and food processing. In view of the involved subjects the traditional knowledge has a great scientific and commercial value and is, therefore, vulnerable to undue exploitation by outside forces mainly those who have financial resources and the technological know-how. There were certain reported instances of attempted exportation of traditional knowledge related material from Sri Lanka.

The protection of traditional knowledge does not strictly fall within the ambit of the existing intellectual property regime. There are certain fundamental issues involving these two areas which need careful examination and well considered resolution. A few examples of such issues may be briefly referred to. Traditional knowledge does not have a known or specific creator or owner and belongs to a nation or community in common. Therefore, the existing intellectual property system based on the Western concept of private ownership has no application to traditional knowledge. The issue as to whether the particular nation or community is the owner of traditional knowledge within the meaning of the present legal definition of “ownership” is also important and may result in some other related legal issues. It is arguable that they are not actually the owners but merely the holders or possessors of such knowledge. The nature and the scope of the legally enforceable rights that the owners are entitled to and the enforcement of such rights would be other crucial aspects. The term “traditional knowledge” may not find a proper and viable legal definition. It will perhaps be more appropriate to describe what traditional knowledge is rather than trying to define it. Certain areas of traditional knowledge like “Ayurveda” may be found in more than one country. In such a situation, the national laws for the protection of traditional knowledge would fail in their objectives.

The laws relating to various objects of intellectual property recognised under the existing law are not intended or devised to protect traditional knowledge. Traditional knowledge cannot be patented as it is already known and in the prior art. The law of industrial designs will not protect the designs in traditional art and crafts because they are not new as required under the law. The copyright law will not be applicable to the literary and artistic works in the traditional knowledge because they have been in existence for many years beyond the period of time during which the rights of the copyright owners are protected whereas the authors of such works are not known. So are the principles of law of undisclosed information. Traditional knowledge does not fit into the legal framework of undisclosed information which is purely based on private ownership and commercial interests. Certain holders of traditional knowledge, for example, in Sri Lanka, do not use their knowledge for commercial purposes at all.
Consequently, it has become important to examine carefully how the existing Intellectual Property regime can protect the rights of the holders of traditional knowledge and whether new legal norms should be developed. It should be mentioned that national laws for the protection of traditional knowledge would not generate desired results unless the international community is willing to respect traditional knowledge and internationally respected norms and standards are established.77

Protection of Folklore
Protection of folklore and management of rights relating to folklore have drawn the attention of many countries both developed and developing. The development of effective and workable standards for the protection of folklore and the mechanisms for identification, management and enforcement of folklore rights are a subject of much importance. There can be links between the protection of folklore and of traditional knowledge and innovations and creations based on traditional knowledge. All these issues need careful and constructive examination. Section 12 of the Code makes provisions for the protection of works of Sri Lankan folklore but they are not very effective mainly due to lack of clarity.

Intellectual Property and Human Rights
Intellectual property rights have become relevant in an unprecedented manner in the policy making process in various sectors such as trade, culture, investment, science and technology, environment and health. Intellectual Property can be a useful instrument in the development process of any given country but its role in the development process is not free from criticism and challenges. Against this backdrop, the issue relating to intellectual property and human rights is steadily emerging.

The human rights character of intellectual property is referred to in several international and regional instruments such as the “Universal Declaration of Human Rights”, “the International Covenant on Economic, Social and Cultural Rights” and the “International Covenant on Civil and Political Rights.” For example, Article 27 of the Universal Declaration of Human Rights declares:

“Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”

The linkage as well as the possible conflicts between human rights and intellectual property rights are relevant in the areas such as right to culture, right to health, right to equal opportunities and rights relating to traditional knowledge and genetic resources. It may be crucially important to achieve a balance between the intellectual property rights and the rights to development and to benefit sharing in the scientific progress and its application. A constructive debate on these aspects is timely.78

CONCLUDING REMARKS

Despite its comparatively long history, the national intellectual property regime in Sri Lanka has not received due attention of courts, educational institutes, legal profession and users of the intellectual property system such as industries, researchers and entrepreneurs. Consequently, the development of a productive Intellectual Property regime has been extremely slow. The inactive economic environment and the lack of creative activity may have largely contributed to this situation. However, we are now experiencing some encouraging indications relating to the Intellectual Property regime in Sri Lanka both in law and administration.

Intellectual Property is today a part of life. It cannot be seen in isolation from its relationship to creativity, knowledge, information and economic growth. One of the major differences between developed and developing nations is the difference between success and failure in the creation and use of knowledge. Sri Lanka cannot run the risk of isolation, marginalisation and being left behind from the rest of the world in the knowledge-based environment where the Intellectual Property regime is an indispensable constituent part. Against this backdrop, the intellectual property regime in Sri Lanka demands constructive and visionary attention of those concerned. The use of Intellectual Property as a means of wealth creation and the promotion of creative activity and creation and use of knowledge must receive priority. Similarly, legal reforms, awareness building and legal education on Intellectual Property as well as efficient and cost effective management and enforcement mechanisms are extremely important.
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CRIMINAL LAW IN SRI LANKA

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INTRODUCTION

The State has a vested interest in criminal law for it is through the criminal law that the State maintains law and order, ensures compliance with its rules and prosecutes and punishes those who defy it. State sanctions and the range of punishments the State can impose, seek to ensure compliance with the law. This article will examine the criminal law as it developed through the years, the amendments to the Penal Code, the judicial interpretations of some sections, the problems in penal theory and suggest a way forward in sentencing.

The criminal law of Sri Lanka is primarily embodied in the Penal Code No. 2 of 1883. The criminal law that existed immediately before the Code we can conclude was the English common law for the existing Roman Dutch law was difficult for the English judges to ascertain and consequently it was ignored.

In 1883 in Regina v. John Mendis1 Bertram CJ delivering the principal judgment of court observed that what particular criminal law prevailed in the colony at the time of cession to the British is a matter of uncertainty. Previous to the conquest by the Dutch, the Portuguese had been in possession of a portion of the Maritime Provinces for many years, and it is scarcely possible to conceive that they should not have left some impress upon the criminal law.2 The Chief Justice also observed that he had not been able to discover any authority that at the time of the capitulation, the Roman-Dutch Law in its integrity and as administered in Holland, was exclusively the criminal law of the Maritime Provinces.3 Clarence J in his

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2 Ibid., p.188.
3 Ibid.
judgment observed⁴ that the Portuguese possessed settlements for between one hundred and two hundred years in certain parts of the Island. The Articles of Capitulation under which the Fort of Colombo capitulated to the Dutch in 1656 are silent on legal matters. Until the close of the 18th century the Dutch possessed settlements along the Ceylon sea-board. There is no information whether any Portuguese Law was retained under the Dutch Government, but the probabilities appear to be against any extensive survival of distinctive Portuguese Law to the later times of the Dutch occupation. In 1796 Great Britain succeeded by conquest to the Dutch possessions in Ceylon. The Articles of Capitulation of 15th February 1796 is silent as to legal matters except the decision of pending civil suits, which it was arranged, should if decided within twelve months, be decided according to the laws of the Dutch possessions.⁵

Roman - Dutch criminal law was forced to make way for the English Law. This took place mainly because the early Proclamations and Charters of Justice had used terms known to the English Law and because the English judges who functioned here were influenced by English precedents and brought with them the modes and habits of thinking of the English common law.⁶ Clarence J observed that⁷ the early British Proclamations and Regulations on the subject of criminal law used terms such as ‘felony’, ‘misdemeanour’, ‘benefit of clergy’, which had no meaning in Roman-Dutch Jurisprudence. Clarence J further observed, “The learned judge of this court, whose judgment, delivered in 1826, is preserved in Mr. Rama-Nathan’s Reports (p.80), but whose name has been withheld from us by insects and damp; - that learned judge recorded in 1826 the vast extent to which in his time the old Dutch Law had passed out of force…speaking of Criminal Jurisprudence, the same judge spoke of the Charters as having ‘enacted such extreme deviations from the Dutch-Roman Law that excepting a few technical phrases, scarcely any of this law remains.”⁸

Dias J in his judgment remarked that the Central province and a great portion of the Island was never under Dutch at all. Confessedly there was no Kandyan Law recognised by the British on criminal matters and the only law which could have been administered down to 1852 was the English Law. The Ordinance No. 5 of 1852, expressly declared the Kandyan Provinces to be subject to the same law in criminal matters as the Maritime Provinces. As regards the Tamil Provinces in the North, some of the interior Provinces in the North were never under Dutch rule, and there being no recognised Tamil Laws on criminal matters, those provinces will necessarily fall under the operation of the English Law. The criminal law administered throughout the Island during English rule was uniform, and it was never

⁴ Ibid., p.190.
⁵ Ibid.
⁷ Supra n.1, p.191.
⁸ Ibid.
suggested that the Kandyan Provinces and the Northern province were under the operation of a criminal law different from that which obtained in the Provinces ceded by the Dutch.\(^9\)

In order to settle the uncertainties in the general law, in 1883 the Penal Code was enacted. Section 3 of the Code expressly abolished the Roman Dutch criminal law. The Penal Code was framed on the model of the Indian Penal Code of 1860, with modifications to meet local conditions.\(^10\) The Indian Penal Code was described as containing the substance of the English Law, systematically arranged but stripped of technicalities and ambiguities and modified to suit the circumstances of India.\(^11\) In fact it is an outstanding achievement. It has been observed that the likeness of the Indian Penal Code to the English criminal law is in many cases superficial and the English criminal law freed from all technicalities and ambiguities and systematically arranged “has undergone such a metamorphosis as to be an entirely new thing.”\(^12\) The Code is said to contain some suggestions derived from the French Code Penal and from Livingston’s Code of Louisiana, as well as traces of Scots law.\(^13\)

**THE PENAL CODE**

For almost 125 years prosecutions have been launched and punishment meted out against offenders under the Penal Code. Before independence and during the 50 years of independence many amendments have been made to the Code. It could be said however that the principal amendment is the Penal Code (Amendment) No. 22 of 1995. Signalling a sign of the times we live in, this amendment sought to secure greater protection for children and amend the law relating to sexual offences. The amendment introduced new sections prohibiting the obscene publication and or indecent exhibition of children, prohibiting cruelty to children and the sexual exploitation of children. The amendment also brings in a new offence of sexual harassment. It is an offence to procure or attempt to procure any person to become a prostitute. Trafficking in persons is also an offence.

The earlier section on rape has been amended. The new section introduces a part concept of marital rape, permitting the charge if the wife is judicially separated from her husband. In this respect it falls short of the English law which contains the full offence of marital rape. Instances of rape in situations of judicial separation are unlikely to arise and this change in the law is merely cosmetic – an effort to show that the legislature looks forward though it seems to lack the energy to move forward. The age for statutory rape has been raised to 16 years. A significant change is the punishment for rape. The amendment embodies a minimum

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\(^9\) Ibid., p.193.

\(^10\) Supra n. 6, p.232.

\(^11\) Ibid.

\(^12\) S.G.Vesey Fitzgerald, *Bentham and the Indian Codes*, cited in T.Nadarajah, *Supra* n. 6, p.255.

\(^13\) Supra n. 6, p.255.
punishment of 7 years and also includes provision for the payment of compensation to the victim. A minimum punishment of 10 years is laid down, *inter alia*, for custodial rape, gang rape and the rape of a woman under 18 years. The question of minimum punishment raises concerns as punishment has so far only had a maximum limit. A minimum sentence fetters the discretion of the sentencing judge and could be unduly harsh on a particular accused, where circumstances may warrant a lesser sentence. Inconsistencies in sentencing should be remedied by the use of the supervisory jurisdiction of the Court of Appeal, it should not be sought to be secured through minimum sentencing. The argument that minimum sentencing would deter also does not hold good as would be offenders are unlikely to be familiar with the Code. Provision is made for a new offence of incest which also carries a minimum term of 6 years. The earlier section on unnatural offences is now given a minimum sentence of 10 years when previously it carried a maximum of 10 years.

Section 365A provides for the offence of homosexual acts with punishment which may extend to two years or fine. The moral overtones of the earlier section are lacking here and no minimum sentence is laid down. While we recognise rape in judicial separation we still are far away from de-criminalizing homosexual conduct. If the homosexual act is on a person under 16 by one over 18, it carries a minimum of 10 years imprisonment.

Section 365B deals with grave sexual abuse which does not amount to rape under section 363 and lays down a minimum punishment of 7 years and where the victim is under 18 the punishment increases to a minimum of 10 years. The final section gives protection to the victim from printing or publication of his name by unauthorised means.

Further amendments were brought in by Penal Code (Amendment) Act No. 29 of 1998. This amendment creates the offence of causing or procuring children to beg, hiring or employing children to act as procurers for sexual intercourse; hiring or employing children to traffic in restricted articles. The amendment also repeals the offence of attempted suicide, repealing a section which has seldom been used.

In relation to defences in criminal law some sections have hardly given rise to judicial discussion. Though we have had two decades of continuous civil war, there are no cases on the defence of duress, which England has developed through the many IRA cases. Section 87 which embodies the defence of duress states,

> “Except murder and offences against the State punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, which at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence; provided the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint.”
This section is clearly outdated as it refers to instant death of oneself. The Sri Lankan courts have had no opportunity to interpret the section. It is hoped they would, if called upon to do so, expand the section to include threats to loved ones which would ordinarily be more potent and not interpret the word “instant” too narrowly, recognising that the threat is as powerful even if it is to take effect at a subsequent time.

Further, despite the continuing civil war and the consequent opportunity for army excesses, the only single instance of superior orders being pleaded as a defence is *Wijesuriya v. The State*\(^\text{14}\) decided in 1973 under the earlier JVP uprising. The decision in *Wijesuriya* is very satisfactory, laying down unequivocally that unlawful commands of a superior cannot be lawfully followed. No other subsequent case has arisen to endorse this view.

The defence of insanity is embodied in section 77. This section states,

> “Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.”

Section 77 was considered in *Barnes Nimalaratne v. Republic of Sri Lanka*,\(^\text{15}\) where the court said it must be carefully borne in mind that in order to succeed, the defence must establish on a preponderance of evidence that at the time the accused committed the criminal act he was in one or other alternative states of mind set out in section 77. The court referred to abnormal personality due to an ‘irresistible impulse’ as laid down in the English law. In the English law the defence of diminished responsibility is embodied in section 2 of the Homicide Act 1957. The section states that where a person kills another, he shall not be convicted of murder if he was suffering from abnormality of mind which substantially impaired his mental responsibility. In *Barnes Nimalaratne* the accused though recognised to have peculiarities in his mind could not benefit from the defence of diminished responsibility as this does not fall within the definition in section 77. Including ‘abnormality of mind’ to enhance ‘unsoundness of mind’ would be a salutary change in the law. There is between sanity and insanity a wide range of aberrations and it is important that the law keeps pace with medical findings.

Besides defences, a series of cases have interpreted the sections relating to property offences. The principal offences against property are theft and criminal misappropriation. Theft arises when there is a dishonest appropriation of property. A series of cases\(^\text{16}\) have held consistently

\(^{14}\) (1973) 77 NLR 25.

\(^{15}\) (1976) 78 NLR 51.

\(^{16}\) *Eorgesy v. Seyadu Saibo*, (1902) 3 Brownes Reports 88; *Kanavadipillai v. Koswatte*, (1914) 4 Balasingham’s Notes 74; *Peries v. Anderson*, (1928) 6 Times of Ceylon Reports 49; *Ranasinghe v. Wijendra*, 74 NLR 38.
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that misappropriation arises when there is an innocent taking of property followed by a dishonest intention to retain it. In Welgamage v. The Attorney General\(^\text{17}\) the Supreme Court held that this distinction was unwarranted on an analysis of section 386. The court held the section itself does not refer to an innocent taking and consequently this requirement should be excluded. This the court held introduced an additional unwarranted ingredient into the definition of the offence. The Penal Code does not contain any rigid demarcation between offences and misappropriation is possible with an initial dishonest intent. This decision brings the law to some extent in line with the English law where the offences of breach of trust and criminal misappropriation come within the broad offence of theft under the Theft Act 1968. It is submitted that this merging of offences unnecessarily clouds the law on property crimes. The distinction as maintained by the judiciary up to 1990 gave a meaningful demarcation between the offences of theft and criminal misappropriation. Though not expressly laid down in the section, the distinction is apparent from the illustrations. Illustrations to sections cannot expand or restrict a section yet the distinction as maintained over many decades was a sensible interpretation of the law. To merge the two offences is unnecessary and now theft and criminal misappropriation are in effect one offence, this would invariably lead to confusion and uncertainty among prosecuting counsel in recognising property offences and framing charges in decisions to prosecute.

PUNISHMENT

In Sri Lanka the death penalty is currently not meted out. The last execution took place in June1976. There is now a move to bring it back. The outcry to bring back the death penalty is an emotive reaction to increased crime in society. There is a popular belief that capital punishment is a deterrent, that would be offenders are deterred from crime because of the possibility of a death sentence. This is erroneous reasoning. It may be a deterrent in cases of pre-mediated homicides, but in instances of death resulting from sudden fights or precipitated killings, the death penalty is no deterrent. It is the certainty of detection, not the severity of punishment which deters crime. What we lack is effective policing. Instead of straightening this out, we moot capital punishment be brought back. The death penalty in England was suspended in 1965 and abolished in 1969. Further in Sri Lanka Buddhism is declared to be the official religion and the Constitution provides for State patronage of it. We cannot execute offenders without violating the First Precept which prohibits killing of any kind. It is time to take stock of what is going wrong with the administration of criminal law and straighten out the police in an effort to reduce crime and introduce respect for the criminal code, rather than raise a cry for the death penalty, when most countries across the globe are abolishing it.

\(^{17}\) SC 38/90 (unreported).
The crime wave in Sri Lanka is high. The total number of serious crimes reported for 1998 was 9,478; the total number for 1999 was 9,056. This figure excludes less serious crime and unreported crime. Prison statistics reveal an increase in incarceration. Unconvicted prisoners in remand prisons increased from 65,356 in 1993 to 71,350 in 1997. Particularly worrying is the incarceration of children. Children under 16 years in remand institutions moved up from 878 in 1993 to 1,431 in 1997. The incarceration of convicted prisoners shows a marginal change, 18,644 in 1993 as opposed to 18,143 in 1997; a similar trend is apparent in regard to children under 16 years, being 25 in 1993 and 26 in 1997. The number sentenced to death in 1993 was 120 and in 1997 the number dropped to 58.

To control criminal statistics we need to have effective policing and we need to rethink our punishment ethic. The Criminal law has for many centuries been and is still dominated by the retributive theory of punishment. The compelling notion of ‘just deserts’ propelled the criminal justice system to prosecute and punish and mete out in general, custodial sentences of different degrees of severity. Yet this by no means reduced the incidents of crime which continued to expand over the years, along with the prison population. The retributive theory fails to control crime statistics, fails to keep society safe and fails to reform prisoners. Yet retribution is almost impossible to dislodge from criminal theory primarily because it has been with us too long. We have grown accustomed to it and believe no system of punishment can exist without retribution being its primary force. This is so because “in the public mind … custody is generally seen as the only retributive or punitive sentence. Anyone who commits a crime of any seriousness and is not sentenced to custody is generally perceived to have got away with it.”

Yet years of experience and painful criminal statistics show us that retribution is not the answer to the crime problem. Not only is crime increasing but it is also becoming increasingly unpleasant in form. In meting out a punishment of a term of imprisonment the judge orders the offender to live in an atmosphere which nourishes and teaches violence; violence may become for him a way of coping, a way of communication. Further, once incarcerated, most offenders have virtually no means of making restitution or paying family support.

20 Ibid., p.28.
21 Ibid., p.39.
22 Ibid., p.65.
The inadequacy of the criminal justice system itself is apparent as it lurches from crisis to crisis, based as it is on an outdated philosophy of naked revenge.26

Restorative justice is an alternative to mitigate the harshness of the retributive system. The term ‘restorative justice’ was probably coined by Albert Eglash in 1977 when he suggested that there are three types of criminal justice. (i) retributive justice based on punishment (ii) distributive justice based on therapeutic treatment of offenders and (iii) restorative justice based on restitution.27 Restorative Justice is defined as “the process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future”.28 While retributive justice sees crime as a violation of the State, restorative justice sees crime as a violation of people and relationships; justice involves the victim, the offender and the community in a search for solutions which promote repair, reconciliation and reassurance.29 It is desirable to modify the present criminal justice system in accordance with restorative principles.

RESTORATIVE JUSTICE

Restorative justice requires offenders to take responsibility for their offence and to take steps to effect restitution. It involves reintegration of both victim and offender within the community. The philosophy of restorative justice maintains that increased crime is an overall failure of society to reform offenders and help rebuild their lives. Society owes a duty and should take active steps to ensure that those isolated from society because of their criminal inclinations be reintegrated back into society. This reintegration theory frowns upon prisons and its high walls as having totally misunderstood the causes, consequences and solutions to the crime problem. Restorative justice sees with compassion that the violation of most violent men is ultimately spawned by the hostility and abuse of others, it feeds on low self confidence and fractured self-esteem.30 Restorative justice principles can be found in community service orders, victim offender mediation, community mediation, sentencing circles, peace-making circles, healing circles, family group conferencing and police cautions. The Truth and Reconciliation Committee of South Africa too is based on the philosophy of restorative justice. It encouraged victims to state their story, ask for the truth and seek atonement.

27 Supra n.25, p.24.
29 Supra n.24, p.181.
30 R. Johnson, cited in ibid, p.36.
John Braithwaite has spoken at length of the role of law in reintegrative shaming, he believes that the key to crime control is cultural commitments to reintegrative shaming.\textsuperscript{31} Shame is intimately tied to our identity, to our very concept of ourselves as human and to the extent that man is a social animal, shame is the shaper of modern life.\textsuperscript{32} The theory of reintegrative shaming assumes that there is a core consensus in modern societies that compliance with the criminal law is an important social goal.\textsuperscript{33}

Reintegrative shaming has been explained through the family model. When a parent punishes his child, both parent and child know that afterward they will go on living together as before. The child gets his punishment, within the continuum of love, after his dinner and before bedtime story and in the middle of general family play and he is punished in his own unchanged capacity as a child with feelings rather than as some kind of distinct and dangerous outsider.\textsuperscript{34}

Reintegrative shaming is contrasted with disintegrative shaming which creates outcasts and propels them into criminal subcultures. Braithwaite cites Japan as the triumph of reintegrative shaming. Japan is the only clear case of a society which had a downward trend in crime rates since the second world war. This he argues is the result of the cultural traditions of shaming wrongdoers, including effective coupling of shame and punishment. Between 1976 and 1980 the number of murders in Japan fell 26 per cent, during the same period in the US, murders increased by 23 per cent.\textsuperscript{35} In 1978 Japanese police cleared 53 per cent of known cases of theft, but only 15 per cent of the 231,403 offenders were arrested. Prosecution only proceeds in major cases or more minor cases where the normal process of apology, compensation and forgiveness by the victim breaks down. Fewer than 10 per cent of those convicted receive prison sentences and for two-thirds of these, prison sentences are suspended. Whereas 45 per cent of those convicted of a crime serve a prison sentence in the US, in Japan the percentage is under 2.\textsuperscript{36}

Braithwaite observes that while it is a mistake to assume that Japanese cultural traditions of repentance can readily be transplanted elsewhere, it is also a mistake to forget that the repentant role has a place in the Western culture and that the Western criminal justice system based on retribution is one of the institutions that systematically crushes these traditions.\textsuperscript{37}

\textsuperscript{33} \textit{Supra} n.31, p.38.
\textsuperscript{34} Griffith, 1970:376, cited in \textit{ibid}, p.56.
\textsuperscript{35} \textit{Supra} n.31, p.61.
\textsuperscript{36} \textit{Ibid.}, p.62.
\textsuperscript{37} \textit{Ibid.}, p.165.
Shaming certainly has a powerful role in social compliance. As rightly observed most of us will care less about what a judge (whom we meet only once in our lifetime) thinks of us than we will care about the esteem in which we are held by a neighbour we see regularly. “I may have to put up with the stony stare of my neighbour every day, while the judge will get only one chance to stare stonily at me.”

Restorative Justice however is not without its problems. As observed the involvement of the communities will require that restorative justice processes be decentralised – located in the neighbourhoods of the victims and offenders and that the process be open and public. This may run counter to notions of privacy and confidentiality, especially in juvenile proceedings. There is fear that with restorative justice due process and legal rights will be compromised. Further, restorative justice would lead to de-professionalisation of the process empowering communities as well as victims and offenders. Communities could be too authoritarian. It is necessary in this situation to give careful attention to community power to avoid vigilantism. Further, people see restorative justice as benefiting the offenders more than the victims. It is also feared that some offenders would feign repentance to benefit from restorative justice. The concept of community in restorative justice needs further development and clarification as the community’s interest can and often do differ from those of the State. Further, as observed there is the problem of fairness as between defendants. If one victim is forgiving and asks little, whereas another is vindictive and makes great demands, offenders might find themselves subject to widely differing expectations for similar offences. As a further note of caution it must be remembered that the restorative justice practice could run away as it were with what was originally intended. Restorative justice may be used by some as justifying every method of punishment save incarceration. Corporeal punishment may be made a mode of diversion, or an offender may be compelled to wear a T-shirt declaring ‘I am a thief.’ In Queensland it used to be common for pubs which sold watered – down beer to be ordered by the court to display signs prominently indicating that the proprietor had recently been convicted of selling adulterated beer. The practice was stopped because it was regarded, *inter alia*, as ‘Dickensian.’

It is true as observed that shaming is rough and ready justice which runs great risk of wrongdoing the innocent and that the most important safeguard is for shaming to be reintegrative, so that communication channels remain open to learning of injustices and

38 Ibid., p.87.
43 *Supra* n.31, p.60.
social bonds remain intact to facilitate apology and recompense.\(^44\) When the accused is guilty repentance plays an important role as a turning point between shame and reintegration. The desire to end the shame, to be reintegrated with others by adopting the repentant role can be so strong that people will even admit to crime they did not commit.\(^45\) Also restitution would be simpler for the wealthy who enter the criminal justice system. We must ensure that restorative justice reaches the poor and the disadvantaged as well. When restorative justice fails the offender should still be encouraged reparation.

Recognising the problems restorative justice would encounter and finding the means to deal with it would further strengthen its function. It is important that restorative justice be incorporated into the existing criminal justice system. It is a simple humane method of dealing with those who have fallen by the way in society’s effort to keep itself crime free. Retribution often leaves a legacy of hatred.\(^46\) The beauty of forgiveness is that by addressing hostilities it allows both the victim and the offender to take control of their lives.\(^47\)

**CONCLUSION**

The criminal law of Sri Lanka has developed over the years with colourful cases and interesting judgments by successive judiciaries. We need now to rewrite the criminal law in softer tones and look differently at our prisoners and move towards effective reform and rehabilitation.

We have several options when faced with crime, we can draw together defensively against the ‘enemy.’\(^48\) A sense of community may be increased, but as a defensive, exclusive, threatened community. Alternatively we can retire to fortified homes becoming distrustful of others. The sense of community, already weak becomes further eroded.\(^49\) The public’s attitude towards punishment is influenced by their conception of criminals and their degree of knowledge about crime and sentencing; the public’s image of an offender tends to be that

\(^{44}\) Ibid., p.161.  
\(^{45}\) Ibid., p.162.  
\(^{46}\) Supra n.24, p.192.  
\(^{47}\) Ibid., p.193.  
\(^{48}\) Supra n.24, p.59.  
\(^{49}\) Ibid.
of a violent offender who is often a recidivist. Thus the public also overestimates the amount of violent crime and recidivism. We have been educated to believe that humiliating and suffering is what justice is about and that evil must be held in check by harshness rather than by love or understanding.

To talk of forgiveness, however in the same breath as retribution, incapacitation, deterrence and other more traditional function of the criminal justice process seems somewhat incongruous. Yet forgiveness lies at the very heart and centre of processes for overcoming the deleterious effects of crime and other social inequity. Further, forgiveness is not something that a victim does for the benefit of the offender. Real forgiveness is the process of the victim letting go of the rage and pain of the injustice so that he can resume living freed from the power of the criminal violation. There is little need for reconciliation when the loss is trivial or can be addressed by third-party compensation through insurance or the State, but there is a tremendous opportunity for reconciliation where pain runs deep. Victims need to progress to the point where the offence and offender no longer dominate them.

Since the mid 1970’s many criminologists have concluded that rehabilitation is simply an impossible goal and that pursuing it within the retributive prisons system is a failed policy. Like most sociological theories of crime, the theory of reintegrative shaming implies that solutions to the crime problem are not fundamentally to be found in the criminal justice system. The underlying assumption well worth holding up to the light, is that courts are harsh, uncomprehending places and that perhaps because of professional self-interest, perhaps because of financial constraints, perhaps because of lack of imagination, we cannot hope to change the nature of courts. Court trial carries its attendant problems. Because of the threat of punishment, offenders are reluctant to admit the truth. Because the punitive

50 Ibid.
51 Ibid.
54 Ibid.
56 Ibid.
57 Supra n.24, p.25 at p.25.
58 Supra n.25, p.12 at p.12.
59 Supra n.31, p.178.
consequences are serious elaborate safeguards of offenders’ rights are needed and these can make it difficult to get at the truth.61 To find lasting solutions we will have to rebuild the criminal justice system from its foundations, the first step will be to construct a new pattern of thinking about crime and justice.62 That new pattern is restorative justice.

Most lives are not touched by the criminal justice system. It is a small segment that comes within it. So the burden on the criminal justice system is not heavy. No system is perfect but the restorative justice is a more perfect system than what we have. Restorative justice must be institutionalised in the existing system of police and courts. If not it would become marginalized and soon overpowered by the retributive tradition.

Restorative justice cannot displace the retributive system immediately. Violent offenders and sexual offenders should remain for the time being within the existing system. But restorative justice should right now be the only avenue for non violent offenders. Of course as with most cases involving policy change we are dependent on political will. Educating the public on the advantages of restorative justice and its contribution towards victim satisfaction and reduced recidivism is an important first step. This public education is the responsibility of politicians and criminal justice officials. As observed, like Copernicus and Galileo we shall have to spend some time getting other people to look through our telescope and verify our observations before they are persuaded.63

The best hope of progress in crime control is to work for a gradual shift from the repressive towards the restorative.64 Nothing else is likely to work. Restorative justice is a different way of thinking about crime and this different way has grown out experience. While retributive justice tries to vindicate the law, restorative justice invites full participation and consensus of all affected by the offence and seeks to heal what is broken. It seeks full and direct accountability, seeks to unite what has been divided and seeks to strengthen the law. Above all it gives new hope to the concept of justice at a time when that concept seems to be wilting.
INTRODUCTION

Crime dates back to the time when mankind appeared on earth and a certain type and amount of crime was tolerated up to the time when society itself placed sanctions on certain types of human conduct or behaviour that were considered to be anti-social. With the passage of time, communities /societies developed systems to control the incidence of anti-social behaviour /crime and established institutions that were necessary both to bring criminals to justice and to ensure that the penal sentences were strictly enforced. The police is one of the agencies of this system and it is the police who form the frontline of the criminal justice system. At the present time the community/society views crime as a police problem\(^1\) and when a crime is reported or it affects the community/society to its detriment, they question the efficiency of the police. Therefore hardly a day passes without some story about the police being published in the local newspapers in Sri Lanka.

The impact of crime on the society today, more than its increased\(^2\) incidence in recent years, results in bitter criticism of the police only if it has a violent or disturbing impact on society, for which the police are being increasingly blamed in Sri Lanka. The notion has developed in the public mind today that there is an imperative need to bring about a change in the

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* Deputy Inspector General of Police.

\(^1\) When it is said that crime is viewed as a police problem, it means the role of the police in the detection and prevention of crime. James Q. Wilson has defined the role of the police as law enforcement and order maintenance. (James Q. Wilson, Varieties of Police Behaviour 1968; Michael Benton, The Policeman and the Community, 1964; Roy R. Roberg, The changing Police Role, 1976; Hermon Goldstein, Problem Oriented Policing, 1990).

\(^2\) The assumption that crime is increasing at a rapid rate is open to debate. Crime statistics are intrinsically unreliable that we can refer to them only as indices or indicators and not as true statistics reflective of the dimensions of crime.
attitudes and outlook of the police in order to achieve efficiency and productivity. The notion has arisen mainly due to the reason that crime is being seen as essentially a police problem but this notion is only partially true. It is understandable that crime is, to some extent, a police problem since the police form the frontline of the criminal justice system but there are other agencies as well, such as the courts and the correctional system (prisons), which have equal responsibility in controlling and curbing the incidence of crime. The common notion that crime is a police problem has been challenged in the studies done by criminologists the world over and they have pointed out that if crime is seen as a police problem, the role of the police has been narrowly defined, because the police play a wider or broader role in the society, that is, the great majority of situations in which the police intervene are not criminal situations in which there could be a prosecution, trial and punishment of the offender. Many of the situations in which the police interact with the public are acts of public nuisance. In some of these situations there could be violations or breaches of the public law and even the commission of serious crime. Experience, however, has shown that the larger part of the police work does not lead to prosecution, trial and punishment, since, very often, situations that arise from disagreement between persons are settled within the precincts of the police station itself.

Research studies have also indicated that in most of the urban areas in Sri Lanka the police spend less than 30% of their working time in dealing with crime or any other law enforcement activities. On most occasions they are involved in settling disputes, providing security for VVIP, doing beat and patrol duties, and responding to calls received from the public. Therefore, the police in Sri Lanka, as elsewhere in the world, have become interwoven with society. This being so, any lapse or shortcoming on their part connected with the public interest would, however trivial it might be, lead to criticism or discussion in the Sri Lankan society. Therefore the Police in Sri Lanka have always been a subject of public interest, because of the unique position they hold and there being no other organisation which has the capacity or power to influence the lives of the people. So when the role of the police is being discussed, it is essential that their functions and duties towards the society must primarily form the basis of such discussion.


4 In addition to complaints relating to crime, the other types of complaints received relate to land disputes, financial transactions, family disputes, abuse and threat, missing persons etc., Furthermore, the police are called to perform special duties in connection with religious/social events and visits by VVIPs.

5 It is difficult to train the police officers to deal with every situation that arises in the society during their day-to-day duties. Therefore, they have a wide discretionary power when they deal with non-traditional situations.
The role of the police is broader today than it was defined many decades ago because they are the only agency which is on duty 24 hours of the day, seven days of the week and thirty days of the month, dealing with every aspect of the community whether it falls within the definition of the police functions or not. And because the police have to play a variety of roles, their performance cannot be measured. Due to this reason, the police are sometimes ridiculed and, at other times, denounced and looked at very cynically. There is no newspaper in Sri Lanka, which has not denounced the police for some reason or another. Such denunciation has been well presented by August Vollmer, U.S.A.:7

“\[The policeman is denounced by the public, criticised by the preachers, ridiculed in the movies, berated by newspapers and unsupported by prosecuting officers and judges. He is shunned by the respectable, hated by the criminals, deceived by everyone, kicked around like a football by brainless or crooked politicians. He is exposed to countless temptations and dangers, condemned when he enforces the law and dismissed when he doesn’t. He is supposed to possess the qualifications of a soldier, doctor, lawyer, diplomat and educator, with the remuneration less than that of a daily labourer.\]”

In order to be able to correctly define the role and the behavioural pattern of the police system, it is essential to view its historical development since the time when the concept of policing was first introduced into Sri Lanka.

**HISTORY OF THE POLICE PRE-INDEPENDENCE ERA**

The history of the police in Sri Lanka, which was known as Ceylon before independence, dates back to the latter part of the Dutch period. Although the Dutch had a fairly good civil administration during their period of occupation, the police were effective only in the areas occupied by the Dutch. During the latter part of the Dutch period, it was the military that covered the policing in Colombo. The Fort area was patrolled by the Dutch troops, the Pettah area by the Malays and the suburbs by the Lascorin of the Attapattu.8

In 1795 the British captured Trincomalee, Point Pedro, Jaffna and Mannar from the Dutch and the Madras Administration was established. Thus the British Civil Administration came to be established in the North of Sri Lanka (then Ceylon) before it was established in the Maritime Provinces. In 1796 the Maritime Provinces became a dependency of the Madras Civil Service and their interest was confined to the collection of revenue. In 1798, with the appointment of Governor North, the Madras Administration came to an end.

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During the next three decades certain regulations were introduced, of which the regulation 14 of 1806 could be considered to be important because it related to the police. This regulation divided Pettah into 11 streets and defined the functions of the Police. It should be noted that during this period about 400 persons were deployed on patrol duties but during the night only one police constable and two peons patrolled the streets in Fort. In 1833 additional regulations were introduced, which empowered the police to prevent strollers and vagrants from entering the Fort. It should be noted from these regulations that the role of the police related to preventing unwanted persons from loitering in the Fort and Pettah areas and providing security to the British Community who lived there.

The year 1833 also was an important year in the history of the Police. Governor Sir Robert Horton complained to the Secretary of State that the police were very ineffective as several burglaries had been committed and a sense of insecurity was prevalent among the British Community. Therefore, a committee comprising five members was appointed and a questionnaire was prepared to be given to the residents in Pettah. Based on the answers received to this questionnaire, certain recommendations were made which also included the establishment of a paid Police Force under a responsible officer. As a result Thomas Oswin was appointed as the Superintendent of Police in Colombo in 1833. With the establishment of this Police Force, efforts were made to increase its efficiency. The important functions assigned to the police during this period were inter alia, the daily supervision of the coolies who swept/cleaned the streets in the Fort and ensuring the dumping of the refuse at the designated places. It was also the duty of these coolies to destroy rabid stray dogs. Additionally, the police were required to guard the smallpox patients, escort poor patients to the hospital, and prevent arson because the great majority of the buildings had thatched cadjan roofs.

At the initial period of the police service in Sri Lanka, the majority of its functions related more to the performance of work of a sub-constabulary nature than to work connected with the prevention and detection of crime. Furthermore, in 1835 and 1836 additional regulations were introduced to check the theft of cattle and it became the duty of the police to check the licenses issued to butchers, who were required to slaughter the animals in public.

After the capture of the hill country by the British in 1815 the duties of the police in the Kandyan District were entrusted to the local Headmen. Following the Kandyan Rebellion a police system was introduced to the Kandy town by appointing a chief constable and two assistant constables, who were given powers to patrol the area and keep the area free from trouble as well as take into custody any suspicious persons. The Headmen were entrusted with the police duties within the town area and in the villages. The police system introduced

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9 Ibid., p.30.  
10 Ibid., p.38.  
11 Ibid., p.50.  
12 Ibid., p.56.
in 1818 existed till 1833. In 1833 the Kandyan Provinces were brought under one administration together with the rest of Sri Lanka.

With the implementation of the plantation economy after 1833 and the introduction of coffee to the Kandy area, a large influx of immigrant Indian labour into the hill country took place and along with them Sinhalese from the Maritime Provinces also came to the hill country in order to evade justice. As a result, in areas such as the Towns of Kandy, Gampola, Badulla and Nuwara Eliya crime and vice increased. This dictated the need to establish an efficient police system in the Kandyan District. During this period there were also conspiracies against the British administration.\(^\text{13}\) In 1842 the Kandy Town had only two constables, one placed at Peradeniya and the other at Katukele. These two offices were inadequate to cope with the law and order situation in their respective areas and in 1843 Dunuwilla Loku Banda was appointed as the Superintendent of Police for the Kandy District.\(^\text{14}\) The main task of the police was to maintain law and order and eradicate crime and vice, which stemmed from the anti-social proclivities of the immigrant Indian labour on the estates.

In 1844 S.J. Colepepper was appointed as the Superintendent of the Central Province and Dunuwilla was reduced in rank to Assistant Superintendent. But with an increase in his salary of $100.00 ostensibly to palliate the demotion. This time around the strength of the police force in the Kandyan Provinces was 11 sergeants and 77 constables who were deployed in the towns and rural areas. The constables attached to the rural areas were required to protect the smallpox patients among the immigrant Indian labour and prevent petty crimes being committed on them. These constables also were required to bury the dead.

The Headmen who policed the rural areas were not paid a salary and due to this fact they became corrupt and earned a regular income through illegal means. Then by an Ordinance enacted in 1843 the Governor in Executive Council was empowered to establish police stations in any town. The police stations, which already existed in Colombo, Kandy, Galle and Negombo, were proclaimed in 1844. Furthermore, in the same year, a directive was issued by the Governor to the Superintendent in Colombo to enlist intelligent and active youths as third-class police constables. During this period the police force was not an establishment in which intelligent and respectable youths sought employment. Nevertheless an effort was made to enlist men of better quality than before and all the men who were recruited were placed on probation. This was a forward-looking step taken by the British in order to de-enlist any officers who were subsequently found to be unsuitable for police duties.

\(^\text{13}\) Ibid., p.157.

\(^\text{14}\) Ibid., p.158.
Order No. 17 of 1844 was yet another step forward as it dealt with the maintenance of discipline in the police force. Disciplinary action against officers was not initiated earlier but following the enactment of this ordinance discipline was strictly enforced. Furthermore the appearance of the police officers was enhanced by providing a new uniform to them. By providing such a uniform and requiring the recruits to undergo a probationary period in the service, besides emphasising the need for discipline in them, the police were gradually regimented.

The period 1847 to 1848 witnessed a decline in the prices for coffee, which resulted in unemployment on the estates. The Indian labour on the estates began to abandon the estates and this led to an unpleasant law and order situation, where an increase in crime and vice was evident.

In 1848 William Isaac Macartney was appointed as Superintendent of Police in Colombo and Dunuwilla was made the Superintendent of Police in Kandy. Even during this period the police were deployed to destroy stray dogs and keep out the vagrants and delinquents by patrolling the areas. But the investigation and detection of crime were not considered to be an important police function. In 1855, due to the thefts and robberies reported along the Kandy road, police stations were opened at Mahara, Veyangoda, Ambepussa and Kegalle besides Panadura and Kalutura. In 1857 police officers were stationed in Trincomalee and placed under the command and control of the Government Agent of the Eastern Province. Following the cultivation of coffee in Yatiyantota, Heneratgoda and Hingula, police stations were established in these areas as well. The police stations in the Kandyan Province were opened mainly due to the plantation economy.

In 1854 Superintendent of Police Macartney issued guidelines for the police in the rural areas and introduced parade, in which the officers were required to participate dressed in full uniform. When they went out to perform duties they were prohibited to take money with them. Regulations of this type were necessary during this period as corruption was rife in the rank and file. It should be noted that the introduction of parade promoted a better degree of physical fitness in the officers and initiated them into regimentation. At the same time efforts were made to inculcate in them a greater sense of discipline. In February 1857, Assistant Superintendent of Police Davoit, two inspectors and a clerk attached to the Kandy Police were dismissed from the service for theft of cattle. 1859 also was an important year in the history of the police because the police both in the Central Province and the Low

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15 The police force of the Island was divided into two separate and independent branches under independent heads, one in Colombo in charge of Negombo and Galle and the other in Kandy. Kandy was sub-divided into town and rural police. Ibid, p.109.

16 Supra, n. 8, pp.125, 131.

17 Ibid., p.140.

18 Ibid., p.194.
Country were amalgamated and Macartney, who was made Chief Superintendent, was given command of the amalgamated Police.\textsuperscript{19} At the end of 1863, 48 police stations had been established island wide.\textsuperscript{20}

On 03.09.1866 G.W.R. Campbell was appointed as the Chief Superintendent of Police for the island. In the amendments introduced in 1867 to the Police Ordinance of 1865 the designation of the Head of the Police Force was changed from Chief Superintendent to Inspector-General of Police. Therefore, 03.09.1866 is considered to be the day that the Police Force, as it stands today, truly began.\textsuperscript{21} The reforms that he initiated resulted in the Police Force becoming an efficient organisation. He also changed the uniform to enhance the appearance of the police officers and took over certain duties performed by the Rifle Regiment such as escorting prisoners, guarding prisoners, guarding prisons and providing guards at the Kachcheris for sentry duties as well as transportation of cash. These are some of the duties taken over by the police, which gradually exempted the constables from performing some of the functions and duties they were earlier required to perform. Additionally, in order to attract better quality recruits into the police service Campbell requested the Superintendent of Police at Kandy to enlist such youths and also placed advertisements in the newspapers in Colombo for filling vacancies in the Maritime Provinces.

One of the far-reaching innovations he introduced was the pension scheme, which also helped attract better quality recruits into the police force. Furthermore, he established the Police Rewards Fund through which rewards are offered even today to officers for the creditable performance of duty.\textsuperscript{22} This too gave an additional impetus to the officers to perform their duties efficiently and effectively and discouraged them from engaging in corrupt practices.

In 1867, he introduced the constabulary register, leave forms, etc., which are still in use today and the Quarterly Police Gazette in which rewards given, punishment meted out, etc. were published. At the time he took over the police force as Inspector General, no records of crime statistics had been kept by the police because the maritime provinces and the Kandyan provinces were separately policed. Realising the importance of the statistics relating to crime, Campbell requested the Magistrates to furnish him such statistics. This will, as earlier stated, demonstrate that the detection and investigation of crime were not considered to be an important aspect of the Police function at that time. It will be seen that these reforms indisputably led to the placement of the Police service on the foundation on which it stands today.


\textsuperscript{22} *Supra*, n. 8, p. 239.
After Campbell retired from the post of Inspector-General of Police, Major L. Fredrick Knollies succeeded him. During this period new Assistant Superintendents of Police were recruited and they were required to pass an examination in law within one year and a test in the vernacular language within three years. They were also required to work with the Magistrates in order to gain experience both in crime and court work. This forward-looking step was taken in the late 1890s. Furthermore, a keen interest was taken in training the police officers. Special classes were conducted for the constables who aspired to the rank of sergeant. The training programs for the recruits were modified and a major part of such training was confined to physical exercises, drill, musketry, etc. Lectures were also delivered on how to perform their day-to-day tasks. The introduction of such training was a forward-looking step as training of this type had not been given in the 19th century.

Criminal investigations were not up to the required standard and in 1896 a new unit was formed to investigate special cases. Inspector John Kotalawala was placed in charge of this unit, which was re-named as the Criminal Investigation Department in 1903. The Criminal Investigation Department has today grown into a very effective and efficient law enforcement arm of the Sri Lanka Police. In 1913 H.L. Dowbiggin assumed duties as the Inspector-General of Police and introduced reforms which made the Police Department a well-structured organisation with checks and balances and special registers, forms etc. designed for ensuring its efficient functioning which were of a more advanced nature when compared with other government departments at that time.

A unique system which the police department had adopted to ensure its smooth and efficient functioning was the monthly, half-yearly inspections conducted by senior officers according to their ranks. This also ensured a greater degree of supervision and instilled discipline in the rank and file.

Due to the nature of the Police role all the recruits upon joining the department were given a training initially to fit them into the role they were required to play in the society. Specialised training programs relating to detection of crime, prosecution, etc. were also conducted.23

Systems for promotion from rank to rank were introduced. It should be noted that at the time of independence, the Police Department was a well-structured organisation. Dowbiggin enjoyed a high reputation due to the reforms he introduced but after he took over the department riots occurred in 1915.

Following these riots Dowbiggin introduced a military outlook to the police service, namely, parade, drill, rifle practice, route marches and other related military exercises. This displeased

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the public, but they were not in a position to give vent to their displeasure as the Second World War was in progress, which diverted most of their attention and less to the police department.

The military outlook given to the police still remain to some extent. This military outlook causes some disenchantment where the people are concerned because, generally, a police officer is not able readily to adjust himself temperamentally when he deals with the public in his day to day work. In 1946 a Commission was appointed to inquire into and report on the administration and discipline in the police service and recommend ways and means whereby its efficiency and productivity could be enhanced in order to win the co-operation and confidence of the public. This Commission, which was called the Soertsz Commission, recommended the raising of the educational qualification for recruitment to the police service, provision of better training and training facilities, uniforms and housing and also recommended systems for promotion and transfers. These recommendations, however, were not wholly implemented.

When one looks back at the Police Service during the pre-independence era, a gradual development would be evident even though, in the modern sense, the police hardly performed any role that benefited the people. The far-seeing and forward-looking reforms introduced by the two Inspector-Generals of Police, Campbell and Dowbiggin, had placed the Police Service on a solid bureaucratic foundation before independence. And some of their concepts that we, in the post-Independent era, still adhere to, militate against the introduction of the concept of Community Policing in Sri Lanka.

STRUCTURE OF THE POLICE ORGANISATION SINCE INDEPENDENCE

At the time Ceylon gained independence, the police organisation was a centralised force, and planning, organising and controlling were devised at and done from Police Headquarters. In 1948 the total strength of the Police Department was 5,29824 with the Inspector-General at the head of the Department, who was assisted by three Deputy Inspector-Generals, also stationed at Police Headquarters. There were 204 police stations established throughout the country. However, vast areas were not policed and in such areas, which were known as un-policed areas, the respective Headmen were the Government representatives who performed the police functions.

The smallest or the lowest level unit of the police organisation was the police station. Several police stations in an area came under the command and control of an Assistant Superintendent of Police and his area was known as A.S.P. District. These Districts were grouped and

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divided into Divisions and each Division was placed in charge of a Superintendent who was the head of the police in that Division.  

The rank of Deputy Inspector-General (DIG) was created in 1916 and at the time when Ceylon gained independence, there were three Deputy Inspectors-General, one of whom was on an acting basis. The provinces came under the command and control of one DIG and the Criminal Investigation Department (CID) under the other; both DIGG were stationed at Police Headquarters.

At the time of independence there were three levels of recruitment to the police department, i.e. constable, sub-inspector and Assistant Superintendent of Police. From its inception recruitment to the Police Department has been a complex procedure. This procedure encompasses the required educational qualifications, physical measurements, viva voce, medical examination and investigation of background. Due to the fact that power and authority are vested in every police officer, the recruits who are selected should possess the right temperament or, in other words, they should be psychologically suitable to hold such power and authority and act impartially in the exercise of their duties and functions. This fact has been recognised by the Soertsz Commission, at which many a person had testified that the recruits enlisted to police should be of a high quality. The Report of this Commission stated:

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25 The ranks in the Sri Lanka Police are as follows:
- i. Inspector-General of Police (IGP)
- ii. Senior Deputy Inspectors-General of Police (SDIGG)
- iii. Deputy Inspectors-General of Police (DIGG)
- iv. Senior Superintendent of Police (SSPP)
- v. Superintendent of Police (SSP)
- vi. Assistant Superintendent of Police (ASPP)
- vii. Chief Inspectors of Police (CII)
- viii. Inspectors of Police (IPP)
- ix. Sub-Inspectors of Police (SII)
- x. Sergeants Major (SMM)
- xi. Police Sergeants (PSS)
- xii. Police constables (PCC)
- xiii. Women Police Constables (WPCC)
- xiv. Police Constable Drivers (PCDD)

The SDIGG and functional DIGG are stationed at Police Headquarters. The territorial DIGG are in charge of the administrative provinces but known as DIGG/Ranges. They are stationed in their respective Ranges.

26 The duties of the IGP and DIGG of the Provinces (Ceylon Government Gazette No. 3750 of 27.05.1925).

“Men who can be depended upon to develop into policemen of that type are not to be found on the highways and byways. They must be carefully sought after. Not only should their educational qualifications, with due regard to the educational standards of the country, be adequate, but also their character should be exemplary, for only such men can resist the many temptations to which policemen are daily exposed.”

It is recognised by the police the world over that a police officer should be both psychologically and physically fit to be able to perform the task required of him. From its very inception, the Sri Lanka Police has adhered to the physical aspect where recruits are concerned, in that both the required height and measurement of chest are essential for recruitment to all three ranks in the service. Research done in developed countries had indicated that a civilian, who joins the police service, should have a balanced psyche in order to be able to work in a complex situation, exercising restraint and displaying confidence in himself where human weaknesses are concerned. Therefore a psychological test has now been introduced as part of the selection process in most countries.28

But, regrettably, in Sri Lanka recruits to the police service are not being subjected to any psychological test to determine their suitability to serve as police officers. Even though belated, the introduction of a psychological test would be a step in the right direction.29

Furthermore, before a person is recruited to the police service, background inquiries relating to that person are vital. Inquiries are therefore made into his educational history, work record, physical and emotional health, character and integrity, his status in the society and whether he or she has any blood-relatives involved in criminal activities.

The purpose of conducting background inquiries into the character of a recruit is necessary to learn of his behaviour patterns in a wide variety of situations, to verify the statements made in his application, to prevent the department from employing a person who is not qualified or committed a crime or engaged in anti-social behaviour. This is of paramount importance as it would help determine the suitability of a recruit who, when once trained and deployed on the performance of law and order functions, should be able to win the confidence and support of the public only if he or she had been well screened before recruitment. Background inquiries have been conducted since the pre-Independence period

28 Roberg, R.R., The Changing Role of Police – New Dimensions and New issues, (1976) pp. 125 – 134. "Police officers are subject to great emotional stress, and they are placed in positions of trust. For these reasons, they must be very carefully screened to preclude the employment of those who are emotionally unstable, brutal, or suffer any form of emotional illness. A growing number of police agencies have turned to psychological screening to eliminate those who are emotionally or otherwise unfit for the police service." Also see Saunders, Charles B. Jr., Upgrading the American Police Education and Training for Better Law Enforcement, (1970).

29 In the 1950s the Sri Lanka Police introduced a psychological test to the recruitment process but this was not continued.
and are still being conducted. An argument has built up in Sri Lanka with regard to recruitment to the police service namely whether or not “the sins of the father or his relatives” should influence recruitment. This is a matter that is still being debated but, nevertheless, background inquiries continue to be conducted. Additionally, each and every recruit is required to undergo a medical examination prior to the recruitment. It will be seen that the recruitment process in the police department is more complex than the recruitment process in other departments of the public service.

Before Independence the educational qualification for recruitment as constables was the 7th standard and for sub-inspectors the Senior School Certificate. In 1947, the Soertsz Commission, after having given thought to this matter, recommended the raising of the minimum educational qualifications for enlistment to the rank of both constable and sub-inspector to Junior School Certificate for constables and the High School Certificate or a pass at the University Entrance Examination for sub-inspectors, with the age limits for both ranks restricted to between 20 and 25 years. These recommendations were implemented in 1950 only for recruitment of constables.

Up to 1947, all the Inspectors who had joined the Police Service were foreign nationals. But when Lt. Col. R.M.M. Bacon relinquished duties on 01.01.1947 as Inspector-General of Police, he was replaced by Sir Richard Aluvihare, who was the first Civil Servant and Sri Lankan to hold this prestigious post. At the time when independence was granted, there was not a single foreign national in the police who held the rank of constable, sergeant or inspector. In the senior–gazetted rank there were only nine foreign nationals. Therefore, at that time all but nine officers in the Police Service were Sri Lankans.

During the pre-independence period, as and when it was necessary for additional strength to meet an emergency or cater for cultural, social and other national events, constables were recruited on a temporary basis. However, in 1949, by an amendment to Section 25(2) of the Police Ordinance No.15 of 1949, the Inspector–General of Police was empowered to form a Special Police Reserve with a strength of 1,000 officers. They were vested with the same powers as the officers of the Regular Police during mobilisation. Initially 500 recruits to this Special Police Reserve were enlisted and with the passage of time the strength was gradually increased. The Police Reserve was formed to supplement the manpower in the

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30 This was a subject of much contention after 1991 when the enlistments of certain recruits were cancelled due to adverse background reports. The policy of the department, however, remains unchanged. Since the territorial police work with considerably reduced strength it is doubtful whether their background reports are based on genuine investigations.


Regular Police and these Reservists continue to perform a very useful and satisfactory function. Furthermore, the persons recruited to the Reserve Police were already employed and their entry into the police service resulted in an appreciable improvement in the police-public relations.\textsuperscript{34}

In 1949 the Inspector-General of Police visited the Metropolitan Women Police in the United Kingdom and when he returned to the Island he recommended the recruitment of women police constables, which was approved by the government.\textsuperscript{35} The first batch of five women constables were recruited from time to time.\textsuperscript{36}

During the 1950s and 1960s the structure remained virtually unchanged but the strength was gradually increased to meet manpower requirements. Police stations were opened in the un-policed areas, which resulted in an increase of the police Districts and Divisions and in the need for increased strength to man them. The years 1970/71 are memorable in the history of the Police Department, because the United Front Government came to power with an overwhelming majority, the Basnayaka Commission Report was published and his Holiness, the Pope, visited Sri Lanka. The historical importance of this period has been well documented in the Report of the inspector-General of Police as follows:\textsuperscript{37}

\begin{quote}
"The year under review can aptly be described as one of promise and tragedy. It was a year of promise in that after many decades, a government began to be sympathetic and realistic in its attitudes towards the needs of the Island’s premier law enforcement agency. It was a year of tragedy in that on the 5\textsuperscript{th} of April, 1971, the entire nation was awakened to a sequence of blood – curdling events unprecedented in recent history."
\end{quote}

Within a period of a little over 20 years since Independence, in 1971 the total strength of the Regular Force and the number of Police Stations increased to 11,515 and 273 respectively, which also brought under police supervision the areas that were un-policed up to that time. The Police Women’s cadre, however, was not increased to an appreciable degree.

The outbreak of insurgent activities during this period, in which a segment of the Sri Lankan youths were involved, dictated the need for the accelerated recruitment of additional cadre. Its implementation posed a problem as the training facilities then available at the Police College were adequate only for 600 recruits at any one time. Additionally, the complex and time-consuming recruitment procedure of the department did not facilitate the accelerated

\textsuperscript{34} Administration Report of the IGP for 1952, p. 32.
\textsuperscript{35} Administration Report of the IGP for 1951, p. A 32. It was in 1951 that the proposal was made to recruit WPCCs.
\textsuperscript{36} Administration Report of the IGP for 1952, p. 32.
\textsuperscript{37} Administrative Report of the IGP for the year 1970/71.
recruitment. Due to these reasons, in order to supplement the Regular Police Cadre the need arose to re-organise the Police Reserve, which did not function at a high level of efficiency during 1970s. As a result a special study was undertaken to identify the areas that needed to be addressed in order to raise the level of efficiency of the Reserve Police cadre to that of the Regular Police cadre. In 1971 approval was obtained to recruit 10,000 Police Reservists. A Reserve Police Headquarters was established under a Commandant and a Senior Superintendent was appointed to re-organise the Reserve Police Service.

In 1970 the number of Deputy Inspectors-Generals (DIGG) was increased to five; two were placed in charge of the Administration and the Criminal Investigation Department and the balance three DIGGs were placed in charge of three Ranges, into which the country had been divided. They were stationed at Police Headquarters. In 1979 the three DIGGs in charge of the Ranges were directed to open offices in their respective Ranges. This was done to facilitate decision-making, to have a better command and control and supervision over the officers in the Ranges, and to forge better cordial relations with the public. With the opening of these offices for the DIGGs at the Range level, it could be said that decision-making at the senior level was done at the Range itself, which facilitated a better public relationship with the Police as no person needed to go to Police Headquarters in Colombo, as in the past, to get any matter attended to.38

The inspection of police stations periodically, is a system that has come down from the pre-Independence era. All Assistant Superintendents of Police in charge of the Territorial Districts are required to carry out the inspection of the police stations once every month. During such inspection they supervise every aspect of the police work, including the books, registers, equipment, buildings and vehicles. They are also expected to meet the public. The Superintendents of the Divisions are required to conduct inspections half-yearly and the Deputy Inspector-General of the Ranges, once in every year. This unique system prevails only in the Police Department, which helps to maintain better supervision of, and a better grip on, the senior officers at the Range level. Regretfully, today these inspections are being treated as mere routine and they do not bring forth the desired results.

On the recommendations of the Basnayake Commission the educational qualification for enlistment as a constable, which was raised in 1950, was again raised from the Junior School Certificate to the General Certificate of Education/Ordinary Level. This posed somewhat of a problem to recruitment at the initial stage. However, with the raising of the educational qualifications, a better type or quality of recruit was expected to join the Police Department.

During the next two decades accelerated recruitment really started. Since 1975 the intake to the Police Department, (except during a few years) had been over 1,000 recruits per year.

<table>
<thead>
<tr>
<th>Year</th>
<th>No. of recruits</th>
</tr>
</thead>
<tbody>
<tr>
<td>1985</td>
<td>3,699</td>
</tr>
<tr>
<td>1986</td>
<td>4,811</td>
</tr>
<tr>
<td>1989</td>
<td>4,282</td>
</tr>
<tr>
<td>1999</td>
<td>2,548</td>
</tr>
</tbody>
</table>

The requirement for increased manpower stemmed from the terrorist problem in the North-East of the country. The complex and protracted recruitment procedure however served as a constraint to the expeditious recruitment of manpower. However it cannot be said that the correct type of persons had been recruited during the period to serve as police officers.

The above statement may well be true where the recruitment of sub-inspectors were concerned. The intake of sub-inspectors during the first two decades after Independence was restricted to the numbers that could be trained but due to the increase in the cadre of police constables, and in order to have a better control over them, more sub-inspectors were simultaneously recruited.

From 1985 up to 1999, the numbers of sub-inspectors recruited were as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>No. of sub-inspectors</th>
</tr>
</thead>
<tbody>
<tr>
<td>1985</td>
<td>151</td>
</tr>
<tr>
<td>1986</td>
<td>308</td>
</tr>
<tr>
<td>1988</td>
<td>253</td>
</tr>
<tr>
<td>1992</td>
<td>245</td>
</tr>
<tr>
<td>1996</td>
<td>208</td>
</tr>
<tr>
<td>1997</td>
<td>306</td>
</tr>
<tr>
<td>1999</td>
<td>337</td>
</tr>
</tbody>
</table>
From the above it will be seen that unprecedented large numbers have been recruited as sub-inspectors since 1985 to date. Due to this accelerated recruitment, the usual training period of six months was drastically reduced. In many instances, the need for manpower in the North-East resulted in the recruits being given a training only in the handling of weapons and the essentials required for the performance of the police and law enforcement function. The problem which the police department has to face and which stems from the inadequate training given to these recruits initially, is that once they complete their period of operational service, they will have to be re-trained. For this purpose well-structured programmes would need to be made since, during the initial part of their service, they had seen only the para-military aspect of their work and therefore they need to be re-trained to be able to perform their duties and functions in the normal areas and interact with the public.

In 1980 a special grade was created known as Senior Deputy Inspector-General of Police. The number of DIGGs was increased to 19 in 1992, and a DIGG was assigned to each Province, other than to the Western Province, where three DIGGs were assigned. The decentralisation process, which began in 1979, continued further with these appointments, through which it was expected to provide a better service to the public and ensure a firm command and control in the Ranges.

An accelerated scheme was put into effect to recruit more strength to the Regular Police but this resulted in a small number of persons being enlisted which was inadequate to meet the policing requirements in the North and the East as well as to deal with the insurgent activities of the JVP. Therefore, an accelerated scheme for enlistment to the Reserve Police was put into effect in order to supplement the number enlisted to the Regular Police. The strength of the Reserve Police stood at 10,000 officers in 1971, which was increased, to 26,059 in 1995. These Reservist Officers were given a para-military training at the Reserve Police Training Centres and after forming them into platoons, they were deployed in the North, East and in the terrorist-threatened villages in the North Central Range. These officers, along with the officers in the Regular Police and military personnel, performed a commendable service in these areas and some of them even made the supreme sacrifice in the brave discharge of duty, for which the people should be grateful to them forever.

It should be noted that by mid 1980s the police service comprised three command structures: territorial, functional and operational. The territorial command comprised the nine provinces, the functional command provided the support services for the territorial command to function smoothly, and the operational command was responsible for the deployment of strength in the North, East and in the threatened villages as well as for other operational matters.

The strength in the Regular Police in 1995 stood at 30,608 officers and the ratio of the population to policemen was 1:320. Furthermore, the ratio of the policemen to 1 square mile was 1: 1.73 which, by any standard, was a high ratio and almost equal to the ratio in the developed countries. This ratio was further reduced by the intake of large numbers of
policemen to the Regular Force after 1995 and its strength today stands at 33,882 officers.\textsuperscript{39} This reduced ratio, however, has not benefited the people to an appreciable degree since one-third of the entire police strength is now deployed in the North, East and in the terrorist-threatened villages. In addition to this, in the rest of the country the police are engaged more on security duties and less on their traditional and non-traditional roles. Benefits, however, will accrue to the people once the situation in the North and the East returns to normality.

The return to normalcy in the North and the East will necessitate the deployment of the majority of police officers, who had been stationed there, to perform their traditional role. This will pose a problem to the officers in the higher echelons of the police service since retraining programmes would need to be devised and implemented to disabuse these police officers of their para-military mentality and instil in them the knowledge and discipline that are necessary to perform their traditional and non-traditional roles as police officers.

\textbf{THE ROLE OF THE POLICE IN INDEPENDENT SRI LANKA}

The problem of crime, law and order, crime in the streets, unknown gunmen, are the catchphrases that have been used to summarise the popular fear and concern about certain aspects of crime, or acts of anti-social behaviour not excluding student protests, labour disputes, etc. Crime or anti-social behaviour has been a problem throughout the history of mankind. The politicians, policy-makers and academics in all disciplines, have been trying their utmost to find an answer to this growing problem.\textsuperscript{40} Various theories have been put forward to analyse the causes for the incidence of crime and how best to curb and combat such crime in the society. Historically the police have been in the forefront of crime detection. Therefore, the society views crime as a police problem. In fact it is being frequently argued that the remedy for curbing the rising levels of crime lies in a stronger and better equipped police force but the police argue that they are not responsible for the incidence of crime because they do not in any way contribute to its causes, which aspect has been well documented elsewhere.\textsuperscript{41} Furthermore, they also argue that the criminals apprehended by them are being dealt with by other agencies of the law-enforcement system which act independently of the police and that they could do very little towards reducing the incidence of crime in the society. Additionally, it is a fact that development is usually accompanied by new forms of crime as a result of avenues being opened or scope being provided for such forms of crime to be committed.

\textsuperscript{39} Administration Report of the IGP for 1995.

\textsuperscript{40} Harry Blag and David Smith, Crime Penal Policy – Social Work, (1989).

“As any country begins to open up, outgrow its traditionalism and respond to outside influences or new ideas by modernising, industrialising and concentrating people in certain areas, its people and particularly its younger generation seize the many new opportunities. And in doing so, a small but progressively increasing number of them succumb to temptations and seek illegal satisfaction through crime.”

Research done by the writer has revealed that the police in Sri Lanka devote more of their time to non-criminal matters such as attending to the needs of the society, domestic problems, land disputes, social matters, locating lost people, etc. than to criminal matters. The urban police engage themselves in regulating traffic on the highways and at least 25 percent of them spend their time in courts assisting to bring criminals to justice.

Due to the emergence of new challenges, such as political unrest, terrorist activities, labour disputes, etc. the police also devote a substantial part of their time and resources to deal with them. The terrorist problem in the North and East and the fear that the terrorists might infiltrate the areas hitherto considered safe also have diverted a large segment of the police personnel, both Regular and Reservists, and resources for providing security for the people in those areas threatened by the terrorists to restrain them from extending their control or activities to other areas. This, therefore has reduced the manpower which could otherwise have been utilised to deal more effectively with the detection of crime and the maintenance of law and order.

As stated previously in this paper, crime statistics were not kept by the police during the early part of the British Administration. With the initial step taken by Campbell, Inspector-General of Police in the 1860s, to obtain crime statistics from the magistrates, the need for the Police Department to maintain statistics for analytical purposes was identified. It was this action that dictated the need for the police to collect statistics relating to crime. Thereafter, up to this day, all the crimes committed are analysed and published by the Inspector-General of Police in his yearly Administration Report.

The reliability of the crime statistics has been questioned by professional bodies, academics and others for various reasons. Today the courts, correctional institutions and the police collect data on crime. This being so, some reliance can be placed on the statistics maintained by the police than on the statistics available in the courts and/or correctional institutions. All

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43 Biderman, Albert d and Reiss Jr., On Exploring the Dark Figure of Crime – Annals of the American Academy of Political and Social Sciences, (1967); Bayley, The Police and Political Development in India, p. 101; The writer, in 1985, conducted a research in “Dark Figures in Crime in Sri Lanka.” It was found that the reportability in theft was only 1:4.
persons suspected of committing crime and arrested by the police are not taken to the courts and the criminals who are prosecuted are not always convicted. Therefore, if any one needs to acquaint oneself with the total crime picture, one should have access to the crime statistics maintained by the police, courts and the correctional institutions. The crime statistics maintained by the police alone cannot be considered to be 100 percent reliable. The degree of reportability of the various crimes depend on the nature of such crimes. In Sri Lanka the reportability of crimes against persons is very high and the degree of reportability of crimes against property is somewhat low. Victims of crime, such as rape, sexual harassment, etc. do not often report to the police due to the stigma attached. The doubt on the part of the public that the police are incapable of investigating crime properly and their lack of confidence in the police are also factors that militate against the people reporting crime to the police. Another factor is police discretion and the doubt on the part of the public whether or not the police would entertain complaints relating to certain types of crimes also militates against victims making complaints to the police. There are also several other factors which have been documented elsewhere by the writer where the Sri Lankan situation is concerned and the reason why victims of crime do not always report such crimes to the police.

The Sri Lankan Police, since independence, has identified crime under 15 heads, which are known as ‘grave crime.’ Whatever crime that does not belong under anyone of these heads is classified as minor offences. Therefore crime has been divided into two categories: one is known as ‘grave crime’ and the other as ‘minor offences.’ In 1948 the grave crime reported to the police totalled 24,648 cases, which represented a reduction when compared with 28,286 cases in 1947. The conviction rate in 1948 was 34 percent. Of these, 5,492 were burglaries, 1,642 cattle thefts and 7,320 thefts. From these figures it will be noted that the bulk of the crime is related to property. In 1953 grave crime totalled 18,016 cases and the conviction rate increased to 44%. The grave crime figure for the period 1970/71 totalled 41,479 cases, which represented an increase of 100 percent. Of this figure 1,194 cases were murders. Burglaries totalled 8,773 cases and theft 10,097 cases. The increase in the crime rate was due to the insurrection in 1971. The conviction rate was about 30 percent.

Up to 1970 the theft of any article valued at Rs.20/- or over was considered to be a grave crime. At the time, most articles had a value of Rs.20/- or over and the theft of an article of the value of Rs.20/- or over was considered too low to constitute a grave crime. Therefore the value was raised to Rs.100/- and over for the theft of any article to be considered a grave

44 The 15 heads of grave crime are – abduction, arson, burglary, cattle theft, exposure of children, grievous hurt, homicide, attempted homicide, hurt by knife, rape, unnatural offence, riot, robbery, theft of property, theft of bicycles.
Aspects of fifty years of Law, Justice & Governance in Sri Lanka

crime. Furthermore it was decided to bring certain other crimes within the definition of grave crime and six more offences were defined as grave crimes during this period, which were to be given special attention and subjected to better investigation as well.\[48\]

Taking into consideration the crime statistics in 1980, which amounted to 52,157 cases, approximately 50 percent were crimes against property. This increase in grave crime was not due to six other offences having been defined as grave crimes.\[48\] Since then crime has been fluctuating and in the year 1994 the total number of cases of grave crime reported to the police stood at 52,344.\[49\]

Although this was not an intolerable rate of crime, the increase in violent and horrendous crime in the recent past such as kidnapping for ransoms, use of explosive devices and modern fire-arms, bank robberies, etc. has had a great impact on the society. The use also by criminals of the advanced sophisticated technological communication/information technology equipment poses a serious challenge to the police where the investigation of crime is concerned. The public, however, are of the view that the police are inefficient and ineffective in detecting crime. However, when some of the sensational crimes committed in Sri Lanka are considered, the police have done very well in detecting and investigating them and bringing the offenders to justice. Some of these cases are the Sathasivam, Kularatna, Pauline de Croos, Thismada, Kalattawa, Wilpattu, Rita Jones and Thenuwara murder cases as well as the Sepala Ekanayake and D.C. Wickramasinghe kidnap cases.

The involvement of the police in the recent past in the social challenges which they have to face, and referred to elsewhere in this paper, have necessitated the diversion of a colossal amount of manpower and equipment in meeting them, thereby hampering their traditional law enforcement function. Therefore, serious thought needs to be given to the acquisition of more strength and equipment to enable the police to perform their traditional role.

The role of the police is not only the detection and investigation of crime but also the prevention of crime. The preventive role has existed since the pre-Independence era and is based on the concept of target-hardening, i.e. to increase the risk to the criminal of being apprehended and to reduce the environmental opportunities for committing crimes. The prevention role that is being implemented comprise day and night patrols, mobile patrols, supervision of convicted criminals and bad characters, arrest on suspicion, beat duty, raids on houses of ill-fame, detection of the sale of narcotics and narcotics-related offences, placement of road blocks to deter and/or apprehend offenders. These prevention methods

\[48\] The six new offences are: cheating, misappropriation and criminal breach of trust over Rs.1,000/-, theft of praedial produce, counterfeit currency, offences against the State, offences under the Offensive Weapons Act and Exchange Control offences.

The Police System

had proved successful in deterring/apprehending criminals during the first two decades after independence but, regrettably, due to the lack of strength and the indifferent attitudes shown towards these methods, the desired results are not being obtained. However, in order to achieve greater preventive capability the concept of community policing needs to be fostered, which would mobilise the community for the prevention of crime. This has proved successful in countries such as Japan and the United Kingdom.

Regulating traffic on the highway has become an important role for the police in Sri Lanka today. During the first three decades after independence, traffic was not a problem of the same magnitude as it is today. With the introduction of the open economy by the then government, who put in place the necessary infrastructure to attract foreign investors, there was an influx of entrepreneurs who invested heavily on building factories in the industrial parks and importing the required ancillary equipment, which included, among others, heavy vehicles required for the conduct of their businesses. Within a short time container-carrying vehicles and other vehicles of various types added to the congestion on the highways. This also afforded the people the opportunity to enter the transport trade and import large buses and three-wheel vehicles for use as taxis, which further added to the congestion on the highways.

A further factor that also contributes to congestion arises from the lack of road sympathy on the part of some drivers of vehicles and their unconcerned driving often results in serious traffic jams and serious/fatal accidents.

Although these changes took place within a short time, any meaningful action that was taken in order to relieve congestion by widening the roads progressed very slowly. One of the reasons why the people in the urban areas do not have a good opinion about the police is also due to the traffic problem. This is a matter to which the officers in the higher echelons of the police department should give serious thought, particularly bearing in mind road engineering, traffic education and law enforcement.

Apart from the role of detecting and preventing crime and regulating traffic the police also play a role in non-criminal matters. This is an area where most people feel that the police are incapable of redressing the grievances of the complainants. It was not until recently that the police identified this role because traditionally they have been engaged only in the detection and prevention of crime and the maintenance of law and order. However Police Headquarters identified this role in the early 1970s and large-scale awareness and training programmes have been conducted since then to help police officers perform this non-traditional function efficiently and effectively.

50 Administration Report of the IGP for 1995. In the year 1995, 48,139 accidents had been reported. The number of vehicles involved in accidents were 79,921. In Sri Lanka the ratio of vehicles is 1 to 14 persons. This should indicate the magnitude of the problem relating to traffic with which the police have to contend.
The police have a fuller role to play in its service to the nation who in turn should co-operate with the police to achieve the best results and benefit from this area of work.

NEW CHALLENGES TO THE ESTABLISHED ORDER

The traditional role of the police, as we have seen from its brief history, since the colonial days, is the prevention and detection of crime and maintaining law and order where the anti-social elements in the society are concerned. Since the colonial days there have been riots, and conspiracies but the threat to the law and order situation at that time was not of the same magnitude as it is today. There were riots in 1843, 1847, 1848 and civil disturbances following the decline in the price of coffee. Most of the protests in 1848 were against the higher taxes imposed on the people and the conspiracies in the hill-country during 1819, 1822, 1823, 1824, 1834, 1842 and 1847 were directed at overthrowing the colonial masters. The Bentota and Jaffna riots in 1867 relating to fishing rivalry and the Kotahena Religious riots in 1883 are but a few. Such anti-social behaviour had been in evidence throughout the colonial period and the police were put to considerable hardship to restore the status quo. These disturbances were dealt with an iron hand by the police as they had no notion of respect whatsoever towards the people.51

At the beginning of the 20th century there were labour disputes,52 which contributed in some measure to unrest, but they did not threaten the established social order of the day to any appreciable extent. For a few years after independence there was no strong threat to the established order till the civil disobedience campaign or hartal of 1953.

But from 1956 onwards progressive reforms were introduced, such as nationalisation of the bus services/companies, oil companies, introduction of the tenant-cultivator concept, the national language, etc, which brought about a radical change in the society. Following these changes, labour disputes, such as strikes, boycotts, picketing, etc. posed a new challenge to the police. The introduction of the national language gave rise to ethnic conflicts and labour unrest. Regrettably, at that time, the police were not prepared or geared to face them. This

51 Pippet, G.K., History of Ceylon Police Service, p. 157. Also see Ceylon Police Gazette Part 11 No. 3640 of 05.04. 1923 (Duties of Police during Strikes).

52 Trade unionism in Sri Lanka is said to have commenced with the formation of the Ceylon Printers’ Union in 1893. During the early part of the 20th Century there were strikes, to which leadership was given by A.E. Gunasinghe who formed the Ceylon Labour Union and by K. Netsan Aiyar, who formed the All Ceylon Indian Estates Labour Federation. The enactment of the Trade Union Ordinance in 1935 provided the impetus to form Trade Unions. Within the first year of the Ordinance being passed, 36 trade unions were registered. However, more and more trade unions were formed since Independence and by the year 1972 there were 480 trade unions comprising a membership of 1.1 million members. Three characteristics were common to these unions: their multiplicity, dependence on political leadership and unsound financial position. Due to the politicians using these unions to further their political agenda, strikes were frequent. In 1956 there were 214 strikes, 304 in 1957, 219 in 1958 and 248 in 1959, both in the public and private sectors (De Silva, W.P.N., Industrial Conflicts: A study of Trade Union Strategy and the Law (1964)).
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has been well presented by the Inspector-General of Police in the Administration Reports for the years 1956 and 1957 as follows.53

“One immediate result of the establishment of the People’s Government was that the ‘old order’ changed completely in an incredibly short time. Several problems that had lurked in the background were thrown into the open and assured a new significance. The repercussions of this new resurgence of spirit were felt by the Police more than by any other Department. It is not a matter for surprise, therefore, that during this extremely difficult period of transition, the Police should inevitably come in for a great deal of criticism.

People become increasingly preoccupied with radical changes taking place around them. The Sinhala only Bill, for example, sparked off a violent chain reaction, the repercussions of which are still agitating the country. Labour disputes, intense political agitation, racial riots and religious rivalry dominated the scene, with the result that the religious revival was relegated to the background. The country was subject to a war of nerves. In its wake crime marched on. Where the Buddha Jayanthi failed, the Police could scarcely hope to succeed.

The Language Issue, which had given rise to racial riots in 1956 continued to smoulder with the Federal Party’s preparations for a mass Civil Disobedience campaign. The rest of the country was alive to the danger. Some Sinhalese organisations therefore planned counter-measures in the South. The position was further complicated by extremist in both camps working overtime to preach a gospel of hate. While these activities went apace, subversive groups prepared to fish in troubled waters. Consequently by June the whole country was suffering acutely from ‘nerves’, and a general atmosphere of alarm and despondency prevailed.

But there was constant turmoil and frustration because everyone tried to get his grievances redressed all at once. Matters were made worse by a growing spirit of indiscipline at all levels and in all spheres, even in sport. Unless this tendency is arrested without much further delay, orderly progress will be seriously jeopardised. In the same context, attention may be drawn to the current practice of forming private ‘Armies’, if I may say so. Either as Thondars on Estates or ‘shock troops’ of trade unions in the City, or ‘labour commandos’ at the various Development Projects scattered in the Provinces, they constitute a menace to the law abiding section of the community and a threat to law enforcement. There are unmistakable signs that some at least of these groups are being trained and

organised to act as disciplined militant units and that, moreover, subversive forces are prepared to provide finance, strategy and leadership. If these unwholesome activities are not checked the country may have to face the consequences of organised indiscipline on a vast scale in the foreseeable future.”

During this period the number of strikes was very high but the police could not use the strong arm tactics, to which they had got used since the colonial times to suppress them, due to the fact that, unlike before, they too were a part and parcel of the Sri Lankan community. Nevertheless the use of a certain amount of force was required and used to ensure the maintenance of law and order. This new social order continued but not without ethnic disturbances, strikes, etc. with which the police had to contend. Even though the police had not been trained to face these new challenges, to their credit it must be said that they fared well.\textsuperscript{54}

The coup, which was planned by some officers in the higher echelons of the armed services and the police in 1962, did not take off the ground as its execution was stalled and the government of the day lost confidence in the officers who were at the helm of affairs in the police and the army, which caused a setback to the country’s progress. In spite of the fact that the police had, for the most part, successfully dealt with such situations in the past, the need had not been identified till then to train and equip the police to handle such situations. The police, however, did not deviate from the traditional role of peace officers even though they had to face such challenges.

The insurrection of 1971 by a segment of disgruntled youths posed a serious threat to the law and order situation of the country as they targeted the police stations and people who possessed fire arms.\textsuperscript{55} This situation was quickly brought under control by the police with the co-operation of the armed services.

The threat posed a new and serious challenge to the police and dictated the need to increase its cadre, provide better training and locate the police stations at places that could not be easily attacked. Certain policies were changed relating to the construction of the police stations, the training discipline and provision of related equipment. Thereafter, the government of the day and successive governments ruled the country under emergency laws and during such times the police were compelled to deviate from performing the normal law enforcement functions and from acting under the normal laws of the land.

Since 1975, following the assassination of the Mayor of Jaffna, Duraiappah, the law and order situation in the Northern Province began to weaken. Tamil youths took up arms in


order to force the government to grant the rights of the Tamil community. The events that have taken place since then are well documented. These disgruntled youths formed themselves into various groups with the single purpose of attacking the government. To deal with this situation more people were recruited by the police. Due to this reason the normal law enforcement functions were delayed as they had to prepare themselves to meet any eventuality. In the early 1980s, out of numerous armed groups, the LTTE emerged as the most ruthless guerrilla outfit in the world. Their activities have permeated every part of the country, and the police have had to gear themselves to meet this terrorist challenge. They were, therefore, given a para-military training and equipped with weapons to suit the new role they had to play in the society. Similar changes have been seen in the world over, when there had been a threat to the law and order situations. Such situations had necessitated the deviation from the traditional policing role. The police in Sri Lanka also have done so in similar situations.

However, to be able to deal effectively with such situations, which may emerge in the future, bearing in mind the situation that emerged in the 1970s, a special unit known as the Special Striking Force was set up in May 1978 under a Senior Superintendent of Police and the officers were given a para military training. They were trained by the Sri Lankan Army and their main duty was to provide backup support to the Regular Police who were engaged in the investigation of terrorist related crimes. This unit, however, lacked sufficient manpower and equipment. Its name was changed to Police Combat Group in 1981 by Police Headquarters and placed in charge of another Senior Superintendent of Police. At this stage difficulty was experienced in attracting manpower to this unit. In 1979 the Subasinghe Commission was appointed, which recommended the establishment of an Armed Reserve Division, as follows.56:

“We are of the opinion that the Armed Services should not ordinarily be summoned to deal with situations which in the normal course could be handled by The Police Service. When public order problems are beyond the capacity of the Police alone to handle, then certainly the Armed Services have to be summoned to control the situation, e.g. in instances of widespread violence. But situations may arise which, on the one hand, cannot be handled by the Riot Squads of the Field Force Division but which, on the other hand, would not justify the intervention of the Armed Services. In order to meet such public order problems, we recommend the establishment of “The Armed Reserve Division.”

It was not until 1983 that this recommendation was implemented. In February 1983 the Inspector-General of Police submitted a report recommending the establishment of a para-military force within the police named the Special Strike Force. This Force was set up and initial training was imparted to the officers by the Sri Lankan Army and these officers were

deployed in the North of the Island. This Force was later named as the Special Task Force (STF), which received recognition from the Government. A special training centre was then provided at Kalutara, which was a wing of the Police College. The services of two S.A.S. expatriate officers were obtained and they imparted the necessary para-military skills training to the officers of the Special Task Force and thus equipped them to perform their tasks with optimum efficiency and effectiveness.

When it was realised initially that the number of the volunteers from the police force was inadequate to acquire the necessary manpower, recruitment was done from outside. These officers were very well trained to engage in counter-guerrilla warfare. In August 1987, the Special Task Force developed a wing within it to provide close protection and security for VVIPP. The selected officers were sent abroad to countries, such as the United Kingdom and Israel, for specialised training and upon their return, they were deployed to perform the functions for which they had been trained. Because of the professional training they had received and the concomitant discipline they had acquired they have been deployed in the Eastern Province where their performance has earned for them a high reputation. Even the terrorists themselves are perturbed when the STF officers are deployed in their areas of activity.

At present the STF is totally in control of the Eastern Province, especially the Ampara and Batticaloa areas, and they have been successful in considerably minimising casualties in these areas from terrorist activities. They are also doing a very commendable job where the provision of protection and security to the VVIPPs are concerned.

During the period 1985/86 the requirement for more manpower in the STF was identified but faced the difficulty of getting recruits. Therefore, the police department recruited more manpower to the Regular Police and to the Reserve Police and established special training centers as Pahalagama, Katana, Mahiyanganaya, Kundasale and Morawewa. The recruits who completed their training at these centers were formed into platoons and deployed in the Eastern Province, Trincomalee District and throughout the villages in Anuradhapura, Polonnaruwa and Trincomalee where they play a supportive role to the Army by providing security for the people in these areas who engage in agricultural activities, besides fighting the terrorists along with the Army. These platoons are also deployed in other areas of the Island for security purposes.57

Due to the present security situation, as explained above, a substantial percentage of police personnel are being deployed in the North, East and the North Central Province. The Reserve Police officers deployed in the North and East total 11,578 personnel and comprise 669 constable platoons and 28 women constable platoons.58 When the number of police Reservists

58 Statistics obtained from the Sri Lanka Police Reserve Headquarters.
deployed in the North Central Province and in the villages in the Eastern Province, which are under terrorist threat, is considered, their total strength would amount to well over 15,000 officers. A substantial percentage of the Regular Police officers are also deployed in the North, East and North Central Province. In other areas too they perform barrier duties, provide VIP security and do static duties to prevent terrorist attacks. The police also provide security at places of worship and at places of public and economic interest such as the Central Bank, Seaports, Airports, etc. Thus it will be seen that these new challenges keep the Sri Lanka Police pre-occupied and that an incredibly large strength and colossal amount of equipment are being utilised to provide security against terrorist attacks. Since 1977 over 2,000 police personnel from the Regular and Reserve Police and the STF have sacrificed their lives to safeguard the sovereignty and integrity of the motherland. Due to these reasons the police are left with a considerably reduced strength to attend to normal law enforcement function.

In Sri Lanka there are no organised crime groups. In the first two decades after independence, the police very effectively controlled the small groups of persons who engaged in anti-social behaviour but, after the introduction of the open economy, these anti-social groups emerged as “underworld criminal gangs” due to the political patronage they received.\textsuperscript{59} Since the police are preoccupied facing other challenges, they do not have the time to deal with these “underworld gangs.” In the 1980s and 1990s these “underworld gangs” threatened the entire social fabric of the Sri Lankan society, especially in Colombo and its suburbs. Today the society face contract killings, kidnappings and rival gang warfare. This is a new challenge, which the police will continue to face in the years to come.

The Crime Detection Bureau of the Colombo Police has identified about 19 underworld gangs who are effectively operating in Colombo and its suburbs. Therefore, unless the police take meaningful action forthwith to contain the activities of these criminal gangs, which are believed to centre on the sale and distribution of narcotics, prostitution, gambling and protection of persons who are themselves connected to anti-social business enterprises, there is a possibility that such criminal gangs might proliferate. It would then require the deployment of considerable resources to curb/control or even bring them to justice. In this connection it would be well to bear in mind the maxim: “A stitch in time, save nine.”

TOWARDS PROFESSIONALISM

The quality of the administration of justice is very important to a democratic country such as Sri Lanka. No agency of the criminal justice system has more direct relationship to the public than the police. No aspect of the police is more important for its future well-being than the proper training of its officers.

\textsuperscript{59} Editorial of \textit{Island} Newspaper of 16.11. 2000.
The policeman is vested with the power and authority to maintain law and order. Such an officer should have a knowledge of the changing society, its economy, political conditions, underlying human behaviour, ability to communicate, assumption of certain moral values, acceptable habits of the mind, and self-control. Although recruitment to the department is through a complex process, which has been designed to get the best candidates into the service, yet the behaviour patterns need to be modified to some degree to turn a recruit into a capable policeman. A law enforcement officer is required to meet with all types of people in diverse situations. Therefore, he should be equipped to make sound judgements, communicate properly and precisely, possess leadership qualities and be able to understand the underlying causes of human behaviour. In the modern context a policeman interacts with the society in every aspect of civil life and the public look up to him when the need arises. The Public feels that an ideal policeman should possess:

"The wisdom of Solomon, the courage of David, the patience of Job and the leadership of Moses, the kindness of the good Samaritan, the strategy of Alexander, the faith of Daniel, the diplomacy of Lincoln, the tolerance of the Carpenter of Nazareth and, finally an intimate knowledge of every branch of natural biological and social sciences."

It may be difficult to develop a policemen to the standard mentioned above but it is essential that when a policeman goes out to the streets in the hope of regulating, directing or controlling human behaviour, he should be armed with more than a gun and have the ability to face an unforeseen incident whilst on duty and act in conformity with the law and win the confidence of the public. Therefore, a policeman needs to have a wider knowledge than the knowledge of the criminal code. This has been well understood by the police forces the world over and therefore training has been made a pre-requisite to perform the law and order enforcement function.

At the initial stage of the colonial period, no training whatsoever was given to the policemen. In 1846 Thomas Thomson identified the requirement of training the police but this training was confined to instructions relating to their day-to-day work. Campbell who in 1867 was keen on training the policemen requested the magistrates to give the policemen instructions...
on criminal investigation and established a training school at Maradana. In 1902 a further step was taken in this direction by requiring recruits to be given training for five months. This training, however, was mostly confined to physical exercises and musketry. Lectures were also given with regard to their day-to-day work. This training institute was later shifted to Pettah and the training periods for recruits and station house officers were shortened to four and six months respectively. In 1909 a five months training course was provided for the constables who had been recommended for promotion. This was a forward-looking step as training was given to the officers to enable them to hold and perform efficiently, their higher ranks. Dowbiggin introduced sweeping reforms in training and emphasised that training was indispensable for the police officers. In 1925 the training institute of Pettah was shifted to Bambalapitiya. It should be noted that during the pre-independence period, the training of the police officers was narrowed down and restricted to the training that was necessary for them to perform only their day to day functions and criminal investigation work. There were no subjects on social sciences, forensic medicine, behavioural science and management. This was due to the reason that the role of the policeman was restricted to the detection and prevention of crime. To inculcate discipline, parade, weapon drills and physical exercises were introduced. The Soertsz Commission in 1947 identified that training was a priority requirement and stated:

“When suitable men have been recruited, there arises the question of adequate instruction for the purpose of making them well-instructed men that modern conditions require them to be, and more than that for the purposes of making them tactful, patient and polite men in their dealings with the public. In these respects, the Police of to-day taking them by and large, are sadly lacking.”

The recommendation made by this Commission were to make the policeman a “law enforcement officer” instead of a “community-oriented officer.” It should be noted that the training, which was limited to the law enforcement function, was also adhered to during the next three decades. In 1948 the training institute at Bambalapitiya was shifted to Kalutara where it stands today.

During the post-Independence period too training was done but it was a continuation of the training done during the pre-Independence period. The training policy in the Sri Lanka police was formulated at the time of Independence and it is mandatory for all recruits to the

64 Ceylon Police Gazette (CPG), No. 3298 of 16.08.1916.
65 Ceylon Police Gazette (CPG), No. 3782 of 13.01.1926 and Ceylon Police Gazette (CPG), No. 3788 of 24.02.1926.
66 Ceylon Police Gazette (CPG), No. 3366 of 05.12.1917 and Ceylon Police Gazette (CPG), No 3919 of 12.09.1928.
police to undergo a period of six months’ training irrespective of the rank.\textsuperscript{67} After training and passing out, all the recruits are put on “on-the-job” training for a period of two and a half years to three years. They are then required to sit an examination set by the police college and on passing such examination, they are confirmed in their ranks.

There is also promotion-training from rank to rank. Such training is being done at the police college and its duration is between one month and three months, depending on the law and order situation in the country.

There is also a specialised training program in criminal investigation, court prosecution, traffic, VIP security, driver training, motorcycle riding, horse riding and heavy truck driving. This specialised training is confined to imparting technical skills only but it has not been designed to meet the new challenges that have emerged in the society after 1956. In every aspect of training, parade and physical exercises are mandatory and emphasis is particularly placed on parade. This gives rise to the notion that a military outlook is being inculcated in the police. This is a legacy that has come down from the colonial masters. During that era the police were not given any training on how to handle violent domestic situations, conflict situations, riot situations, etc. which the police may have to face whilst on the streets. The department expected the policeman to learn this important aspect of his duties through experience. Therefore such situations were handled on a trial and error basis. This has been one of the main reasons why a good response from the public had not been received.

There was no scientific training given on how to handle a strike or a riot situation, civil disturbance situations or ethnic conflict situation which were common during the first two decades after Independence. Some sort of in-service training was done by the department up till 1995 but it was not based on a scientific or structured framework. No “training-need” analysis was done on a scientific basis nor were performance appraisals done as most of the training programmes had been designed to fulfil the day to day routine work.

The Basnayake Commission in 1965 emphasised the importance of raising the educational qualification for recruitment as constables and this was done in 1971. Furthermore, this Commission identified the requirement of establishing a Higher Training Institute to impart knowledge in the managerial skills to the officers and in 1978 the Police Higher Training Institute was established. It has now grown into a full-blown institute, which conducts courses

\textsuperscript{67} Basnayake Commission Report of 1965 stated that since the inception of the training school there had not been uniformity in the duration of the courses given to successive batches of recruits, as certain batches had been given a training of two to three months and others up to ten months. The reason for the curtailment of the duration of the training had been due to special duties at religious functions, social events, law and order situations, etc. From this it will be noted that the knowledge and skills imparted to the trainees varied from batch to batch – pp. 11 and 12.
for all senior officers from the rank of Deputy Inspector General down to the rank of Sub-Inspector.\textsuperscript{68} Up to that time there was no such institute in the police department.

The Subasinghe Commission too emphasised the importance of training and the W.T. Jayasinghe Commission in 1995 recommended the establishment of In-service units in all the Ranges to give a training to the officers whilst they perform their duties at the Range level. In 1996 an In-service Division was established at police Headquarters under a Senior Superintendent and nine In-service Training Centres were established in the Ranges. Here, five programs were developed to impart the technical skills required by officers to perform their functions efficiently and effectively.

At present, the Sri Lankan Police are in the process of establishing a Police Academy to be affiliated to the Jayewardenepura University in order to provide higher education to police officers.\textsuperscript{69}

Apart from the in-house training, the Police Department has been “buying” training, that is, police officers are selected and sent out to participate in programs conducted by the Sri Lanka Institute of Development Administration (SLIDA), National Institute of Business Management (NIBM), Post-Graduate Institute of Management (PGIM), etc. Additionally it has been and still is the practice to send officers for specialised training to countries such as Japan, United Kingdom, Australia, Germany, France, Israel and India. Up to now a large number of officers have undergone such specialised training abroad in the fields of crime detection, disaster management, conflict resolution, traffic, enforcement of laws relating to narcotics etc. It will therefore be seen that emphasis is being given to training officers in order to equip them to perform their duties at the highest level of efficiency.

The 1978 Constitution included Fundamental Rights. This was an area where the police were not aware of the law and since 1980, efforts are being made to impart to the officers the knowledge related to fundamental rights, as there has been a public outcry that the police are responsible for violating fundamental rights. The position at present is that all the senior gazetted officers and the inspectorate have undergone training in this aspect of the law.\textsuperscript{70}

\textsuperscript{68} Since the establishment of the Police Higher Training Institute (PHTI) in 1978, the lacuna in training has been filled. At the initial stages its directors developed management programs which also included training on non-traditional police work. Today this institute conducts supervisory management courses for SPP/Divisions, ASPP/Districts, OICC/Stations and for promotees to fit them into their new ranks. Courses are also conducted on disaster management, conflict resolution, on the handling of industrial disputes, etc. W.T. Jayasinghe Committee Report, p. 27.


\textsuperscript{70} This awareness program on fundamental rights has been conducted at the PHTI since 1985 and up to date SPP/divisions, ASPP/Districts and OICC/Stations have been trained in this area of the law.
The police department also encourages it officers to do higher studies at the universities and particularly law. Today there are in the police department quite a number of officers who have obtained post-graduate degrees, diplomas and other professional qualifications from recognised universities and the Law College.

The training now being given to officers is not only in technical skills but also in human and conceptual skills. There is however a need to further analyse the requirements relating to training and to develop programs to make the police officers more professional. Although the public feels that the police officers have not been trained, it will be noted from what has been stated above that this is a misconception on the part of the Public.

It must be emphasised that the police department is the only department in the public service which provides both training and re-training for its staff. However, there is still room and the urgent need for further development in the field of training in order to better equip the police officers to meet the new challenges of the 21st century.

FOR BETTER POLICING

It will be seen from the facts given in this paper that the police organisation, which was started with a few peons and later with constables performing a limited role, has now grown into a gigantic organisation spread throughout the length and breadth of the country. This organisation has now been in existence for 134 years. For over a century now the police department has been maintaining law and order at a satisfactory level, even though there has been sporadic upheavals where more pressure and power had to be brought to restore the status quo.

Since independence various governments in power had appointed Commissions and Committees to look into the organisational and administrative aspects of the Police Service and how best it could be re-organised in order to provide a better service to the people. All these Commissions and Committees had recommended forward-looking strategies to bring about a change in the general attitude of the policeman in order to foster better public relations, upgrade the training, provide housing, welfare and infrastructure to optimise the benefits both to the department and the public. But, regrettably, most of these recommendations were only partly implemented or not implemented at all. Today, the reports of these Commissions and Committees serve only as reference material for both academics and scholars at the archives and libraries in Colombo and elsewhere. The Commissioners concerned had collected a colossal amount of data relevant to the matters connected with the police organisation and made recommendations to fill the lacuna identified in the police service at that time. These recommendations are still valid and could be implemented, mutatis mutandis to suit the needs of today.
Any organisation committed to ensuring its efficiency and effectiveness, must take cognisance of the fact that it is of paramount importance that its members should have job satisfaction. The police department has time-tested promotion, welfare and transfer schemes but, in the recent past, due to certain anomalous situations having arisen, these schemes were not adhered to thereby causing dissatisfaction among some of its officers. As a result, several cases were filed by officers in the courts against the Department relating to various matters due to the non-implementation of these schemes.\textsuperscript{71} This should suffice to indicate, to some extent, the dissatisfaction among a segment of the officers in the department. This sad state of affairs, which militates against the morale as well as the efficiency of the rank and file, can be corrected without difficulty if these schemes are implemented.

Elsewhere in this paper, the writer has identified the new challenges that have emerged since Independence. These challenges should be identified in their correct perspective and strategies should be developed for proper training of the officers to meet such challenges.

An organisation, such as the police service, needs the public co-operation, confidence and trust to be able to function effectively and efficiently. In order to ensure that the co-operation, confidence and trust on the part of the public would be forthcoming, strategies need to be developed. And the first among such strategies is that the police, on their part, must respect, recognise and trust the public, which will in turn result in a reciprocal reaction. The police also must bear in mind that the strategies developed should suit a multi-racial society.

Because of the conflicting role the police have to play in the society, that is, they have to support one party on one issue in the morning and oppose the same party on another issue in the evening or deal with one party for, say, a traffic offence in the morning and go to the same party in the evening to get information relating to a crime committed in his neighbourhood. The police are therefore commended in the morning with regard to one issue and denounced or condemned in the evening with regard to another issue. This is a veritable “brickbats and bouquets” situation in which the police find themselves. Therefore the role played by the police is a very complex one which should receive not the public condemnation or denunciation but the public co-operation which would make the role of the police a meaningful and result-oriented one.

INTRODUCTION

Sri Lanka inherited the present system of prisons from the British as the many other areas of criminal justice administration. However, it does not mean that prisons did not exist prior to the British period. There is historical evidence that the Dutch and the Portuguese had prisons in some of their maritime centres. There have been prisons even in the time of Sinhala kings. The Mahawansa refers to imprisonment in several instances. Kuveni is supposed to have imprisoned all 700 of Prince Vijaya’s men. Robert Knox in his book “Historical Relations of Ceylon” gives a short account of the ‘Common Goal’ and the prisoners in the Kingdom of Kandy. The difference, however, was that there was no organized system of prisons during these periods. It was the British who introduced a ‘prison system’ together with their criminal law.

The first legislation regarding prisons titled “An Ordinance for the Better Regulation of Prisons” was introduced in 1844. It is evident from this legislation that there were prisons under the British Administration prior to 1844. In 1853 another enactment titled “An Ordinance for the Safe Custody of Convicts Employed upon Public Works” was introduced. During this period several prisons including the main Welikada Prison and the Hultfsdorp Prison had been established. The next important statute was the Prisons Ordinance of 1869 under which a uniform prison system was established in the country.

In 1877 a statute was passed to amend and consolidate the law relating to prisons. This piece of legislation, commonly known as the “Prison Ordinance” with several amendments
Aspects of fifty years of Law, Justice & Governance in Sri Lanka

effected from time to time, is the law governing prisons and prisoners even today. Under this Ordinance the supervision and control of all the prisons in the island was vested in the Inspector General of Prisons. However, at the inception the office of the Inspector General of Prisons was also held by the Inspector General of Police as both departments functioned under him.

It was only in 1905 that the prisons were separated from the police and the supervision and control of all prisons in the island was vested in a separate Inspector General of Prisons. When Ceylon gained independence from the British in 1948 there was a well-established network of prisons covering most parts of the country. This consisted of 22 medium and large prison establishments and four small prison establishments.

Few years prior to Independence two significant events took place in the area of Criminal Justice Administration, particularly in relation to corrections. They were the introduction of the Youthful Offenders (Training Schools) Ordinance No. 28 of 1939 and the introduction of Probation of Offenders Ordinance No. 42 of 1944. Functions under both these laws came under the purview of the Department of Prisons.

Under the Youthful Offenders (Training Schools) Ordinance the British Borstal system was introduced to the country. The first training school for youthful offenders was established in 1940 at Wathupitiwela near Nittambuwa. At the time of its establishment it was said to be the first open Borstal institution in the whole of Asia.

Probation service under the Probation of Offenders Ordinance of 1944 was inaugurated in March 1945 and was made available to judicial divisions of Colombo, Kandy, Galle, and Kalutara. By the year 1955 probation service was expanded to cover all the judicial divisions of the island. Probation service functioned as a separate branch under the Department of Prisons until the creation of a new department called the Department of Probation and Child Care Services.

In the early post independence period prisons were managed on the principles laid down by the British. The modern concept of rehabilitation was not introduced in full measure to the prison system. In these early years the prisoners were occupied mainly in metal breaking and husk beating. There were metal quarries at the Bogambara and Mahara Prisons, two major establishments housing convicted prisoners. In most prisons prisoners were engaged in monotonous unproductive work such as mending mail bags and coir twisting.

FUNCTIONS OF THE DEPARTMENT OF PRISONS

Until 1956 the major function of the Department of Prisons was the keeping of prisoners, i.e. the custodial duties. Other duties relating to courts such as the production of prisoners,
receiving prisoners in courts and transporting them to and from courts were carried out by the Fiscal’s Department.

To facilitate the performance of these duties the Fiscal’s Department maintained over 25 small institutions throughout the country known as Fiscal’s lock-ups. However with the closure of the Fiscal’s Department in 1956 the duties and functions of that Department were entrusted to the Department of Prisons. Fiscal’s lock-ups too were handed over and came to be known as Prison Lock-ups thus adding a new category of institutions to the Department of Prisons.

Today the main functions of the prison system in Sri Lanka centers around two major categories of prisoners: the convicted and the unconvicted. For the purpose of keeping the convicted prisoners the Department of Prisons maintained three main prisons from the time of the British administration. They were Welikada, Bogambara and Mahara prisons that housed the long term first offenders, re-convicts and recidivist re-convicts respectively. For the purpose of keeping unconvicted prisoners several remand prisons were maintained throughout the country. As remand prisoners require to be produced in various courts, the Department of Prisons also maintains over 20 prison lock-ups that were taken over from the Fiscal’s Department.

CHANGE OF FACE

The adoption of “United Nations Standard Minimum Rules for the Treatment of Prisoners” in 1957 had a great impact on the administration of prisons in all member nations. These rules set out what is accepted to be good general principles and practices in the treatment of prisoners. In keeping with these norms adopted by the United Nations, Sri Lanka too is committed to the cause of rehabilitation of offenders. However, it must be mentioned that most of the norms incorporated in these rules were already in existence in our Prisons Ordinance.

An examination of the relevant rules of the United Nations Standard Minimum Rules will enable us to understand the aims and objectives of the prison system, which Sri Lanka is committed to observe.

Rule 58:

“The purpose and justification of a sentence of imprisonment or a similar measure deprivative of liberty is ultimately to protect society against crime. This end can only be achieved if the period of imprisonment is used to ensure, so far as possible, that upon his return to society the offender is not only willing but able to lead a law abiding and self supportive life.”
Rule 59:

“To this end the institution should utilize all remedial, educational, moral, spiritual and other forces and forms of assistance which are appropriate and available, and should seek to apply them according to the individual treatment needs of the prisoners.”

For many decades the accepted principle in Sri Lanka has been that an offender is sent to prison as punishment and not for punishment. Once the offender is admitted to prison the emphasis moves away from punishment towards re-socialization or rehabilitation, i.e. to instill in him the will to lead a law abiding and self-supporting life upon release.

Towards achieving these objectives the Department of Prisons has introduced many new features to the prison system. They are the new prison industries, religious and education curricula, recreation and leisure time activities. Prison industries such as tailoring, carpentry, masonry, motor mechanism, sheet metal work, manufacture of coir goods such as brooms, carpets and rugs, and bakery were introduced with the aim of offering vocational training to prisoners and making the prisons self-sufficient. Instead of the earlier occupations like metal breaking and husk beating, prisoners are now employed and trained in these industries with prospects for employment upon their release from prison.

A very noticeable feature among the prisoners was their low level of education. There were a large number who were illiterate. Literacy and education classes were started in all major prisons with the assistance of the Department of Education. Libraries too have been introduced to all prisons for leisure time reading and reference.

Lack of religious knowledge and practice was noticed to be another characteristic among prisoners irrespective of the religion they followed. To inculcate the importance of religious practices and to give prisoners a basic knowledge of their religion, religious instructors were appointed to all prisons. Places of worship for all major religions were established in all prisons.

A major step taken for the rehabilitation of prisoners in the early post independent era was the establishment of the Open Prison at Pallekelle in 1950. Before the end of the decade three other open prisons were established in Anuradhapura, Kopai and Batticaloa. Open Prisons were based on a new concept hitherto unknown to the country. The emergence of the open prison marked the beginning of a new phase in the history of the prisons in Sri Lanka. These open institutions are minimum security institutions characterized by the absence of material and physical precautions against escape such as security walls, locks, iron bars and armed guards. It is based on self discipline and individual responsibility towards the group in which the inmates live. The underlying philosophy of the minimum security open prison is based on several assumptions that could be summarized as follows:
(a) that a person is sentenced to imprisonment as a punishment and not for punishment;

(b) that a person cannot be trained for freedom in conditions of captivity. Therefore, the gap between the institutional life and the life in society should be minimized; and

(c) that a greater degree of trust and responsibility given to the prisoner would have a favourable response from him in return, which is essential for his rehabilitation.

Open Prison Camps in Sri Lanka serve as half way centres for long term offenders prior to their release to society. Selected prisoners serving long terms of imprisonment who have already been in prison a considerable period of time are sent to open camps. The inmates in open prisons are given the opportunity to have more contact with their families and the community. They often participate in community service projects such as road building, preparation of play grounds and clearing canals. The system had been a great success from the time of its inception with only very few escapes taking place from these camps. However, it is most unfortunate that the open camps in Kopai in the Northern Province and Batticaloa in the Eastern Province had to be closed down in the early half of the 1980’s due to civil disturbances in those areas.

A NEW CATEGORY OF PRISONERS

With the insurrection by the Janatha Vimukthi Peramuna (JVP) in 1971 the Department of Prisons had to face a crisis situation. Over 20,000 suspected insurgents were taken into custody upon their arrest or surrender. After initial preliminary investigations, over 16,000 persons were detained under emergency regulations. The Department of Prisons was entrusted with their custody although it was not prepared for such a contingency. It did not have either the facility to house such a large number of prisoners or the staff to meet with the situation. The two Universities, Vidyodaya and Vidyalankara, a home for elders in Koggala, a rehabilitation hospital at Weerawila, a house of detention at Ridigama and several other institutions in various parts of the country were requisitioned under the emergency regulations for running detention camps for the new category of prisoners. Staff were recruited at walk in interviews and posted to institutions after only a few days of training. By the end of 1971 there were 12 such detention camps established throughout the country. This was in addition to the large numbers held in the prisons. A special feature of these camps was that while the Department of Prisons was involved in administration, perimeter security was provided by the armed forces.

From the time of the British rulers prisons had to hold prisoners involved in anti government activities. The detention of leaders of the leftist movement such as Dr. N.M.Perera,
Dr. Colvin R. de Silva, Phillip Gunawardane and Edmond Samarakkody and the detention of the coup suspects in 1962 are two examples. However, these detentions did not pose a problem to prison authorities as the numbers involved were small. The 1971 insurrection was a situation which involved thousands of youth. They were not ordinary prisoners. They were not like the common criminals normally held in prisons. Neither were they held in custody under the normal law. The government did not officially acknowledge them as political prisoners. However, they had to be treated differently. The normal programmes of rehabilitation could not be applied to them. Having realized the situation, the government established a new Department of Rehabilitation whose officers were entrusted with the rehabilitation of these detainees while they were in prison custody. The detention camps themselves came to be known as Rehabilitation Camps.

Within a few years these detainees were gradually released. However, the phenomenon of the third category of prisoners (convicted and remand prisoners being the first two) continued to remain almost a permanent feature in the prisons. This is due to the arrest and detention of large numbers of suspected LTTE activists from time to time under emergency regulations and the Prevention of Terrorism Act. Presently a separate prison at Kalutara houses over 700 of these detainees.

EXPANSION OF SERVICES

The decade between 1970 and 1980 saw some important reforms effected in the area of prisoner rehabilitation. Most of these reforms were the brainchild of the then Commissioner of Prisons, Mr. J.P. Delgoda, who was a very dedicated and enlightened correctional administrator.

The first of these was the introduction of “Release on Licence Scheme” which is the equivalent of the more familiar term “parole”. Parole is an early release mechanism that is used widely in developed countries. The basic philosophy of parole is that a prisoner should not be kept in prison any longer than necessary, as it would be detrimental to his reformation. Parole as a correctional measure is a procedure whereby a person is released from prison at a time considered appropriate before completing his term of imprisonment so that he may serve the balance of his sentence in society under certain conditions, supervised by a correctional officer. This process is designed to facilitate the re-integration of the offender into the community under the guidance of a supervising officer. Any violation of the conditions in the licence would result in the cancellation of the licence and the licensee being brought
back to prison. Sri Lanka does not have a separate parole law. Section 111 of the Prevention of Crimes Ordinance No. 2 of 1926 is made use of in the implementation of this programme. However, a comprehensive parole law is a long felt need as the provisions of the above section is inadequate.

Another important progressive measure introduced was the Work Release Scheme commenced in 1974. Under this scheme selected prisoners for whom suitable employment can be found are sent to work in the community either from the prison or a Work Release Centre. Their earnings are sent to their families for their maintenance or saved to be taken upon their discharge to start a new life. The advantage of this scheme is that it helps the long-term prisoner to get prepared for life in free society. He learns the work norms and also gets an opportunity to develop and improve his skills and build up self-confidence. This scheme has been very successful and is very popular among the prisoners.

Home leave is also another important step taken during this period. Under this programme selected long-term prisoners who have served a considerable period of their sentence are sent home to visit their families without any supervision. Each case is carefully examined before they are selected for home leave. Prisoners released on home leave are permitted to stay one week at home and are expected to come back to prison on their own.

With the establishment of the first Open Work Camp at Weerawila in 1977 another new concept was introduced to the correctional administration in Sri Lanka. In the next few years that followed, several Open Work Camps were established in Koggala, Anuradhapura, Pallekelle and Meethirigala. At the beginning Open Work Camps were meant only for first offenders serving sentences less than two years. It was found that the majority of those convicted are sentenced to less than two years of imprisonment. These prisoners were unable to benefit from the various rehabilitative programmes in the closed prisons due to the shortness of their sentence. The negative effects of imprisonment had a greater impact on them by their association with the hardened criminals. It was felt that these short-term prisoners would benefit more by being kept away from the environment of closed prisons in an open camp engaged in agricultural pursuits. In later years a separate Open Work Camp was established for re-convicted short-term prisoners. Open Work Camps also have been established for young offenders at Pallansena and Taldena. These Open Work Camps have not only helped the short-term offender to keep away from the bad influences of closed

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1 It shall be lawful for the Minister, by an order in writing, to grant to any prisoner undergoing sentence of imprisonment or preventive detention in any prison in Sri Lanka a licence, in the prescribed form, to be at large in Sri Lanka or in any part thereof during such portion of his period of imprisonment or preventive detention and upon such conditions, as to the Minister shall seem fit. The Minister may, if he thinks fit, revoke or alter such licence or vary the conditions thereof. Every such licence may be granted and every revocation or alteration of a licence or variation of the conditions thereof may be made by an order in writing under the hand of the prescribed officer.
prisons, it has also helped to ease the congestion in closed prisons. Today there are thousands of convicted short-term prisoners in these Open Work Camps engaged in agricultural pursuits.

TRAINING STAFF

According to the United Nations Standard Minimum Rules for the Treatment of Prisoners it is essential that all Prison Officers be given proper training. Rule 47 stipulates as follows.

1. The personnel shall possess an adequate standard of education and intelligence;

2. Before assuming duties, the personnel shall be given a course of training in their general and specific duties and be required to pass theoretical and practical tests;

3. During their career, the personnel shall maintain and improve their knowledge and professional capacity by attending courses of in-service training to be organised at suitable intervals.

A proper establishment of a centre for the training of prison staff was a long felt need in the 1970’s. What was available up to then was an ad-hoc arrangement for the training of staff in a section of the Training School for Youthful Offenders at Wathupitiwela. In 1975 the Centre For Research and Training in Corrections was established with residential facilities for 40 trainees at a time. With the assistance of the UNDP (United Nations Development Programme), services of two foreign experts in the field of correctional training were obtained for the training of trainers. In 1978 a well-equipped library was established with a qualified librarian at the Training and Research Centre. At present, the Centre conducts all the basic and in-service training courses with the assistance of other organisations such as the Police, National Dangerous Drugs Control Board and the Ministry of Justice. It must be noted, however, that due to the shortage of institutional staff and inadequate financial resources, sufficient training programmes cannot be conducted. Most prison establishments manage their daily routine with a severe shortage of staff and are often unable to release sufficient numbers for training. The initial basic training provided at the time of recruitment cannot be considered adequate in terms of time, duration and substance.

Officers at the middle management level are given the opportunity to follow the two year diploma course at the School of Social Work functioning under the National Institute of Social Development. Senior officers are given the opportunity to follow training courses at the Sri Lanka Institute of Development Administration. Sometimes they also get the privilege of undergoing training at the United Nations Asia and Far East Institute for the Prevention of Crime and Treatment of Offenders in Tokyo, Japan, under the auspices of Japan International Co-operation Agency (JICA).
UNIQUE EXPERIMENTS

Two unique experiments in the area of offender rehabilitation attempted by the Department of Prisons were the establishment of the Family Rehabilitation Centre at Senapura in 1981 and the establishment of Navajeewanagama, a colony established for the settlement of discharged prisoners. The Family Rehabilitation Centre was established in an abandoned rehabilitation camp taken over from the Social Services Department. Selected long-term prisoners serving the last two years of their sentence were sent to this camp. They were permitted to bring their families and live in the houses provided to them. Prisoners were found employment in the nearby government farm at Mahaillupplallama. They were also given a plot of land for cultivation. At the beginning of the project there were ten families living in this Family Rehabilitation Centre. Unfortunately, the project was in operation only for about four years. Initial problems started with the Mahailluppalama farm refusing to employ the prisoners due to pressure from the local politicians who wanted the jobs for their henchmen. This innovative project was abandoned in 1985 with the handing over of the land and the buildings back to the Social Services Department.

The discharged prisoners’ colony Nawajeewanagama was established in 1983 in the abandoned government farms Dollar and Kent in the Padaviya area. Discharged prisoners who did not have homes of their own were selected as settlers in these two farms. They were given land for cultivation and assistance to settle in. Within a period of six months about 300 discharged prisoners were settled in these two farms, many with their families. The whole project ended in disaster when on 30th November 1984 Northern terrorists attacked the settlements killing 56 discharged prisoners and their family members.

THE PRESENT

Presently the Department of Prisons comprises the three main prisons for the convicted prisoners, Welikada, Bogambara and Mahara, 14 Remand Prisons in various judicial zones, 28 Prison Lock-ups, six work camps, two open prison camps, Correctional Centres for Youthful Offenders, the Prison Headquarters and the Training and Research Centre. It has nearly 4000 uniformed staff and 110 non-uniformed staff.

PRISONERS - THEIR COMPOSITION

According to the statistics available at the end of July 2000 the total prison population of the country was 17,095. This consisted of 8,177 convicted prisoners and 8,918 remand prisoners inclusive of the detainees. This shows a changing pattern in the prison population from the previous years. Until 1992 remand prisoners consisted of over 60% of the total prison population. This percentage has gradually come down during the last few years due to the increase in the number of convicted prisoners. It is also observed that there is a sharp increase in the total number of prisoners during the same period. Until 1996 the average number of...
prisoners did not exceed 12,000. The mid-year prison population in 2000 has exceeded 17,500.

One of the main reasons for the increase in the convicted prisoner population is the withdrawal of several special amnesties granted every year. Prior to 1997 special amnesties were granted to prisoners on nationally important days such as Wesak, Christmas, Deepawali, Prophet Mohamed’s Birthday, Independence day, etc. Under these special amnesties prisoner serving long terms were granted two or three week’s remission for each year or part of the year served in the prison. All prison sentences in default payment of fines too were remitted under these amnesties. These amnesties served to reduce the prison population, on the one hand, and released those sentenced to prison because of their poverty, on the other.

Many believe that all those sentenced to prison are dangerous criminals. This is not correct. Although a large number of them could be categorized as offenders all of them are not criminals. About 40% of all offenders convicted to prison in a given year are narcotic drug offenders, the majority of them being convicted for possessing very small quantities of drugs, while another 26% have been convicted of excise offences, mainly for the manufacture of illicit liquor. It would be seen, therefore, that over 65% of those convicted to prison are for these two offences which do not fall under “criminal offence” category. The next highest categories of offenders convicted to prison are for theft and retention of stolen property which comprises 4.2% and 2.6% respectively. Another significant feature is that nearly 85% of those convicted to prison in any given year are for serving sentences below one year and of this number about 50% are for sentences below 6 months. The question that arises is whether imprisonment was necessary in these cases and whether they could have been given alternative punishments.

Another significant feature is that in any given year almost 80% of those convicted to prison are for the non-payment of fines. Most of the drug offenders and excise offenders mentioned earlier fall under this category. These are offenders whom the courts have originally decided as not deserving prison sentences and imposed fines. Their inability to pay the fines has resulted in their imprisonment. The imprisonment of such large numbers of people for the non-payment of fines puts a heavy burden on the government. On the one hand, the government is unable to collect the fine and, on the other, it has to maintain prisoners at high cost. The question that is obvious is whether imprisonment is the only alternative to default payment of fines.

CURRENT ISSUES

The main issue the Department of Prisons has faced from the time of independence is the very low priority it has received in the overall national development process. It receives a very low place even within the criminal justice system. Successive governments have paid little or no heed to the call of the Department of Prisons. Police service has been spread
over all parts of the country by opening up police stations even in remote areas. It has expanded over ten fold since independence. So has the judiciary. Primary Courts and Magistrate’s Courts have been established in all parts of the country. Even the number of High Courts has been increased. Although the Police, the Judiciary and the Prisons form the three main institutions of the criminal justice system, unfortunately the prison service has not expanded as compared to the other two. It is not because prisons did not need development. Except for the three new prisons built during the period since independence there has been only very little development. Almost all other prisons are over hundred years old. The three main prisons, Welikada, Bogambara and Mahara are over 125 years old. The multi-storied buildings built of bricks, lime and sand with wooden floors have long outlived their usefulness.

The most serious problem that the prison administration faces today is the severe overcrowding that has arisen as a result of the situation described above. The authorized accommodation available in the prisons in the whole country today is for about 7,000 prisoners. At present, however, the prisons hold over 17,000 prisoners. This is an overcrowding of nearly 250% on average. The gravity of the problem could be further observed when the overcrowding of convicted and remand prisoners is examined separately. Of the total of 17,000 prisoners about 8,000 are convicted and about 9,000 are remand prisoners. The authorized accommodation for convicted prisoners is about 5,500 and that of remand prisoners is about 1,500. Therefore, the rate of overcrowding is 65% for convicted prisoners and 600% for remand prisoners. It is a well-known fact that in some prisons prisoners take turns to sleep in the night. Overcrowding in prisons has reached alarming proportions. It is not only a question of space as many tend to believe. It is a problem of not having enough water, toilet facilities, essential items of equipment such as bedding, plates, mugs, towels and often items of clothing. Overcrowding severely affects the lives of those inmates held under very undesirable conditions. Any form of classification and segregation of prison inmates become impossible in such conditions leading to the disruption of rehabilitation programmes. It also causes severe strain on the prison staff. With the low prisoner officer ratio maintaining discipline has become difficult, affecting the security and the morale of the officer.

While overcrowding is the most pressing problem for which immediate solutions are necessary, there are other problems faced by the Department of Prisons. Transport, overhauling of prison industries and organizing vocational training to suit the labour market, staff training, housing and other facilities for staff, are some other areas that need attention.

**PROSPECTS FOR THE FUTURE**

There is no doubt that the prisons do not receive the attention and the interest of the public or the politicians as hospitals, schools or even the courts and police which accounts for the low priority prisons have received under successive governments. This situation cannot
continue as it could lead to disastrous consequences. Immediate steps have to be taken to solve the serious problem of overcrowding. Solutions to the problem of overcrowding, however, do not lie within the prison system alone. They also lie with the other branches of the criminal justice system such as the police, judiciary and state policy. There are two principal ways of solving the problem: by reducing the number of prisoners or building new prisons. Building new prisons is a very expensive proposition even for developed countries. Therefore, a country like ours will have to depend more on reducing the numbers admitted to prisons. This may be achieved by changing the State policy and a change of attitude in society particularly the attitude of the police and the judiciary. The emphasis of penal reformers today is to keep the non-dangerous offender out of the prison. This can be achieved by diversion programmes and development of new non-institutional means to deal with the offenders and utilizing to the maximum the existing ones.

In the developed as well as in some developing countries there is strong pressure from various segments of society to decriminalize certain existing offences such as homosexuality, vagrancy and drunken disorderly behaviour. They also propose the diversion of mentally ill offenders, prostitutes, alcoholics and drug addicts from prison to other treatment centres. Time is opportune for Sri Lanka to consider changes in law where necessary.

Criminologists and penologists world over consider community-based corrections as the most promising means of reforming offenders. Incarceration of the offender is much easier than keeping him in society. Society enjoys a deceptive sense of security by putting the offender out of circulation. An imprisoned offender will return to society sometimes angrier, more revengeful, socially handicapped, less employable and, therefore, less capable of being re-integrated into society. What society does not realize is that many negative and adverse influences that are unavoidable within any prison setting cannot be outbalanced by even the best of rehabilitative and treatment efforts. In this it is relevant to recall what a special parliamentary sub committee that examined the prison system in Canada had to say in its report after an exhaustive study. The parliamentarians said:

“Society has spent millions of dollars to create and maintain the proven failure of prisons. Incarceration has failed in its two essential poses - correcting the offender and providing permanent protection to the society. The recidivist rate of up to eighty per cent is the evidence of both.”

There is a false perception in society that prisons deter crimes. All studies in this field prove, that it does not. There is no valid demonstration that existence of prisons deter crime. Therefore prisons must be used as the last resort in the punishment of offenders. New procedures must be preferred and developed over the traditional punitive measures for those offenders who do not present a serious threat to society.
In the United States, Canada and Japan more than 50% of the offenders sentenced to correctional treatment are placed on probation. There is great potential for probation as an alternative to imprisonment. However our courts use this option very sparsely. The use of probation must be expanded not only because it helps to reduce the prison population but also because it is viewed as the brightest hope for corrections. Probation is defined as the application of modern scientific casework to selected offenders who are placed by courts under the personal supervision and guidance of a probation officer and given treatment aimed at their complete and permanent social rehabilitation. In recent years probation programmes have been developed to include new forms of probation such as “Intensive Probation Supervision” and “Home detention.” In some countries probation is combined with electronic monitoring. Probation is developed in this manner because of its value as a community development method. It is very sad to observe that a programme of such immense potential is grossly under utilized in Sri Lanka.

Presently less than five percent of those convicted by courts are placed under probation orders. To make more and better use of probation it is necessary not only to improve the Probation Services but steps also must be taken to educate the judges and the community of the benefits of Probation. It will help to reduce the prison overcrowding to a great extent and offer the courts the use of a more humanitarian form of punishment.

Community service by order of the court is another alternative to a prison sentence. Community services as a penal sanction was first introduced by the Code of Criminal Procedure Act No. 15 of 1979. The sentence however was not imposed effectively by our courts due to procedural difficulties. With the introduction of the Community Based Corrections Act, No. 46 of 1999 the sentence is now being used on an experimental basis by few selected Magistrate’s Courts in Colombo. The new Act also empowers courts to impose community services orders in lieu of suspended sentences, in which case it will not help to reduce the prison population. It is hoped that it will be extended to all the courts in the near future. If used as an alternative to imprisonment community based corrections will help to reduce the prison population considerably.

Suspended sentences were widely used by our courts until 1999 under the provisions of section 303 of Code of Criminal Procedure Act No. 15 of 1979. An amendment to this provision of law introduced by Act No. 47 of 1999 had curtailed the use of suspended sentences obviously resulting in an increase of the number of prison sentences. The reason attributed to this curtailment is the belief in society that suspended sentences contributed towards increasing crime. Such beliefs are mere speculations and are not based on any research or statistical data. Amending such progressive laws on mere speculations is taking a step backwards.

Mention was made earlier about the introduction of ‘Parole’ or ‘Release on License’ to Sri Lanka. Though the programme is implemented successfully there is potential to expand it.
The disadvantage the long-term prisoners are faced with by the abolishing of several special amnesties can be outbalanced by the enhanced use of parole. This will no doubt ease the pressure on the prison systems.

It was pointed out earlier that the remand population too has gone up in an unprecedented manner. While there may be several reasons for this increase one of the main causes is the non-use of bail provisions by court. The Bail Act No. 30 of 1997 in section 2 states that “the guiding principle in the implementation of the provisions of this Act shall be, that the grant of bail shall be regarded as the rule and the refusal to grant bail as the exception.” However, the general observation is that our courts do not pay heed to this principle. If the provisions of this Act are implemented as they were intended then much of those in remand custody would be released on bail easing the congested situation in prisons.

In addition to the introduction of various alternatives to imprisonment some countries have made use of private entrepreneurship to solve the problem of prison over-crowding. U.S.A., Canada, Australia and several other countries have introduced the concept of Private Prisons. However advantageous to the government, great caution has to be taken when introducing a system of private prisons. Strict rules and regulations governing these institutions have to be made and a system of close monitoring and supervision has to be introduced to prevent any form of exploitation, mal-administration or ill-treatment of prisoners. Keeping of certain categories of remand prisoners in private remand homes is a practice prevailing in Sri Lanka even today. An example of this is the Salvation Army Remand Home for Women. In this age of privatisation the concept could be developed and extended to selected categories of convicted prisoners too. If accepted as state policy Private Prisons will assist in reducing the pressure on State prisons.

Most of the proposals made earlier would help in reducing the numbers in the convicted prison population. With a 600 per cent overcrowding the problem of overcrowding is most acute among the remand prisoner population. Therefore the solutions are most urgently needed in this area. An analysis of the remand population shows that only one in every four remand prisoners ultimately gets convicted to prison. For example in the year 1997 a total of 71,350 remand prisoners were admitted during the year whilst only 18,143 convicted prisoners were admitted during the same period. Remand prisoners are persons suspected of committing offences. They are generally kept under remand custody pending investigations or trials; majority of them pending investigation. They are kept in custody to ensure their appearance in courts, prevent interference in investigation or to safeguard society from repetition of offences. Statistics reveal that nearly 50 per cent are remanded for less than one month and 25 per cent for less than two weeks. This would mean that interference with investigations or the protection of society or even the appearance in courts have not been material in these cases. It is a well known fact that success rate in criminal investigation is very poor in our country. On a very liberal calculation it can be stated that less than 10 per cent of all criminal offenders ultimately get convicted. In countries where success rates of
investigations are low there is a tendency to use remanding as a form of punishment. A person is considered innocent until he is proven guilty. Prolonged detention in remand custody is an unnecessary deprivation of liberty.

The primary solution to the problem of remand custody is use of bail. Having considered the problem the government introduced the Bail Act of 1997 that could be described as a progressive piece of legislation. Section 2 of the Act states that, subject to the exceptions provided for in the Act, the guiding principle in the implementation of the provisions of the Act shall be, the grant of bail shall be regarded as the rule and the refusal to grant bail as the exception. Further, the Act introduced anticipatory bail where by, when a person has reason to believe that he may be arrested in connection with a non-bailable offence he could apply to the Magistrate for a direction that in an event of his arrest he shall be released. In spite of this progressive law on bail large numbers continue to remain in remand custody. It appears that our courts still refuse to be guided by guiding principle set out under this law. Our courts are accustomed to stringent application of bail provisions due to pressures from the police and public. Therefore the transition to a more liberal system of bail will be slow. Mere introduction of laws is insufficient. Measures must be taken to educate the criminal justice practitioners and the concerned public the intention, impact and the necessity for the introduction of such laws. It is only then the objectives could be achieved. However it is hoped that when the new laws are applied in full measure according to the intention of the legislature numbers in remand custody will reduce.

Our experience shows that many prisoners languish in remand prisons due to the utter ignorance of legal procedures and their inability to retain counsel. Their misery could have been avoided if the services of a properly conducted legal aid facility were available to them.

Prisons are functioning in buildings built over 125 years ago. Many of them have long outlived their usefulness and cannot meet the present day challenges. However expensive the proposition is, it is imperative that the government undertakes a building programme for the prisons. There is also a proposal to move some prisons from their present locations. The Welikada prison complex is occupying over 40 acres of prime land in Colombo. The Bogambara and Kandy Remand Prisons are located in the heart of the city and occupy over 12 acres of land. Similarly, the Galle prison occupies nearly five acres of valuable land in the commercial area of Galle town. The development of these cities have been badly hampered by the presence of prisons in the city centres. Urban development authorities have identified these lands for expansion and development of the cities but for a long time have not been able to move the prison to other suitable locations due to financial constraints. It is learnt that steps have finally been taken to shift the Bogambara a prison to a location in Pallekelle. It would be a matter of time before the other two are also shifted. New concepts in prison building, present and future needs will have to be well considered in the undertaking of these new buildings.
There is an urgent need to build new remand prisons in areas where new courts have been established. Due to the non-availability of prisons in these areas prisoners have to be transported for long distances to the nearest prison. For example, prisoners have to be taken to Maho courts from Bogambara prison in Kandy travelling nearly 100 kilometers. Prisoners to Nuwaraeliya and Monaragala courts are taken daily from Badulla. Some of the large administrative districts such as Kurunegala, Puttalam and Vauniya do not have remand prisons. Transporting prisoners for long distances not only exposes the prisoners and prison officers to dangers, it also result in heavy expenditure for the government in addition to other administrative difficulties and inconvenience to lawyers and relatives of prisoners. Therefore, building of new prisons in such areas is an immediate necessity.

CONCLUSION

From an overall perspective, the prison system in Sri Lanka has kept abreast with many of the developments in other parts of the world. Open prison camps, work camp, parole, home leave, work release, vocational training, are all present in the system. What makes all progressive measures ineffective is the problem of severe overcrowding in prisons. In the history of prisons in all parts of the world, plans for correctional measures have been undermined by the problem of overcrowding and under-funding. All other issues are ancillary to these problems. However costly and ineffective it may be as a preventive measure for crime, prisons have come to stay as an essential and permanent feature in our society. Therefore, prisons must be given its legitimate place in the overall national development process.
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A GENERAL OVERVIEW OF LABOUR LAW IN SRI LANKA SINCE INDEPENDENCE

Geoffrey Alagaratnam*

INTRODUCTION

Most aspects of industrial relations in Sri Lanka are governed by legislation. Several reasons can be adduced for the active intervention of the State by way of labour legislation instead of the traditional laissez faire attitude that characterised powerful western economies during their emergence and expansion.

The desire of government to set minimum terms and work conditions, the reluctance of employers to deal with unions, the belief that the parties alone should not be allowed to settle industrial disputes, the reluctance to accept that the employer and employee are of equal bargaining strength and the influence of colonial policy in protecting industrial relations were contributory factors. Furthermore, the necessity to give effect to the obligations embodied in the conventions of the International Labour Organisation (ILO), too, has resulted in legislation.

The Industrial Disputes Act No 43 of 1950 (Chapter 131) is the main legislation that sets out the various mechanisms available for the resolution of industrial disputes.

However, the process of labour legislation commenced much earlier - in the 1830s - necessitated by the growth in the tea and coffee plantations. Prior to that, the master-servant relationship was governed by custom.

Ordinance No.5 of 1841 was passed “for the better regulation of Servants, Labourers and Journeymen Artificers under contracts of Hire and Service of their Employers.” The need

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for cheap unskilled workers and the labour crisis of 1846 prompted the State importation of labour from South India. The Ordinance of 1846 contained laws that were unfavorable to the immigrant labourers. Later, Ordinance No.15 of 1858 was enacted to promote the importation of Indian labour.

These laws were consolidated, with amendments, and enacted as the Service Contracts Ordinance No.11 of 1865. “Servant” was defined as including “menial, domestic or other like servants, pioneers, kangabies and other labourers who were employed in agriculture, railway or other work.” Penal sanctions for breach of contract by servants was also provided. This Ordinance was extended to chauffeurs in 1912.

Contracts for long periods had to be in writing and attested by a Magistrate or a Justice of the Peace. This Ordinance was amended in 1884 to enable the speedy recovery of wages due to labourers.

Medical care of workers was provided for under Ordinance No.19 of 1880. Thereafter, in 1889 the Estate Labour (Indian) Ordinance No.13 was enacted.

Other legislation followed as the State took upon itself the role of protecting industrial relations, and to give effect to obligations as a member of the United Nations.  

SOME IMPORTANT LABOUR LAWS

The Industrial Disputes Act No. 43 of 1950

The Industrial Disputes Act is one of the main statutes dealing with the resolution of industrial disputes in Sri Lanka. According to its long title, the Act provides for the prevention, investigation and settlement of industrial disputes.

Part 2 of the of the Act sets out the functions of the Commissioner of Labour (the “Commissioner”) and the circumstances in which industrial disputes will be referred for settlement by conciliation or by arbitration or by an Industrial Court. This Part also deals with the Minister’s powers in regard to industrial disputes.

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1 One of the obligations that is undertaken by member Nations is ‘to promote higher standards of living, full employment and conditions of economic and social progress and development.’

2 For some of the significant labour laws enacted in Sri Lanka, see Annexure 1.

Part 3A provides for collective agreements, settlements, awards and their effect. The provisions also deal with the duties of the employer, the Commissioner, termination and the Minister’s power to extend the terms of the collective agreement to other industries in different areas.

Part 3B provides for settlement by conciliation. The provisions of this Part deal with the powers of the Commissioner, the Memorandum of Settlement, which will set out the terms of settlement; its effect, and termination of the settlement.

Part 3C deals with settlement by arbitration. The provisions of this Part deal with the duties and powers of the Arbitrator, publication, duration, effect and termination of the award. A Labour Tribunal President is permitted to act as Arbitrator. The provisions on arbitration under the Industrial Disputes Act specifically exclude the applicability of the Arbitration Act and the Civil Procedure Code.4

Part 4 sets out the powers and duties of Industrial Courts. The President of Sri Lanka appoints the members of the Industrial Court. The Minister is empowered to refer disputes for arbitration to the Industrial Court. An Industrial Court is required to make an order that is just and equitable. The terms of an award by an Industrial Court will be implied terms in the contract of employment. An application to reconsider the award may be made to the Minister after a lapse of 12 months. An application prior to 12 months can be made if the Commissioner certifies that there are exceptional circumstances requiring entertainment of the application. The Industrial Court can, on an application for reconsideration, confirm, set aside, make new order after setting aside or varying or modifying its original award.

Part 4A deals with the powers and duties of Labour Tribunals, one of the most important bodies in the administration of justice related to disputes concerning employment. An application may be made to the Labour Tribunal in respect of (i) termination of a workman’s services by his employer (ii) to adjudicate whether gratuity or any other benefits are due to an employee on termination (iii) such other matters related to the terms of employment or conditions of labour as may be prescribed or (iv) related to forfeiture of gratuity in terms of the Payment of Gratuity Act No.12 of 1983. Category (iii) is non-operative, as there has been no legislation or law prescribing the matter.

The President of the Labour Tribunal, who is now appointed by the Judicial Service Commission,5 is obliged to make an order that is “just and equitable.” This phrase has received judicial interpretation in a mass of case law. The Labour Tribunal may adopt its own

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4 It is recommended that Arbitration should be resorted to only where a class of persons is aggrieved; where there is a dispute between an employer and a single workman it is inappropriate for settlement by arbitration especially where there has been termination of employment of only one workman.

5 Brought about by the 1978 Constitution of the Republic.
procedure and the Tribunal’s order is final and conclusive, subject to appeal to the High Court of the Province, on a question of law. The amending Act No. 56 of 1990 has provided for deposit by the employer of specified sums of money with the Labour Tribunal prior to preferring an appeal to the Provincial High Court.6

The Labour Tribunal will suspend proceedings if the employer and the employee have entered into negotiations or where a matter affecting its findings is pending in another court (for example, where an employee is being prosecuted for theft in the Magistrates’ Court, the offence in relation to which the employee’s services were terminated). The Tribunal may make award in respect of wages and conditions of service, reinstatement, compensation, gratuity etc.

The Presidents of Labour Tribunals were appointed as Magistrates by the Judicial Service Commission (JSC) in 1998, for the limited purpose of enforcement of their orders by Gazette Notification No.1052 dated 30.11.1998.

Part 4B deals with retrenchment of workmen employed in organisations employing less than 15 workmen and in industries that only provide seasonal or intermittent work.

Part 5 provides for the protection of essential industries. The provisions of this Part deal with strikes and lockouts, and require written notice of the intention to strike or initiate a lockout at least 21 days before resorting to such action.

The Industrial Disputes Act creates offences in respect of violations concerning collective agreements, settlements, awards and strikes in violation of collective agreements. Contempt proceedings can be initiated for failure to comply with the terms of the Arbitrator’s award, Industrial Court awards and orders of the Labour Tribunal.

The most recent amendment to the Industrial Disputes Act, enacted on 31st December 1999, places an obligation on an employer to bargain with a trade union, provided it is representative of at least 40% of the employees of the organisation. This amendment also creates offences to discourage discrimination against trade union membership or activity.

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6 The requirement to deposit the sums within the given time period was held not to be mandatory in Sri Lanka. General Workers Union v. H. D. M. Samaranayake, SC Appeal 93/94 decided on 27th November 1995.
The Shop and Office Employees Act No. 19 of 1954

This Act seeks to provide for the regulation of employment, hours of work and remuneration of persons in shops and offices. Part 1 of the Act relates to regulation of hours of employment, the health and comfort of employees in all shops and all offices in Sri Lanka. Part 1 also deals with the following:

- annual holiday and leave
- public holidays
- employment on Poya days
- employment during midnight
- interval for meals
- employment of women and persons below the age of 18
- lighting and ventilation; residence and place for meals
- sanitary and washing conveniences
- providing seats for female shop assistants
- the obligation to give particulars of employment, maintenance of records pertaining to employees, work hours, minimum remuneration and other particulars
- prosecution for breach of provisions of the Act.


“Shop” means any premises in which any retail or wholesale business is carried on and includes residential hotels and any place where the business of the sale of articles of food or drink or the business of a barber or hairdresser or any other prescribed trade or business is carried on.

“office” means any establishment maintained for the purpose of the transaction of the business of any bank, broker, insurance company, shipping company, joint stock or other company, estate agent, advertising agent or forwarding or indenting agent or for the purpose of the practice of any profession and includes:

(a) the office or clerical department of any shop, factory, estate, mine, hotel, club or other place of entertainment or of any other industrial, business or commercial undertaking (including the business of transporting persons or goods for fee or reward and any undertaking for the publication of newspapers, books or other literature), and

(b) such other institutions or establishments as may be declared by regulation to be offices for the purposes of this Act, whether or not they are maintained for the purposes of any profession, trade or business or for the purposes of profit.
Part 1A deals with maternity benefits, and is applicable to every female employed in a shop or office. It contains provisions with regard to leave in consequence of pregnancy, remuneration during leave (employer is directed to pay full remuneration), work prohibited for three months before and after confinement if injurious to mother or child and restraint on termination of employment on grounds of pregnancy or connected illness and or giving notice of dismissal.

Part II relates to remuneration. The time and manner of payment are set out, and authorised deductions cannot exceed 60% of the remuneration. On termination of employment, the employer is obliged to make payment of dues of remuneration before the end of the 2nd day after termination takes effect.

Part III relates to regulation of remuneration. It contains provisions on the determination of the minimum remuneration with the consent of the employer and the employee, consequent to the Minister ordering the Commissioner to fix minimum remuneration. The parties, if they so wish, could repudiate a determination thus made.

Provision is made for the establishment of Remuneration Tribunals. The Minister may direct a Remuneration Tribunal to fix minimum rates, where the parties are unable to agree. The duties and powers of Remuneration Tribunals and the obligations of employers are also set out in the Act.

Under Part IV the Minister may issue closing orders for shops and offices for particular days and hours. Part V deals with the authorities and their powers under the Act as well as offences under the Act.

The Commissioner appointed under the Act is in charge of the general administration of the Act, and wide powers are bestowed on him. Either the Commissioner or a Trade Union will be entitled to recover monies due to an employee upon termination of his employment.

Remuneration due to employees will be a first charge on the assets of a business under the Act. Specific offences have been created for the violation of the Act.

Payment of Gratuity Act No.12 of 1983

This Act provides for the payment of a gratuity by employers to their workmen and for the amendment of, *inter alia*, the Industrial Disputes Act. The provisions of the Act does not apply to Indian repatriates governed by the Emergency (Payment of Gratuities and other Monetary Benefits to Indian Repatriates) Regulations under section 5 of the Public Security Ordinance, and the Payment of Gratuities and other Monetary Benefits to Indian Repatriates (Special Provisions) Law No. 34 of 1978.
The Act specifies that any workman who has worked for five years or more under an employer employing 15 or more persons, will be entitled to gratuity on termination of services at the prescribed rates. If termination is by death, the workman’s heirs will be entitled to the gratuity due to the workman. The Act is not applicable to a domestic servant or personal chauffeur in a private household or to a person drawing a pension under a non-contributory pension scheme. A workman whose services are terminated for fraud, misappropriation of funds, willful damage to property, or causing loss of goods, articles or property, will forfeit gratuity to the extent of the loss or damage caused.

Upon default of payment, the Commissioner can file a certificate in a Magistrate’s Court having territorial jurisdiction, which will be prima facie evidence that such an amount is due under this Act. The Magistrate will impose the amount stated in the certificate as a fine, if the employer does not show sufficient cause as to why such an order should not be made against him.

Every person holding the position of director of a company at the time of the commission of an offence under the Act will be deemed guilty where an offence has been committed by the company. The same rule applies in respect of a member of a non-corporate body.

This Act amends sections 31B and 33 of the Industrial Disputes Act whereby the Labour Tribunal could determine the lawfulness of a forfeiture of gratuity. It could also award gratuity to those who are employed in a place having less than 15 employees and where an employee’s services have been terminated in circumstances causing financial loss to the employer an employer can withhold or deduct such sum from an employee’s gratuity.

### The Wages Boards Ordinance No. 27 of 1941

This Ordinance provides for the regulation of the wages and other emoluments of persons employed in a trade and for the establishment and constitution of Wages Boards. It requires wages to be paid in legal tender, and restricts authorised deductions to a maximum of 50% of the total, except in special cases where the Minister may permit deductions up to 75 per cent.

The Minister is empowered to establish Wages Boards for different trades, and is expected to address all objections in that regard. The Wages Board will be chaired by the Commissioner, and will include representatives of employees and employers.

The Minister or the Commissioner may direct a Wages Board to inspect and report on the employment conditions of a trade. The Wages Boards are required to determine the minimum rate of wages for time-work for their respective trades. They may also prescribe minimum

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rates for piece-work, guaranteed time work and overtime rates. A minimum wage may consist of a basic rate and a special allowance. The employee’s presence at his work place will suffice for the purpose of computing wages where minimum rates are applicable if the employer does not provide work, unless he was present either without the employer’s consent or for reasons not connected with work.

The Ordinance also provides for hours of work, weekly holidays, intervals for meals, rest, conditions of employment during holidays, substitution of holidays, remuneration during holidays, annual holidays etc. The payment of wages during holidays is regulated. For instance, an employee is entitled to receive 1 ½ times the normal wage rate if required to work on a full moon Poya day.

The Wages Board will take into consideration the circumstances in branches of the trade or areas affecting particular classes of workers. Decisions of the Wages Boards will take effect only after approval of the Minister. Section 32 states that once a Wages Board decision is in force, it will have effect notwithstanding anything in any other written law.

The Commissioner may also be authorised by the Minister to determine a general minimum time rate for workers in a particular trade. Provision is also made for special cases such as where a worker performs two or more classes of work and for workers performing piece-work. Provisions of the Ordinance will also apply where work is performed under an arrangement by way of trade. The Commissioner may issue a permit to an employee suffering from an infirmity or injury, enabling him to be employed at a rate less than the minimum wage. The employer will not be liable for prosecution for the payment of wages less than the minimum wage in such a situation.

The Wages Board is empowered to determine conditions of employment for apprentices/learners who can be employed only with the written consent of the Commissioner. Section 40 enables the Commissioner to withdraw permission to employ apprentices/learners if there are no proper facilities for training. Where minimum wage rates are applicable the employer is not entitled to charge a premium from apprentices/learners, unless payment is made within four weeks after commencement of employment and it is agreed in writing.

Section 45 provides that where the immediate employer is in the employment of another person, the other person will be deemed a joint employer along with the immediate employer. A contractor will be liable to pay wages to an employee of a sub contractor, where the latter fails to make payment.

The burden of proving that sums in dispute were paid to the employee will lie on the employer. The statute creates an offence for the dismissal of an employee for the reason that he is a member of the Wages Board.
The Ordinance spells out the duties of employers and creates several offences for non-compliance. The Commissioner or a Trade Union may recover sums due to a worker through the Magistrate’s Court.

Workman’s Compensation Ordinance No. 19 of 1934\(^\text{11}\)

This ordinance seeks to provide for compensation to workmen who are injured in the course of their employment. For the purpose of this law, a “minor” is described as a person below the age of 15 years; “employer” includes the government, unincorporated bodies, Managing Agents, heirs and administrators and persons to whom a workman is lent or given on hire. The definition of wages includes the monetary value of any privilege or benefit capable of being estimated in money. While a “workman” was earlier defined as any person employed on wages not exceeding Rs.500/- on any capacity specified, the limit of Rs.500/- has now been abolished. Dependents of workmen, too, are conferred rights under this Ordinance.

The Ordinance does not cover workmen employed on a casual basis or for purposes other than the employer’s trade or business; and the members of the armed forces and the police.

Section 3 states that if personal injury is caused to a workman arising out of accident in the course of his employment, the employer is liable to pay compensation to the victim. The Ordinance imposes strict liability and thus the question has arisen as to whether it should cover all employees or only non-white collar workers; even if it is to cover white collar workers, should it cover only the lower income categories of workers leaving higher income workers to the common law remedies? The employer will not be liable unless there is total or partial disablement for seven days or more. The employer will also not be liable, where death results on account of an injury consequent to drunkenness, wilful disobedience of safety instructions, or wilful removal or disregard of such measures. Under the Ordinance, the employer is liable in respect of certain occupational diseases.

Part III deals with the amount of compensation payable in the event of death of adults as well as minors; permanent total disablement; permanent partial disablement and temporary disablement. Compensation for disablement will be proportionate to the loss of earning capacity. This Part also deals with use of employer’s property for residence, and the method of calculating wages for the purposes of compensation.

The Ordinance vests the Commissioner with powers of a Civil Court for the purposes of taking evidence, and is deemed to be a Civil Court under section 135 of the Civil Procedure Code and Chapter XXXII of the Criminal Procedure Code. The Ordinance empowers the Commissioner to submit a question of law to the Supreme Court and provides that a Civil Court has no jurisdiction over questions which is required under the Ordinance to be dealt

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\(^{11}\) Amended by Act Nos. 3 of 1946, 31 of 1957, 72 of 1959, 4 of 1966 and 15 of 1990.
with by the Commissioner. This does not, however, oust the alternative remedies available from a Civil Court. Section 60 states that an injured workman must elect between the common law and the statutory remedy. A workman has no right to compensation under this Ordinance if he instituted a civil action, and no damages will be awarded by a Civil Court if there is a claim before the Commissioner or if there is an agreement with the employer to apply for relief under the Workman’s Compensation Ordinance.

Under Part VIII, an employer is permitted to enter into an agreement with an injured person to pay compensation, in which case a memorandum of the agreement should be sent to the Commissioner. Failure to do so will be an offence. Such an agreement will have no effect if fraud, undue influence, or improper means were used in order to enter into the agreement with the employee. Any contract whereby the employee relinquishes his right to compensation under this Ordinance is void.

An appeal can be preferred on a point of law to the Provincial High Court within 30 days of the Order. In order to do so, an employer must annex a certificate from the Commissioner that he has deposited the required amount of money. An appeal cannot be preferred where the parties have agreed to abide by the Commissioner’s decision or where the order gives effect to a previous agreement between the employer and the employee.

The Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971

This Act makes special provisions in respect of the termination of the services of workmen in certain employment by their employers. As per this Act no employer shall terminate the scheduled employment of any workman without the prior consent of the workman in writing or with the prior written approval of the Commissioner. The Act applies in respect of all terminations except the termination of services on disciplinary grounds.

The Act vests the Commissioner with discretion to make orders with appropriate conditions in respect of terminations falling within the purview of this law. The Commissioner’s decision under Section 2 on the grant of permission to terminate is final and conclusive, and cannot be called in question by writ or otherwise. Termination covered by this Act includes non-employment, whether permanent or temporary, and non-employment in consequence of closure of the employer’s trade or industry.

The Act has no application if there were less than 15 persons in employment within six months preceding the employee’s termination; if a person was employed for less than 180 days (consequent to Amendment Act No. 51 of 1988) or if termination is due to retirement based either on a Collective Agreement or the contract of employment; to employees in the government sector, local authority, cooperative sector, public corporations; and to those employed illegally. The category of employees that comes within the ambit of this statute

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12 Amended by Law No. 4 of 1976 and Act No. 51 of 1988.
includes seasonal, casual or temporary employees who have been in continuous employment for 182 days.

Any termination of employment in contravention of the Act will be null and void. Violating the provisions of the Act will be an offence regardless of whether employer is a body corporate, firm, trade union or an unincorporated body. Such offences would be punishable before a Magistrate’s Court.

An aggrieved workman may make application to the Commissioner within 6 months of the termination. The workman may also concurrently seek other legal remedies without prejudice to his rights under this Ordinance (Amendment Act No. 51 of 1988).

The Commissioner may order the payment of compensation in lieu of reinstatement along with other entitlements. The Commissioner also has powers of inspection and requiring returns to be furnished by employers. Interference with the Commissioner’s functions amounts to contempt of Court, and is punishable by the Court of Appeal under Article 105(3) of the 1978 Constitution. In the event of any conflict between the provisions of this Act and any other law, the Act provides that the provisions of this Act will prevail.

**Employees’ Provident Fund Act No. 15 of 1958**

This Act provides for the payment of superannuation benefits to employees in the private sector, through contributory provident funds. The scheme is financed jointly by the employer and the employee. The Act excludes self-employed persons.

The Act is designed to ensure that an employee, by receiving a lump sum, could spend his retirement without being dependent on others. The Act is applicable to all employers and employees in a covered employment.

The Monetary Board of the Central Bank of Sri Lanka is the legal custodian of the fund, while the Commissioner is charged with the general administration of the Act. The employer must contribute at least 12% of the employees’ earnings while 8% will be deducted from the employee. Contributions may also be made at a higher percentage, on mutual agreement.

The Act defines earnings as follows: Basic wages; cost of living allowances, special living allowances and similar allowances; payment for holidays; cash value of cooked food, meals and other prescribed remuneration.

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The employer is liable to a surcharge for delayed payment. Amounts due will be considered a debt to the State, and will be recovered through summary procedure laid down in the Civil Procedure Code. The dues will also be a first charge on the assets of an employer.

Amendment Act No. 8 of 1971 introduced further methods of recovery. The Commissioner could issue a certificate with full particulars of the sum due to the District Court, which will authorise the seizure and sale of the employer’s movable and immovable property in order to recover the sum of money in question.

If this amount cannot be recovered in the aforesaid manner, the Commissioner can issue a certificate with full particulars to the Magistrate having territorial jurisdiction. If the defaulting employer cannot show sufficient cause the Magistrate will impose the sum as a fine for an offence punishable with imprisonment.

The Supreme Court has held that a certificate filed in the Magistrate’s Court should have sufficient details as to the identity of employees, periods for which sums were overdue and the details of sums in default to enable an employer to show cause.14

Previously there were only three stated grounds upon which an accused employer may challenge the matter before a Magistrate, i.e. absence of jurisdiction, that the sums due have been paid or that he is not the person or employer from whom the amount is due. An employer who reduces an employee’s earnings for the purpose of pruning their joint contribution will be liable to pay the difference between the amount remitted to the EPF and the sum that should have been paid.

The Act sets out the circumstances under which EPF benefits are available to employees. Amendment Act No. 14 of 1992 provides for an employee in a public corporation or government owned business undertaking to withdraw the amount lying to his credit, if retrenched from service. Withdrawal is also possible upon reaching retirement age or where there is termination by a female in view of marriage or where an employee migrates.

The EPF Act previously provided for the setting up of private provident funds and contributory pension schemes. However, after 1st February 1996, an employee taking up a covered employment is prohibited from contributing to any provident or pension fund other than to the Employees’ Provident Fund, by virtue of an order by the Minister under section 1 of Act No. 7 of 1975. The Commissioner no longer approves the setting up of provident or pension funds.

Amendment Act No. 42 of 1988 permits an employee to obtain loans against EPF monies lying to his credit as collateral.

An employer cannot pass his obligations under the Act to his employees. EPF funds are protected from seizure and bankruptcy. The Commissioner is vested with wide powers to enter premises and examine records for purpose of inquiry.

**Employees’ Trust Fund Act No. 46 of 1980**

The Act is meant to assist employees during their working life. It is administered by the Employees’ Trust Fund Board, a statutory body, whose objects are the promotion of employee ownership, welfare, employee participation in management and provision of non-contributory benefits on retirement.

The Act applies to both the public and private sector. It excludes domestic servants, employees in charitable institutions etc. with less than 10 employees, industrial undertakings for the training of juvenile offenders etc., and undertakings where only family members are employed. Self employed persons and migrant workers are permitted to join the Fund on a voluntary basis.

The employer is required to contribute 3% of the earnings of the employee to the fund. The employer is liable to a surcharge for delays in remittance of contributions. An employee can in different situations claim the amounts standing to the employee’s credit in the Fund.

Employees will be entitled to automatic life insurance benefits provided they meet the necessary qualifications. Medical insurance is also available. There is provision for the Board of the Fund to declare dividends to employees from investment profits.

The provisions relating to recovery of monies due and surcharge on defaulting employers are similar to those of the Employees’ Provident Fund Act.

**The Trade Union Ordinance No. 14 of 1935**

This Ordinance provides for the registration and control of trade unions. It defines a trade union as any association or combination of workmen or employees, whether temporary or permanent, having among its objects one or more of the following:

a. The regulation of relations between workmen and employer or between workmen and workmen or between employers and employers;

b. The enforcing of restrictive conditions in the conduct of any trade or business;

c. The representation of either workmen or employers in trade disputes;

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d. The promotion or organisation or financing of strikes or lockouts in any trade or industry or the provision of pay or other benefits for its members during a strike or lock out.

The Registrar of Trade Unions is required to maintain a register of Trade Unions in the prescribed form. Every Trade Union has to be registered within three months of it being established. Part IV of the Ordinance contains special provisions applicable to Trade Unions of public officers.

The Registrar is authorised to cancel or withdraw a certificate of registration, after giving two months notice in writing of his intention to do so.

A person aggrieved by the Registrar’s refusal to register or by an order to cancel or withdraw the certificate of registration, may appeal to the District Court within 30 days of the order. An appeal against the District Court order will lie to the Court of Appeal.

The Registrar has the power to cancel the registration of a Trade Union for non-compliance with certain provisions of the Ordinance. Criticism has been levelled that this power is not exercised, even where Trade Unions have been errant (failure to provide regular accounting) due to political patronage and that, therefore, the Trade Unions exercise the freedom of the wild horse.

Holidays Act No. 29 of 1971

The Act declares every full moon Poya day and Sunday as a public and bank holiday, and make special provision for the observance of the full moon Poya day. This Act was enacted following the repeal of the Holidays Act No. 17 of 1965 and the Holidays Ordinance. There has been criticism of the number of holidays enjoyed by employees in Sri Lanka, unprecedented in most parts of the world, having adverse consequences on productivity and efficiency. The need to rationalise holidays is an urgent need in an era where Sri Lanka has to compete with other international players on an equal footing.

Cooperative Employees Commission Act No. 12 of 1972

The Act established the Cooperative Employees Commission, and made special provisions with regard to wages of employees of cooperative societies, and their terms and conditions of employment.

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16 Amended by Act No. 21 of 1991.
The Cooperative Employees Commission is vested with powers relating to methods of recruitment and conditions of employment; conducting of examinations for recruitment; determining qualifications for appointment; fixing scales of salaries; determining disciplinary procedures; maintenance of records by cooperative societies; calling for information in respect of employees; inquiring and reporting where necessary and for determining benefits upon termination.

Every cooperative society is required to issue letters of appointment to its employees giving prescribed particulars. Only a person resident in an area for two years can be appointed to a cooperative society of that area. Employees are covered under the Employees’ Provident Fund.

Amending Act No. 51 of 1992 removed the inapplicability of the Industrial Disputes Act to cooperative societies and their employees. Therefore, an application for relief can be addressed to the Labour Tribunal, if an application on the same matter has not been made to the Commissioner.

**Employment of Private Sector Trainees Act No. 8 of 1978**

The Act provides, *inter alia*, for a private sector employer to enter into a contract of training with a person on certain terms and conditions and to guarantee employment after the conclusion of the training period. The Act regulates hours of work, over-time and medical leave.

The provisions of the Workman’s Compensation Ordinance and the Employees’ Provident Fund will apply to the employer as well as the trainee. However, the Shop and Office Employees Act, the Industrial Disputes Act, the Wages Boards Ordinance, the Trade Unions Ordinance and the Termination of Employment of Workmen (Special Provisions) Act, and collective agreements relating to a vocation specified under the Act will not apply to a trainee during the training period.

At the end of the training period the employer must either provide him employment or find him suitable alternative employment. The contract of training could be terminated for disciplinary reasons or with the permission of the Commissioner, if the trainee has failed to attain the necessary degree of proficiency.

An employer who fails to pay a trainee an allowance payable under the Act or fails to guarantee employment, will be guilty of an offence.
The Service Contracts Ordinance No. 11 of 1865\(^{18}\)

This Ordinance regulates the employment of servants, labourers and skilled craftsmen under contracts of hire and service. The term servant includes Kanganies and other labourers in agriculture, road, railways etc.; chauffeurs and domestic servants. Shop and office employees are excluded.

A contract for the hire of any servant, except in casual employment, will be deemed a month’s contract. It will be automatically renewed unless determined by one month’s notice or warning by either party or if the job does not require a month’s notice.

The provisions of this Ordinance are, however, rarely enforced.

Estate Labour (Indian) Ordinance No. 13 of 1889\(^{19}\)

This was enacted in 1889 to amend and consolidate the law relating to Indian labourers in Sri Lanka’s plantations.

Certain provisions of the Service Contracts Ordinance were extended to cover plantation of Indian origin and their employers. Specific provisions were made with regard to contracts of employment and the payment of wages. Labourers could even sue for the recovery of wages.

A Kangany, subordinate Kangany or labourer was given immunity from arrest in the execution of a decree for money. A discharge certificate was available to an employee who lawfully quit his services. Amendment Act No. 14 of 1978 abolished the previous practice of terminating the employment of the spouse/children of a labourer, consequent to his dismissal.

Laws Relating to Occupational Health

The Factories Ordinance, The Shop and Office Employees Act and the Maternity Benefits Ordinance are some of the main laws applicable with regard to the maintenance of occupational health.

LEGISLATION AFFECTING FEMALE EMPLOYEES

Employment of Females in Mines Act No. 13 of 1937

This law prohibits the employment of females in mines. The Minister is empowered to make regulations exempting the applicability of the law for certain categories of employment.

\(^{18}\) Amended by Ordinance Nos. 16 of 1884, 16 of 1905, 23 of 1912, 41 of 1916, 43 of 1921 and 27 of 1927.

\(^{19}\) Amended by Act Nos. 7 of 1890, 9 of 1909, 43 of 1921, 27 of 1927, 6 of 1932, 15 of 1941, 27 of 1941, 41 of 1943, 22 of 1945, 22 of 1955 and 14 of 1978.
However, the Minister has not framed regulations exempting applicability of the law to date.

**Employment of Women, Young Persons’ and Children’s Ordinance No. 47 of 1956**

This Act prevents employment of women at night in a public/private industrial undertaking. The Minister is empowered to suspend the operation of this requirement in the public interest or after consultation with employers and employees. Amendment Act No. 32 of 1984 removes the general restriction prohibiting females from being employed at night, and imposes certain conditions under which this can be done.

**Factories Ordinance No. 45 of 1942**

This Ordinance sets out the total number of hours and prohibits the employment of women between 6 p.m. and 6 a.m. However, Amendment Act No. 32 of 1984 removed this restriction on employers, by permitting women to work at night subject to certain conditions. The Amendment Act also regulated night work and maximum number of hours for persons between the age of 16 and 18 years.

**The Shop & Office Employees Act No. 19 of 1954**

The Act prevented the employment of females between 6 p.m. and 6 a.m. but, Amendment Act No.32 of 1984 removed this prohibition. Females above the age of 18 years could be employed in a shop or office between 6 p.m. and 8 p.m. The maximum number of working hours is nine hours, inclusive of rest and meals.

**Maternity Benefits Ordinance No. 32 of 1939**

This Ordinance does not apply to women in casual employment or to industries involved in industrial training to juvenile offenders, orphans or to persons who are destitute, the dumb and the deaf. Maternity leave given under this Ordinance is less than what is available under the Shop & Office Employees Act. Both the Maternity Benefits Ordinance and the Shops & Office Employees Act restrict the type of work that can be given to employees during pregnancy and prohibit termination of employment during such time.

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Under the Shop & Office Employees Act a female employee will be entitled to two nursing intervals of one hour each, if crèche facilities are not available. If a crèche is available she will be entitled to two half-hour intervals.

Sri Lanka ratified in 1981 the UN Convention on All Forms of Discrimination Against Women as a result of which amendments were made to the Maternity Benefits Ordinance conferring longer periods of leave and other rights on women employees.

**Laws Relating to Wages and Allowances**

In general legislation does not discriminate against males and females with regard to wages. However, where there is no Wages Board for a particular trade, discrimination could take place as the law does not prohibit discrimination. Female employees are entitled to full remuneration during maternity leave.


In fact, the Employees’ Provident Fund Act provides that a female employee will be entitled to EPF benefits in consequence of marriage, as opposed to men who will be entitled to benefit only upon termination of employment or on retirement.

Other laws such as the Shop and Office Employees Act, the Special Allowance of Workers Law No. 17 of 1978, the Interim Declaration Allowance of Employees Act No. 40 of 1979, the Supplementary Allowances of Workers Act No. 65 of 1979, the Budgetary Relief Allowances of Workers Law No. 1 of 1978 and the Budgetary Relief Allowance of Workers (No. 2) 10 of 1978 which govern remuneration also do not discriminate between male and female employees.

Furthermore, the Wages Boards Ordinance specifically provides that women shall be eligible for appointment as members of a Wages Board, as well as men. However, the Special Allowance of Workers Law No. 17 of 1978 in its 1st schedule recognises a class of workman, who could only be a male, entitled to an additional (but negligible) allowance of 6 cents (Rs.0.06).

Sri Lanka’s judiciary has recognised that it is not just and equitable to discriminate on irrational grounds (*Sithamparamathan v. Peoples Bank* (1989) 1 SLR p. 96). Therefore, the provisions of the Industrial Disputes Act may be invoked to seek redress if there is gender discrimination in employment though there are no reported cases.

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24 With regard to public sector employees coming within the Fundamental Rights jurisdiction of the Supreme Court a remedy lies in an action for equality under Article 12 of the Constitution of the Republic.
Sexual Harassment

The Penal Code, amended by Act No. 22 of 1995, enables an employee to file a Private Plaint in the Magistrate’s Court, alleging sexual harassment in the course of employment. Under the new law the employer may be liable for a fine as well as imprisonment.

The new section 345 of the Penal Code states, “Whoever, by assault or use of criminal force, sexually harasses another person, by the use of words or actions, causes sexual annoyance or harassment to such other person commits the offence of sexual harassment and shall on conviction be punished with imprisonment of either description for a term which may extend to five years or with fine or with both and may also be ordered to pay compensation of an amount determined by Court to the person in respect of whom the offence was committed for the injuries caused to such person.”

The first explanation to this section states, “Unwelcome sexual advances by words or action used by a person in authority in a working place or any other place shall constitute the offence of sexual harassment.”

The second explanation to this section states, “For the purpose of this section an assault may include any act that does not amount to rape under section 363.”

SIGNIFICANT FEATURES/DEVELOPMENTS IN THE APPLICATION OF LABOUR LAWS IN SRI LANKA

Labour Laws Applicable to the Free Trade Zones (FTZ)

It is significant to note that with the enactment of the Greater Colombo Economic Commission Law No. 4 of 1978 which was a step forward in the liberalisation of trade that occurred commencing 1977 towards attracting foreign capital, it was thought prudent by the legislators to create a different regime in the application of the labour laws of the country in the FTZs. Thus the Bill seeking to set up the Greater Colombo Economic Commission (GCEC) sought to legislate to eliminate the operation of certain laws in the FTZs.

This was challenged before the Constitutional Court (Decision of 18th January 1978) which held that permitting the GCEC to exempt the operation of certain labour laws in the FTZs is inconsistent with certain provisions of the Constitution. Consequent thereto, today the full gamut of the labour legislation is applied in all parts of the country.
However, in practice by means of a gate pass the Commissioner’s inquisitorial powers have been administratively restricted and the Commissioner though bound by the law to ensure compliance with the labour laws has not challenged this practice.

Furthermore, industrial disputes in the FTZ are dealt by the Industrial Relations Division of the Board of Investment of Sri Lanka (formerly the GCEC) and not by the Commissioner of Labour, which may appear to be contrary to the spirit of the legislation though there is no express attempt to oust the jurisdiction of the Commissioner of Labour or the other Tribunals.

**Laws Applicable to Migrant Workers in Sri Lanka**

Sri Lanka’s Labour legislation is applicable to foreigners employed locally. Their right to seek redress under local laws was recognised by the judiciary in *Coeme v. Kularatne* (1995) 1 SLR 63 and *Blanka Diamonds v. Henri Coeme* (1996) 1 SLR 200).

**Laws Applicable to the Public Sector**

The Establishments Code governs the conduct of employees in the Public Sector. The Public Services Commission governs their appointments, transfers and dismissals. Employees having grievances with regard to appointment, transfer, promotion or dismissal may apply to the Supreme Court for infringement or imminent infringement of their fundamental rights. Laws such as the Essential Public Services Act, the Cooperative Employees’ Commission Act, the Holidays Act and the Vocational Training Authority of Sri Lanka Act, the Trade Unions Ordinance, the Employees’ Councils Act, the Workman’s Compensation Ordinance and the Employees’ Trust Fund are also applicable to the Public Sector.

There are wide disparities in the laws applicable to the public and private sector employees in certain areas, which have no rational basis resulting in discrimination in favour of either. The Termination of Employment (Special Provisions) Act and the Industrial Disputes Act are examples in this regard.

**The 13th amendment to the Constitution of the Republic**

Labour Laws were not included in the Provincial List and is not a devolved subject under the 13th Amendment to the Constitution and, therefore, continues as a subject within the purview of the Central Government. To expedite appeals from Labour Tribunals under the Industrial Disputes Act as well as from decisions of the Commissioner under the Workman’s Compensation Ordinance such appeals are now to be referred to the Provincial High Court set up by the 13th Amendment.

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25 Every employee in the FTZs and any person seeking entry into a FTZ require a gate pass issued by the authorities to enter into the FTZ.

26 *Weragama v. Eksath Lanka Wathu Kamkaru Samithiya & others* (1994) 1 SLR 293 where the Supreme Court held that the Provincial High court had no writ jurisdiction over matters related to the Industrial Disputes Act.
Emergency Regulations and Workers’ Rights

The President of Sri Lanka can make emergency regulations under the Public Security Ordinance for the maintenance of law and order, and to maintain supplies and services essential to the nation. One such order enables the President to requisition personal services in connection with national security or maintenance of essential services. Such orders will compel persons to perform their duties, regardless of their objections.

The Head of State could declare any service essential to the life of the community to be an essential service, whether a state of emergency exist or not. The failure to comply with an essential service order is an offence.

Provisions previously used under emergency regulations are now largely incorporated in the Essential Public Services Act No. 61 of 1979, which prohibits work stoppage even by a registered Trade Union, with respect to an essential service.

CONSTITUTIONAL PROVISIONS AND GOVERNMENT POLICY ON INDUSTRIAL RELATIONS

Constitutional Provisions

Article 12(1) of the Constitution guarantees all persons equality before the law and equal protection of the law. Article 12(4) of the Constitution provides that special provision may be made by law, subordinate legislation or executive action for the advancement of women, children or disabled persons.

Article 14 guarantees freedom of association, the freedom to form and join a trade union and to engage oneself in a lawful occupation, trade or profession.

Article 27(6) guarantees that the State will ensure the equality of opportunity to citizens so that no citizen will suffer any disability on the ground of race, religion, language, caste, sex, political opinion or occupation.

Article 27(13) states that the State will promote with special care the interests of children and youth. However, the provisions in Article 27 are Directive Principles of State Policy and cannot be enforced in a court of law.

Articles 17 and 126 provide for application to the Supreme Court in respect of infringement or imminent infringement by executive or administrative action of guaranteed fundamental rights, but such an application cannot be made in respect of a violation by the Private Sector.
There are also provisions concerning the administration of labour law. Article 114 vests the Judicial Service Commission with powers of appointment, transfer, dismissal and disciplinary control of Labour Tribunal Presidents.

**Government Policy**

The Annual Report of the Central Bank for 1999 states that the government is continuing with its policy of private sector led export-oriented industries. The government’s aim is the expansion, diversification and upgrading of the domestic industrial base, creation of new employment opportunities, efficient management of physical and manpower resources and the promotion of regional industrialisation.

The average household labour force in the first 3 quarters of 1999 was estimated at 6,646,000. On average about 91% of the labour force was estimated to be in employment. About 45% of the labour force are employed in the private sector. The major employment generating sectors are manufacturing, light engineering, construction, transportation, communication, food outlets and catering, automobile repair services and personal services.

**International Labour Conventions Ratified by Sri Lanka**

Sri Lanka has ratified the several conventions of the International Labour Organisation (ILO).27

Out of the 37 Conventions ratified by Sri Lanka 32 are in force; 19 have been ratified since 1948, when Sri Lanka was granted member status of the ILO. The most recent convention to be ratified was the Labour Statistics Convention in 1985.28 In addition to Conventions the ILO also makes recommendations, which are not subject to ratification, but provide more detailed guidelines.

**THE RELEVANCE OF EXISTING LAWS**

**Substantive Law**

One law that has raised much debate is the Termination of Employment (Special Provisions) Act, which prohibits an employer from retrenching workmen either without the employee’s consent or the Commissioner’s approval.

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27 See Annexure 2 for ILO Conventions ratified by Sri Lanka.

28 This information was obtained from the ILO Office, Colombo.
Critics point out that such rigidity in the labour laws could be counter-productive to the economy as a whole. The Termination of Employment (Special Provisions) Act served its purpose during a particular time in the evolution of industry in Sri Lanka and was intended to cater to a limited situation where there was wide scale retrenching at the time it was enacted. Its continued presence, however, is widely believed to retard the growth of industry.

Given the extent of regulation of the labour market, questions have been raised whether the legislative framework as a whole, and this statute in particular, is a deterrent to labour intensive employment and to foreign investment. In practice, too, this Act has been found to be too cumbersome and not providing any certainty as to the outcome in the absence of guidelines to the Commissioner in computing compensation etc.

The Payment of Gratuity Act, too, places an excessive burden on the employer by requiring the payment of gratuity upon the completion of five years when gratuity was traditionally a payment for long and meritorious service. The period of five years also encourages heavy turnover of workers.

The Trade Union Ordinance should prohibit employees and unions from resorting to Go-Slow, which is an unfair labour practice that causes financial and productivity loss to the employer. One could also query the popular practice of tendering sick notes by union members as an alternative to strike action, where it is obvious that the sickness is feigned.

The Factories Ordinance is not broad enough to encompass dangers and occupational diseases arising from technological advancement. The law needs to be amended to secure the employees’ safety in a rapidly changing industrial environment.

The Amendment in 1999 to the Industrial Disputes Act compels an employer to bargain with a trade union that has a membership of 40% of employees in that organisation. Such compulsion (failure to do so being an offence) may not be healthy towards maintaining industrial harmony, and also may not result in the attainment of the bargainers’ objectives.

Another criticism is that labour legislation is dispersed over several dozen different Ordinances and Acts of Parliament and enforced through different authorities resulting in lack of uniformity and certainty, obstructing convenient access to employers, employees, foreign investors, industrial relation consultants, lawyers and academics etc. Suggestions have been made to codify the existing law as well as provide for uniform procedures and a minimum number of enforcement authorities. The impact of holidays on productivity and the failure of legislation to link wage increases to productivity is another criticism.
Procedural Law

Criticism has also been levelled at the delays in dispensing justice. Should there be a greater attempt at mediation and conciliation? Should the enforcement machinery and authority be streamlined?

The Commissioner, as a member of the executive arm of the government, also exercises judicial powers. This has prompted recommendations that the office of the Commissioner be made autonomous, independent and free from political pressure. With regard to Labour Tribunals, although the Tribunal is required to dispose an application within six months after the application is made, in practice, this does not happen due to a variety of reasons. Further, conforming to this time stipulation is not considered mandatory.

Although Labour Tribunals are required to make a just and equitable award unfettered by rules of evidence and adopting an inquisitorial method, often proceedings assume a technical nature similar to a Court of Law, resulting in delay. The sheer number of applications before Labour Tribunals is another factor delaying their disposal. An appeal against a Labour Tribunal order can be made within 30 days of the order. Appeals are heard in an adversarial environment by Courts of Law burdened with a large number of appeals, again resulting in delay. The setting up of administrative tribunals to hear appeals instead of directing them to the ordinary appellate courts could reduce delay as well as technicality.

If procedures that will eliminate technicality could be devised, the delays in our industrial tribunals/courts can be minimised.

GLOBAL AND REGIONAL TRENDS IMPACTING ON LABOUR LAW

Equal opportunity both for males and females is one of the main employment issues confronting the international community today. Related to this is the maintenance of satisfactory working conditions for women and young persons. The importance of child rights and protecting the child in the context of employment has gained increasing international attention. Also environmental issues play a key role in determining working conditions.

Developed labour markets manifest greater flexibility and mobility compared to Sri Lanka’s market. Given the State’s policy of industrialization and export led growth, it may be opportune for legislators to amend our laws in line with global changes. In this light, the Termination of Employment (Special Provisions) Act is an enactment that needs serious review.
SOME THOUGHTS – FOR A BETTER AND BALANCED LABOUR LAW REGIME IN SRI LANKA

a. The need to review the Termination of Employment (Special Provisions) Act. To consider its repeal or applicability to limited category of employees based on the nature of employment and/or ceiling on income or provide for a scale of compensation for non-disciplinary termination. To redefine “non-disciplinary termination” to exclude inefficiency and incompetence.

b. Consider establishing a social insurance scheme to benefit employees whose employment is terminated for non-disciplinary reasons, until suitable alternate employment is found.

c. Examine the possibility of setting up an insurance or social security scheme that would reduce the heavy burden placed on employers with regard to maternity benefits for female employees.

d. Review the Payment of Gratuities Act, consider a period longer than 5 years for eligibility and wider rights of forfeiture.

e. Explore ways of linking remuneration to productivity in establishing wages and emoluments.

f. Examine whether the Trade Union Ordinance should prohibit the adoption of unfair labour practices by Unions and also to ensure that Unions comply with the obligations imposed by the statute strictly. The depoliticisation of Trade Unions and requiring Trade Unions to be trade based.

g. Examine whether equal opportunity in employment for both sexes in the Private Sector ought to be guaranteed by law.

h. Consider amending the Factories Ordinance and the Workman’s Compensation Ordinance to include within the scope of such legislation, new threats and dangers to workmen as a result of use of sophisticated technology. Codify the entire gamut of labour legislation to ensure certainty and uniformity.

i. Consider whether the office of Commissioner of Labour should be an autonomous and independent body, without being subject to the criticism that it is subject to political pressures.

j. Devise means that will promote mediation and conciliation to solve industrial disputes.
k. Streamline/reconsider the existing enforcement machinery for speedy disposal of disputes and to promote certainty.

l. Study the impact of Sri Lanka’s legislation on both foreign and local investment.

m. Evaluate the impact of holidays on productivity, and recommend measures to increase productivity. Broad directions may also be formulated to link wage increases with productivity improvements.

n. Introduce procedures that would promote an inquisitorial approach in Labour Tribunals and other bodies entrusted with the task of industrial conflict resolution.

o. Initiate processes to set up administrative appellate tribunals, to hear appeals from Labour Tribunals and the Commissioner of Labour so as to provide an independent speedy machinery separate from the ordinary courts already beset by a heavy workload and backlog and also steeped in the adversarial approach to dispute resolution.

CONCLUSION

The preceding sections are an attempt to summarise the main laws governing employment in Sri Lanka. The laws that have been covered are mainly those applicable to the Private Sector.

Apart from deficiencies in laws and procedures to ensure industrial harmony and peace a major criticism is the lack of a clear policy on the part of successive governments to recognise that labour laws would be relevant only if there is employment generation. It is necessary to ensure that a climate conducive to employment generation is created in the first place and accordingly remove obstacles to employment generation found in the labour laws and its practice. There cannot be a surfeit of rights and a deficit of jobs.
ANNEXURE 1

Service Contracts Ordinance No. 11 of 1865

Domestic Servants Ordinance No. 28 of 1871

Estate Labour (Indian) Ordinance No. 13 of 1889

Chauffeurs Ordinance No. 23 of 1912

Indian Immigrant Labour Ordinance No. 1 of 1923

‘Tundus’ Ordinance No. 43 of 1921

Minimum Wages Ordinance No. 27 of 1927

Workman’s Compensation Ordinance No. 19 of 1934

Trade Union Ordinance No. 14 of 1935

The Employment of Females in Mines Ordinance No. 13 of 1937

Maternity Benefits Ordinance No. 52 of 1939

Wages Boards Ordinance No. 27 of 1941

Factories Ordinance No. 45 of 1942

Industrial Disputes Act No. 43 of 1950

Shop and Office Employees Act No. 19 of 1954

Fee Charging Employment Agency Act No. 37 of 1956

The Employment of Women, Young Persons and Children Act No. 47 of 1956

Employees’ Provident Fund Act No. 15 of 1958

Interim Devaluation Allowance of Employees Act No. 40 of 1968

Trade Union Representatives (entry into estates) Act No. 25 of 1970

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Estate Quarters Act No. 2 of 1971

Holidays Act No. 29 of 1971

Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971

National Apprenticeship Act No. 49 of 1971

Cooperative Employees Commission Act No. 12 of 1972

Privilege Leave (Private Sector) Law No. 14 of 1976

Budgetary Relief Allowance of Workers (No.1) Law No. 1 of 1978

Employment of Private Sector Trainees Act No. 8 of 1978

Special Allowance of Workers Law No. 17 of 1978

Budgetary Allowance of Workers (No.2) Law No. 18 of 1978

Payment of Gratuities etc. to Indian Repatriates Law No. 34 of 1978

Employee Councils Act No. 32 of 1979

Essential Public Services Act No. 61 of 1979

Supplementary Allowance of Workers Act No. 65 of 1979

Foreign Employment Agency No. 32 of 1980

Employees’ Trust Fund Act No. 46 of 1980

Payment of Gratuity Act No. 12 of 1983

Vocational Training Authority of Sri Lanka Act No. 12 of 1995
ANNEXURE 2

C 4 Night work (women) convention, 1919
C 5 Minimum age (industry) convention, 1919
C 6 Night work for young persons (industry) convention, 1919
C 7 Minimum age (sea) convention, 1920
C 8 Unemployment indemnity (shipwreck) convention, 1920
C 10 Minimum age (agriculture) convention, 1921
C 11 Right of association (agriculture) convention, 1921
C 15 Minimum age (trimmers and stokers) convention, 1921
C 16 Medical examination of young persons (sea) convention, 1921
C 18 Workman’s compensation (occupational diseases) convention, 1925
C 26 Minimum wage fixing machinery convention, 1928
C 29 Forced labour convention, 1930
C 41 Night work (women) convention (revised) 1934
C 42 Workman’s compensation (occupational diseases) convention, 1934
C 45 Underground work (women) convention, 1935
C 58 Minimum age (sea) convention (revised), 1936
C 63 Convention concerning statistics of wages and hours of work, 1938
C 80 Final articles revision convention, 1946
C 81 Labour inspection convention, 1947
C 87 Freedom of association and protection of the right to organise convention, 1948
C 89  Night work (women) convention (revised), 1948

C 90  Night work of young persons (industry) convention (revised), 1948

C 95  Protection of wages convention, 1949

C 96  Fee charging employment agencies convention (revised), 1949

C 98  Right to organise and collective bargaining convention, 1949

C 99  Minimum wage fixing machinery (agriculture) convention, 1951

C 100 Equal remuneration convention, 1951

C 103 Maternity protection convention (revised), 1952

C 106 Weekly rest (commerce and offices) convention, 1957

C 108 Seafarers’ identity documents convention, 1958

C 110 Plantations convention, 1958

C 111 Discrimination (employment and occupation) convention, 1958

C 115 Radiation protection convention, 1960

C 116 Final articles revision convention, 1961

C 131 Minimum wage fixing convention, 1970

C 135 Workers’ representatives convention, 1971

C 144 Tripartite consultation (international labour standards) convention, 1976

C 160 Labour statistics convention, 1985
I would like to begin this paper on a personal note. When the idea of a conference and a publication on Fifty Years on Law and Justice in Sri Lanka was first put forward, it met with an enthusiastic response from our Director, Dr. Neelan Tiruchelvam, as was usually the case with any idea to further scholarship. Although the conference was to coincide with the fiftieth anniversary of Sri Lanka’s independence, it got postponed due to other pressing matters. On 27th July 1999, two days before the fateful day, when we met Dr Tiruchelvam in his office, he told us: “I think your idea of Fifty Years of Law and Justice is a great one. You should go ahead with it.” These were his last words to us and I am glad that we were able to make his final words become a reality.

INTRODUCTION

It is not the intention of this chapter to trace the events relating to environmental protection in Sri Lanka chronologically, although some discussion of history is inevitable. Rather, it seeks to flag some milestones in the evolution of environmental law in Sri Lanka and discuss the direction in which it is evolving, bearing in mind the international developments in this field. Considerable attention will be paid to the National Environmental Act of 1980 (amended in 1988)¹ as this statute marked the watershed in the history of environmental law in Sri Lanka. While the main focus of this publication is tracing developments since Independence, this chapter will refer to some developments prior to Independence, in order to fully appreciate the evolution of the subject.

With the advent of globalisation, and with the obligations that Sri Lanka has undertaken at the international level, it is inevitable that national law becomes influenced, and indeed

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¹ Hereinafter the “NEA.” The material for this paper is drawn from *Environmental Law in Sri Lanka* (forthcoming) of which the author is a co-author.
fashioned, by international developments. Thus, a brief discussion will be made of Sri Lanka’s international commitments and their impact on national law.

Outline of the chapter

Having surveyed the history of environmental law in Sri Lanka in Section I, the legal framework governing environmental protection will be discussed in Section II. The relevant statutes will be discussed in brief categorising them as pre and post NEA era statutes. Section III will survey the institutional framework and the various actors in the field who have helped develop environmental law in Sri Lanka. Section IV will discuss the recent developments relevant to the field, particularly in relation to intellectual property issues arising under the WTO agreements and their impact on biodiversity and the current debate taking place on linking environmental issues to international trade and its impact on Sri Lanka. Sri Lanka’s international obligations will be discussed in Section V and Section VI and will embody future trends in the field and also some recommendations for further development of environmental law and the lessons to be learnt from past experience. The concept of sustainable development will underlie the paper which, despite its various connotations and criticisms aimed against it, remains the most important tool to fashion decision-making and, in fact, our very life styles.

SECTION I – EVOLUTION OF ENVIRONMENTAL LAW IN SRI LANKA

Twenty years ago, nobody in Sri Lanka would have heard of environmental law. Even today, there are so many people who do not know that there are laws to regulate conduct which has an impact on the environment. Why did “environmental law” become necessary?

For our ancestors, who understood and respected nature, no laws to protect the environment were necessary. They lived in harmony with nature, never over-exploiting natural resources. In short, sustainable development was the norm which fashioned their way of life. Sri Lanka can be proud of its ancestors and indeed, learn a lot from their wisdom. Sadly, however, we seem to have ignored the wisdom of our ancestors and, in any event, the solutions to present day environmental problems are neither so simple nor clear cut. Environmental problems are becoming increasingly complex, so complex that some environmental issues affect the entire international community. The phenomena of global warming and depletion of the ozone layer are good examples. Every State in the international community is contributing to these problems although their contribution differs. The response to these issues is inevitably a global one and Sri Lanka, which has ratified the conventions governing

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2 See discussion, infra.

3 See the separate opinion of Justice Weeramantry in the Hungary v. Slovakia case [ICJ Reports (1997)] who makes extensive reference to the ancient irrigation systems of Sri Lanka and how sustainable development was practised by our ancestors.
these issues, must fulfil those obligations by adopting necessary standards and criteria nationally. Thus, much of Sri Lanka’s environmental obligations are fashioned by international law.

In addition, uncontrolled population growth, which puts much pressure on land and natural resources, urbanisation and industrialisation all have an impact on the environment. Further, our traditional farming practices have undergone considerable change with a preference for cash crops and an increased dependence on pesticides and fertilizer. These, in turn, have negative impacts on the environment as well as human health. It is, therefore, obvious that some kind of legislation was necessary to regulate activities which have deleterious effects on human health and the environment, some of which may be long-term and may put even future generations at risk.

While environmental law in the strict sense of the word is rather recent, there were statutes governing some aspects of the environment even at the turn of the 20th century. One could count over a hundred laws in statute books which apply to some segment of the environment. The Forest Ordinance is probably one of the oldest of such laws which was adopted in 1907, although it was not conservation-oriented. Despite the effort made to “green” the law through amendments by providing for reserved forests etc., the original idea of framers of the law was to regulate the exploitation of forests and transportation of timber. The idea of community participation in conserving forests is embodied in the Ordinance in relation to village forests, a practice prevalent among our ancestors. Efforts are underway to revamp the entire Forest Ordinance by the Forest Department embodying developments at the international level, such as the public trust doctrine, concept of sustainable development and community participation in conservation, as well as to give effect to the Forestry Sector Master Plan prepared for Sri Lanka sometime ago.

The Fauna and Flora Protection Ordinance No. 2 of 1937, on the other hand, is much more conservation oriented. In contrast to the Forest Ordinance, the overriding objective of this Ordinance is conservation. Enacted during the colonial era, this Ordinance represents one of the earliest statutes on conservation, although penalties under the Ordinance remained woefully inadequate until the 1993 amendment was passed. About 10% of the total land area of Sri Lanka is protected under this law.

Another important statute, although weak in terms of enforcement, is the Soil Conservation Act of 1951. The main problem with the statute was its implementation, as the institution charged with its implementation was the Department of Agriculture and no co-ordination was envisaged with either the Forest Department or the Department of Wildlife Conservation.

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4 See the long title to the Forest Ordinance.
This was rectified only in 1996 when the law was amended to provide for a multi-disciplinary group to advise the implementing body.

This fragmented approach to environmental protection continued until 1980 when the National Environmental Act was adopted. Despite providing a holistic approach to environmental protection and establishing a central apex body to implement the Act, the provisions of the Act left many disappointed: what finally ensued was rather a “framework” type statute and a body lacking teeth to enforce the law. The law was amended in 1988 giving the Central Environmental Authority regulatory powers and considerably strengthening the legal provisions on environmental protection. Given the importance of these provisions, they will be discussed in detail later.

Perhaps the first true “environmental” statute with regulatory powers was the Coast Conservation Act of 1981. It was also the first statute to legalise the environmental impact assessment (EIA) process, discussed below. It regulates development activities\(^5\) within the coastal zone.\(^6\) Although the geographical application of the Act is limited to the coastal zone, it remains one of the most important environmental statutes in Sri Lanka. It was amended in 1988 to prohibit coral mining within the coastal zone.

The Marine Pollution Prevention Act was also adopted in 1981 to control pollution of the territorial waters of Sri Lanka.

Another milestone in relation to environmental protection came from rather unusual quarters. With the devolution of power under the 13\(^{th}\) amendment to the Constitution in 1987, a rather confusing situation arose when protection of the environment became listed under both the concurrent list (which vests powers in both the central government and the provincial government) and the provincial list (which vests powers solely in the provincial government). The only provincial council so far to adopt an environmental statute was the North Western Provincial Council which has its own institutional framework to implement the Statute.

The problems encountered with over-lapping jurisdiction became evident with the proposed coal power plant to be located in Norichcholai, in Chilaw. While the main plant fell within

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\(^5\) Defined in the Act as “any activity likely to alter the physical nature of the coastal zone in any way and includes the construction of buildings and works, the deposit of waste or other material from outfalls, vessels or by other means, the removal of sand, sea shells, natural vegetation, sea grass and other substances, dredging and filling, land reclaiming and mining or drilling for minerals, but does not include fishing” (1988 amendment).

\(^6\) Defined in the Act as the area lying within a limit of 300 metres landwards of the Mean High Water Line and a limit of two kilometres seawards of the Mean Low Water line and in the case of rivers, streams, lagoons,... the landward boundary shall extend to a limit of two kilometres measured perpendicular to the straight base line drawn between the natural entrance points and shall include the waters of such rivers etc.
the jurisdiction of the North Western Provincial Council, some parts of the plant also came within the jurisdiction of the Department of Coast Conservation, while the transmission lines fell within the jurisdiction of the Central Environmental Authority. The question then arose as to which institution should be the project approving agency\(^7\) for the project. The North Western Provincial Council which had not gazetted regulations on EIAs, rushed these through and called for an EIA, after the Department of Coast Conservation had already done so. This became subject to litigation when the Environmental Foundation filed action against the North Western Provincial Council on the ground that its statute was unconstitutional and sought a writ of certiorari from court quashing the decision of the Provincial Council to call for an EIA. This case highlights the problems that can arise with overlapping authority. Perhaps the solution would be to reserve projects of national importance such as this one with the Central Environmental Authority, with the relevant Provincial Council/s working together with the CEA in an advisory capacity.

The Ministry of Forestry and Environment, in an effort to harmonise environmental statutes which may be adopted by the Provincial Councils and to minimize the adverse consequences of possible conflicting statutes, commenced work on a model statute with the involvement of representatives from the Provincial Councils, the CEA and civil society for the voluntary adoption by the Provincial Councils. Although a draft model statute was prepared with much effort going into it, the present status of the draft remains unclear.

**SECTION II – THE LEGAL FRAMEWORK**

**CONSTITUTIONAL PROVISIONS**

The Independence Constitution – the Soulbury Constitution of 1948 – did not contain a bill of rights, except for a reference to minority rights. The fact that there was no reference to environmental protection is not surprising at all for the simple reason that at that time, the environmental movement had not gained any momentum. The first Republican Constitution of 1972, while containing a bill of rights, did not make the bill of rights justiciable.

The 1978 Constitution, which embodying a justiciable bill of rights, does not specifically endorse a right to a clean environment, neither does it embody a right to life. In the chapter on Directive Principles, however, there is a specific reference to environmental protection which requires the State to take measures to protect nature and conserve its riches. There is also an obligation cast upon on people to protect the environment. The Directive Principles are not, however, justiciable in a court of law.\(^8\) The Directive Principles were invoked by

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\(^7\) See the discussion on EIAs, *infra*.

\(^8\) See, however, the decision of the Philippines Supreme Court in *Oposa’s case* in which it was held that the fact that these obligations are contained in the Directive Principles and not in the Bill of Rights does not detract from the importance of these obligations.
EFL in the *Nawimana Case*⁹ which involved a public nuisance caused by a quarry. EFL filed a fundamental rights case on behalf of the affected people. Although the case was settled out of court and the Court did not go into the merits of the case, the fact that leave to proceed was granted to the petitioner seemed to indicate that the Court was receptive to the arguments advanced in the case and that it was ready to relax the principle of *locus standi* where necessary.¹⁰

When efforts were underway to draft a new constitution for Sri Lanka, representations were made by civil society groups to the Parliamentary Select Committee on the Constitution to include a specific right to a clean¹¹ environment. However, none of the drafts put forward by the government makes any reference to environmental rights. They seem destined to be relegated to the Directive Principles Chapter. One important inclusion, however, was the right to life clause which has been interpreted by the Indian Supreme Court as encompassing a right to a clean and healthy environment. Much would thus depend on how our judiciary will interpret the right to life clause, when the new constitution is adopted. While the general trend is encouraging, judicial activism in Sri Lanka has been confined to a few judges on the bench rather than the Supreme Court as a whole.

**OTHER STATUTES**

**Pre-NEA era**

Prior to the enactment of the NEA in 1980, several statutes were in existence which governed specific segments of the environment. Several such statutes were already noted: the Forest Ordinance, the Fauna and Flora Protection Ordinance, the Soil Conservation Act, several statutes relating to land, including the State Lands Ordinance and the various local government statutes.

The Fauna and Flora Protection Ordinance provides for the protection of six categories of areas: strict natural reserves, national parks, nature reserves, jungle corridors, intermediate zones and sanctuaries. The degree of protection varies with the nature of the protected area:

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¹⁰ The present constitution does not recognise public interest litigation in relation to a fundamental rights violation. Article 126 of the Constitution requires the aggrieved person or his attorney-at-law to file a petition in relation to a fundamental rights violation or imminent violation.

thus, the highest protection is accorded to strict natural reserves. Entry into these areas is also restricted and except for the latter three, one needs to obtain a permit to enter such areas. The Director of Wildlife Conservation is authorised to issue a permit to enter a strict natural reserve only for the purpose of carrying out scientific research. A sanctuary can comprise both State land and private land.

The amendments to the law in 1993 sought to provide for developments that were not envisaged at the time the law was drafted. This amendment provides that where any activity is proposed to be established within one mile of the boundary of any national reserve (i.e. strict natural reserves, national parks and nature reserves), the proponent is required to obtain the approval of the Director of Wildlife Conservation for which either an Initial Environmental Examination Report (IEE) or an Environmental Impact Assessment Report (EIA) must be prepared in terms of the National Environmental Act. Thus, no activity can take place within one mile of a national reserve without obtaining prior approval from the Director of Wildlife Conservation. In order to do so, the preparation of an IEE or an EIA is mandatory. This amendment was put to test in the case of EFL v. University of Colombo and others12 which involved a tissue culture project by the University and the project bordered the Bundala National Park.13 No EIA was prepared and no permission was sought by the proponent. The case is pending.

There were several problems with this approach to environmental protection:

- The sectoral approach to environmental protection ignores the impact of one segment on another. Environmental issues are inter-connected and require a holistic approach, not a sectoral one;

- There was no apex body to be in charge of the subject of environmental protection;

- The plethora of law and institutions gave rise to unco-ordinated, fragmented and often expensive action relating to environmental protection. Thus, for example, Department of Forestry is responsible for the management of forests while the Department of Wildlife Conservation manages those forests which are protected under the Fauna and Flora Protection Ordinance with the two departments often coming under the purview of two different ministries. Soil conservation is handled by the Department of Agriculture and until the 1996 amendment to the Act there was no real attempt at providing an integrated approach. In addition, the various local authorities were responsible for the

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12 CA 331/99, C.A. Minutes, 30.03.2002.
13 Bundala is an internationally protected wetland. See discussion, infra.
abatement of public nuisances, for the maintenance of public health and recently, they have been entrusted with pollution control activities as well.

The adoption of the NEA and the establishment of the CEA

It is against this background that the National Environmental Act was adopted in 1980 in an attempt to consolidate the law relating to environmental protection and to establish one organisation to be responsible for environmental protection and to co-ordinate activities with other organisations/agencies dealing with environmental protection. When the law was adopted in 1980, however, it came as a disappointment because the Central Environmental Authority (CEA) was not given any regulatory powers. This issue was rectified in 1988 when the Act was amended to give the CEA regulatory powers. The 1988 amendment vested CEA with considerable powers with regard to pollution control and to take action, including legal action, against defaulters.

With the enactment of the 1988 amendments to the NEA, it can be said that environmental law in Sri Lanka “came of age.” Despite various shortcomings in the law, the NEA is comparable to environmental statutes in developed countries and most of its provisions were drafted along the US law model. Problems have arisen with its implementation and, as with many other issues, due to political interference.

Post-NEA era

It was after the adoption of the NEA that laws that could be termed as “environmental statutes” came into being. The Coast Conservation Act, the National Heritage Wilderness Areas Act of 1988 and the Marine Pollution Prevention Act are good examples. In addition, several existing statutes were amended to embody provisions on environmental protection. Examples include the Urban Development Authority Law, the Greater Colombo Economic Commission Law, the Municipal Councils Ordinance, the Soil Conservation Act, the Forest Ordinance and the Fauna and Flora Protection Ordinance. The Southern Development Authority Act of 1996 also contains provisions on EIAs. Thus, the NEA marked a watershed in the history of environmental law in Sri Lanka. Despite its shortcomings, its importance should not be under-estimated.

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14 When amendments were being drafted to the NEA, EFL made representations to include citizens suits in the Act. (This allows any member of the public to file action against the CEA without having to prove locus standi). This, however, was not included due to fears that it would open a pandora’s box and give rise to a plethora of litigation. Other shortcomings in the law relate, inter alia, to the appeals procedure under the NEA which is one-sided (only the person whose application for an EPL/EIA has been cancelled has a right of appeal. Aggrieved citizens do not have such a right under the NEA), a monitoring plan and a cost-benefit analysis not being included as mandatory in relation to EIAs, and lack of public participation in relation to standard setting.

15 Which later became the Board of Investment.
Salient features of the NEA

The NEA (as amended) has extensive provisions on pollution control, regulation of development activities and preparation of management plans for the protection of the environment. It contains two tools to achieve sustainable development, although the NEA does not refer to the concept specifically. While the modern concept of sustainable development was coined by the World Commission on Environment and Development in its widely acclaimed report *Our Common Future*,16 the concept is neither new nor alien to us. As Justice Weeramantry pointed out in his separate opinion in the *Hungary v. Slovakia* case,17 sustainable development was practised in ancient Sri Lanka. He further noted that the concept of sustainable development has now achieved normative status under international law.18

Sustainable development envisages a balancing process between economic development and environmental protection. It embodies an inter-generational dimension, as decision-making should take into account rights of future generations as well as intra-generational equity. In other words, it seeks to integrate environmental protection into the economic development process. The two tools in the NEA are: the environmental protection licence process (EPL); and the environmental impact assessment process (EIA).

EPL process

The NEA provides that no person can, after the relevant date (which is 1st July 1990), emit waste19 into the environment20 which will cause pollution except under the authority of a licence and under such terms and criteria to be prescribed under the Act. This provision requires all polluting activities to be licensed under the Act. Thus, all industrial establishments in the country must have an EPL before commencing operations in the country. This requirement applies to any industry operating in the country.

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16 Sustainable development was defined by the WCED as “development that meets the needs of the present generation without compromising the ability of the future generations to meet theirs.” See *Our Common Future* (1987) Oxford University Press.


19 Defined in the Act.

20 Defined in the Act.
This provision enables industries to operate, but under strict terms and conditions. All industries have to be licensed – there are no exceptions. Industrial development is necessary for developing countries such as Sri Lanka, and particularly due to international trade, they must remain competitive in the international market.

Several problems, however, arose with implementing the law. The CEA could not cope with the number of applications for licences due to shortage of manpower. Since these licences have to be renewed annually, it became an impossible task for the CEA. Some industries in Sri Lanka have never obtained an EPL while several others’ applications are still pending at the CEA. In addition, it simply could not monitor the activities of the industries in order to check whether the terms and conditions stipulated in the licence were being complied with. This, in effect, negated the whole idea behind licensing. The CEA should have dealt only with high polluting industries which would have been a manageable number and the CEA would then have been in a better position to monitor the activities of these industries. This situation has been rectified to a certain extent as this power has been delegated to the District Environmental Agencies appointed under the NEA in relation to certain industries. Monitoring the activities of industries, however, remains a serious problem.

A considerable amount of case law has emerged in relation to the EPL process. The most important issue that arose involved the relationship between the provisions in the NEA on EPL and the common law remedy of public nuisance\(^\text{21}\) and whether the former has ousted the latter. The courts have taken the view that, while the provisions of the NEA are considered to be applicable in the event of any inconsistency with other laws, the magistrate’s jurisdiction in relation to a public nuisance cannot be ousted if a public nuisance exists.\(^\text{22}\) The Supreme Court has also noted that public participation and transparency are essential if sustainable development is to be achieved. The Court further stated that before issuing an EPL licence, objections from the public must be considered, although the Act itself does not impose such an obligation on the CEA.\(^\text{23}\)

\(^{21}\) The remedy of public nuisance has been the most frequently resorted to form of remedy as, according to the provisions in the Criminal Procedure Code of 1979, any person can, by way of an application, bring the existence of a public nuisance to the notice of the Magistrate. If the Magistrate is satisfied that a prima facie case has been established, he is empowered to issue a conditional order against the respondent directing him to abate the public nuisance within a specified period of time. The reason for this remedy being the most frequently resorted to one was due to problems of locus standi and because only the CEA is empowered to file legal action under the NEA. See Nanayakkara, A., Public Nuisance Law.


\(^{23}\) V.D.S. Gunaratne v. Homagama Pradeshiya Sabha and five others SAELR 5(2) and (3), 1998, p.28.
The EIA process

The NEA regulates certain types of development activities identified according to their location,\textsuperscript{24} magnitude\textsuperscript{25} or the type of the project.\textsuperscript{26} Called prescribed projects, these require approval under the NEA. The NEA provides that, \textit{notwithstanding the provisions of any other written law}, all prescribed projects\textsuperscript{27} which are being undertaken in Sri Lanka by any government department, corporation, statutory board, local authority, company, firm or individual, will be required to obtain approval under the Act. Such approval will have to be obtained from the appropriate project approving agency (PAA).\textsuperscript{28} In relation to certain projects, however, the concurrence of the CEA is also necessary. The preparation of an EIA\textsuperscript{29} or an IEE\textsuperscript{30} for such projects is mandatory under the Act.

Put simply, an EIA is a document which seeks to predict the environmental impact of a proposed development activity. The predictions may or may not materialise in the form or magnitude that was envisaged at the time the document was prepared. Its significance lies in the fact that it enables us to evaluate a project for its viability from an economic, sociological and environmental point of view. If used properly, it enables us to choose the best project and the best locality for that project. It also enables us to reduce the impact on the environment as once the possible consequences are identified, it becomes possible, through various devices, to mitigate the impact. While an EIA seems to be the answer to a lot of problems, our

\textsuperscript{24} Thus, activities which borders fragile eco-systems or a protected area, activities which fall within a one mile radius of an area protected under the Fauna and Flora Protection Ordinance require the preparation of an EIA. See discussion, \textit{supra}.

\textsuperscript{25} Some projects have been identified according to their size. Thus, for example, a highway exceeding a length of 10 kilometres, hotels exceeding 99 rooms or 40 hectares in extent; hydro-electric power stations exceeding 50 megawatts etc.

\textsuperscript{26} Some projects by their very nature require the preparation of an EIA. Construction of ports, airports, harbours and nuclear power plants are examples.

\textsuperscript{27} Prescribed projects are those which are identified by the Minister and published in the Gazette as requiring approval under Part IVC of the NEA (section 23Z).

\textsuperscript{28} Under section 23Y, the Minister is required to publish in the Gazette a list of State agencies which shall be the project approving agencies.

\textsuperscript{29} Defined in the Act as a written analysis of the predicted environmental consequences of a proposed prescribed project and containing such information as are required under the Act. Very importantly, it must contain an analysis of alternatives which are less harmful to the environment together with reasons as to why such alternatives were rejected. That the discussions of alternatives lies at the heart of the EIA process was recognised by the Court in \textit{Amarasinghe and three others v. The Attorney general and three others (Katunayake Colombo Expressway case)} SAELR 1(1), 1994, p.23. As it provides the decision-maker with options to choose the best project which is environmentally, socially and economically viable, an EIA can be rejected if alternatives are not adequately discussed. However, only reasonable alternatives need to be discussed. See \textit{NRDC v. Morton} in which this principle was laid down.

\textsuperscript{30} An initial environmental examination report has been defined in the Act as a preliminary report which seeks to ascertain whether the impacts on the environment are significant and hence, requires the preparation of an EIA. The Act does not, however, define “significant impact on the environment.”
experience with the EIA process has shown a negative side of EIAs. The main objective of the EIA is to integrate environmental protection into the economic development process, which principle also underlies the concept of sustainable development.

The EIA document is a public document which must be made available for public inspection at a pre-determined location for a period of thirty days. Any member of the public can, during this period, make his/her comments to the relevant project approving agency. In certain instances, the relevant project approving agency can hold a public hearing. Public hearings have been held in relation to various projects in Sri Lanka. While the latter is not a mandatory requirement under the NEA, if a decision is made to hold a public hearing, then rules of natural justice must be followed.

The importance of the EIA process is that it is participatory and transparent and provides access to information. These principles, which are human rights guaranteed under international law, are increasingly being recognised in relation to environmental issues as well.

In addition, the NEA has extensive provisions on environmental quality. It makes pollution of the air and water an offence and for the first time makes noise pollution an offence. The remedy under the common law for excessive noise was private/public nuisance, but the NEA recognised noise as a form of pollution. It also empowers the Minister in charge of the subject of environment to promulgate regulations on emission standards, prohibited chemicals, hazardous/toxic waste, disposal of garbage etc. Furthermore, it requires the CEA to initiate management plans in relation to the protection of forests, wildlife, land use, and soil conservation in consultation with the relevant institutions. These management plans, particularly a land use plan, would have gone a long way in protecting our natural resources in a holistic and systematic manner. Although a National Conservation Strategy was prepared by the CEA in 1990, to date, these management plans have not been prepared.

In early 1990s a task force consisting of eminent environmental lawyers, environmentalists, policy makers and members of civil society was established under the auspices of the Ministry of Environment to draft a new environmental statute for Sri Lanka. While an extensive document was prepared which was made available for public comments, it met with considerable opposition, particularly from the industrial lobby. Some of their concerns were well-founded. Although the President later appointed a sub committee to look into

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31 Thus, it is often criticised for coming too late in the decision-making process; using it to justify a decision already made; being too technical; being only in English; and being project-oriented, therefore, overlooking the cumulative impact of projects.

32 Although called an environmental impact assessment, this seems a misnomer as an EIA must take economic as well as sociological impacts into consideration, in addition to the environmental impact.
these objections and to make the draft law more pragmatic, and the sub committee presented its report to the President, the draft law, together with the recommendations of the sub-committee have not been adopted to date. The draft law seems to have been shelved, indicating the importance (or rather, lack of it) the government accords to environmental issues. This is unfortunate as much effort went into preparing the draft law and its revised version.

**SECTION III - THE INSTITUTIONAL FRAMEWORK AND ACTORS IN THE FIELD**

The establishment of the CEA under the NEA was already noted. The CEA has four divisions – environmental protection division, natural resources division, legal division and environmental promotion division. It is headed by a chairman with the Director-General being the head of administration.

A separate ministry for environmental protection was established in 1990 and after various changes of names and amalgamations with other subjects, environmental protection now comes within the purview of the Ministry of Forestry and Environment. While the CEA comes within the purview of the Ministry of Environment, the Forest Department comes within the purview of the Ministry of Forestry and Environment. The Department of Wildlife does not, at present, come within the purview of a Ministry, but is under the purview of the President of the country. International trade which has ramifications for environmental protection comes within yet another ministry with the Ministry of Foreign Affairs playing a role in relation to international treaties on environmental protection and WTO negotiations. Co-ordination among these ministries is essential if meaningful action is to be taken to protect the environment. Duplication of action, secrecy and bureaucracy are not unheard of in our country. They seem the norm rather than the exception. Very often, diplomats who are neither prepared nor conversant with the subject are sent for treaty negotiations. This results in accepting obligations which may not be conducive to our country or obligations which conflict with existing obligations. The TRIPS agreement adopted under the aegis of the WTO is a good example.33

**The role of civil society**

Without the help of civil society and two national level NGOs in particular, environmental law would not have developed to this extent in Sri Lanka. We owe much to Environmental Foundation, the first NGO in Sri Lanka to specialise in environmental law and Mihikata, which also specialised in environmental law and environmental education, particularly among

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33 See discussion, *infra.*
Aspects of fifty years of Law, Justice & Governance in Sri Lanka

school children. These organisations, first started by a few committed individuals many of whom were practising lawyers, have come a long way, and have professional staff. They have filed many law suits, helped thousands of victims through their legal aid clinic and have also carried out education programmes on environmental law and environmental protection. No paper on the history of environmental law in Sri Lanka would be complete without a reference to these organisations which have had an uphill task in putting environmental law on the legal and, particularly, the litigation map. They have also produced many publications and have campaigned vigorously on various issues, including making amendments to the law. In addition to these national level NGOs, there are thousands of NGOs working at the grassroots level without whose help the national level NGOs would not have been successful.

The role of the judiciary

While our judiciary has not been as adventurous or ambitious as the Indian judiciary, it has, in its own way, contributed to the development of environmental law in Sri Lanka. The lower judiciary, in particular, after a slow start, has been very receptive to environmental cases. The upper judiciary has handed down a few important decisions relating to environmental protection, the most recent and undoubtedly the most significant being its decision in the Eppawala phosphate mining case. This judgment is significant for its discussion of the “principle” of sustainable development and is the first judgment which specifically refers to international environmental law instruments on sustainable development. Given its significance, some discussion of the case is necessary.

In a scholarly judgment, Justice Amerasinghe stated that the proposed agreement to exploit the Eppawala mine should be considered in the light of the principles embodied in the Stockholm Declaration on the Human Environment of 1972 and the Rio Declaration on Environment and Development of 1992. He further stated that:

Admittedly, the principles set out in the Stockholm and Rio De Janerio are not legally binding in the way in which an Act of Parliament would be. It may be regarded merely as ‘soft law.’ Nevertheless, as a Member of the United Nations, they could hardly be ignored by Sri Lanka. Moreover, they would, in my view, be binding if they have been either expressly enacted or become a part of the domestic law by adoption by the superior courts of record and by the Supreme Court in particular, in their decisions.

Justice Amerasinghe was of the view that authorities must pay due regard to the general principle encapsulated in the phrase sustainable development that human development and exploitation of natural resources must take place in a sustainable manner. Referring to the definition of sustainable development put forward by the World Commission on Environment
and Development, Justice Amerasinghe pointed out that some of the elements encompassed in the principle of sustainable development are of special significance to this case:

First, the conservation of natural resources for the benefit of future generations – the principle of inter-generational equity; second, the exploration of natural resources in a manner which is ‘sustainable’, or ‘prudent’ – the principle of sustainable use; the integration of environmental considerations into economic and other development plans, programmes and projects – the principle of integration of environment and development needs.

The inter-generational principle, in my view, should be regarded as axiomatic in the decision making process in relation to matters concerning the natural resources and the environment of Sri Lanka in general, and particularly in the case before us. It is not something new to us, although memories may need to be jogged.

Justice Amerasinghe seems to have drawn much inspiration from the separate opinion of Justice Weeramantry in the Hungary v. Slovakia case in which extensive reference was made to the ancient irrigation systems of Sri Lanka and how sustainable development was practised by ancient rulers in Sri Lanka. Referring to the above separate opinion, Justice Amerasinghe stated:

In my view, the human development paradigm needs to be placed within the context of our finite environment, so as to ensure the future sustainability of the mineral resources and of the water and soil conservation ecosystems of the Eppawala region, and of the North Central Province and Sri Lanka in general.

Justice Amerasinghe also referred to the polluter pays principle, another evolving principle of environmental law, and providing access to environmental information so that people could participate in the decision making process. He preferred the principle of shared responsibility to the public trust doctrine in relation to the protection of natural resources as he was of the view that the former principle is wider than the latter. Emphasising that EIA provisions in the NEA must be followed, together with the regulations framed under it, it was held that an imminent infringement of fundamental rights of the petitioners guaranteed under Articles 12(1), 34 14(1)(g) 35 and 14(1)(h) 36 has been established. The Court ordered that no contract should be entered into by the respondents to exploit the Eppawala deposit.

34 “All persons are equal before the law and are entitled to equal protection of the law.”
35 “Freedom to engage by himself or in association with others, in any lawful occupation, profession, trade, business or enterprise.”
36 “Freedom of movement and of chosing his residence within Sri Lanka.”
without a comprehensive exploration and study and the results of such exploration and study being made public. The project proponent was also directed to obtain approval from the CEA in accordance with law.

In 1998, a leading environmental lawyer in Sri Lanka, Mr. Lalanath de Silva, filed a fundamental rights case alleging that his right to life has been violated by the Minister of Forestry and Environment by his failure to promulgate emission standards for vehicles. He argued that, although the 1978 Constitution does not guarantee right to life specifically, all other rights guaranteed by the Constitution would be meaningless without the right to life. He sought a directive from the Court to compel the Minister to gazette the necessary regulations. While the petitioner (who argued his own case) put forward a convincing argument, the Court was rather reluctant to give a judgment on the right to life clause, perhaps fearing opening a pandora’s box. The Court, however, directed the Minister to gazette the necessary regulations before 1st July 2000. This was done by virtue of Regulations gazetted on 23rd June 2000.

Environmental education

No one would deny the importance of environmental education as it is a sound understanding of issues that triggers the need to take necessary action. Environmental studies now feature in the school curriculum and forms part of the social studies syllabus. At the tertiary level, several faculties offer various courses on environmental studies. Faculty of Law of Colombo University was the first faculty to start a course on environmental law for undergraduates in 1993. This was an optional subject in the final year. It is now a compulsory optional subject in the final year37 and the curriculum was considerably revamped with a strong focus on international environmental law. The Law Faculty is now planning to introduce a graduate course on environmental law at the LL.M level. The Legal Division of the Open University recently commenced a course on environmental law.

SECTION IV - RECENT DEVELOPMENTS

The World Trade Organisation, which has become a major player at the international level, also has a direct impact on environment and human rights. Not only do some of our obligations under the WTO agreements conflict with our environmental obligations, there is also a threat to link international trade with environmental protection. Thus, the TRIPS agreement, which gives patent rights to innovations, conflicts with the obligations under the Convention on Biological Diversity which provides for benefit sharing. The TRIPS agreement has given rise to what is called “bio piracy” – pirating indigenous knowledge and practices.

37 During the recent changes to the Law Faculty curriculum, human rights law and environmental law were made compulsory optional subjects in that students have to choose one or the other. They could also choose both subjects, if they so wished.
There is a clear conflict between indigenous knowledge which benefits the community at large and recognising patent rights which provides only for exclusive rights of the owner of the patent.

During the doomed round of Seattle negotiations in December 1999, several members of the WTO urged the need to link international trade with labour and environmental issues. In other words, the issue is whether products from a particular State can be boycotted on the ground that the exporting State’s environmental regulations do not measure up to the importing State’s regulations. While not denying the link between environmental protection and international trade, many feel that the WTO is not the proper forum to deal with these issues. The opponents argue that other issues such as human rights and good governance would also be linked to international trade if the present trend continues. It is also feared that the WTO would collapse under its own weight if too many issues are brought under its purview. Already issues such as intellectual property and investment have found their way to the WTO agenda. The danger for developing countries is that, since WTO is a rule-based organization, WTO dispute settlement body will have jurisdiction over such issues and sanctions can be imposed against the defaulting State, if environmental protection is linked to international trade.

Another important development, although not necessarily recent, is the convergence of the environmental movement with the human rights movement, particularly in developing countries. Many environmental problems give rise to human rights violations, like the right to health, livelihood, and in extreme cases, the right to life itself. While the debate continues whether a right to a clean and healthy environment exists and if so whether it is a third generation right (a solidarity right), one thing is clear: the very existence of life on this planet could be jeopardised if timely action is not taken to arrest global environmental problems. Speaking of human rights protection then may be too late. Due to the lack of enforcement machinery for environmental issues, the human rights machinery has been used to seek redress for environmental problems. Thus, right to life and right to health, are frequently invoked in relation to environmental issues. Unlike human rights issues which are often individual in nature (except, of course, issues like genocide, apartheid and slavery), environmental violations often involve groups and even future generations. It also involves the right of other species to survive. The human rights machinery cannot obviously deal with such issues. However, the debate on and a call for a specific environmental right continue and is likely to become one of the major issues in the years to come.

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38 The same argument is made in relation to labour.

The concept of sustainable development also has human rights implications. It embodies rights of future generations and also the right of present generations to develop in a sustainable manner. Despite criticisms that this is a vague term, the concept of sustainable development is, in the opinion of the author, a significant development of recent years. While it may not have attained the status of a customary international law principle, and its legal status remains questionable, almost all recent international environmental instruments make specific reference to it and seem to have accepted it as a norm which should be taken into account when taking decisions on the environment. It has at least encouraged States to evaluate their development activities for their environmental impact by adopting the EIA process which is participatory, transparent, and provides access to information. The importance of this development should not be undermined.

SECTION V – SRI LANKA’S INTERNATIONAL OBLIGATIONS

As a signatory to several environmental treaties, Sri Lanka is obliged to give effect to these obligations at the national level. Some of these conventions are: Ramsar Convention on Wetlands, Framework Convention on Climate Change, Vienna Convention for the Protection of the Ozone Layer, the Montreal Protocol on Substances that Deplete the Ozone Layer and the Convention on Biological Diversity (CBD). While efforts are underway to draft legislation to give effect to the CBD and regulations have been drafted in relation to ozone depleting no enabling legislation was ever passed to give effect to the Ramsar Convention on Wetlands which Sri Lanka ratified in 1979. Wetlands such as Bellanwila-Attidiya, Muturajawela and Bundala have been protected under the Fauna and Flora Protection Ordinance. Bundala remains the only wetland in Sri Lanka to be declared a Ramsar site under the Convention. The provisions in the NEA on EIAs are also applicable to wetlands as some projects involving wetlands have been listed as prescribed projects. However, no legislation protects wetlands per se. While a draft Wetlands Act was prepared by EFL sometime ago at the request of the National Aquatic Resources Agency (NARA), it remains a draft to date. In fact, some laws on the statute books are in direct conflict with protection of wetland, their main objective being reclamation. The harmonisation of these conflicting laws is essential. While certain wetlands can be reclaimed for other purposes, this must be done in a scientific manner with

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40 In the Eppawala case referred to above, the Court seemed to have regarded the concept of sustainable development as legally binding, and non-adherence to it could entail legal consequences. Thus, as far as Sri Lanka is concerned, sustainable development has achieved normative status.

41 A good example is the Colombo District (Low-Lying Areas) Reclamation and Development Board Act No. 15 of 1968 (now referred to as the Sri Lanka Land Reclamation and Development Corporation Act) which seems to endorse the popular belief that “wetlands are wasteland.” Section 2 of the Act (as amended by Act No 52 of 1982) empowers the Minister to declare, in consultation with the minister of local government, any area of land which is low-lying, marshy, waste or swampy as a reclamation and development area for the purposes of the Act (emphasis added).
due regard to the importance of the wetland in terms of its ecological value and by providing for flood control measures. We have only too well seen the adverse effects of indiscriminate reclamation of wetlands, particularly in and around the city of Colombo.

The developments in relation to international environmental law also have an impact on Sri Lanka. Some of these developments were already noted. The precautionary principle which requires States not to use scientific uncertainty as an excuse to postpone cost effective measures to protect the environment, the polluter pays principle (essentially an economic principle, the polluter pays principle requires internalising the costs of pollution prevention as mandated by public authorities), prior notification and consultation, EIA process, participation in the decision making process and access to information all have had an impact on national law.

In addition, “internationalisation” of the environment is a significant development of recent years. Early international environmental law dealt only with extra-territorial effects of State activities as well the effects on global commons. What measures States took within its jurisdiction and control were not subject to international scrutiny (except where it had a transboundary impact) due to the customary international law principle of non-interference in domestic affairs of states, also embodied in Article 2(7) of the UN Charter. With the advent of human rights law and environmental protection, this has slowly given way to international regulation and scrutiny of state activities, even in the absence of an extra-territorial impact. Thus, how a State treats its subjects and how a State exploits its biodiversity are very much subject to international scrutiny and this internationalisation of environmental protection has a significant impact on national law and traditional international law itself.

SECTION VI - WHAT ARE THE LESSONS TO BE LEARNT?

The lessons to be learnt from our rather short history of environment law are many. The most important lesson to be learnt is that environmental protection requires a balancing of competing interests. There is no such thing as a pristine environment where no development activity takes place as any activity will have some impact on the environment. Environmentalists in Sri Lanka have been referred to as “anti-developmentalists,” sometimes with good reason. Several development activities have been stalled due to environmental

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43 While this principle originated from the OECD countries, it is now considered an environmental principle of general application. Its importance is endorsed by the Rio Declaration. This principle was referred to with approval by Justice Amerasinghe in the Eppawala Phosphate mining case, see discussion, supra.

44 All these principles are embodied in the Rio Declaration.

45 “Environmental law” here is used to mean environmental statutes adopted after 1980 and the jurisprudence of the courts after that date.
lobby, the coal power plant being the most controversial. That Sri Lanka needs an additional source of energy was recognised at least 10 years ago and the energy crisis in 1996 sounded a good warning.\textsuperscript{46} But did we take steps, five years down the line, to establish a coal power plant? This issue was politicised to such an extent that it became an election pledge during the Presidential elections of 1999. While accepting that coal power has its own environmental problems, what we need to do is to ensure that these problems are minimised. Technology is available to minimise environmental risks of coal power plants. Thus, as environmentalists, we need to take a realistic stand in relation to development activities as well as environmental protection. Poverty itself has a severe impact on the environment (which is perhaps the biggest polluter in developing countries) and every effort must be made to achieve development in a sustainable manner. Attempts to stall development on environmental issues which seem baseless or at best trivial are, in the opinion of the author, short-sighted and indeed, irresponsible.

Another good example of such a short-sighted attitude on the part of environmentalists was the proposed sanitary land-fill site at Alupotha. Although a strategic environmental assessment\textsuperscript{47} was carried out in relation to this project which would have relieved the garbage disposal problem in the city of Colombo to a considerable extent, due to “environmental lobby” this project was stalled and ultimately, the World Bank which was to fund the project, pulled out its funding.

The converse of this scenario should also be considered. Very often, politicians try to push development activities forward (very often at the behest of investors) without considering their environmental impact. This again is dangerous and short-sighted and will jeopardise the future of our children and grandchildren. Thus, the way forward would be for policy-makers to join hands with environmentalists and take an integrated approach to environment and development, which principle underlies the concept of sustainable development. It is also embodied in the Rio Declaration of 1992. The EIA process which integrates environmental protection with the development process, should be pursued without exceptions and not used to justify a decision that has already been made.

Another approach that should be adopted in Sri Lanka is strategic environmental assessment (SEA). This requires the analysis of environmental impact at the macro or planning level. One criticism of the present EIA process has been that it comes too late in the planning process and also overlooks the cumulative impact of development activities on the

\textsuperscript{46} The power cuts during 1996 also saw the President promulgating emergency regulations to suspend the operation of environmental statutes, including the NEA, relating to power and energy projects. Needless to say that this is a very dangerous approach. See also Wickremasinghe, “Emergency Rule” in \textit{Sri Lanka: State of Human Rights 1997} (Law & Society Trust, Colombo, 1997), chapter 3.

\textsuperscript{47} See discussion, \textit{infra}. 
environment as the NEA envisages the preparation of EIAs for individual projects. While the present legal framework and a detailed discussion of SEAs are outside the scope of this paper, it should be emphasised that SEAs should be prepared in relation to policy-decisions involving regional plans or masterplans to ensure that a holistic approach to environmental protection is adopted. In countries such as the Netherlands, SEAs have been in existence for many years. Even in Sri Lanka, SEAs have been prepared in a few instances.

As environmental education and awareness are critical for environmental protection, it is proposed that the present school curriculum be strengthened to include recent developments and also to expose the students to field work. In addition, policy makers and various other actors in the field should be made more sensitive to environmental issues and the CEA and other NGOs should continue their activities on environmental education.

Education and awareness will go a long way in changing attitudes and unsustainable practices. How many of us are guilty of wasting water, dumping garbage, throwing away plastic containers and bags and other unhealthy practices? We need to change now, and unless and until all of us do so, environmental degradation would continue. Similarly, training and awareness raising is necessary for policy makers and enforcement agencies and co-ordination among various institutions charged with, inter alia, environmental protection, finance, foreign affairs, industry and trade, is crucial for an integrated approach to environmental protection as well as to appreciate the multi-disciplinary nature of the subject.

The role played by international law in protecting the environment should not be underestimated. Granted that international law has its own problems, particularly in relation to enforcement, but a closer look at the international legal system, there is no denying the unprecedented developments that have taken place in the international law arena during the last three decades. Despite cynics who even doubt that international law is really “law”, international law has played a major role in shaping international obligations in relation, inter alia, to human rights and environmental protection which, in turn, have had an impact on national law. What is necessary, and often lacking, is international co-operation and political will to implement these undertakings, but this should not be used as an excuse to attack the very basis of international law. Regional developments in relation to environmental protection are also important, particularly since much can be learnt from the experience of states which share similar socio-economic and geo-political situations.

A word of warning though: the emphasis in this paper on environmental law should not be taken as endorsing the view that law and regulation is the only answer to environmental protection. This is not so. Environmental issues are so complex and technical and involve so many issues and disciplines that lawyers would be lost without any input from scientists, sociologists, economists, medical personnel, engineers etc. Law is only one of several tools that can be used and is often used in conjunction with other tools that are available. In fact,
it is often felt that a command and control method may not be the best mechanism to adopt in relation to environmental problems which require the balancing of competing interests.

Finally, I would like to conclude by quoting the words of wisdom of Chief Seattle:

> We have not inherited this earth from our parents and grandparents.  
> Rather, we have borrowed it from our children and grandchildren.
HER OPPORTUNITIES AND HER RIGHTS: 
THE DILEMMA OF THE MIGRANT WORKER

Shyamala Gomez*

Iranganie is 39 years old. When she was 19 years old, she married Lal, a labourer in the Highways Department. He subsequently lost his job. In order to support a family of five she went to Kuwait in 1997. A cousin working as a housemaid in Kuwait had asked her to come. She was asked to buy her own air ticket to Kuwait on the understanding that this amount will be reimbursed by her employer. She bought a ticket paying Rs.18,500 out of loans taken at a high interest rate. She spent Rs.26,000 to go to Kuwait.

The employer refused to reimburse the money for the ticket. Her cousin in Kuwait advised her to work as she had arrived in Kuwait. She had to cook, wash and clean in a household of eleven. She was paid a monthly salary of Rs.7000.

After one year and ten months, the 24 year old brother of her employer made sexual advances at her. She escaped to the Sri Lankan embassy in Kuwait. She was kept in the embassy for one and a half months. She had to get Rs.13,500 from home to pay for her ticket. Her employer made several attempts to get her back on the ground that she had signed a three year contract. She refused to go back. She was not paid her salary for two months.

When she came to Sri Lanka, with the help of the Sri Lankan Embassy officials who provided her with the necessary travel documents, she lodged a complaint with the Sri Lanka Bureau of Foreign Employment. The only relief she got was Rs.12,200 from Suraksha, the insurance scheme available to migrant workers.1

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1 Adapted from a case study obtained from the American Centre for International Labour Solidarity.
INTRODUCTION

Iranganie’s story is not unique. The press frequently reports such incidents. Reports also indicate that women migrant workers are tortured, physically abused, sexually abused and harassed by their employers and others.² Complaints received by the Ministry of Foreign Affairs between 1993 and 1995 indicate that 2,268 women had complained of harassment in 1995 and 16 women had complained of ‘mutilation’ in the same year.³ Some of these cases end in death or suicide.⁴ The social cost of migration such as the impact of migrant women on their families have been the subject of several studies.⁵ Alcoholism, drug abuse by children of migrant parents, adultery and incest are among a host of issues that confront the families left behind.⁶ The problem is exacerbated by inadequate State and non State support structures to assist spouses and children left behind to cope on their own.⁷

Private remittances by Sri Lankan migrant workers employed overseas amounted to Rs.64,517 million in 1998 and increased to Rs.74,342 million in 1999.⁸ Given the vast contribution of these migrants to the national economy, it is envisaged that they will be provided with the necessary information, training and assistance prior to departure to facilitate their migration and be provided with opportunities for reintegration and other assistance after their return. This paper will look at whether the Sri Lankan government through the various mechanisms adopted and regulatory bodies established is fulfilling these expectations.

This paper will also examine whether the current Sri Lankan laws and policies protect the rights of migrant workers and their families. The international framework has put in place a number of safeguards to protect this vulnerable group of workers. Sri Lanka’s international obligations in this regard will also be examined here.


⁴ Cooray, P., Sri Lankan Migrant Workers to the Middle East, 1998, p. 47.


⁶ See generally, T.S. Hettige, Social Costs of Migration, Paper presented at the International Conference on Migrant Women Workers, October 1997, p. 4, organised by the American Centre for International Labour Solidarity in collaboration with the All Ceylon Federation of Free Trade Unions.

⁷ Ibid., p.4.

A myriad of questions accompanies the issue of migrant workers. In the Sri Lankan context, the female migrant worker comes into focus as the majority of migrant workers are female. What are the rights they enjoy at work? What are the obligations of the receiving State and the sending State? How do you hold the sending State and receiving State accountable for the safety and protection of this vulnerable group of workers? What mechanisms can be put in place to protect the rights and interests of these workers? Are the current local and international laws adequate to deal with the problems facing migrant workers? This paper will attempt to address these questions.

PROFILE OF THE MIGRANT WORKER

The past 50 years witnessed the gradual increase of workers leaving Sri Lanka to seek employment overseas. The State sought to cope with this exodus by resorting to legislation. It also introduced new policies to strengthen the interests of migrant workers. However, it was only during the past 20 years that effective mechanisms were put in place to deal with this growing phenomenon.

The 1960’s saw the emigration of highly qualified Sri Lankan nationals for employment to the West (to countries such as the United Kingdom and the United States), to Australia, and to East and West Africa.9 The numbers were small, averaging a few thousand migrant workers annually.10 Prior to this, the first half of the century was not a period in which very many people explored the employment market overseas. An exception was a small group of Tamils who migrated to Malaysia when both Sri Lanka and Malaysia were colonies under British rule.11

In recent years, the numbers of migrant workers have increased with the lure of ‘oil’ rich countries. Countries of West Asia and the Far East with their open labour policies have welcomed the unskilled and middle level skilled workers. Of these vast numbers of Sri Lankan migrant workers, the majority consists of unskilled women workers who are employed mainly as household workers in the labour receiving countries.12 From 1991 to 1999, the number of household workers who departed for employment to major labour receiving countries increased from 34,857 in 1991 to 87,710 in 1999.13 The government’s labour policies encouraged emigration as a devise to solve unemployment, especially female

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9 Ibid., p.73.
10 Ibid.
11 Ibid.
12 Of the total placements in 1999, almost 73% were in the category of unskilled labour (inclusive of household workers), 49% of the total placements in foreign employment in 1999 were household workers and 65% of the placements in 1999 were female workers, Central Bank of Sri Lanka, Annual Report 1999, p.114.
unemployment. Employment as household workers is not popular with nationals in the labour receiving countries. The high demand for household workers will continue to attract a high percentage of female labour from Sri Lanka, despite the exploitation and abuse they are subjected to.

Some organisations discourage women from going overseas for employment and, instead, encourage men to migrate for work. This kind of paternalistic policy which seeks to “protect” women infringes the woman’s right to seek employment of her choice in a country of her choice. The reality is also that the demand is for female unskilled labour rather than male skilled labour. It would be more appropriate to put in place mechanisms to safeguard the rights of migrant workers and their families rather than attempting to thwart their efforts at trying to secure better paid employment overseas. In addition, Sri Lanka, which is listed by the ILO as a main labour exporting country, should make remaining in the country for employment a viable option by increasing job opportunities.

Family reunification was found to be a cause for female migration in the 1970s when women migrated to join their partners. Today, this scenario has changed. Women go in search of employment to countries where they will be better paid than if they remained in their home country. The ‘feminisation’ of migration has resulted in almost half the world’s migrant workers being women. It has also resulted in these women migrant workers being at the receiving end of abuse, ill treatment and even death at the hands of their employers. With this global phenomenon of migration on the rise, an attendant problem, which has raised its head, is the trafficking in women. As a huge influx of labour penetrated into West Asia and other parts of the globe, the incidence of trafficking in South Asia has also increased.

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15 Statement made by David Soysa, Director, Migrant Services Centre at a meeting on Women Migrant Domestic Workers held on 20th May 1999 and its proceedings reproduced by CENWOR, Doc. Series No.64, p. 17.
16 Several studies on the social costs of migration done by various groups and individuals have revealed that children of female migrant workers are subject to physical and sexual abuse and incest, and very often suffer the consequences of being separated from their mothers. See for example P. Cooray, Sri Lankan Migrant Workers to the Middle East, 1998; T.S. Hettige, Social Cost of Migration, Paper presented at the International Conference on Migrant Women Workers, October 1997, Colombo.
INTERNATIONAL STANDARDS

Migration for employment has necessitated the development of a set of international norms to confer rights on migrant workers and also to hold States accountable for the protection of non nationals employed within their borders. The three main international instruments are:

1. ILO Convention No. 97 on Migration for Employment (Revised) of 1949. (Hereafter Convention No.97)
2. ILO Convention on Migrant Workers (Supplementary Provisions) No.143 of 1975. (Hereafter Convention No.143)

The International Labour Organisation (ILO) adopted the two above Conventions in 1949 and 1975. These Conventions do not take into account the multitude of problems that confront the migrant worker today. The United Nations sought to complement the ILO instruments on migration with the Convention on Migrant Workers in 1990.

International Labour Organisation

Sri Lanka’s record when it comes to ratification of international instruments on migration is poor. The two ILO Conventions on migration, Conventions No.97 and No.143, which deal specifically with migrant workers have not been ratified by Sri Lanka. These two ILO Conventions contain minimum standards for migrant workers. Both these Conventions are strengthened with two complementary Recommendations - Recommendations (Revised) No.86 and No.151.

Convention No. 97

Convention No. 97 obliges member states to provide accurate information to the ILO on the migration process and free services to assist migrant workers. The Convention also provides for the transfer of earnings, appropriate health services on departure and arrival and the equal treatment of legal migrant workers in regard to remuneration and trade union rights as

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20 The ILO recently estimated that over 90 million migrant workers and their families are residing in countries other than their own. See Migrant Workers, International Labour Office, Geneva, 1999, p.3.

21 Convention No.97 came into force in 1952. As of 31st December 1999, it has been ratified by 41 member States. Convention No.143 came into force in 1978 and as of 31st December 1999 it has been ratified by 18 member States.

nationals in the country of employment. Three Annexes to the Convention strengthen the provisions of the Convention by laying down conditions for recruitment by both government sponsored arrangements and non government sponsored recruitment.

**Convention No.143**

Convention No. 143 deals mainly with the clandestine movement of migrant workers and imposes obligations on member States to take measures to combat such movement. In addition, it accords equality rights in employment, cultural rights, trade union rights, and rights of reunification to legal migrant workers. The Convention does not elaborate on the basic human rights to be respected by member States to the Convention.

Article 19 of the Constitution of the ILO obliges Member States to report to the International Labour Office at appropriate intervals on the status of the member State’s law and practice in relation to Conventions which the State has not ratified and also to report on Recommendations. Although the above stated ILO Conventions have not been ratified by Sri Lanka, the Sri Lankan government has submitted reports under each of the above instruments on direct requests by the ILO.23

The provisions of Conventions No.97 and 143 apply to both sending and receiving States as well as to transit States in some instances. A survey conducted by the ILO revealed that some States were under the misconception that the obligations under the Conventions applied only to receiving States or those which received emigrants and this was given as a cause for non-ratification.24 The stand of the ILO is clear; the Conventions apply to countries of emigration and immigration. Provisions which relate to remittances, measures in relation to suppression of illegal migration, the supplying of information prior to migration and measures to ensure equality of treatment in relation to the substance or contents of contracts of employment are those which apply to sending States as well. Reports submitted by some States revealed that the double applicability of the provisions of the Conventions has not been recognised.25 Sri Lanka has stated in a report to the ILO that immigration measures are not relevant as ‘there is no inward migration for employment’ when Sri Lanka reported on national policies, laws and regulations relating to emigration and immigration.26 This is a wrong interpretation of the Convention.

23 Repeated efforts to obtain copies of the reports submitted by Sri Lanka from the Ministry of Foreign Affairs and the Bureau were of no avail. The Bureau was unable to supply me with the reports and the official contacted at the Ministry via another source was reluctant to give them to me on the ground that they were confidential documents! Sri Lanka is listed as a country which does not plan to ratify both Conventions and a reason given by the Sri Lankan government is that their laws were not in conformity with the provisions of the instruments. (Migrant Workers, International Labour Office, Geneva, 1999, p. 235).


Sri Lanka is unable to ratify ILO Convention No. 97 because the Convention states that employment services should be provided free to migrant workers. This provision acts as a barrier to ratification. The Sri Lanka Bureau of Foreign Employment currently charges a fee to register prospective migrant workers.\textsuperscript{27}

\textbf{UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990}

Sri Lanka has a poor record within the ILO of not having ratified the two main Conventions on migrant workers. However, it ratified the UN Convention on Migrant Workers in 1996.\textsuperscript{28} This Convention only received a cursory welcome from the international community when it was adopted by the UN General Assembly on 18 December 1990. As of 15 June 2001, sixteen States had ratified or acceded to it, Sri Lanka being one.\textsuperscript{29} It is the only UN Convention which deals directly with migrant workers.\textsuperscript{30} Twenty States must ratify or accede to the Convention, for the Convention to enter into force.\textsuperscript{31} The Convention sets standards and is the only UN Convention, apart from the two ILO Conventions, which deal specifically with migrant workers.

\textbf{Basic Concepts in the Convention}

The Migrant Workers Convention is unique in that it sought to strengthen the existing ILO Conventions by granting a plethora of rights to migrant workers and their families. The Convention looks at the migrant worker from a rights perspective. It imposes obligations on member States to ensure that basic human rights are accorded to all migrant workers, irrespective of whether they are legal or illegal workers.\textsuperscript{32} The Convention embodies the principle of non-discrimination and provides that all migrant workers and their families shall not be discriminated against in relation to the rights provided for in the Convention.\textsuperscript{33} It also seeks to promote humane conditions within the migration process to migrant workers and their families.\textsuperscript{34} The right of all migrant workers to leave a State including their country

\textsuperscript{27} This point is raised in Sri Lanka’s report under ILO Convention No. 97 referred to in Migrant Workers, International Labour Office, Geneva, 1999, p. 65.

\textsuperscript{28} Sri Lanka deposited its instrument of ratification with the Secretary-General of the United Nations on 11\textsuperscript{th} March 1996.

\textsuperscript{29} The other States being Bosnia and Herzegovina, Cape Verde, Colombia, Egypt, Morocco, Philippines, Seychelles and Uganda.

\textsuperscript{30} The International Convention on the Elimination of all Forms of Racial Discrimination is also relevant as its provisions on non-discrimination indirectly impact on migrant workers.


\textsuperscript{32} See Part III of the Migrant Workers Convention.

\textsuperscript{33} \textit{Ibid.}, Article 7.

\textsuperscript{34} See Part VI of the Migrant Workers Convention.
of origin is also a basic concept embodied in the Convention. The Convention looks at migrant workers as persons with enforceable rights and thereby expands on the rights conferred to migrant workers under ILO Convention No.143.

Ambit of the Convention

The Convention covers within its ambit legal and illegal migrant workers and also extends its reach to all types of migrant workers, including those, which are excluded from existing ILO Conventions. Ratifying States cannot exclude any type of migrant worker from the application of the Convention. The Convention thereby recognises the vulnerable status of migrant workers who enter labour receiving countries in search of employment.

As the title of the Convention indicates, it applies to workers and their families and in this regard, obliges ratifying States to protect the rights of migrant families. The Convention thus applies to the entire migration process, which begins with preparation for migration, departure from the country of origin, transit and the entire duration of the stay in the host country till the return of the migrant workers and their families to the country of origin. The Convention recognises the long process of migration, which may last up to several years.

The term ‘migrant worker’ has been defined in the following manner in the Convention:

“… ‘migrant worker’ refers to a person who is to be engaged, is engaged, or has been engaged in a remunerated activity in a State of which he or she is not a national.”

This definition takes into account the entire migration process by including the migrant worker who is to be engaged and one who has been engaged in remunerated activity. A migrant worker who is yet to be engaged would cover a migrant worker who has yet to leave the country of origin and one in transit and also one who is returning to the country of origin after being engaged in paid work. The expansive definition of a migrant worker in the Convention protects the migrant workers and their families’ rights even before the migrant worker commences employment in the receiving country.

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35 Ibid., Article 8.
37 Article 1(2), UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Adopted by the UNGA at its forty fifth session in 1990.
38 Article 2(1).
The Migrant Workers Convention gives a broad definition to the term ‘migrant worker.’ The term covers a frontier worker, seasonal worker, seafarer, worker on an offshore installation, itinerant worker, project tied worker, specified employment worker and also the self-employed worker. However, seafarers and offshore installation workers who have not been admitted to reside and engage in employment in the State of employment are excluded from the application of the Convention.39 Students, trainees and investors are also not covered by the Convention.40

Not only does the Convention define in broad terms who a migrant worker is, it also brings within its ambit the members of their families. The broad definition given to the term ‘members of the family’ in the Convention has implications for the Sri Lankan family. Article 4 defines ‘members of the family’ as

“… persons married to migrant workers or having with them a relationship that, according to applicable law, produces effects equivalent to marriage, as well as their dependent children and other dependent persons who are recognized as members of the family by applicable legislation or applicable bilateral or multilateral agreements between the States concerned.”

The Convention thus takes into consideration the different marriage practices and customs recognised by law, which prevail in some countries and recognises the different family units, which may be constituted as a result.

The Convention draws a distinction between legal and illegal migrant workers and their families.41 Documented workers (or legal workers) are those who are “authorized to enter, to stay and to engage in a remunerated activity in the State of employment.”42 Migrant workers and their families are considered as non documented (or illegal workers) if they are not authorised to enter, to stay and engage in paid work in the State of employment.43

The Convention accords different groups of rights to the documented and the non documented worker. However, basic human rights are granted to all migrant workers, irrespective of whether they are legal or illegal migrant workers. These include:

i. the right to life,

ii. to be free from torture,

39 Article 3(f).
40 Article 3(c) and (e).
41 Article 5.
42 Article 5(a).
43 Article 5(b).
iii. freedom from slavery,
iv. freedom from forced labour,
v. the right to freedom of thought, religion and opinion,
vi. freedom of statement,
vi. right to privacy,
viii. arbitrary deprivation of property,
ix. right to liberty and security,
x. freedom from arbitrary arrest and detention.
xi. right to transfer earnings and savings
xii. equal treatment in relation to conditions of work as nationals in the state of employment.44

Part III of the Convention thereby protects the human rights of all migrant workers, whether legal or illegal, and their families. Part IV embodies the rights accorded only to documented or legal migrant workers. Illegal workers are not entitled to the rights enumerated in this section of the Convention.

The rights laid down only for the benefit of legal workers include:

i. the freedom of movement within the State of employment,
ii. the freedom of association,
iii. equal treatment in relation to access to housing, vocational training, health services, education as nationals in the State of employment,
iv. the right to reunification of the family,
v. exemption from tax on earnings in the state of employment,
vi. protection from arbitrary expulsion.45

Application of the Convention

The Convention has a reporting procedure similar to other international instruments. A Committee will be appointed under the Convention, which will examine reports submitted by member States to the Convention.46 The Convention also has an optional communications

44 See Part III of the Convention.
45 See Part IV of the Convention.
46 Article 72.
procedure whereby a State can submit complaints to the Committee on the non compliance of another member State with the provisions of the Convention.\textsuperscript{47} It also has an optional individual complaints procedure by which the ratifying State recognises the competence of the Committee to hear individual complaints.\textsuperscript{48}

**Lacunae in the Convention**

There are several lacunae in the Convention. It is unfortunate that it does not specifically address the rights and interests of women workers. Article 16(2) states that migrant workers and their families are entitled to be protected by the receiving State against violence, physical injury, threats and intimidation flowing from a public or private source.\textsuperscript{49} Another provision deals with the right of migrant workers and their families to be free from torture, or cruel, inhuman or degrading treatment or punishment.\textsuperscript{50} These provisions are indirectly relevant to a woman migrant worker who has been subjected to violence. The Convention also does not impose any obligations on the State to investigate and prosecute incidents of violence against women. The Convention is silent on this aspect.

The omission of a provision in the Convention on the rights of women migrants to be free from violence and the receiving State’s duties of investigation and prosecution is surprising. The female migrant worker is dependent on her employer and is in a hostile environment. These women are most often illiterate, unassertive and unaware of their rights as migrant workers. In the case of a household worker, her status is uncertain and is tantamount to a custodial situation where she is in the custody of her employer. With negative publicity being given by the media to abuses of women migrants globally, the omission is unfortunate. With the feminisation of migrant workers, violence directed at these women workers by their employers is an issue which remains to be tackled at the international level.

The Convention is also silent on the duties and obligations of the sender country in protecting the migrant worker from exploitation and fraudulent practices before departure. The Convention does not deal with the obligations of recruitment agents and the State’s role in the recruitment process. The Convention does not contain the contentious provision of providing free services to migrant workers and this maybe a reason why the Sri Lankan government had no objection to ratifying the Convention. The less controversial the instrument is, the easier it is to attract ratification!

\textsuperscript{47} Article 76.
\textsuperscript{48} Article 77.
\textsuperscript{49} Article 16.
\textsuperscript{50} Article 10.
Obligations upon Ratification

Labour sending countries as well as labour receiving countries must ratify the Convention if the rights of these vulnerable workers are to be protected. The trend among the ILO Conventions on migration reveals that the number of sender countries ratifying the Conventions are considerably more that those which receive migrant workers. A similar fate may fall upon the Migrant Workers Convention. The effect of a Convention is considerably weakened if States in which violations and abuses of migrant workers rights take place do not ratify the Convention. This is equally true of the UN Migrant Workers Convention. If labour receiving countries do not ratify the Convention, then labour sending States and the international community cannot compel the former States to abide by the standards laid down in the Convention.

LAWS, INSTITUTIONS AND POLICIES AT THE NATIONAL LEVEL

The Sri Lankan government has tried to respond to the needs of the migrant worker by putting in place laws, institutions and policies to deal with the migrant worker. Some of these include:

- The licensing of foreign employment agencies.
- Compulsory registration of migrant workers.
- The appointment of labour welfare officers and labour attaches in the Sri Lankan missions overseas.
- The formulation of standard contracts of employment.
- The registration of contracts of employment at the Sri Lankan embassy in the state of employment.

In the next section, we look at these mechanisms closely to ascertain whether they have succeeded in improving the vulnerable status of the Sri Lankan migrant worker.

Role of the Sri Lankan Embassies

Part III of the UN Migrant Workers Convention is further strengthened by Article 7(7) which obliges the diplomatic mission of the country of origin to take steps to protect the interests of migrant workers who have been arrested or detained. The Sri Lanka Bureau of Foreign Employment Act No. 21 of 1985 makes provision for the appointment of labour welfare

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51 See ILO Convention No. 143, which has only 18 ratifications as of 31st December 1999, where approximately five countries were receiving countries.
officers in the labour receiving countries to oversee the welfare of migrant workers in these countries.\textsuperscript{52} Currently, twelve labour welfare officers serve in several Middle Eastern countries and also in the Far East.\textsuperscript{53}

Their mandate is broad and these officers are responsible for the welfare of Sri Lankan migrant workers employed in that country and for the promotion of employment for Sri Lankans. Their duties include liasing with government authorities such as the police and immigration, the repatriation of deceased migrant workers, the investigation of complaints regarding breaches of contracts of employment, the settlement of disputes and the submission of monthly performance reports to the Bureau. The duties of these officers are well laid out. However, it is unclear as to whether these officers are effective in dealing with the cases of abuse and exploitation (especially in the case of household workers) so often reported in the media. Given the continuing reports of harassment, abuse and exploitative conditions of work these women are subjected to, the labour welfare officers do not appear to be playing a proactive role in investigating and bringing to book the perpetrators of violence and abuse.\textsuperscript{54} The recent recalling of two labour welfare officers attached to the Sri Lankan missions in the Middle East due to poor performance records indicate that these fears are not unfounded.\textsuperscript{55}

The SLBFE Act does not distinguish between registered and unregistered migrant workers. The Sri Lankan missions overseas receive complaints from migrant workers who have not registered with the Bureau. The Bureau’s stand is that they cannot and do not discriminate against unregistered workers who seek assistance from the Sri Lankan embassies overseas.\textsuperscript{56} The Bureau maintains that the Sri Lankan embassies would consider the requests of unregistered workers as well. Repatriation is also carried out of unregistered workers when circumstances demand such action.\textsuperscript{57}

In addition to the labour welfare officers, the Ministry of Foreign Affairs in Sri Lanka has appointed labour attaches in Kuwait, Lebanon, Oman, Saudi Arabia, Singapore and the United Arab Emirates to monitor the working conditions of migrant workers.\textsuperscript{58} The large number of female domestic workers in the Middle East has prompted Sri Lanka to take further measures to protect this vulnerable group of workers by mandating that all such

\textsuperscript{52} Sections 21 and 22 of the SLBFE Act.
\textsuperscript{53} Labour welfare officers are appointed by the Bureau and report directly to the Bureau. The following countries currently have labour welfare officers in the Sri Lankan missions: Lebanon, Kuwait, Jordan, Qatar, Oman, Singapore, Malaysia and Korea. In addition, labour welfare officers are also based in Dubai, Abu Dhabi, Riyadh and Jeddah. Two officers had been recalled due to poor work records and are no longer with the Bureau.
\textsuperscript{54} In an interview, an official at the SLBFE commented that labour welfare officers are unaware of their duties!
\textsuperscript{55} Interview with official at the SLBFE.
\textsuperscript{56} Interview with official at the SLBFE.
\textsuperscript{57} Interview with official at the SLBFE.
\textsuperscript{58} Migrant Workers, International Labour Office, Geneva, 1999, p. 52.
contracts of employment must be registered at the Sri Lankan embassy in the country of employment.\textsuperscript{59} Registering the contract in itself is inadequate as a protective measure. The Sri Lankan missions overseas must ensure that there is follow up action and monitoring of these contracts of employment to ensure that no violations of the contracts take place.

The lack of cooperation by officials in West Asian countries is cited by the State as a major constraint to the work of the labour welfare officers and labour attaches appointed at the respective Sri Lankan missions overseas.\textsuperscript{60} Such observations must not deviate from the service expected of these labour welfare officers and labour attaches. The State has an obligation to ensure that these officers perform their duties diligently by acting on complaints of migrant workers and by conducting frequent inspections of workplaces to ascertain the working conditions of these workers. There appears to be overlap between the functions of these two categories of officers. A useful exercise would be to allocate their duties. Another alternative would be to have only one category of labour officers responsible for safeguarding and promoting the welfare of migrant workers.

Other Mechanisms

Another measure taken by the Sri Lankan authorities was to instruct airlines not to issue tickets to those who do not provide certification of registration with the Bureau.\textsuperscript{61} Female domestic workers are by far the most exploited. The Bureau has formulated standard contracts of employment for a few countries, which includes specific contracts for housemaids.\textsuperscript{62} The housemaid, the employer, the recruiting agent in Sri Lanka and the recruiting agent in the labour receiving country, must sign these contracts. Signing a standard contract of employment is only a first step. Sri Lankan missions in labour receiving countries must ensure that constant supervision and surveillance is carried out to ascertain whether these contracts are being violated by the parties to the contract. The effective implementation of such contracts will ensure that these contracts are not only abided by on paper, but also in practice. As already noted, in spite of all these measures adopted to safeguard migrant workers, they continue to be abused, sexually harassed and exploited.

\textsuperscript{59} The monitoring of female domestic workers’ contracts takes place in Kuwait, Lebanon, Oman, Saudi Arabia, Singapore and the United Arab Emirates.

\textsuperscript{60} Statement made by the Secretary, Minister of Labour at a meeting on Women Migrant Domestic Workers held on 20\textsuperscript{th} May 1999 and its proceedings reproduced by CENWOR, Doc. Series No. 64, p. 17.

\textsuperscript{61} Meeting on Women Migrant Domestic Workers held on 20\textsuperscript{th} May 1999 and its proceedings reproduced by CENWOR, Doc. Series No. 64, p. 7.

\textsuperscript{62} Current employment contracts include contracts for housemaids to be employed in Cyprus, Malaysia, Singapore and in the Middle East.
The Constitutional Framework

Articles 12(1) of the Sri Lankan Constitution ensures equality before the law and equal protection of the law to all. Article 12(4) makes provision for special measures to be taken by the State to advance the rights of, *inter alia*, women. The majority of migrant workers are women and constitutionally, the State can take measures to protect and advance the rights of this vulnerable group of workers. Article 14 articulates two important rights which migrant workers may invoke. It articulates the freedom of movement and the right to return to Sri Lanka at any time. A migrant worker is also covered by these provisions and has the right to travel overseas to seek a more lucrative job market and to return to Sri Lanka at any time.

The Women’s Charter

The Sri Lankan government adopted the Women’s Charter in 1993 in keeping with its obligations on ratifying the UN Convention on the Elimination of All Forms of Discrimination against Women in 1981. The Charter contains several provisions whereby the State takes upon itself the task of promoting the rights of women in the social, economic, cultural and political spheres. Among the several undertakings of the State is that enunciated in Section 12 which lays down that:

“The State shall take appropriate measures to:

... ensure that interests of all migrant women are protected within the country and in the host country through bilateral agreements.”

It is the ‘interests’ of migrant women and not their rights, which are to be protected under the Charter. The Charter is not a legally enforceable document as it has not been enacted into law by Parliament. It serves as a guide to the State in formulating policy. It is arguable however, that the Charter should be a morally binding document, which should bind the State to take measures to improve the status of women and in this case, the plight of women migrant workers.

The Workers’ Charter

The Workers’ Charter too has a provision on migrant workers which imposes an obligation on the State to “do its utmost to promote and guarantee the protection of the interests of Sri Lankan migrant workers.” Here too, it is the interests of the migrant workers, and not their rights, which are to be protected. The Workers’ Charter, like the Women’s Charter, is not legally enforceable.

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63 Article 14(1)(h) and 14(1)(i) of the Second Republican Constitution, 1978.
64 Article 12(ii) of the Women’s Charter (Sri Lanka), Office of the Minister of State for Women’s Affairs, Ministry of Health & Women’s Affairs, Colombo, Sri Lanka, 1993.
Sri Lanka Bureau of Foreign Employment Act

The Sri Lanka Bureau of Foreign Employment (hereinafter the Bureau) was established by the Sri Lanka Bureau of Foreign Employment Act No. 21 of 1985.66 (hereinafter the SLBFE Act). This Act repealed the Foreign Employment Agency Act No. 32 of 1980. Under the repealed Act of 1980, there was no separate authority to oversee the interests of migrant workers and the Department of Labour was entrusted with the task of enforcement.

The objectives of the Bureau are to promote and regulate foreign employment and to take measures to protect the welfare of migrant workers and their families. Among the other objectives of the Bureau enumerated in the Act are to regulate the business of foreign employment agencies and to provide them with assistance and support, to set standards for contracts of employment, to undertake research into overseas employment opportunities, the training and orientation of recruits and the formulation and implementation of model contracts of employment which guarantee fair wages and standards of employment.67

The objectives of the Bureau laid down in the Act envisage that the Bureau will play a vibrant role in safeguarding and promoting the interests of migrant workers. Whether the Bureau has achieved at least some of the objectives laid down in the Act is a question this paper will seek to answer.

Licensing of Foreign Employment Agencies

In many countries licensing of foreign employment agencies is seen as a mechanism to reduce or prevent abuse in the recruitment process.68 Diverse methods are resorted to. Under the SLBFE Act, the Bureau is the sole body entrusted with the task of issuing licences to foreign employment agencies.69 The Act prohibits the carrying on of business of a foreign employment agency unless it is the holder of a license issued by the Bureau.70 The Bureau is given powers under the Act to accept applications for licenses and for renewal of licenses and to insist on conditions laid down in the Act before the granting of licenses to foreign employment agencies.71 The Bureau also has the power to cancel licenses and to refuse the renewal of licenses.72

70 Ibid., Section 24.
The SLBFE Act envisions the Bureau as a regulatory body. Under the Act, the Bureau has the power to impose sanctions if employment agencies engage in fraudulent or illegal activities. The Act imposes penalties for offences committed under the Act, which includes imprisonment and payment of a fine. Stringent conditions are laid down in the Act to ensure that only persons of good repute are granted licenses. Before a license is granted, the applicant for a license is required to enter into an agreement with the Bureau that it will carry on the business in a ‘morally irreproachable manner.’ Licensees are further compelled to keep their record clean if they wish to renew their licenses. A license is liable to be cancelled if the licensee has contravened any provision in the Act. All licenses must be renewed each year.

An applicant for a license must provide a bank guarantee of Rs. 250,000. The applicant must also provide two sureties and enter into a bond with the Bureau to the value of Rs. 250,000. In addition, a licensee must pay a fee of Rs. 11,250 (inclusive of GST). The fee on application for renewal is the same. The high licensing fee may act as a deterrent to licensees from engaging in fraudulent practices while in operation. However, this is subject to the condition that the Bureau prosecutes those who violate the Act.

The Bureau is vested with wide powers under the Act to regulate licensed agencies. It must ensure that licensees comply with the provisions of the Act before they are granted licenses. If the Bureau is lax in not insisting on conditions being met before granting licenses, then it fails in its duty as a regulatory body and licensing would be a farcical exercise.

While licensing laws will not prevent malpractices completely, they make engaging in such practices risky because of the heavy penal sanctions which attach to non compliance. However, such laws are effective as a regulatory mechanism only if the Bureau is vigilant in exposing and prosecuting foreign employment agents who operate without licenses. If the Bureau is not vigilant in investigating and prosecuting those operating without licenses,

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73 Ibid., Sections 62, 63, 64, 65, 66 and 67.
74 Ibid., Section 26(1).
75 Ibid., Section 28(1).
76 Ibid., Section 31.
77 Ibid., Section 29.
78 Ibid., Section 28(1)(c).
79 Ibid., Section 28(1)(b).
81 Eight licenses were cancelled in 1999 by the SLBFE. Central Bank of Sri Lanka Annual Report - 1999, p. 115.
there would be no advantage in securing a license.\textsuperscript{82} It would be less costly and more profitable to operate a licensing agency without paying for a license, if the licensing agent does not fear exposure and prosecution. Academics estimate that there are nearly 10,000 unlicensed agents in the country.\textsuperscript{83} The Bureau claims that the horror stories of migrant workers highlighted in the press are those who have secured employment through illegal job agents.\textsuperscript{84} If the estimated number of illegal operators in the country is as high as 10,000, then it is because the Bureau has been ineffective in flushing out these illegal agencies. In 1995, the Bureau had received 1,626 complaints by prospective migrant workers.\textsuperscript{85} The progress reports of the Bureau reveal that in 1995, only 355 inspections had been carried out on licensed agents, 41 raids had been carried out on illegal premises, 53 cases had been filed in court and only 13 of them had ended with conviction in a court of law.\textsuperscript{86} These statistics indicate that the Bureau is unable to cope with the number of complaints it receives and its performance in taking action against those who have violated the law is minimal. It also indicates that the Bureau is ineffective as a regulatory body.

The Bureau is currently moving away from a policy of compulsion and the threat of penal sanctions by using more persuasive tactics to encourage licensees to abide by their duties and obligations under the Act.\textsuperscript{87}

**Compulsory Registration of Migrant Workers**

**The Registration Fee**

A migrant worker who leaves the country for employment overseas is under an obligation to register with the Bureau.\textsuperscript{88} The SLBFE is entrusted with the task of registering migrant workers under the Sri Lanka Bureau of Foreign Employment Act. When the Act was initially passed in 1985, a standard fee of Rs. 2500 was charged for registration and Rs. 200 additionally as facility fees.\textsuperscript{89} Of this, Rs. 2000 was given to the recruiting agency and Rs. 500 was retained by the SLBFE. Section 51(5) makes provision for the registration fee to be paid in instalments.

\textsuperscript{82} Supra n. 68.

\textsuperscript{83} Cooray, P., Sri Lankan Migrant Workers to the Middle East, 1998, p. 38.

\textsuperscript{84} Ibid.


\textsuperscript{86} Ibid.

\textsuperscript{87} Foreign employment agents are being offered duty free cars as an incentive to deter them from involvement in fraudulent practices. Interview with official at the SLBFE.

\textsuperscript{88} Section 53(3), Sri Lanka Bureau of Foreign Employment Act No. 21 of 1985.

\textsuperscript{89} Ibid., Sections 51(1) and 51(2).
The 1994 amendment to the SLBFE Act gave the Minister in charge of labour the power to pass regulations under the Act as regards the sum to be paid as registration.\textsuperscript{90} The amended section states:

> "Every person who is recruited for employment outside Sri Lanka shall pay the Bureau such sum as may be determined by the Minister, by Order published in the Gazette, for the category under which such employment falls. Different sums may be determined by the Minister in respect of different categories of employment, having regard to the skills required for employment in the category and other relevant circumstances."\textsuperscript{91}

The currently applicable circular under the Act lays down three categories of compulsory registration fees depending on the wages to be earned by the migrant worker under different categories of employment. The categories operate as follows:

<table>
<thead>
<tr>
<th>Wages to be earned by migrant worker</th>
<th>Registration fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than Rs.10,000</td>
<td>Rs.5200/=</td>
</tr>
<tr>
<td>Rs.10,000 – 20,000</td>
<td>Rs.7700/=</td>
</tr>
<tr>
<td>above Rs.20,000</td>
<td>Rs.10,200/=</td>
</tr>
</tbody>
</table>

A Goods & Services Tax (GST) was added onto the registration fee in 1998.\textsuperscript{92} If a licensing agency has secured employment for the worker, of the total sum paid as registration fees, 70\% is paid to the licensing agent and the Bureau retains the balance thirty per cent. Of the 30\% the Bureau retains, 10\% is deposited in the Workers’ Welfare Fund.\textsuperscript{93} Under the Act, the funds lying in the Workers’ Welfare Fund are to be utilised for the reintegration of migrant worker returnees, providing information to families of workers, training programmes for recruits and providing assistance to migrant workers and their families.

The registration of migrant workers with the Bureau could assist the migrant workers in several ways:

- The Bureau would be able to keep track of migrant workers and their families.
- The Bureau would be able to cater to the needs of newly recruited workers and migrant worker returnees who need rehabilitation.

\textsuperscript{90} Sri Lanka Bureau of Foreign Employment (Amendment) Act No. 4 of 1994.

\textsuperscript{91} \textit{Ibid.}, Section 51(1).

\textsuperscript{92} Implementation of Goods & Services Tax, Chairman’s Circular No. 06/98.

\textsuperscript{93} Section 45, Sri Lanka Bureau of Foreign Employment (Amendment) Act No. 4 of 1994.
- Registration will enable the Bureau to keep statistical records of workers and document their situation under different categories.
- Registration enables migrant workers to enter the host country as documented or legal workers.
- Registration acts as a deterrent to unscrupulous foreign employment agencies which attempt to dupe job seekers and charge them exorbitant sums of money to secure employment overseas.
- On registering with the Bureau workers will be entitled to training in the use of household appliances and other skills necessary to adjust to alien working conditions. For this purpose the Bureau has established several training centres island wide.
- Registration entitles the migrant worker to benefit from an insurance scheme.
- Registration also entitles children of migrant workers to scholarships and educational materials.

No one will quibble with the fact that registration of migrant workers is a salutary and necessary effort to ensure that the rights and interests of migrant workers are protected. However, the concern is that large sums of money have to be paid by the worker to the Bureau in order to be registered. For example, a housemaid, at the lowest wage earner level, would have to pay Rs. 5200 plus GST to register with the Bureau. This is an unconscionable amount when the monthly salary of a housemaid may not exceed Rs. 10,000.

The charging of fees for registration and other services to be provided to the migrant worker is contrary to the ILO’s policy of providing such services free of charge. As noted above, ILO Convention No. 97 states in Article 2:

> “Each Member for which this Convention is in force undertakes to maintain, or satisfy itself that there is maintained, an adequate and free service to assist migrants for employment, and in particular to provide them with accurate information.”

Article 4 of Annex II to Convention No.97 states:

> “1. Each Member for which this Annex is in force undertakes to ensure that the services rendered by its public employment service in connection with the recruitment, introduction or placing of migrants for employment are rendered free.

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94 Article 2, Migration for Employment Convention (Revised), 1949 (No. 97).
2. *The administrative costs of recruitment, introduction and placing shall not be borne by the migrants.*

The definition of what constitutes ‘administrative costs’ is not dealt with in the Convention. In 1993, the Bureau asked the ILO Office for an informal opinion on whether the tax (registration fee) paid by prospective migrants which is used to provide services such as medical examinations, insurance, vocational training, information and other social services contravenes the provisions of the Convention. In response, the ILO Office stated that:

“a. On the one hand, it was possible that an institute whose sole mandate was to deal with questions relating to emigration for employment, was not a public employment service, and that therefore the SLBFE was not included in the scope of the Convention;

b. On the other hand, Article 2 of the Convention stipulates that a free service ‘to assist migrant workers’ must be ensured, without specifying whether this service is to be provided by the public employment service, or another service. Article 2 refers, in particular, to the provision of reliable information, as an example of the type of service, which should be provided free to migrant workers. According to the Government’s letter, the charges made by the SLBFE covered, inter alia, the ‘provision of information’;

c. In consequence, the ILO concluded that the charges foreseen by the SLBFE ‘appear to be incompatible with Article 2 of the Convention’.”

In the opinion of the ILO Office, charging fees from migrant workers contravenes ILO Convention No. 97. The Bureau, on the other hand, states that it cannot provide its services without charging a fee from the migrant workers as it is a self financed institution and relies on the registration fee as a major source of income. The high registration fee is unjustifiable as it is the low wage earner and the unskilled worker who will be affected by the high costs of registration. Those who fall into the potentially high - income bracket will leave the country undetected and unregistered as they will derive little benefit in being registered.

On the other hand, the high costs of registration discourage migrant workers from registering with the Bureau. The fees charged are unconscionable given that migrant workers, especially female migrant workers due to their numbers, remit their earnings and contribute significantly

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96 Ibid., p. 65-66.

97 Interview with official at the SLBFE.
to the country’s foreign exchange earnings. It is only equitable that they be provided with free services to assist them in the migration process. The State has a duty to provide free registration and free services to the migrant worker. If registration of births, deaths and marriages are provided at a nominal fee by the State, then the registration of migrant workers and the services offered to them should also be provided free or at a nominal fee.

**Enforcement of Registration**

The SLBFE Act states that all Sri Lankans leaving the country for employment outside Sri Lanka must register with the Bureau before they leave. Migrant workers may go to any of the branches of the Bureau set up around the country and register themselves. The Bureau has set up a counter at the airport for the purpose of registering migrant workers who have not already registered with the Bureau and to prevent “clandestine departures for employment.” If unregistered workers do get past this counter without being detected, SLBFE officials at the airport who check their passports for the seal of registration stamped by the Bureau will send them back to the counter to be registered if they do not have the seal of registration. Migrant workers are told that it is compulsory for them to register under Sri Lankan law in order for them to be permitted to embark on the flight.

In order to be registered, the prospective migrant worker needs to have the necessary documentation in order. The necessary documentation would differ depending on the category of worker. If migrant workers do not have the necessary documentation, they cannot register. If they cannot register, they will not be permitted to leave the country. The workers will be advised to go back and collect the relevant documentation and register themselves at the Bureau.

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99 Nearly half a million Sri Lankan women are employed in the Middle East. Migrant Workers, International Labour Office, Geneva, 1999, p. 71; In 1999, 87,710 housemaids were employed by major labour importing countries. See the Statistical Handbook on Migration, 1999, Sri Lanka Bureau of Foreign Employment.


102 Interview with official at the SLBFE.

103 Ibid.

104 For example, a certificate stating that the migrant worker has attended training programmes. Interview with official at the SLBFE.

105 Interview with official at the SLBFE.

106 Ibid.

107 Ibid.

108 Ibid.
The law is ambiguous on the sanctions which attach to non-registration. An ambiguous section in the 1994 amendment may have a bearing on migrant workers who fail to register with the Bureau. It states:

“(1) Any person who contravenes, or fails to comply with, any provision of this Act or any regulation, direction or requirement made or given thereunder shall be guilty of an offence under this Act.

(2) Every person who is guilty of an offence under this Act for which no punishment is expressly prescribed by any other provision of this act, shall be liable on conviction after summary trial, by a Magistrate to a fine not exceeding one thousand rupees or to imprisonment of either description for a term not less than twelve months and not exceeding two years.”

The above provision covers any person who contravenes any provision, any regulation or any direction under the Act and makes it an offence. This provision covers any offences for which no punishment has already been imposed by any other provision of the Act. Therefore, it should cover a migrant worker who has failed to register with the Bureau who would, if found guilty, be liable to a fine not exceeding one thousand rupees or to imprisonment from twelve months up to two years. However, the Bureau has never prosecuted migrant workers who have not registered with the Bureau. In other words, Section 67A has never been enforced in respect of workers who have failed to register with the Bureau. Prosecuting a migrant worker for not registering would be a disproportionate reaction. Instead, the Bureau enforces compulsory registration by disallowing migrant workers from proceeding overseas if they have not registered with the Bureau.

It is contended that Section 67A is an arbitrary provision as it imposes penalties on every offence committed under the Act, for which penalties are not already provided for in the Act. The ambit of the section is too broad and ambiguous and maybe subject to arbitrary interpretation. Section 53(3) of the Act deals with registration. It lays down that:

“Every Sri Lankan leaving for employment outside Sri Lanka, shall, prior to such leaving register with the Bureau.”

109 Sri Lanka Bureau of Foreign Employment (Amendment) Act No. 4 of 1994, Section 67A.
110 For example, see Sections 62, 63, 64 and 65 which provide sanctions for offences committed during the process of recruitment.
111 Interview with official at the Sri Lanka Bureau of Foreign Employment.
112 Interview with official at the Sri Lanka Bureau of Foreign Employment.
This is the only section which specifically states that all workers leaving the country must be registered. This provision is tucked away in a section of the Act entitled “Information Data Bank.” The impression created is that workers must be registered for the purpose of establishing a data bank of those who leave the country for employment and their return. This view is further reinforced by the objectives of the Bureau stated in the Act by which the Bureau undertakes to “establish and maintain an Information Data Bank to monitor the flow of Sri Lankans for employment outside Sri Lanka and of those who return after such employment.” Neither section 53 nor the section immediately following in the Act provides for sanctions on non-compliance.

While the scheme of registration is a salutary effort to safeguard the interests of the migrant worker, the method of enforcement is questionable.

Labour sending countries which have ratified the Convention on Migrant Workers and their Families are bound by the provisions in the Convention, which mandates the freedom of movement and the right of migrant workers and their families to leave their State of origin. It also embodies the notion that the State must protect migrant workers and their families from threats and intimidation by public officials. By not permitting unregistered migrant workers to leave the country is Sri Lanka violating these provisions of the Convention? The Bureau maintains that workers are persuaded at the airport to register. If these workers are told that they cannot leave the country unless they register, it may amount to curtailing their freedom of movement.

CONCLUSION

This paper has examined the dilemma of the migrant worker. These workers decide to leave Sri Lanka for employment, as the remuneration he or she will receive in the country of employment will far exceed the remuneration he or she would receive in Sri Lanka. The migrant worker must be given this opportunity. At the same time, it is important that their rights are protected during the entire process of migration. Before departure, the SLBFE must ensure that they are not exploited by recruiting agents. Migrant workers must be given training and be provided with assistance and the necessary information by the Bureau. The State has an obligation to provide these services free of charge.

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114 Article 8 of the Migrant Workers Convention.
115 Ibid., Article 16.
116 Interview with official at the SLBFE.
Sri Lankan missions overseas must play a vibrant role in preventing the abuse of women migrant workers. The officials attached to the missions must take into account the vulnerable and exploitative position of these workers. On their return to Sri Lanka, migrant workers should be provided with rehabilitation, counselling and financial advice on how to invest their earnings.

These migrant workers contribute significantly to the national coffers. Concessionary credit schemes, low interest loans, tax holidays and other tax concessions should be given to migrant workers in recognition of their contribution to the national economy. It is only equitable that they be provided with these and other benefits.

The paper has also looked at Sri Lanka’s international commitments. Sri Lanka should aim to bring its laws and policies in line with the two ILO Conventions on migrant workers so that it can ratify the Conventions and thereby strengthen the protection it can offer to migrant workers. Sri Lanka should also use its diplomatic ties to urge these labour receiving countries to ratify the UN Convention of Migrant Workers. Ratifying the Convention will impose obligations on these states to comply with international laws on migrant workers.
THE STORY OF NATIONAL SECURITY LAWS IN SRI LANKA

J.C. Weliamuna*

INTRODUCTION

Laws pertaining to national security play a prominent role in the life of the public. The main statutes in this field are the Public Security Ordinance (PSO), the Prevention of Terrorism Act (PTA) and the Sixth Amendment to the 1978 Constitution.

Perhaps, National Security Laws will be best understood with contemporary events and the background that lead to enacting these laws. Therefore a great deal of this paper will be devoted to the background facts relating to each of these statutes, without any opinion being expressed thereon.

Attempt is also made to examine some of the important provisions of National Security laws with judicial interpretations.

PUBLIC SECURITY ORDINANCE, NO. 25 OF 1947

Background to the Ordinance

In May 1947, there were many strikes in the country and attempts were being made by certain parties to paralyse the food distribution, to derail trains, to dislocate the post and telegraph and to bring all rail and bus transport to a standstill. In short, the government thought that the country was under a grave threat of a general strike. Mr. A. Mahadeva, Minister of Home Affairs, in moving the Public Security Ordinance Bill in the State Council, as a matter of public importance, asked the House “whether it is not time that a Legislature elected by manhood franchise should endorse the request that is being made by the

* Attorney-at-Law
Government for the provision of special powers to be used in an emergency and at an appropriate moment.”¹

This was one of the statutes that came under heavy criticism in the State Council. Prophetic words of Dr. A.P. De Zoysa, (Member for Colombo South), is worth mentioning:

“I am prepared to admit that a very sad state of affairs exists today. Instead of taking measures to prevent disorder, are we wise in passing a law of this nature? An unscrupulous Minister, and an unscrupulous Prime Minister, could, in the future, make use of this very law to detain innocent people. At present our laws provide for emergencies. It is the Governor who has the power to act in an emergency. Why should we remove that power from the hands of the Governor and invest in a Minister? Ministers some times are members of political parties. They may be persons with their own prejudices and hatreds. But the Governor, in theory and in law, is placed above all that. It is therefore in the interest of the country, of good government to have the emergency powers vested in the hands of the Governor. If there is an actual state of affairs which threatens order and peace in the country, the simplest thing to do - it has been done in the past - is to declare martial law, and allow the military to manage the affairs. Instead of that, you want to create a petty dictator, and allow him to control the citizens of the country. The citizens will not tolerate that.”² (emphasis added)

In fact, some of the Members raised the question as to why “when there is an ordinary struggle of the working class for elementary rights, the leaders of those working classes should be detained behind closed doors.” Member for Bibile Mr. W. Dahanayake stated “if one can think of a reason, it must be this. The Board of Ministers are feeling quite nervous about the forthcoming elections, and the Board and their political friends think that one of the easiest ways in which they can win the coming election is by locking up all their opponents.”³

This Ordinance was viewed by Mr. G.G. Ponnambalam as a complete and absolute negation of the civil liberty of the subject.⁴ Dr. S.A. Wickramasinghe raised the question “whether it is not rather ironical that this piece of legislation should be brought up on the eve of the granting of that great power given to the people of this country under the wonderful Soulbury Constitution.”⁵

¹ Hansard of the State Council - debate dated 10th June 1947 columns 1935-1939.
² Supra, Hansard column 1940.
³ Supra, Hansard column 1944.
⁴ Supra, Hansard column 1962.
⁵ Supra, Hansard column 1918.
The State Council debated the provisions of the Bill in detail and, in fact, a large number of amendments were suggested at the Committee Stage. Finally, the PSO was enacted with a majority of 33 with 7 Members opposing.

**PSO in the Early Stage - a Summary**

The PSO was intended to provide for the enactment of emergency regulations in the interest of the public security, the preservation of public order, the maintenance of supplies & services essential to the life of the community. The emergency regulations could prevail over other laws.

Section 2(1) of the PSO makes the President (then the Governor General) the sole judge of the existence or imminence of a state of emergency. The President’s Proclamation for the entire country under this section is the starting point of other provisions of the PSO including the promulgation of emergency regulations.

By Proclamation, the President may declare that provisions of Part II of the PSO shall come into operation, Part II being the provisions dealing with the promulgation of emergency regulations. Where the provisions of Part II have come into operation, those provisions would be in operation for a period of one month.

Once Part II of the PSO is in operation, the President is empowered under section 5 of the PSO to make such emergency regulations provided such regulations are necessary or expedient:

- a. in the interest of public security,
- b. preservation of public order,
- c. suppression of mutiny, riot or civil commotion, or
- d. for the maintenance of supplies and services essential to the life of the community.

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6 Long Title of the PSO.
7 Section 7 of the PSO.
8 Section 2(2) of the PSO.
9 Section 5(1) of the PSO.
The PSO presumes that once Part II is in operation, there exists a state of public emergency and, therefore, the existence of a state of emergency shall not be questioned in any court.\textsuperscript{10} It further provides that no emergency regulation and no order, rule or direction made or given there under shall be called in question in any court.\textsuperscript{11}

\textbf{Amendment Act No. 8 of 1959\textsuperscript{12}}

By this amendment, the scope of the PSO was broadened. Its limited nature of permitting the Head of the State to promulgate emergency regulations was extended to cover other areas during a time of emergency. The amendment to the long title read as “Enactment of Emergency Regulations or the adoption of other measures” adequately demonstrates the reasons for the amendment.

By this amendment the Head of State was permitted to make the proclamation for the entire country or for a part of the country.\textsuperscript{13} Further, legal immunity was introduced for the acts committed in good faith under emergency regulations or any orders or directions thereunder.\textsuperscript{14}

The addition of Part III was the main feature of the Amendment. It sets out various measures such as calling out the armed forces, curfew orders, and declaring services as essential services etc.

The Amendment Bill was debated in Parliament for many days. Leading members of the opposition vigorously objected to the Bill, mainly for introducing the provisions relating to essential services under the proposed section 17. During the debate, Mr. Bernard Soysa said “when workers are ready to strike, on the basis of just grievances, to have their problems solved or in order to get some concession which would help them to meet the rising costs of living, the answer of this Government is this Public Security Amendment Bill”.\textsuperscript{15} Many Members viewed the Bill as an amendment to meet the Industrial Disputes Act. Mr. M.M. Mustapha (member for Potuvil) said that, “this is an Amendment which really should find a place in the Industrial Disputes Act”.\textsuperscript{16} During the second reading of the Bill, many members including Dr. N.M. Perera (Member for Ruvanwella), E. Samarakkody (Member for Dehiovita) and Dr. Colvin R. de Silva (Member for Wellawatta - Galkissa) were physically removed from the House. Federal Party Members led by Mr. S.V.J. Chelvanayakam withdrew from the House. Finally, the Bill was passed with 52 Members voting for the Bill and 3 Members opposing.

\textsuperscript{10} Section 3 of the PSO.
\textsuperscript{11} Section 8 of the PSO.
\textsuperscript{12} Certified on 13th March 1959.
\textsuperscript{13} Section 3 of the Amendment Act.
\textsuperscript{14} New section 9 of the PSO.
\textsuperscript{15} Hansard 12\textsuperscript{th} February 1959, column 739.
\textsuperscript{16} Hansard 10\textsuperscript{th} February 1959, column 532.
Amendment Act No. 28 of 1988\textsuperscript{17}

When the Bill was presented to Parliament on 5\textsuperscript{th} July 1988, Mr. Vincent Perera, Minister of Local Government, Housing and Construction and the Chief Government Whip put forward the following as the intention of the Amendment:

"The purpose of this amendment is to reduce the work involved in the naming and reprinting of the Regulations and Orders each month. This is to reduce the work involved. We are not giving additional powers to the President thereby. In signing this Proclamation he has to sign a series of documents. It takes unnecessary time. In order to avoid that we are bringing this amendment. What is the purpose of putting so many signatures when you can do it with one signature?"\textsuperscript{18}

By this amendment, a new sub-section 2A was introduced, which provides that where a further Proclamation is made under section 2(2) at or before the expiration of a Proclamation made under that section, every regulation made under section 5 and every order and rule made under any such regulation, in force on the day immediately preceding the coming into operation of such further Proclamation shall be deemed to be in force from and after the coming into operation of such further Proclamation. Further, the President may declare by Order that such previous regulations or rules shall not be deemed to be in force or shall be in force with amendments or modifications.

Briefly, the legal effect is that upon the making of a further Proclamation, all Regulations, Rules and Orders made under Section 5 and in force on the date of the coming into operation of such new Proclamation, will be deemed to be in force without prejudice to the powers exercised by the President ordinarily under section 5.

Constitutionality of the Public Security Ordinance

The validity of the PSO has been challenged in courts in various cases. In Gunasekara v. Ratnavale\textsuperscript{19} it was held that the Ordinance was validly enacted under the legislative power given to the Governor under Article 72 of the Donoughmore Constitution (State Council Order in Council) of 1931. In Weerasinghe v. Samarasinghe,\textsuperscript{20} the validity of the PSO was challenged on the basis of improper delegation of legislative power to the executive in violation of the principle of separation of powers. However, the Supreme Court decided that the PSO has been passed \textit{intra vires} the Constitution.

\textsuperscript{17} Certified on 27\textsuperscript{th} July 1988.
\textsuperscript{18} Hansard dated 5th July 1988. Part 53 no. 7, columns 611-612 concluding remarks of the debate.
\textsuperscript{19} 76 NLR 316.
\textsuperscript{20} 68 NLR 361.
The question of the validity of the PSO did not arise after the enactment of the 1972 Constitution. Article 134 of the 1972 Constitution specifically provided that the PSO was deemed to be a law enacted by the National State Assembly. Similarly, in the 1978 Constitution, Article 155 deems the PSO to be a law enacted by Parliament.

**State of Emergency**

Section 2 of the PSO enables the President in a state of public emergency to bring into operation by Proclamation Part II of the Ordinance.

A state of emergency is not defined in the PSO. During the debate on the Bill, many members raised the question of not defining many terms including of the term “state of emergency.”

This issue was decided by the Privy Council as follows:

> ‘State of Emergency is something that does not permit any definition. It connotes a state of matters calling for drastic action which is to be judged as such by someone. It is more than obvious that someone must be the Governor General and he alone. Any other view would render utterly inept the whole provision. Emergency demands immediate action and that action is prescribed to be taken by the Governor General. At present, the President is the head of the State. It is he, the President, alone who can promulgate the Ordinance.’

This proposition has been cited with approval by Justice Sharvananda in *Yasapala v. Wickramasinghe.* It was further held by the Court that “the existence of a state of emergency is not a justiciable matter which the Court could be called upon to determine by an objective test.”

**EMERGENCY REGULATIONS**

**When can Emergency Regulations be made?**

Once a Proclamation is made by the President under section 2 of the PSO, Part II of the PSO vests the President with wide and extensive powers to deal with the emergency situation. The President may make regulations as appear to him to be necessary or expedient in the interest of public security and the preservation of public order and the suppression of mutiny, riot or civil commotion.

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21 Mr. G.G. Ponnambalam, Member for Point Pedro, Hansard dated 10<sup>th</sup> June 1947, column 1958.

22 *Bhagat Singh v. King Emperor* AIR 1931, PC 111.

23 Fundamental Rights Decisions (Vol. 1) 143 at p. 154.
Period of Validity of Emergency Regulations

Prior to the Public Security Ordinance (Amendment) Act No. 28 of 1988 all emergency regulations and the rules and orders made thereunder automatically lapsed at the end of the one month period in respect of which the Proclamation was in force. If the emergency continued, therefore, each month, when a fresh Proclamation was made, the emergency regulations had to be made and published in the Gazette all over again. However, after the Amendment Act No. 28 of 1988, where a proclamation is made afresh, the previous regulations, orders and rules remain in force unless otherwise provided.

In other words, emergency regulations are valid so long as the Proclamation is in force or otherwise rescinded before the Proclamation is revoked.

The effect of emergency regulations

Emergency regulations come into operation as soon as they are made. Section 7 of the PSO states that an emergency regulation or any order or rule made under a regulation shall have effect notwithstanding anything inconsistent with any other law. Further, if any law is inconsistent with any provision of any written law, the emergency regulations or such order or rule prevails over other law.

Article 155(2) sets out the following provision in this regard, securing a constitutional guarantee to emergency regulations:

“The power to make emergency regulations under the Public Security Ordinance or the law for the time being in force relating to public security shall include the powers to make regulations having the legal effect of over-riding, amending or suspending the operation of the provisions of any law except the provisions of the Constitution.”

In short, once a Proclamation is made, the President, through emergency regulations, can make laws which may have the effect of overriding the general law of the country except the Constitution.

Given below are a few common examples as to how emergency regulations can override the normal statutory laws:

a. A person once arrested has to be produced before a Magistrate within 24 hours. However, Emergency Regulations could permit the arresting authority to keep a person in his custody without producing before a Magistrate for more than 24 hours.24

b. A person detained at a Prison is entitled to the safeguards of a civil prisoner including prison visits under the Prison Ordinance. But these visits could be restricted under Emergency Regulations.\(^{25}\)

**Are Emergency Regulations and Orders made thereunder justiciable?**

This is an issue that has been raised often in relation to *habeas corpus* cases as many attempts have been made to exclude judicial review of emergency regulations and of orders made under regulations.

In *Hirdramani v. Ratnavale*,\(^{26}\) Emergency Regulation 55 that took away the right to institute *habeas corpus* applications under the Courts Ordinance came up for consideration. H.N.G. Fernando CJ held as follows:

> “Lord Atkin in his dissenting judgement in the Liversidge case stated that in England the laws are not silent in times of war. With utmost respect, I agree that the laws are never silent, but Regulation 55 is itself a law which surely was intended to speak. If the intention was that it should speak to the effect which suggest itself to me so obvious, then the Court should not flout that intention.”

Having examined numerous authorities, the Chief Justice while expressing the view that Regulation 55 could not have been intended to cover the cases of arrests under Regulation 19, goes on to hold that Regulation 55 deprives the Court of the power to review the Detention Order made under Regulation 18. In other words, in the case of a Detention Order which is *ex facie* valid, it is not a justiciable matter. However, in this case *vires* of the Regulation 55 was not argued.

Justice Alles in *Gunasekara v. Ratnavale*\(^{27}\) followed the decision of the *Hirdramani case*. Regulation 55 stated that the *habeas corpus* jurisdiction was not applicable with regard to “any person detained or held in custody under any emergency regulations.” Justice Alles held that the words “or held in custody” in the Regulation are *ultra vires*. Resulting position is that courts could review arrests, which is not validly made under Regulation 19.

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\(^{25}\) Sections 71 and 72 in Chapter IX of the Prisons Ordinance No. 16 of 1877 as amended have been restricted under Regulations 17(3) of the Emergency (Miscellaneous Provisions and Powers) Regulation No. 1 of 2000. In *Weerasinghe v. Samarasinghe*, 68 NLR 361 at p. 367, Sansoni CJ considered a similar regulation and held that it is not for the court to judge the necessity for measures taken by the Inspector General of Police to issue instructions regarding the conditions of detention.

\(^{26}\) 75 NLR 67 at pp. 91 and 93.

\(^{27}\) *Supra*, n. 19, at p. 331.
However, in the same case Justice Alles held that section 8 of the PSO ousted the jurisdiction of the court with regard to the right to question the validity of a Detention Order while stating that “it must necessarily shock the conscience of the court and disturb any legal mind who has respect for the rule of law.”

In *Siriwardena v. Liyanage* and *Edirisuriya v. Navaratnam*, it was held that the finality clause in section 8 of the Public Security Ordinance does not preclude the Court from examining and ruling upon the validity of an Order made under any Emergency Regulation, when such order is challenged.

The question whether the Emergency Regulations and orders made thereunder were justiciable arose in *Wickramabandu v. Herath*, a case that came up after the enactment of the 1978 Constitution. The ouster clause in section 8 of the PSO and a regulation providing that an order made under a regulation shall not be called in question in any court came up for consideration. The Supreme Court held that these ouster clauses do not affect the jurisdiction of the Court.

The first successful challenge of an emergency regulation was made in *Joseph Perera v. Attorney General*. The Supreme Court held that section 8 of the PSO has to yield to Article 155(2) of the Constitution and that the regulations made under section 5 of the PSO do not attract the immunity from challenge provided by Article 80(3) of the Constitution. In other words, unlike the Parliamentary Statutes, Emergency Regulations do not enjoy the immunity from challenge and, therefore, it is open for a court to inquire into and pronounce upon the validity of an emergency regulation.

Thus, an emergency regulation owes its validity to the subjective satisfaction of the President that it is necessary in the interest of public security and public order. The President is the sole judge of the necessity of such a regulation and, therefore, courts are reluctant to inquire into the necessity for the regulations *bona fide* made by the President to meet the challenge of the situation.

Chief Justice Sharvananda held in the *Joseph Perera* case that “under Article 15(7) of the Constitution, it is not all regulations, which appear to the President to be necessary or

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29 FRD (2) 310.
30 (1985) 1 SLR 100.
31 (1990) 2 SLR 348 at p. 361.
33 Article 80(3) reads thus: “Where a Bill becomes law upon the certificate of President or the Speaker, as the case may be, being endorsed thereon, no court or tribunal shall inquire into, pronounce upon or in any manner call in question, the validity of such Act on any ground whatsoever.”
expedient in the interest of public security and preservation of public order, made under section 5 of the Public Security Ordinance which can impose restrictions on the exercise and operation of fundamental rights. It is only regulations which survive the test of being in the interest of national security, public order etc. in terms of Article 15(7). In a contest regarding the validity of a regulation, the President’s evaluation of the situation, that the Regulation appeared to him to be necessary or expedient is not sufficient, to lend validity to the regulation.”

Limitations and Restrictions on Emergency Regulations

Limitations under Article 15 of the Constitution

Article 15 of the Constitution lays down legitimate restrictions on fundamental rights and the Constitution permits all except two fundamental rights to be restricted by laws that are prescribed. Article 15(1) of the Constitution defines the term ‘laws’ to include regulations made under the law for the time being relating to public security.

“The President’s legislative power to make Emergency Regulations is not unlimited. It is not competent for the President to restrict via Emergency Regulations the exercise and operation of the fundamental rights of the citizens beyond that warranted by Article 15(1-8) of the Constitution. The width of the restriction envisaged by Article 15(7) cannot be added, varied, or superseded by any emergency regulation in excess of that referred to in Article 15(7). For a restriction, imposed by the emergency regulations which directly and substantially affect the freedom of speech, to be valid, it has to be based on one of the grounds of restriction specified in 15(2) & (7) and only to the extent referable to it. Any further restriction will not have the support of law. The grounds of restriction specified in the limitation Article 15 are exhaustive and any other restriction is invalid.”

Examining the nexus of the regulation and the interest of national security/public order, Chief Justice Sharvananda stated:

“A restriction can be said to be in the interest of security or public order only if the connection between the restriction and the security or public order is

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34 Supra n. 32 at p. 216.

35 The two fundamental rights in the Constitution that are not subjected to any restrictions are the freedom of thought (Article 10) and freedom from torture (Article 11)

36 Joseph Perera’s case. Supra n. 32 at p. 214.

37 Ibid., p. 215.
proximate and direct. Indirect or far-fetched or unreal connection between the restriction and security/public order would not fall within the purview of the statement in the interest of security/public order. If the restrictions imposed are wide enough to cover permissible as well as impermissible restrictions, the regulation will be struck down as a whole, since the restriction put upon the freedom of speech will not be justified by Article 15(2) or 15(7).”

Limitations under Article 155 of the Constitution

Article 155(2) provides for a limitation on the emergency law making power of the President, in that the emergency regulations cannot over-ride the Constitution. For example, the President cannot, by emergency regulations, establish a new institution for the administration of justice, as the establishment of courts etc. are specifically covered under Chapter XV (Articles 105 to 117 of the Constitution).

Restrictions permissible on the fundamental rights under Article 15 can also be examined in the light of the restrictions placed on the President under Article 155. In Joseph Perera, the Court held that:

“[i]n the enforcing of a fundamental right the court is, by reason of the provisions of Article 155, necessarily charged with the duty of enforcing the fundamental right and of declaring void any regulation which is inconsistent with those rights to the extent of the inconsistency. When Article 15(7) provided that, for the purpose of that paragraph ‘law’ included regulations made under the law for the time being relating to public security, it postulated intra vires regulations and not regulations prohibited by Article 155.38

Lack of Proximity and Rationality

For an impugned regulations to be valid, the relationship between the regulation and the purpose of the regulation must be rational or proximate.39

The precision of the regulation must be the touchstone in an area so closely encroaching upon a most precious freedom (i.e. freedom of expression). Such a regulation must be strictly construed and the greater the restriction the greater the need for strict scrutiny by the court. In Joseph Perera’s case Chief Justice Sharvananda stated as follows:

“Regulation 28 confers a naked and arbitrary power on the Police to grant or refuse permission to distribute pamphlets or posters as it pleases, in exercise of

38 ibid., p. 216.

39 Supra, n. 23, pp. 159-160.
its absolute and uncontrolled discretion, without any guiding principles or policy to control and regulate the exercise of such discretion. There is no mention in the regulation of the reasons for which an application for permission may be refused. The conferment of this arbitrary power is in violation of the constitutional mandate of equality before the law and is void... There is no rational or proximate nexus between the restriction imposed by Regulation 28 and national security/public order. It is unconstitutionally over-broad... Hence that Regulation is invalid and cannot form the basis of an offence in law.”

Limitation vis-a-vis the mode

There is a structural restriction on emergency regulations in relation to its mode and format. Whether emergency regulations can be in a form of executive order or decision was examined by Justice Mark Fernando in Karunathilaka & Another v. Dayananda Dissanayaka, Commissioner of Elections & others as follows:

“Article 75(2) of the Constitution permits Parliament to make, in any law relating to national security, provision empowering the President to make emergency regulations. Article 155 deems the PSO to be a law enacted by Parliament, and section 5 of the PSO authorises the President to make emergency regulations ‘as appear to him to be necessary or expedient in the interests of public security and the preservation of public order and the suppression of mutiny, riot and civil commotion, or for the maintenance of supplies and services essential to the life of the community’... Section 5 is thus a provision for the delegation of legislative power in a public emergency (see Weerasinghe v. Samarasinghe (1966) 68 NLR 361) and emergency regulations are delegated legislation. An emergency regulation must therefore be in form legislative, rather than executive or judicial; it must be a rule, rather than an order or decision.”

Abuse and Misuse of Emergency Regulations

It is often seen that some of the emergency regulations fall within the ambit of the law making powers available to the Executive during the time of an emergency, whereas some fall clearly outside the ambit of the powers of the Executive. A Committee that reviewed the emergency regulations that existed between 1989 to May 1992 divided the then existing emergency regulations into several categories, as follows:

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40 Joseph Perera’s case, Supra n. 32, p. 320.
42 Report of the Committee comprised Prof. G.L. Peiris, Ranjith Abeysuriya PC, Suriya Wickramasinghe, Dr. Denis Aloysius, Dr. Deepika Udagama and Rohan Edirisinghe - Centre for the Study of Human Rights, University of Colombo in association with Nadesan Centre – 1993.
(a). Regulations which are not properly within the purview of the law making powers of the executive because of an inadequate nexus with public security concerns.

The following three examples adequately demonstrate the inadequate nexus of some regulations to the national security concerns:

i. **Emergency Regulation 606/6 dated 18.04.1990 amending the Adoption of Children Ordinance Amendment**[^43] - This regulation amended section 3(6) of the Adoption of Children Ordinance (Chapter 61). Under the amended provision the Court was precluded from permitting any adoption when the Commissioner of Probation reports to the court that the adoption is detrimental to the child.

ii. **Emergency (Edible Salt) Regulation No. 1 of 1990**[^44] - This regulation prohibits any person from manufacturing, selling or offering for sale any edible salt which does not conform to the standard specifications approved by the Sri Lanka Standards Institution.


(b). Regulations which, while falling within emergency powers, have an unduly harsh impact on fundamental rights.

Examples include the admissibility of confessions that have been made to police officers and doing away with inquests in respect of deaths occurring in custody.

(c). Regulations which are still in force although the circumstances which necessitated them have undergone significant change.

For example, the regulation introducing a Commissioner of Civil Security in the EMPP Reg.10B.

[^43]: ER 606/6 dated 18.04.1990 amending section 3(6) of the Adoption of Children Ordinance.
[^44]: ER 635/7 dated 07.11.1990.
[^46]: ER 695/11 dated 01.01.1992.
One of the recent examples of a misuse was the attempt by the President to cancel/postpone the Provincial Council Elections in 1999 under emergency regulations. Given the importance of the case, facts relating to this matter are given below.

The period of office of five Provincial Councils came to an end in June 1998. The Commissioner of Elections fixed the nomination period in terms of section 10 of the Provincial Councils Elections Act No. 2 of 1988. At the conclusion of the receipt of nominations, the returning officers according to sec. 22 has authority to publish a notice in the gazette specifying the date of elections/poll and fixed 28.08.1998 as the date of poll by a notice under section 22 of the Act. Although the postal vote was fixed for 04.08.1998, the returning officers without any reason suspended the postal voting on 03.08.1998. On 04.08.1998, the President issued a proclamation under section 2 of the PSO bringing the provisions of Part II of the PSO into operation throughout the country. On the same day the President made an emergency regulation which had the legal effect of cancelling the date of poll. No steps were taken by the President or the Election Commissioner thereafter to re-fix the date of the poll.

Two journalists challenged the postponement of elections in five Provincial Councils in their capacity as voters. The Supreme Court analysed the nature of the emergency regulations and held as follows:

"An emergency regulation must be in form legislative rather than executive or judiciary. It must be a rule rather than an order or a decision. If it was considered necessary to suspend the notices issued under Section 22 of the Act, there should first have been enacted a regulation conferring power, in general terms, on some authority to suspend notices already issued under Section 22, and then only could there have been an exercise of that power in relation to particular instances… I hold that the impugned regulation is not a valid exercise of power under Section 5 of the PSO. It is not an emergency regulation. It has, rather, the character of an order, purporting to suspend notices lawfully issued under the Act. There was not in force, then or later, any legal provision which authorised the making of an order suspending such notices."

The Court thereafter directed the Commissioner of Elections to take immediate action to fix a date of poll. Thus elections were held subsequently in April 2000.

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Emergency Regulations Guaranteeing Fundamental Rights

Notwithstanding the rationality warranting emergency regulations, there are a few regulations that have been introduced to safeguard the fundamental rights of the people during the period of emergency.

One noticeable example is the regulation that was promulgated by President R. Premadasa on 31st July 1991 enabling the Sri Lanka Foundation to make by laws (regulations), *inter alia*, to set up a Human Rights task Force (HRTF) to monitor the fundamental rights of the detainees.48 The Sri Lanka Foundation is a body corporate established in 1973 under Sri Lanka Foundation Law No. 31 of 1973 with the objective, *inter alia*, of promoting a democratic way of life and protecting human rights.49 However, the main law does not have provisions for the Sri Lanka Foundation to make such by laws.

By a further Emergency Regulation, the President gave effect to the by laws made by the Sri Lanka Foundation setting up the Human Rights Task Force and spelling out the powers of the Task Force.50 In June 1995, the Government introduced Emergency (Establishment of the Human Rights Task Force) Regulation 1 of 199551 to establish a new HRTF with a somewhat different legal status, without reviving the old HRTF. “The new HRTF has no link with the Sri Lanka Foundation and is entirely a creature of the emergency regulations. Should the emergency be lifted, it would automatically cease to exist.”52

The work of the HRTF has been appreciated by the human rights community of Sri Lanka on many occasions. In fact, when the Human Rights Commission was established under Act No. 21 of 1996, appeals were made to the President not to transfer the functions of the HRTF unless and until the Commission was fully able to continue the service with adequate experienced personnel and effective mechanisms.53 The setting up of HRTF was seen by Amnesty International as a positive step to minimise disappearances in Sri Lanka.54

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49 Section 5(a) of Law No. 31 of 1973.
51 Gazette No. 874/8 dated 7th June 1995.
53 Letter of Dr. J. Uyangoda and Ms. Suriya Wickramasinghe dated 19.06.1997 addressed to the President enclosing the letter of the nine members of the National Advisory Group of the HRTF dated 17.03.1997.
It is also pertinent to note that the hasty abolition of the HRTF in June 1998 had drastic repercussions on the fate of persons arrested and held under special legislation. Some of the functions discharged by the HRTF were written into the Human Rights Commission of Sri Lanka Act No. 21 of 1996 but it is doubtful whether the Human Right Commission was in fact able to discharge the functions of the HRTF at the time it was dissolved.

Unconstitutional and Illegal regulations

Many emergency regulations have been challenged in the Supreme Court on their unconstitutionality, but this section relates to an extraordinary situation where those that had been declared to be unconstitutional have been subsequently promulgated as fresh regulations.

Two such regulations in point are regulations 17(8) and 17(9) of the Emergency (Miscellaneous Provisions and Powers) regulations No. 1 of 2000. The two regulations read thus:

17(8) Where the Secretary to the Ministry of Defence certifies in writing that any person in respect of whom an order under paragraph (1) of this regulation is made is suspected by him to be or have been a member of an organization, proscribed under regulation 68 of these regulations, the provisions of paragraphs (4), (5), (6), (7) and (8) of this regulation shall not apply in regard to that person.

17(9) An order under paragraph (1) of this regulation shall not be called in question in any court on any ground whatsoever.

The above regulations had been declared unconstitutional by the Supreme Court in the five Bench decision of Wickramabandu v. Herath and others and thereafter the reintroduction of these regulations are unconstitutional.

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57 This regulation in effect takes away the rights of a person suspected of being a member of a proscribed organisation, who has been in custody, to make an appeal to the Advisory Committee that has been set up under the Regulations relating to arrest and detention.

58 Supra, n. 31, pp. 361 - 385.
Distinguishing Emergency Regulations from other Statutory Law

The legislative power of the people, being a part of sovereignty of the People, is to be exercised by the Parliament.\(^59\) Parliament has the power to make any law including laws with retrospective effect.\(^60\) It is also relevant to note that under the Constitution, Parliament cannot abdicate or alienate its legislative power or cannot set up any authority with any legislative power. However, the emergency regulation making power is deemed not to be a contravention of this provision.\(^61\) It is in that context that one has to look at the promulgation of emergency regulations. Emergency regulations are made by the President without consulting the Parliament, thus, bypassing the entire normal legislative process.

Section 5 of the Public Security Ordinance is a provision for the delegation of legislative power in a public emergency and emergency regulations are delegated legislation.\(^62\) Hence, emergency regulations are a category of delegated legislation with special features such as the power to override other statutory laws.

PARLIAMENTARY CONTROL OVER EMERGENCY PROCLAMATION AND REGULATIONS - THEORY AND PRACTICE

Constitutional Guarantees through Parliament

As the law stands today, Article 155 of the Constitution that deals with public security of the State, gives the following safeguards:

“Upon making the Proclamation by the President, the occasion thereof shall be communicated to Parliament forthwith, subject to the provisions of Article 155.\(^63\)

Where any provision of any law relating to public security has been brought into operation by virtue of a Proclamation, such Proclamation is valid only for a period of one month. For emergency to continue, a further proclamation is necessary at or before the end of the period of the previous Proclamation.\(^64\)

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\(^{59}\) Articles 3 and 4(a) of the Constitution.

\(^{60}\) Article 75 of the Constitution.

\(^{61}\) Article 76(2).


\(^{63}\) Article 155(4).

\(^{64}\) Article 155(5).
However, if such Proclamation has also brought into operation emergency regulations over-riding any laws, such Proclamation is valid for a period of 14 days, unless such Proclamation is approved by the Parliament.65 Thereafter, Parliamentary approval of the Proclamation is necessary for the Proclamation to continue in force monthly.”

If the Parliament disapproves the Proclamation, such Proclamation ceases to be valid without prejudice to anything lawfully done thereunder.66

Amendment of Article 155 by the 10th Amendment67

Prior to the 10th Amendment to the Constitution, the provisions of Article 155(8) and (9) required a 2/3rd majority in Parliament to continue a state of emergency after 90 consecutive days or 10 days in six consecutive months. With the enactment of the 10th Amendment which deleted sub Articles (8) and (9), a uniform procedure was laid down for the introduction and continuation of a state of emergency for any period, namely, that there has to be the approval of Parliament by a bare majority.

The Bill on the 10th Amendment to the Constitution was challenged in the Supreme Court. Having considered many provisions of the PSO and the provisions of Article 155(8) and (9) of the Constitution, the Supreme Court held that the Bill could be passed with a 2/3rd majority and did not need the approval of the people at a referendum. In the course of the determination, the Supreme Court stated as follows:

“It has been said that the insertion of sub-Articles (8) and (9) of Article 155 was the result of recent experience. It was the answer of the people to the continuous use of emergency regulations by the previous government for a long time. However, looking to the future and the eventualities that can occur, there is apparently a great deal of re-thinking now as to the wisdom of those provisions. A future government may not have the support of a two-thirds majority of Parliament and this seems most likely if elections were to be held under the proportional representation system. Even the bona fide making of a Proclamation by a government declaring a state of emergency is in the nature of a policy decision and may be influenced by political consideration. There is no guarantee that opposition parties will necessarily co-operate with the Government and support it when it finds itself in difficulties. This may be valid for any government and any opposition. If the opposition is single mindedly bent on bringing down

65 Article 155(6). However, there are few exceptions on how approval of Parliament is dispensed with in exceptional circumstances such as dissolution of Parliament.

66 Article 155(10).

67 Certified on 6th August 1986.
the Government in power, such an occasion may well provide an excellent opportunity for achieving that end. The consequence of such action in certain instances could be disastrous not only for the party in power but also for the State and the community. One way of deciding this matter is to balance the risk of possible misuse of this power as against the disastrous consequence that may ensue if a government is inhibited and paralysed from protecting the State and its citizens even in genuine emergencies.68

Emergency Debate - a Formality?

The Parliament does not generally debate the emergency regulations; it debates the Proclamation - called the “Emergency Debate” for each month during the existence of a state of emergency.

The Emergency Debate has its own format in the House. Initially, the Proclamation of the President is read. The Minister of Defence often being the President, the Deputy Minister of Defence (or the Prime Minister) gives an account of terrorist activities committed during the immediately preceding month and seeks the approval of Parliament to continue with emergency for another month. Members of Parliament join the debate and the Deputy Minister of Defence concludes the debate. Thereafter, the question is put to the House for approval.

There are few common aspects that can be observed during the emergency debates. A considerable number of Members do not participate nor do they have any interest in the debate. On many occasions, there were allegations that the responsible Ministers were not present in Parliament when opposition Members spoke.69

The emergency debate is often used by government and opposition members of Parliament, to criticize each other. Some of these verbal attacks are aimed at comparing the current government with the previous government. Some Members consider this as an occasion to “air the problems of the Members,”70 and some of the problems have no relevance to the National Emergency.71 Often, most of the Members are interrupted and, therefore, serious doubts arise as to whether the Members take the debate seriously.72

69 Emergency and Parliament, Centre for Policy Alternatives (CPA), Examination of 1997 January to July debates, (Sinhala) p. 33.
70 Hansard dated 11th March 1999 column 614.
71 Example - During the debate dated 11th March 1999, PA Member for Gampaha District Jinadasa Nandasena spoke of his son’s difficulties in contesting the Local Government Elections and even suggested that the laws pertaining to posters should be suspended during elections. His entire speech dealt with the expected victory of his candidates in the Gampaha District – Hansard dated 11th March 1999, Columns 690 - 693.
72 During the Emergency Debate of 11th March 1999, the UNP Member John Ameatunge was disturbed by Mr. Jeyaraj Fernandopulle (Minister of Parliamentary Affairs) on 12 occasions. - Hansard dated 11th March 1999, Columns 612-624.
The emergency debate in practice covers many matters not strictly relevant to emergency. It was pointed out in a study undertaken by the Centre for Policy Alternatives (covering 7 months in 1997) that Members of Parliament take part in the debate to say “something” during the allocated time. Only a few Members understand the national importance of the debate. It was also pointed out that during the period of the said study, the Prime Minister, Prof. G. L. Peiris, (Minister of Constitutional Affairs), Lakshman Kadiragamar, (Foreign Minister), Mangala Samaraweera, (Minister of Post and Communication and the Minister in charge of peace movement in the Government), who were working towards a political solution to the conflict had not taken part in the debates.73

Direct Powers of Parliament to Alter Emergency Regulations

Section 5(3) of the PSO permits the Parliament to alter or revoke any emergency regulation. The said provision state as follows: “Any emergency regulation may be added to, or altered or revoked by resolution of the Parliament or by regulations made under preceding provisions of this section.”

No reports were found of any Parliament invoking this provision and it is safe to assume that there has not been a single occasion at least in the recent past, where the Parliament exercised this power in relation to any emergency regulations.

EMERGENCY (MISCELLANEOUS PROVISIONS AND POWERS) REGULATIONS (EMPPR)

Emergency (Miscellaneous Provisions and Powers) Regulations, often referred to as EMPPRs occupies a prominent place in relation to national security, for the reason that the main penal provisions in emergency laws are contained in the EMPPRs. Usually EMPPRs contain regulations governing arrest, detention, inclusive of preventive detention, control of publications and penal provisions relating to almost all violations of any emergency regulation. Needless to say, it is the EMPPRs that control a situation during the time of emergency, overriding other statutes in relation to many important aspects.

The PSO and the regulations thereunder substantially followed the pattern of wartime regulation in the United Kingdom.74 Since independence there were two major insurgencies in the South launched by the Janatha Vimukthi Peramuna (JVP) in 1971 and 1987 and one major insurgency in the North and East by the LTTE since 1978. On all these occasions, the MPPRs of the day were utilised to the maximum to deal with the emergency offences and offenders.

73 CPA Study, supra n. 69, p. 36.
74 Supra, n. 31 per Kulatunga J at p. 370.
EMPP Regulations No. 1 of 1989 was often regarded as the toughest regulations that have ever been introduced since independence. President R. Premadasa introduced the said regulations with a view to crushing the JVP insurrection in the South. Due to pressure from national and international human rights groups, and due to many comments that were made by the Supreme Court, the Premadasa Government drastically changed the EMPPRs in 1990. By 1994, the EMPPRs were limited to few essential regulations and most of the draconian provisions had disappeared.75

With the fall of the Elephant Pass Military camp to the hands of the LTTE on 16th April 2000, President Chandrika Kumaratunga placed the country on a “war footing.” As a step taken in that direction, the President introduced Emergency Regulations (EMPPR) No. 1 of 2000.76 A comparison of these regulations with the previous EMPPRs demonstrate that the 2000 Regulations are the same as the 1989 regulations that were withdrawn by President Premadasa in 1990.

Having examined many previous Emergency Regulations including the 1989 regulations and 2000 EMPPRs in detail, Retired Justice Kulatunga comments on the year 2000 EMPPRs as follows:

“EMPP 2000 Regulations are a copy of the 1989 EMPPRS. Grammatical errors and printing mistakes that had been in the 1989 regulations were repeated in the 2000 regulations. The 2000 regulations also ignored the Supreme Court decisions that have nullified some regulations in the 1989 regulations. It has also ignored the changes that were introduced to the 1989 regulations due to local and international pressure such as Emergency Regulations dated 18.04.1990 (606/4), Regulations dated 17.06.1993 (771/16) and Regulation dated 04.11.1994 (843/12). This shows that the 2000 EMPPR is an arbitrary document that had been prepared by a person who had no sense or knowledge of the law. This regulation would bring shame to the country internationally”.77 (Translation is mine)

76 No. 1,130/8 dated 3rd May 2000.
77 Ravaya article, supra, n. 75.
PROSCRIBING OF LIBERATION TIGERS OF TAMIL EELAM AND OTHER SIMILAR ORGANISATIONS LAW NO. 16 OF 1978

Provisions of the Main Act

This law was introduced as one of the last statutes in the National State Assembly. The intention of the Government in passing this statute is reflected in the Preamble to the Act which states, inter alia, as follows:

“WHEREAS an Organisation styling itself as the Liberation Tigers of Tamil Eelam has advocated the use of violence for the purpose of prejudicing National Unity and Integrity and thereby endangering national security, public safety and public order,…

AND WHEREAS it has become necessary to proscribe the said organisation and to provide for the proscribing of other organisations advocating the use of violence and whose activities are prejudicial to national unity and integrity, national security, public safety, and public order.”

The National State Assembly initially intended to enforce this law for a period of one year from the date of its commencement. Under this Act the LTTE was proscribed. The President was authorised to proscribe any other similar organisations as well.

The President’s power to proscribe “other similar organisations” came under criticism. Dr. Colvin R. de Silva stated thus:

“The sting of this law is not in the proscription of the unknown Eelam Tiger organisation but in the President’s power to proscribe other organisations; and that proscription by and under this law applies also to other (un-proscribed) organisations ‘engaged in activities substantially similar to those carried out or formerly carried out’ by (expressly) proscribed organisation. The ambit of this law, which is probably unique to Sri Lanka among democratic countries, thus extends to organisations which cannot know and have no means of knowing that they have come under proscription!”


79 Section 15 of the Law.

80 Section 2 of the Law.

PROSCRIBING OF LIBERATION TIGERS OF TAMIL EELAM AND OTHER SIMI-
LAR ORGANISATIONS (AMENDMENT ACT) NO. 30 OF 1979

The main law was amended on 21.05.1979. At the time of the amendment, the 1978
Constitution had come into operation.

The main object of the amendment was to extend the period of the principle enactment for
another one year. The Bill was introduced as an urgent Bill and, therefore, came up for
consideration before the Supreme Court. It thus became necessary for the Court to consider
the provisions of the original Law, inasmuch as if the provisions of the original law is
inconsistent with the Constitution, the instant Bill too would be inconsistent with the
Constitution.82

In considering the provisions of the principle enactment, the Court found that provisions
relating to the Minister’s power to effect a forfeiture to the State, of property of the prescribed
organisations without a judicial order is contrary to the judicial powers of the people
guaranteed under Article 4(c) of the Constitution and, therefore, required to be passed by
special majority.83 Thus the amendment was passed accordingly.

PREVENTION OF TERRORISM (TEMPORARY PROVISIONS)
ACT NO. 48 OF 197984

Background

This Act (commonly referred to as the PTA) was introduced by projecting to the public that
the Government will not let the motherland be divided. President J.R. Jayewardena addressing
the Government Parliamentary Group on 3rd July 1979 briefed the Group of an intended
legislation to combat terrorism and wipe it out for the betterment of the majority of the
people whatever race they may belong to.85

In the mean time, in July 1979 itself the Government appointed Army Chief of Staff Brigadier
T.I. Weeratunga as the Commander of Security Forces in the Jaffna District with a mandate
to “eliminate in accordance with the laws of the land, the menace of terrorism in all its
forms from the island and more specially from the Jaffna District.” Brigadier Weeratunga,
who took up residence in Jaffna, had been promised all resources of the State to enable him
to complete his task before the end of the year.86

83 Ibid.
84 Certified on 24th July 1979 except section 30. Section 23 lapsed on 23rd May 1980.
Against this background, it was reported in the newspapers that the Prevention of Terrorism Bill would be debated in parliament soon.\textsuperscript{87}

Dr. Colvin R. de Silva commented that “the PTA is as tigerish as the Proscribing of Liberation Tigers of Tamil Eelam and Other Organisations Act of the previous year. It is relevant to point out that this law has been rushed through in the context of announced increase in food prices and of the impending abolition of food and fuel subsidies.”\textsuperscript{88}

\textbf{Reception to the PTA in Parliament}

This was introduced as an Urgent Bill and was presented to Parliament on 19\textsuperscript{th} July 1979 by Mr. K.W. Devanayagam, the Minister of Justice. Introducing the Bill, the Minister stated as follows:

\begin{quote}
“…This had been necessitated as a result of a number of activities that have been going on for some time in this country. Terrorism is not something peculiar to Sri Lanka. In this 20\textsuperscript{th} century it is a feature prevalent in most countries. The motive behind terrorist activities varies from country to country. In some countries it is mercenary while in other countries it is politically motivated, but in general it is a crime against society because whatever may be the motive, one thing is common, they violate all laws of God and man.”
\end{quote} \textsuperscript{89}

Thereafter the Minister referred to many legal provisions in other jurisdictions that have utilised special statutes to counter terrorism and described many crimes and activities committed in the North to divide the country. The Minister clearly stated that the PTA was introduced to wipe out terrorism in the interest of this country.

The Tamil United Liberation Front (TULF) was absent during the debate as a result of their boycotting Parliament protesting against the adjustment of the boundaries of the Anuradhapura and Vavuniya Districts.\textsuperscript{90} However, making a statement on behalf of the eight members of the SLFP, Mr Maitripala Senanayake (the SLFP member for Medawachchiya) stated that during the 1971 insurgency the then Government was able to maintain law and order by utilising the PSO without enacting special laws to crush the insurgency. In fact, an amendment was suggested by him unsuccessfully to limit the operation of the Act to the District of Jaffna.\textsuperscript{91} Finally, the Act was passed with 131 votes (with no votes against) with minor amendments as suggested by the Government.\textsuperscript{92}

\textsuperscript{87} Ceylon Daily News issue dated 17\textsuperscript{th} July 1979.

\textsuperscript{88} \textit{Supra}, n. 81, p. 116.

\textsuperscript{89} Hansard dated 19\textsuperscript{th} July 1979, Vol. 5 – No. 13, Column 1436.

\textsuperscript{90} Ceylon Daily News issue dated 16\textsuperscript{th} July 1979.

\textsuperscript{91} \textit{Supra} n. 89, columns 1445 – 1465.

\textsuperscript{92} \textit{Ibid}, columns 1597 – 1603.
Constitutionality of the PTA

The constitutionality of the PTA was considered by the Supreme Court at the Bill stage when the it was introduced as an urgent Bill. The Cabinet of Ministers had decided to pass the Bill with a special majority (i.e. two thirds in Parliament) and the Supreme Court had only to decide whether the Bill required the approval of the people at a referendum. The Court held that the Bill does not require approval by the people at a referendum and, therefore, the Bill was passed by Parliament on 19th July 1979.93 This in other words means that the Cabinet of Ministers admitted that the Bill was inconsistent with the Constitution but not with the provisions that require a referendum.

Preamble to the PTA

As stated above, the PTA was introduced as an Act to make temporary provision for the prevention of acts of terrorism in Sri Lanka, the prevention of unlawful activities of any individual, group of individuals, association, organisation or body of persons within or outside Sri Lanka.94

The Preamble of the Act is of great significance to ascertain the declared intention of the Parliament in enacting the Act:

“WHEREAS the Parliament of the Democratic Socialist Republic of Sri Lanka continues to affirm that men and institutions remain free only when freedom is founded upon respect for the Rule of Law and that grievances should be redressed by constitutional methods;

AND WHEREAS pubic order in Sri Lanka continues to be endangered by elements or groups of persons or associations that advocate the use of force or the commission of crime as a means of, or as an aid in, accomplishing governmental change within Sri Lanka, and who have resorted to acts of murder and threats of murder of Members of Parliament and of local authorities, police officers, and witnesses to such acts and other law abiding and innocent citizens, as well as the commission of other acts of terrorism such as armed robbery, damage to State property and other acts involving actual or threatened coercion, intimidation and violence;

AND WHEREAS other democratic countries have enacted special legislation to deal with acts of terrorism.”

94 Long title of the Act.
The PTA was intended for a specific period of three years from the commencement of the Act.95 "The Act is for three years just as the ‘Liberation Tigers’ Act was for one year. The latter has been extended and there is nothing to prevent the same being done with this Act” predicted Dr. Colvin R. de Silva in September 1979.96 The Proscribing of LTTE and other Similar Organisations Law No. 16 of 1978, discussed above, was repealed by this Act.97

Amendment Act in 198298

This Amendment to the PTA was also introduced as an Urgent Bill. Mr. Nissanka Wijeyaratne, the then Minister of Justice, presented the Bill on 11th of March 1982 amidst serious objections of the Opposition against the Bill being taken as an urgent motion and for not giving adequate time for the Members to study the Bill.

In a brief introduction of the Bill, Minister Wijeyaratne stated that in every civilized country there are special laws of this nature, where the existing law has been found to be inadequate to maintain law and order in the face of terrorism. It was sought to amend Section 29 so that the main law ceases to be a temporary Act.99 Thus, the Act became another permanent statute without a specific duration for the operation of the Act.100

Attempts were made by parliamentarians to convince that the PTA would be used only against separatist terrorists. To dispel the myth, Mr. Sarath Muttetuwegama, the MP for Kalawana in his speech stated as follows;

“The government and certain sections of the people are trying to show that this is an Act which is aimed at those sections of the Tamil people who have been nebulously loosely described as the tiger movement. We are not here to find out who are the members of the Tiger Movement; whether it exists and in what forms it exists. But if one reads the original Act and considers the Amendments to this Act in toto, one will see that this is not an Act which can be limited to one section of the people, to one racial group or even to one minority within that racial group.”101

95 Section 29 of the Act.
96 Supra, n. 81 p. 123.
97 Section 30 of the Act.
100 Prevention of Terrorism (Temporary Provisions) (Amendment) Act No. 10 of 1982 and certified by the Speaker on 15.03.1982.
This Amendment was carried with a few amendments with 122 Members voting in favour and 13 against. With this amendment to section 29 of the Act, the principal Act ceased to be a temporary statute. The Amendment Bill was again challenged in the Supreme Court. The Court found that proposed section 15A which empowers the Minister to make an order that a person be kept in the custody of any authority outside the judicial custody is inconsistent with Article 4C of the Constitution and, therefore, required to be passed by a special majority. The Court also suggested that the Bill be amended to make the Ministerial order an administrative one subject to such directions as may be given by the High Court to ensure a fair trial of the person in custody. This provision was subsequently amended at the Committee Stage and subject to that, the Bill was passed on 11th March 1982.

Summary of provisions of the PTA

Part I of the Act details the offences and penalties under the PTA. Part II provides for the investigations of offences and for the powers of the police to:

1. arrest any person;
2. enter and search any premises without a warrant;
3. stop and search any individual or any vehicle etc.
4. seize any document or thing connected with any unlawful activity.

Any person arrested under the PTA may be kept at the police station up to three days prior to being produced before a Magistrate. On being produced, the Magistrate has to remand the suspect until the conclusion of the trial.

Part III provides for detention and restriction orders. Where the Minister has reason to believe or suspect that any person is connected with or concerned in any unlawful activity, the Minister may order that such person be detained for a period not exceeding three months in the first instance at a place determined by the Minister and subject to such conditions as may be determined by the Minister. The detention order may be extended from time to time for a period of three months. However, the aggregate period cannot exceed 18 months.

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104 Section 6 of the PTA. Under normal law, a person can be kept in custody only 24 hours without being produced before a Magistrate Court.
105 Section 9 of the PTA.
It is also provided that the detention orders cannot be called in question in any court or tribunal by way of writ or otherwise.

Part IV of this Act establishes an Advisory Board to which representations may be made in respect of any detention or restriction order. Part V provides for prohibition of publications. Part VI provides for trial on indictment before a Judge of the High Court without jury or before a Trial at Bar without a jury. It should also be noted that such trial may commence without a preliminary inquiry. Further, persons detained under the PTA are not entitled to be granted bail under normal law except in exceptional circumstances by the Court of Appeal. In any trial, confessions and statements made to a Police officer above the rank of an Assistant Superintendent of Police, while in custody are also admissible.106

**Constitutional Protections versus the PTA**

Many questions have been raised as to whether the provisions in the PTA have the effect of taking away the rights guaranteed to persons in respect of arrests and detentions. “When the PTA Bill was referred to the Supreme Court the Court did not have to determine whether or not any of the provisions constituted reasonable restrictions on Articles 12(1), 13(1) and 13(2), permitted by Article 15(7) (in the interest of national security, etc.) because the Court was informed that it has been decided to pass the Bill with a two-thirds majority. The PTA was enacted with a two-thirds majority and accordingly, in terms of Article 84, the PTA became law despite any inconsistencies with the Constitutional provisions.107

Under section 9(1) of the PTA, where the Minister has reason to believe or suspect that any person is connected with or concerned in any unlawful activity, the Minister may order such person to be detained for a period not exceeding three months. The detention could be extended from time to time for a period not exceeding three months at a time but the aggregate period shall not exceed a period of 18 months. In many cases, the Supreme Court has expressed the view that if an arrest or detention order is challenged, the authorities should justify their conduct objectively by means of sufficient evidence. Therefore, a detention order that was found to have been signed by the Minister mechanically at the request of the police without giving his mind to the preconditions under Section 9 for making such order, the Court has held that such detention order was contrary to Article 13 of the Constitution.108

Detention under section 9 is an aid to investigation and its validity will be strictly adjudged by the application of the objective test as opposed to the subjective test applicable to a

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106 Section 16 (1) of the PTA. Under normal law confessions made to the police are inadmissible.


preventive detention order which may be made in circumstances in which no charge is preferred and no investigations are pending.\textsuperscript{109}

Section 6(1) of the PTA permits the arrest of persons and search of premises etc. Section 7(1) permits the detention of those who have been arrested under the PTA to be kept in custody up to 72 hours. At the end of the 72 hours, such detainees should either be detained on a detention order under section 9(1) of the PTA or produced before a Magistrate, who shall remand such persons until the conclusion of the trial. Such persons can be released prior to the conclusion of the trial only with the consent of the Attorney General. In respect of the power to arrest under section 6(1) of the PTA, Justice Kulatunga in \textit{Dissanayake v. Superintendent of Mahara Prison} held as follows:

“Where the power to arrest without a warrant is couched in the language of s. 6(1) of the PTA, it is well settled that the validity of the arrest is determined by applying the objective test. This is so whether the arrest is under the normal law (Muttusamy v. Kannangara 52 NLR 324), under the Emergency Regulations (Gunasekara v. de Fonseka 75 NLR 246) or under PTA (Somasiri v. SI Jayasena SC Application 147/88 SCM 1-3-91). However, it is not the duty of the court to determine whether on the available material the arrest should have been made or not. The question for the Court is whether there was material for a reasonable officer to cause the arrest.”\textsuperscript{110}

In the recent judgment of \textit{Weerawansa v. Attorney General}\textsuperscript{111} Justice M.D.H. Fernando examined, \textit{inter alia}, the scope of detention under section 7(1) and 9(1) of the PTA and made the following observation on “arrests under PTA” in relation to the safeguards, when a person was arrested in respect of an alleged offence under the Customs Ordinance:

“A prerequisite for detention under section 7(1) is a valid and proper arrest under section 6(1): an arrest in conformity with section 6(1)... while the general rule is that all arrests and consequent detentions are subject to the Constitutional safeguards in Article 13, the exception created by the PTA will apply only where the stipulated pre-conditions of an arrest under section 6(1) exist. Those safeguards can never be circumvented by a false assertion or a mere pretence that an arrest was under section 6(1).”

In the same judgment, the Supreme Court pointed out that an arrested person must be produced before the Magistrate before the period of 72 hours allowed by section 7(1) comes to an end,


\textsuperscript{110} (1991) 2 SLR 244, p. 256.

\textsuperscript{111} SC Application No. 730/96, SCM 3.8.2000.
unless a detention order has been made under section 9(1). On the legality of such detention orders the Court stated thus:

“While Article 13(2) permits detention only upon judicial order, section 9(1) allows a Ministerial order. However, being an order which results in a deprivation of liberty, it must be made with no less care and consideration. The Minister’s order does not depend on the validity of the preceding arrest and detention. Even if such arrest and detention were invalid, nevertheless if at the time the detention order was made the Minister did have reasons to believe or suspect that the detainee was “connected with or concerned in any unlawful activity”, the detention order and subsequent detention would be lawful.”

National and International concerns of the PTA

A large number of persons have been detained under the PTA since its introduction and, in fact, prolonged detention of persons in Sri Lanka under PTA and emergency regulations has attracted comment both nationally and internationally.

The United Nations Committee Against Torture (CAT) recommended that Sri Lanka review the emergency regulations and the PTA as well as rules of practice pertaining to detention to ensure that they conform with the provisions of the United Nations Convention against Torture.\textsuperscript{112} In addition, the United Nations Working Group on Disappearances and Amnesty International have frequently urged the Government of Sri Lanka to bring the PTA in line with accepted international standards regarding due process and treatment of prisoners.\textsuperscript{113}

Perhaps, the words of Dr. Colvin R. de Silva summarise best the effect of the PTA:

“What has in fact been done is to incorporate in the ordinary law the much denounced Emergency Regulations - along with further and more undemocratic features, such as we have shown. The pretence is that this Government does not resort to the use of Emergency Laws. That fact is that they are making such resort unnecessary since the regulations themselves are being incorporated in the normal permanent law. The military, police regime of Emergencies is being clamped on the country permanently.”\textsuperscript{114}

\textsuperscript{112} Conclusions and Recommendations on Report of Sri Lanka - Summary record CAT/C/SR.341.


\textsuperscript{114} Supra, n. 81, p.123.
SIXTH AMENDMENT TO THE CONSTITUTION

Background
The period of July and August 1983 was full of dramatic events in the socio-political history of Sri Lanka. National security concerns had a major impact on society during that time. President J.R. Jayewardena vowed to eliminate all terrorists fighting for an independent Tamil state and said that he would soon be initiating intensified anti terrorist measures. Referring to the role played by Sri Lanka’s main opposition party in Parliament, the TULF, the President said that legislation was being drafted whereby all new candidates would be required to pledge in an affidavit that they would not advocate separatism. The President’s statements created speculation in July 1983 whether martial law was to be introduced in the North.115

Political circles speculated that an amendment was being brought to the Constitution to prevent the Parliamentarians from advocating separatism. It was rumoured that many important personalities were to challenge the amendment at the Bill stage.116

From 24th of July 1983 racial violence erupted all over the country as a result of the killing of 13 soldiers at Thinnavely in Jaffna. The Government immediately proscribed the Janatha Vimukthi Peramuna (JVP) the Communist Party (CP) and the Nava Samasamaja Party (NSSP) and accused those parties of aiming to overthrow the government. The question was often raised as to why the TULF was not proscribed.117

Mr. Lakshman Jayakody, the Parliamentary group leader of the SLFP, which had the second highest number of Members in the opposition in Parliament, said that while supporting the proposed Sixth amendment the SLFP would also move certain other amendments:

“One of these amendments would be to the effect that any person advocating separatism to be charged with treason. The proposed civic disability is not a sufficient deterrent and sterner action is the need of the day. The necessary action should have been taken earlier.”118

When the Sixth Amendment Bill was referred to Supreme Court, nine Judges of the Supreme Court considered the constitutionality of the provisions of the Bill on 3rd August 1983. The Supreme Court was of the opinion that the proposed provision on forfeiture of property

116 The Island dated 13th July 1983 reported that Mr. Felix R.D. Bandaranayake would challenge the proposed 6th Amendment. However Mr. Bandaranayake did not challenge it.
118 The Island dated 2nd August 1983.
without any qualification or limitation was inconsistent with Article 11 of the Constitution. In other words, the said provision could only be passed with the approval of the people at a referendum. However, Mr. K.M.M.B Kulatunga, the then Solicitor General, submitted that this provision would be suitably amended so that it will not be inconsistent with Article 11.

Parliament met amidst tight security and detectives armed with metal detectors frisked journalists before they were allowed to enter the precincts of the House. The public galleries were closed. The proceedings of Parliament were subject to censorship by a House Committee. The debate which began shortly after 3 p.m. on Thursday the 4th ended at 4.15 a.m. on Friday the 5th August 1983. The Bill was presented to Parliament by Mr. R. Premadasa, the Prime Minister.

The Prime Minister explained to the Parliament the reasons why the Government was enacting this Amendment to the Constitution and his speech adequately demonstrates the Government’s intention:

“The question can then be asked as to why we are enacting this Law. The Hon. Members are now aware that we have provided for the proscribing of parties which declare as one of their aims or objects, the establishment of a separate State. So a party may not even commit any act in furtherance of the establishment of a separate State. Yet, if one of its aims or objects is the establishment of a separate State, that alone would be sufficient to deprive a party of legal existence. Consequently all members who continue to be in that party would also face the same consequence as those who individually advocate the establishment of a separate State.

Hon. Members are also aware that the Tamil United Liberation Front have stated that they hope to achieve the establishment of a separate State by civil disobedience. Under the proposed amendment to the Constitution, that alone is sufficient to proscribe a party and deprive the party of its legal existence and equally every member of that party will now face proceedings in the Court of Appeal.”119

The Members of the UNP, the SLFP and the sole member of the MEP voted for the Bill. The MP for Kalawana, who represents the proscribed Sri Lanka Communist Party was not present at the time of voting. The TULF was absent. The Amendment was approved with 150 votes to nil.

The Sixth Amendment in Brief

The Sixth Amendment to the Constitution has the following preamble:

“WHEREAS Sri Lanka is a Free, Sovereign, Independent and Unitary State and it is the duty of the State to safeguard the independence, sovereignty, unity and the territorial integrity of Sri Lanka;

AND WHEREAS the independence, sovereignty, unity and the territorial integrity of Sri Lanka has been threatened by activities of certain persons, political parties and other associations and organisations;

AND WHEREAS it has become necessary to prohibit such activities and to provide punishments therefor.”

Advocating the establishment of a separate State within the territory of Sri Lanka was made an offence, indictable before the Court of Appeal according to such procedure prescribed by law. Punishment includes seven years imprisonment and civic disabilities up to seven years.120

The law further provided that no political party, association or organisation shall have as one of its aims or objects the establishment of a separate State within Sri Lanka. Any person is entitled to invoke the jurisdiction of the Supreme Court to have such political party, association or organisation declared proscribed and have Members of Parliament belonging to such political party or association declared to have vacated their office.121

The provisions of the Sixth Amendment also require the public servants, Attorneys-at-Law and many categories of representatives of people including Members of Parliament to take and subscribe to the following oath against separatism:

“I do solemnly declare and affirm/swear that I will uphold and defend the Constitution of the Democratic Socialist Republic of Sri Lanka and that I will not, directly or indirectly, in or outside Sri Lanka, support, espouse, promote, finance, encourage or advocate the establishment of a separate State within the territory of Sri Lanka.”122

120 New Article 157A(1) to (5).

121 Article 157A(2) read with sub Article (5).

122 Seventh Schedule to the Constitution.
The failure to take the oath will result in such person ceasing to hold office. If any declaration is given by the Supreme Court, any member or officer of such political party, association or organisation could be indicted in the Court of Appeal according to procedure prescribed by law. Punishment includes seven years imprisonment and civic disabilities up to seven years and forfeiture of property.

Aftermath of the Sixth Amendment

Consequent to this Amendment, the Speaker and other Members of Parliament took oaths on 9th August 1983 except the TULF. As a result, the TULF ceased to be Members for the then Parliament. On the same day, when Mr. Lakshman Jayakody moved to ask a question on behalf of TULF Member for Kytes K.P. Ratnam, the Speaker, Al Haj M.A. Bakeer Markar refused him permission to ask the question stating “no questions by members who had so far not taken their oath against separatism would be allowed to be placed on the Order Book or asked by anyone in Parliament.”

All categories of public servants and Attorneys-at-Law took their oath under the Sixth Amendment.

One of the main objectives of the Sixth Amendment was to deal with those who advocate separatism under penal provisions introduced in Article 157A. However, no person has so far been indicted in respect of any offences thereunder. Perhaps the reason is that no procedure has yet been prescribed under Article 157A, which is a prerequisite for a prosecution in the Court of Appeal. No application has so far been filed by any person in the Supreme Court under Article 157A(4) to have any political party or association declared proscribed.

CONCLUSION

Demonstrably, most of the national security laws under review have been passed by Parliament without examining its effects on the fundamental rights of the people; in a hasty manner without the opposition being given adequate time; and without adequate consultations. The allegation that some of these laws were introduced to gain political advantages is not without merit.

The implementation of national security laws has come under severe criticism nationally and internationally. Many emergency regulations justify the allegation that emergency powers were abused by the executive. Be it the PSO or the PTA, the existing legal framework has

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123 New Article 157A(7) to (9) read with Articles 165 and 169(12).
124 Article 157A(5).
proved to be insufficient to control the abuses of the executive in the implementation of the emergency regulations.

Parliamentary control of emergency regulations exists in nothing but theory in today’s context. Although the extension of the emergency is debated in Parliament monthly, neither the Constitution, the Standing Orders of Parliament nor other mechanisms ensure parliamentary scrutiny of regulations themselves. Unfortunately, commitment of the parliamentarians toward due scrutiny of emergency appears to be non-existent. Adding to this, abuse of emergency laws by the executive too takes place. Doesn’t it then demonstrate a clear lack of political will to extricate the country from emergency rule? Isn’t it correct to state that this country needs strong political will to fight against the misuse and abuse of emergency laws?

Despite these laws, terrorist activities, and the use of fire arms and explosives continue. All types of serious crimes are committed, both in and outside conflict areas. Thousands have been taken into custody and some have been dealt with under the national security laws; however, crimes that are punishable under national security laws are on the rise. It is well known that the LTTE, on the other hand, has resorted to extreme forms of terrorism including suicide bombing and killing of civilians. Thousands have become victims of terrorism in all parts of Sri Lanka. Thus, one could seriously ask whether the national security law has had the desired effect in the independent Sri Lanka.

Among many criticisms of the PTA and emergency regulations are that the prolonged detentions under these special laws facilitate police and army officers to torture the detainees and to cause them to disappear. It has also been pointed out that conditions of detention and prolonged detentions under these special laws are contrary to international standards. Although many international bodies have recommended, successive governments have failed to bring these laws in line with Sri Lanka’s international obligations.

The Sixth Amendment is hardly utilised except to subscribe to an oath under the Seventh Schedule. No citizen has so far applied to the Supreme Court to have any organisation or a political party declared proscribed. Nor was any attempt made by any Government to prescribe the procedure as required under Article 157A to enable prosecutions before the Court of Appeal under the Sixth Amendment.

It is, therefore, submitted that the national security law including emergency regulations be examined with a view to ensuring their compliance with constitutional and legal guarantees for the protection of the public as well as their compliance with international standards.
Continuing an independent review and control of the exercise of powers under emergency regulations is a clear need of the hour. Beside that, the necessity for many regulations in the EMPPRs must be seriously considered and unwarranted regulations must be invalidated. An effective mechanism is required to ensure parliamentary scrutiny of emergency regulations. If national security laws were to continue, they need to be in compliance with international standards and must be consistent with the internationally accepted limitations to the fundamental rights of people.
THE LAW RELATING TO CHILDREN IN SRI LANKA AFTER INDEPENDENCE:
A GENERAL OVERVIEW

Rohana Rathnayake*

INTRODUCTION

The law relating to children in Sri Lanka, though developed on a piecemeal basis, has a long history beginning from the 20th century. The principles of the Roman Dutch Law, English Law and personal laws together with legislation introduced by successive legislative bodies in the 20th century and decisions pronounced by appellate courts largely contributed to the development of law on children and were responsible for uplifting the status of children to its present position. The Roman Dutch Law concept of the right of the courts as upper guardian of children to intervene in the interests of children and the English law concept of best interest of the child encouraged legislative developments that led to the enactment of statutes such as The Civil Procedure Code (1889), Maintenance Ordinance (1889), Education Ordinance (1939) Children and Young Persons Ordinance (1939), Adoption of Children Ordinance (1941) and various other legislation concerning children during the pre-independence period. These developments that took place during the colonial period laid a foundation for the post independence period to develop further the law relating to children in Sri Lanka.

DEVELOPMENT OF LAW RELATING TO CHILDREN AFTER INDEPENDENCE

Sharya de Soysa observes that Sri Lanka’s commitment towards child rights has not been consistent and reforms were introduced on a piecemeal basis. This is especially true in

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regard to legislative development on children’s rights in Sri Lanka even after independence. As the following discussion reveals, efforts have been made to introduce legislation relating to children on an *ad hoc* basis without having a clear vision in the concept of child rights.

The Employment of Women, Young persons and Children Act (EWYPICA) was introduced in 1956, to regularise the employment of children who were defined by the Act as those under 14 years and young persons defined as persons between the age of 14 – 18 years.\(^2\) The statutory prohibition under the Children and Young Persons Ordinance (CYPO) (1939) regarding employment of children below 12 was removed by the EWYPICA and given the status of subsidiary legislation. The Act provided for the Minister of Labour to promulgate subordinate regulations prescribing the age below which children are not to be employed.\(^3\) The regulations promulgated by the Minister in 1957 carried a total prohibition on employment of children under the age of 12 years in any occupation.\(^4\)

It is clear that the Act in principle accepted that children over 12 years can be employed under restricted grounds. The Act contained a total prohibition on children being engaged in any employment during school hours.\(^5\) Even this prohibition could not be observed properly due to absence of compulsory education regulations. The regulations promulgated by the Minister of Labour under the Act were not clear enough and as a result, regulatory control over employment of children between 12 and 14 years could not be properly exercised.

These regulations contained a list of occupations in which children between the ages of 12 –14 years could not be employed. The Act also specified certain occupations that are prohibited for children in the above age limit\(^6\) and for young persons below 15 years\(^7\) and 16 years.\(^8\) The Act sought to protect children from being exploited by interested parties who engage them in night shift work,\(^9\) entertainment activities\(^{10}\) and in other types of hazardous employment.\(^{11}\) It made provisions for regulatory action in respect of work places where children are employed and permitted authorised officers to inspect such premises.\(^{12}\)

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2 Section 34.

3 Section 14 (c) (i).

4 Section 2 of the Regulations promulgated on 11\(^{th}\) April 1958 by the then Minister of Labour, Housing and Social Services.

5 Section 13.

6 Sections 18 and 20 of the Act.

7 Section 9.

8 Section 20(2).

9 Section 2.

10 Section 18.

11 Part II of the Act.

12 Part V of the Act.
The Shop and Office Employees Act No. 19 of 1954 which was enacted to regulate employment, hours of work and remuneration of persons in shops and offices also contained a total prohibition on employment of children under 14 years in shops and offices.\textsuperscript{13} It prohibited employment of male children under 18 years and females in night shifts except in certain categories of employment.\textsuperscript{14}

Due to the enactment of various laws prohibiting employment of children below 12 years, employment of small children is minimal and often non-existent, at least in most areas of the regulated sector of employment. But due to the absence of efficient enforcement machinery, exploitation of children continues to take place even today in the informal sector where children work as domestic servants, helpers in shops, garages, hotels and tea boutiques.

The Maintenance Ordinance was amended in 1972 introducing a speedy procedure which enabled the adoption of a summary procedure in filing actions for maintenance in the Magistrates Courts. Further, the new amendment permitted courts to order a sufficient amount depending on the income of the father and also to take into account the income of the mother in ordering maintenance for herself and children. The amendment introduced a novel method of issuing a court order for the attachment of the salary of the defendant who defaults the payment of maintenance ordered by the court. Thus, the Magistrate’s court was given jurisdiction to require the employer of the defendant to deduct the amount ordered by the court as maintenance from the salary of the defendant and remit it to the court.

The Maintenance Ordinance was repealed and a new Maintenance Act\textsuperscript{15} was introduced in 1999. The new Act made it the responsibility of both parents to maintain their children. Further, the upper age limit of an offspring who could claim maintenance from his or her parents was raised to 25 years making it possible for adult children who are pursuing their education to claim maintenance from their parents. The new Act removed the requirement of corroboration of evidence of the mother in the case of a non-marital child and other obstacles that hinder claiming maintenance for non-marital children due to any omissions on the part of their mother.

There were some instances of later legislation that improved the status of children in other spheres. For example, the Legitimacy Act (1970) provided for a child born outside wedlock to acquire the status of legitimacy by the subsequent marriage of his or her parents.\textsuperscript{16} A

\textsuperscript{13} Section 10.
\textsuperscript{14} Section 10(2) and proviso.
\textsuperscript{15} Act No. 37 of 1999.
\textsuperscript{16} Section 3.
similar provision could be seen in the Kandyan Marriage and Divorce Act (1952) which legitimised children procreated by the union of unmarried parents when such parents legalise their union by registering the marriage.\textsuperscript{17} The Election law was amended in 1959 to give voting rights to youths over 18 years.\textsuperscript{18} Other statutes followed suit and recognised the age of 18 years as the age at which a child acquires full status of adulthood for certain purposes.\textsuperscript{19} The Age of Majority Ordinance (1865)\textsuperscript{20} was amended in 1989 bringing down the age of majority from 21 to 18 years\textsuperscript{21} to be on par with the age for franchise. The Code of Civil Procedure (Amendment) Act No. 12 of 1996 updated the provisions in the Code of Civil Procedure by declaring that a minor is deemed to have attained majority or full age on his attaining the age of eighteen years or on marriage or on obtaining letters of \textit{venia aetatis}.

The minimum age for marriage under General Law and Kandyan Law was raised from 12 years to 18 years in 1995 by amendments\textsuperscript{22} introduced to General Marriage Law and Kandyan Law. According to this amendment, both parties to a marriage contracted under the General Law and Kandyan Law should have completed 18 years. Equalising the minimum age for marriage to that of age of majority has had the effect of preventing forced child marriages among persons governed by these systems of laws.

These legislative reforms make it clear that Sri Lanka is moving consistently towards the standards set by the Convention on the Rights of the Child (1989) in defining children as persons under 18 years. An important development took place in the law relating to children when the Penal Code (1883)\textsuperscript{23} was revised in 1995 by the Penal Code (Amendment) Act No. 22 of 1995 to protect children from various kinds of criminal offences perpetrated on them. The reforms introduced by this new amendment brought about far reaching changes in the Criminal Law of Sri Lanka and strengthened the law to deal with new types of crimes committed on children in particular and women in general.

A new section was introduced to the Penal Code to deal with obscene publications or indecent exhibition, show, photograph, or film including video recording, using children\textsuperscript{24} by any

\begin{itemize}
\item \textsuperscript{17} Section 7 of the Act.
\item \textsuperscript{18} Section 2 of the Parliamentary Election (Amendment) Act No. 11 of 1959 amended, section 4 of the Ceylon (Parliamentary Election) Order in Council 1946 by substituting the words ‘twenty one’ appearing in that section with the words ‘eighteen years.’
\item \textsuperscript{19} Section 9(1)(b) of the Local Authorities Election Ordinance No. 53 of 1946 as amended by Act No. 9 of 1963; section 66(a) and 66(b) of the Land Reform Law No. 1 of 1972; Wills (Amendment) Act No. 5 of 1993.
\item \textsuperscript{20} Ordinance No. 7 of 1865.
\item \textsuperscript{21} Age of Majority (Amendment) Act No. 17 of 1989.
\item \textsuperscript{22} Marriage Registration (Amendment) Act No. 18 of 1995; Kandyan Marriage and Divorce (Amendment) Act No. 19 of 1995.
\item \textsuperscript{23} Penal Code Ordinance No. 2 of 1883.
\item \textsuperscript{24} Section 286A.
\end{itemize}
person including a parent, guardian or person having the custody of such children. The scope of the previous section in the Penal Code on cruelty to children was expanded by insertion of a new section which made it a criminal offence to wilfully assault, ill treat, neglect or abandon a child by parents or any person having the custody, charge or care of a child. The section on grievous hurt in the Penal Code was expanded by the new amendment to deal with all kinds of grievous hurt caused to persons including children.

In order to deal with growing incidence of sexual exploitation of children and child prostitution, a new section was added to the Penal Code making it an offence to knowingly permit any child to remain in any premises for sexual abuse, to participate in any sexual activity, involving any kind of sexual exploitation of a child. Section 360A of the Penal Code before 1995 made the offence of procuration applicable only in respect of a girl or woman under 21 years of age. The new amendment made procuration an offence irrespective of sex and also declared that procuration for sexual intercourse becomes an offence if the person is less than 16 years. Further the scope of the offence was expanded by bringing detention of any person without consent in any brothel with a view to sexual intercourse or sexual abuse or for procuration for prostitution, within the definition of the offence. The new section removed the obstacle of convicting any person on the evidence of just one witness unless corroborated in material particular.

Another section in the new amendment section 365B, seeks to deal with acts of grave sexual abuse, which do not fall under the category of rape. This section aims at dealing with acts of violence committed by any person against any person irrespective of the gender and covers acts of violence committed by adult persons on child victims.

As regards trafficking of children a new section made it an offence to buy or sell or barter any person for money or for other consideration. Thus, arranging or assisting a child to travel abroad without parental consent; obtaining an affidavit of consent from a pregnant woman for the adoption of her unborn child; recruiting women or couples to bear children, knowingly permitting the falsification of any birth record or register; engaging in procuring children from hospitals and other institutions for money or other consideration or procuring a child for adoption from any such institution or centre by intimidation of the mother or any other person; or impersonating or assisting in the impersonation of the mother, becomes an offence.

One of the most significant changes introduced by the Amendment in 1995 was the updating of law on rape in terms of new developments made in this respect in other countries. The new amendment increased the age of statutory rape from 12 years to 16 years making it an

25 Section 308A.
26 Section 311 of the new amendment.
27 Section 360 B.
28 Section 360 C.
offence to have sexual intercourse with a female below 16 years of age with or without her consent, except with one’s own lawful wife who is over the age of 12 years.29

Section 364(2) of the new amendment recognised custodial rape and gang rape by declaring that a public officer or person in a position of authority, who makes use of his position and commits rape on a woman or a person in his charge, is punishable for the offence of rape. Another significant change in the law of rape is that the new amendment has deleted the requirement of proving that the act of rape was committed against her will. Thus a victim of rape is no longer required to bring evidence of actual physical injury as an indication of resistance offered by the prosecutrix to corroborate the fact that the act was committed against her will.

The new amendment Section 364A, made for the first time incest a criminal offence in Sri Lanka. The marriage statutes30 had prohibited solemnisation of marriages between persons within prohibited degree of relationships but had not made it a criminal offence to have sexual intercourse with persons within prohibited degree of relationships. In order to curtail increasing incidences of elders in the immediate family sexually abusing young girls in the family with impunity, the new amendment has made incest a punishable offence under the Criminal law of Sri Lanka.

The law relating to offences against children was further strengthened when the Penal Code was again revised by the Penal Code (Amendment) Act No. 29 of 1998. This amendment requires any person who develops photographs to inform the police if he discovers that any film given to him contains indecent or obscene photograph or film of a child. Similarly this amendment introduces new offences such as causing or procuring children to beg, or employing children to act as procurers for sexual intercourse, hiring or employing children to traffic in restricted articles defined in the Poisons, Opium and Dangerous Drugs Ordinance. Further, the law relating to offences such as rape and grave sexual abuse was expanded by declaring that the consent of the victim of the offence becomes irrelevant in certain situations.

The Code of Criminal Procedure (Amendment) Act No. 28 of 1998 introduced new measure to dispose of child abuse cases expeditiously by requiring every court hearing child abuse cases to give priority to the trial of any person charged with child abuse.31 It also allowed the police to detain a person suspected or accused of child abuse in police custody for 3 days on the order of a Magistrate.

29 Section 363.
30 Section 16 of the Marriage Registration Ordinance; section 5 of the Kandyan Marriage and Divorce Act.
31 Section 453A of the Act.
The law on evidence was amended in 1995 making provision for contemporaneous recordings admissible in evidence in court proceedings. This new amendment makes it possible to admit tape or video recordings that were recorded at the time of incident so that the court will be able to arrive at a reasonable judgement and the parties will be able to prove their case without much difficulty. This method will be especially helpful in child abuse cases where the condition of the child immediately after abuse could be depicted in court.

A National Child Protection Authority was set up by a parliamentary Act to formulate national policy on the prevention of child abuse, to protect and treat children who are victims of such abuse and to co-ordinate and monitor action against all forms of child abuse. This Act broadened the meaning of the term ‘child abuse’ by declaring that child abuse means any act or omission relating to a child which would amount to a contravention of specific provisions in the Penal Code, the Employment of Women, Young Persons and Children Act, the Children and Young Persons Ordinance or the regulation relating to compulsory education made under the Education Ordinance. This statutory body serves as an umbrella organisation amalgamating all actions relating to child abuse which has hitherto been handled by various State departments.

The Constitution of Sri Lanka (1972) recognised for the first time the fundamental rights and freedoms of all persons and citizens of Sri Lanka in regard to thought, conscience and religion, freedom of peaceful assembly and of association, and freedom of speech and expression. Though these fundamental rights were not enforceable in a court of law, they could be appreciated as providing a foundation for later development in recognising such rights of persons and citizens including children, and as guiding State Policy.

The Constitution of Sri Lanka (1978) introduced a chapter on fundamental rights which was enforceable by the Supreme Court of Sri Lanka. These rights included freedom of expression and association, freedom of conscience and religion, freedom from torture, cruel, inhuman or degrading treatment and equality before the law.

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33 Act No. 50 of 1998.
34 Article 18 (1).
35 Article 17.
36 Article 14 (1)(a).
37 Article 14 (1)(c).
38 Article 10.
39 Articles 10 and 11.
40 Articles 12 (1) and 12 (2).
Article 12(4) declares that Article 12(1) should not be used to prevent the introduction of administrative and legislative provisions for the advancement of children and disabled children. This enables the government to introduce measures to upgrade the status of children without being hindered by any action filed in court challenging such measures on the basis that such special treatment to a particular section of the population is a violation of the constitutional right to equality before the law. As the Constitution refers to persons and citizens in the chapter on fundamental rights, it is clear that these rights expressed in the Constitution are available to children too.

Furthermore, the Constitution has a separate Article under the chapter on Directive Principles of State Policy that provides special protection for children. Article 27(13) of the Constitution declares that the State shall promote with special care the interests of children and youth, so as to ensure their full development, physical, mental, moral, religious and social and to protect them from exploitation and discrimination. This directive principles guide the State authorities in the enactment of laws and governance of the country and also in interpreting constitutional provisions and statutes.

A landmark development in the sphere of children’s rights is the special place accorded to children’s rights as fundamental rights in the Draft Constitution which was scheduled to be tabled before Parliament in 1999. The Draft Constitution contained a separate Article titled “Special rights of children” and under it several Sub Articles that reflect an interest in children’s rights and also the influence of constitutional provisions on children’s rights in the South African Constitution. Under these proposed provisions, in addition to other fundamental rights that are enjoyed by children too, every child has a right to a name from birth, to be protected from maltreatment, neglect, abuse or degradation and a right to legal representation in criminal proceedings.

41 Article 12(4).
45 Article 28 of the Constitution as adopted by the Constitutional Assembly of the Republic of South Africa on 8th May 1996.
46 Article 22(8).
47 Article 22(1).
Further, the proposed Constitution recognises that a child has the right to family care or parental care or appropriate alternative care and to basic nutrition, basic health care and social services.\textsuperscript{48} The State is vested with the responsibility of taking legislative and other measures to achieve progressive realisation of rights guaranteed by Article 22(2). Article 22(4) goes well beyond the standard of the Convention on the Rights of the Child by declaring that the best interests of the child should be given ‘paramount importance’ in all actions relating to children. The recognition of the right of children between the ages of five to fourteen years to have access to free education\textsuperscript{49} and the right to protection from being employed in hazardous activities as a fundamental right of children is another noteworthy development in the field of child rights. If the draft constitutional proposals become law, they will provide a base for public interest litigation and permit child activist organisations to intervene on behalf of children and file action against infringement of the fundamental rights of children recognised by the new constitution.\textsuperscript{50}

Compulsory education rules were introduced in 1997 by the government and were published in gazette notification by the Minister of Education\textsuperscript{51} making school attendance compulsory for children between 5 and 14 years. The draft constitutional provisions\textsuperscript{52} recognize the right of access to education for all children between the age of five and fourteen years.

Sri Lanka ratified the Convention on the Rights of the Child (CRC) on 12\textsuperscript{th} July 1990 and subsequently signed the Global Plan of Action for Children in 1991. Signing of these international instruments cleared the way for the introduction of further improvements in the sphere of child rights in Sri Lanka. The government has acted in conformity with the Convention on the Rights of the Child and adopted a national Plan of Action for the Children of Sri Lanka. It has identified important areas that need improvement. In 1992 the government also adopted a major policy statement called the Children’s Charter setting out most of the principles contained in the CRC with some modifications. The Charter also set up a monitoring committee on child rights.\textsuperscript{53} The functions of the committee, among other matters, are promoting legislative reforms and making recommendations on matters set out in the Charter and monitoring progress of the implementation of the provisions of the Charter.

\textsuperscript{48} Article 22(1).
\textsuperscript{49} Article 22(6).
\textsuperscript{50} Article 30 read with Article 171.
\textsuperscript{52} Article 22(6) of the Government’s proposals for Constitutional Reforms 1997.
\textsuperscript{53} This committee consists of six presidential nominees, Secretaries to the Ministries of Education, Justice, Defence, Health, Women’s Affairs, Social Welfare, Planning, Labour, Provincial Councils and the Commissioner of Probation and Child Care.
Sri Lanka has committed itself to developing child rights in conformity with international standards. Although the Charter is not a legal document and cannot be enforced in a court of law, it is a reflection of the Sri Lankan policy on child rights and serves as baseline for future administrative and legislative reforms in this sphere. In giving effect to this Charter, the government has recently taken the initiative to introduce new legislation raising the minimum age for marriage and criminal sanctions to deal with sexual offences against children as discussed earlier.

**CONTRIBUTION OF THE JUDICIARY TOWARDS DEVELOPMENT OF LAW OF CHILD**

The courts of Sri Lanka have made an important contribution to the development of law on child rights from early years. In the absence of legislative intervention in setting principles relating to custodial and guardianship matters in Sri Lanka, the courts played a key role in applying the non statutory Roman Dutch law and developing the all important concept of ‘welfare of the child’ in litigation in relation to the above matters. Courts have used this principle in determining cases relating to children such as custody disputes.

Courts also recognised the Roman Dutch Law principle of father’s preferential right to have custody of a minor child when the marriage is subsisting and applied this principle in custody cases in a context where the best interests of the child was to be secured. Thus in *Ivaldy v. Ivaldy* H.N.G. Fernando J. said that “the court will recognise the father’s prima facie right, except when the element of danger or detriment is positively established.” The courts sometimes displaced the parental right to have custody of the child when it was proved that granting custody to a particular parent was prejudicial to the ‘life health and morals’ of the child and in determining access rights.

Courts have also accepted that the wishes of older children who are at the age of discretion should be considered in awarding their custody. In *Re Evelyn Warnakulasuriya* (1955), the court gave effect to the wishes of a girl of 15 years and awarded her custody to a third

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55 (1956) 57 NLR 568.

56 *Ibid*, at page 571.


60 56 NLR 525.
party against the wishes of her mother. In an effort to award maintenance for children, courts have sometimes adopted artificial arguments to circumvent rigid rules in the Islamic law which made it difficult for them to order a Muslim father to pay maintenance for his school going child who had reached the age of puberty.\(^{61}\) As a result of these judicial developments, the courts today have accepted the concept of the best interests of the child that paves the way for the recognition of other rights of the child.

The chapter on Fundamental Rights in the Constitution of 1978 which perceives the child as a person who enjoys rights as any other person in the society has helped to promote children’s rights in court actions and to grant relief to children when their fundamental rights have been violated. For instance, in *Bandara v. Wickramasinghe* (1995)\(^{62}\) the Supreme Court held that excessive use of corporal punishment on a 17 year old student by the Deputy Principal of a secondary school constituted a violation of the child’s fundamental rights. There are other fundamental rights cases filed by children challenging torture and inhuman and degrading treatment meted out to them by law enforcement authorities in different situations.\(^{63}\) There are also fundamental rights cases brought against school authorities for violation of the Article on equality in the case of school admission.\(^{64}\) This constitutional framework ensures that any child can challenge the actions or inaction of State authorities if they are in conflict with his or her fundamental rights enshrined in the Constitution.

The courts have developed important principles in other areas too. When the requirement of corroborating the evidence of the prosecutrix in a rape case has been considered to be a rule of practice almost equivalent to a rule of law and as an essential requirement,\(^{65}\) the court of Appeal in *Punchibanduge Wijesinghe Rajaratne v. A.G.* (1996),\(^{66}\) in which a 5 year old girl had been allegedly raped by an adult person, held that in a case where the identity of the accused is an issue, it is no longer necessary for a direction to be given on corroborating the evidence of the complainant in regard to the identity of the accused, provided the judge gives proper direction tailored to the facts of the case. This important decision sets out guidelines on the requirement of corroboration as to the identity of the accused in a child abuse case in an environment where the judiciary had adopted a strict attitude in regard to the aspect of corroboration of the evidence of a child witness.

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64 These cases are not reported in Law Reports due to the fact that such cases are settled out of court when school authorities agree to admit the child to the relevant school.
PROSPECTS FOR THE FUTURE

The above discussion on the development of law relating to children in Sri Lanka shows that many developments have taken place over the last 50 years in the sphere of children’s rights. Although this may be true with regard to certain areas such as Criminal Law, which has comprehensive provisions to protect children from various kinds of abuses such as sexual abuse, sexual exploitation and physical violence, there are many areas that still need improvement.

Child labour is an area that has failed to provide protection for our children. Despite the existence of legislation regulating employment of children, children are continued to be economically exploited due to inadequacy of sufficient protective legislation and strong enforcement machinery to implement laws passed by Parliament.

On an examination of the minimum age for employment in Sri Lanka one will find that our minimum age for employment lags behind international standards. The ILO Convention Concerning the Minimum Age for Admission to Employment (1973) defines the minimum age for employment as 15 years while the ILO Recommendation concerning the Minimum Age for Admission to Employment (1973) advises that those countries which adopted a lower age should take urgent steps to raise this age to 15. The position taken by the ILO Convention is strengthened by the Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999) which defines the term ‘worst form of child labour’ as work which by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children. The Sri Lanka Children’s Charter (1992) adopts a very similar position to that in Article 32 of the CRC but goes a step further and sets the upper age limit for compulsory education as 16 years. It is to be noted that the UN Committee on the Rights of the Child having studied the initial report of the Sri Lankan government on its progress recommended in June 1995 that the age for employment be raised and compulsory education up to the age of 15 years be introduced.

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67 Employment of Women, Young Persons and Children Act.
69 Article 2.3.
70 Articles 2.3 and 2.4.
71 Ibid.
72 Article 28(1).
Adoption of the maximum age for compulsory education as 14 years and the recognition of the right to education up to 14 years as a fundamental right in the proposed Constitution\textsuperscript{74} is a retreat from earlier standards in the Education Ordinance (1939)\textsuperscript{75} and in the Children’s Charter (1992)\textsuperscript{76} and the government undertaking\textsuperscript{77} that compulsory education should be provided to children up to the age of 16 years. It is to be noted that acceptance of age 14 as the minimum age for employment is not in conformity with the ILO Convention and also with other human rights treaties that supports the position of this Convention. Raising the minimum age for employment to 15 years will keep our child employment legislation in line with international\textsuperscript{78} and local\textsuperscript{79} standards and expert opinions.\textsuperscript{80} It will ensure that all Sri Lankan children will receive an education up to year 10 in the school curriculum. This will act as an incentive to some of them to wait another year and sit for the G.C.E. (Ordinary Level) Examination in year 11, which is considered as a basic qualification for all jobs in the regulated sector.

Goonesekere observes\textsuperscript{81} that deleting the statutory prohibition in the CYPO on employment of children under 12 years and giving it an inferior status as a regulation promulgated under the EWYPCA has resulted in concealing this important provision from the public scrutiny.\textsuperscript{82} The Technical Committee on Child Employment\textsuperscript{83} too observes that many people were

\begin{itemize}
\item Section 37(s) of the Education Ordinance No. 31 of 1939 as amended.
\item Article 28(1).
\item Article 2.3 of the ILO Convention Concerning Minimum age for Admission to Employment (1973); Article 7.2 of the ILO Recommendation No. 146 concerning the Minimum Age for Admission to Employment (1973); Article 32(2) of the UN Convention on the Rights of the Child (1989) which refer to relevant provisions of international instruments; Observations of the International Committee on the Rights of the Child referred to in Muttetuwegama, Supra n. 73.
\item Report containing recommendations of the Technical Committee on Child Employment appointed by the Minister of Social Service to look into child employment and child abuse and forward their recommendations for legislative and administrative reforms (unpublished); Report of National Workshop on Child Labour in Sri Lanka organised by the ILO Colombo and the Ministry of Labour and Vocational Training from 4\textsuperscript{th} to 6\textsuperscript{th} September 1996 at Galadari Hotel in Sri Lanka.
\item Goonesekere, S.W.E., Children, Law and Justice: A South Asian Perspective, Sage Publications, New Delhi, p. 216.
\item Goonesekere, S.W.E., Child Labour in Sri Lanka: Learning from the Past, ILO, Geneva, p. 46.
\item The regulations published in a gazette notification in 1958 are not easily accessible. Other than the National Archives, the only place where a copy of the gazette is available for inspection is the Labour Ministry.
\item Report of the Committee appointed by the Minister of Social Service to look into child employment and child abuse and forward their recommendations for legislative and administrative reforms.
\end{itemize}
unaware that this minimum age regulation had superseded the provision in the Minimum Wages (Indian Labour) Ordinance (1927) which had stipulated the minimum age for employment of a child on estates as 10 years.

It is to be noted that the regulatory measures introduced by the Employment of Women, Young Persons and Children Act (1956) in regard to the employment of children under 14 years do not apply to employment by their families in industrial undertakings, at sea and at night. Further, Industrial undertakings in relation to children under 14 years have been interpreted to include a very wide range of activities which make it difficult to distinguish them from prohibited employment. As studies on the employment of children have revealed, the act of exempting families from the general prohibitions introduced for the protection of children under 14 years has had the effect of permitting exploitation of children within the family circle and creates problems in implementing these prohibitions successfully.

Lack of strong enforcement machinery to ensure implementation of labour laws has resulted in more and more exploitation of children under minimum age for employment in the informal sector. Though compulsory education rules have been promulgated, children under 14 years are still employed in garages, residences, hotels and restaurants etc. during school hours. It appears that compulsory education rules are confined to statutory books and are not implemented anywhere in the country. Education and Labour authorities need to be provided with manpower, vehicles and resources to implement labour laws and compulsory education rules.

In regard to marriage laws, failure to reform the Muslim law, by specifying a minimum age for marriage under that law and by requiring the Muslim bride to sign the marriage register, has had wide repercussions on the Muslim girl child. Muslim law as applied at present does not recognise a minimum age for marriage and it is the wali or the marriage guardian, who is always the father of the Muslim bride, that signs the marriage register on behalf of the bride. This may lead to forced child marriages on young Muslim girls, which is not in their

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84 Section 7 (2)(a) of the Employment of Women, Young Persons and Children Ordinance.
85 Section 9 (2)(a).
86 Section 3 (1)(c).
87 Section 34 (c).
best interest. International standards\textsuperscript{90} medical opinion\textsuperscript{91} and surveys\textsuperscript{92} indicate the necessity of initiating an in-depth discussion on the need to specify a higher minimum age for marriage under Muslim law in order to convince the Muslim community regarding the advantages of adoption of a higher minimum age for marriage.

When the minimum age for marriage was raised to 18 years in 1995, wide publicity was not given to this legal requirement. As a result many young people under 18 years are still unaware that the marriageable age is now 18 years. They fall into trouble when they elope and find that they cannot marry under the law. If the police arrest them, the young man may face the risk of being charged for kidnapping a minor girl from the custody of her parents. The situation may be worsened if the girl is under 16 years and the medical examination reveals that the couple had sexual intercourse, because the male partner can be charged for statutory rape. If the parents refuse to take back the girl or the girl refuses to go back to parents, the court may order that the girl be placed in a children’s remand home until she attains the age of majority. This greatly affects the education of both the boy and the girl. The situation will become worse if the girl becomes pregnant and delivers a child who will be treated as a non-marital child by society. On the other hand, since sexual relationships among males and females over 16 is not prohibited by law, lack of knowledge regarding contraceptive methods, sexuality and legal aspects of marriage will expose girls between the age of 16 – 18 years to unwanted pregnancies and delivery of non-marital children who suffer many social and legal disabilities.

Article 17 of the Convention recognises the right of children to have access to information and material from a diversity of sources especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health. This right to information includes information relating to laws that affect them as well as medical information such as sexuality, contraceptive methods etc. Needless to say that such information will guide youth to prepare them for the future with greater confidence.

\textsuperscript{90} The Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962) declares that no marriage shall be legally entered into without the full and free consent of both parties and advocates specifying a minimum age for marriage while the UN Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1965) declares that member States shall take legislative action to specify a minimum age for marriage, which in any case shall not be less than fifteen years of age.

\textsuperscript{91} An article written by C. Aloysius based on a paper on Teenage Pregnancies presented by Dr. A. Atapattu, a Senior Lecturer in Obstetrics and Gynaecology and Head of the Department at the University of West Indies which appeared in the “Sunday Observer” on 15.11.1998 reveals that a high incidence (39.8\%) of babies born to teenage mothers in the age group 15-19 years were below 2500 grams at birth and that adolescent girls who become pregnant suffer from pregnancy related complications such as toxemia, anemia, pre-eclampsia, premature delivery, low birth weight babies and prolonged labour.

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In order to alleviate the difficulties faced by unmarried mothers of all ages and the children born to them, it is necessary to take action to do away with the requirement of stating the marital status of the parents of the child concerned in the birth certificate. This will help to erase the social stigma that non-marital children are compelled to carry during their lifetime. It is also necessary to reform the law on intestate succession so as to enable non-marital children whose paternity has been established before a court of law, to claim intestate inheritance rights from the natural father.

Article 12 of the Convention on the Rights of the Child recognises the participation rights of children in judicial proceedings and advocates State parties to provide the opportunity for the child to be heard in judicial and administrative proceedings affecting the child either directly or through a representative. On an examination of the present Sri Lankan law, one will find that children do not get legal representation in criminal proceedings in the Magistrate’s Courts and High Courts or in the Juvenile Court and in Magistrate’s Courts sitting as Juvenile Courts.

Though the Civil Procedure Code provides limited representation for children in civil actions by and against minors, this has not been satisfactory as parents who have conflicting interests with their children will represent the children. As a result interests of children are not independently represented in court proceedings. Similarly when decisions are taken affecting children in divorce or custody proceedings or in proceedings for the alienation of interests of children in property, children are not independently represented.

The Convention\textsuperscript{93} and international standards\textsuperscript{94} make it clear that any person, including a child, should get representation compulsorily in criminal and juvenile proceedings. Recognising this constitutional right of children, the US Supreme Court in 1967 held in \textit{re Gault} (1967)\textsuperscript{95} that in juvenile proceedings where the freedom of the juvenile was going to be curtailed by referring him to a detention home, the child has a right to be represented by a lawyer retained privately or at State expense if he is unable to retain a private lawyer. But our Constitution (1978) and other Sri Lankan legislation dealing with criminal and juvenile proceedings does not recognise the right to representation in judicial proceedings.

\textsuperscript{93} Article 40 of the Convention on the Rights of the Child deals with the due process rights of the child involved in juvenile or criminal proceedings, which includes among other matters the right to representation in court proceedings.


\textsuperscript{95} 387 US 1 (1967).
Several studies\(^9\) on children have revealed that lack of legal representation for children in court proceedings badly affects the abandoned or neglected child participating in such proceedings as an offender or a victim. Similarly in civil proceedings, decisions affecting children such as custody and property matters are taken without giving any representation to them. A recent study on the Abused Child commissioned by the National Monitoring Committee on the Children’s Charter has recommended that a child involved in the legal process should get legal representation as a matter of right. It further recommended that this right should be incorporated in the Fundamental Rights Chapter of a new Constitution.\(^7\)

Although section 118 of the Evidence Ordinance (1895)\(^8\) does not insist on the corroboration of the unsworn evidence of a child witness, some hold the view\(^9\) that this rule of practice is almost equivalent to a rule of law and a court is generally required to warn the jury in a rape case regarding the danger of acting on the uncorroborated evidence of the prosecutrix and in the absence of such an explicit warning the conviction would be generally quashed in appeal.\(^10\) But there are judicial decisions\(^11\) and academic opinion\(^12\) that declare that the failure of the trial judge to warn the jury not to act on the uncorroborated evidence of the prosecutrix would not constitute a non-direction. In cases involving rape of children the two requirements that have to be established by the prosecution are the act of rape and the identity of the abuser. Since medical evidence can prove the alleged act of rape itself, evidence has to be led only in regard to the identity of the alleged rapist.

In this connection *Punchibanduge Wijesinghe Rajaratne v. A.G.* (1996) is very important from the perspective of a child witness and a victim. The Court of Appeal held that in a case where the identity of the accused is an issue, it is no longer necessary for a direction to be given on corroborating the evidence of the complainant in regard to the identity of the accused, provided the judge gives proper direction tailored to the facts of the case.\(^13\)


\(^8\) Ordinance No. 14 of 1895 as amended.


\(^11\) *Punchibanduge Wijesinghe Rajaratne v. A.G.* C.A. 13/94. (Unreported)


law on evidence needs to be amended adopting such a course of action in rape cases to give justice to children involved in sexual abuse.

The Juvenile Court is vested with exclusive jurisdiction to hear and determine any case in which a child or young person is charged with any offence other than a scheduled offence and any question of law or fact arising in such case. The court lacks jurisdiction to deal with adult offenders who commit crimes on children. As such, when an under age child who had been employed by an adult, or a child who is sexually abused by an adult is brought before the court together with the adult offender, the Juvenile Court should remit the case to the Magistrate’s Court which has jurisdiction to deal with the adult offender. But when an employed under age child is produced before the Juvenile Court, what the court practically does is to persuade the adult violator of the law to pay compensation to the child either in full or in instalments on the argument that the child will get nothing if the case is remitted to the Magistrate’s Court. Vijaya Samaraweera reveals a case where an employer had been permitted to pay a sum of Rs.10,000 determined by the court as compensation, in monthly instalments of Rs.200. From June 26, 1995 the case had been called 29 times by the Court to monitor the payment. This arrangement totally ignores the two important concepts of the criminal justice system, i.e. punishment and deterrence.

According to Article 37(b) of the Convention, any arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time. Article 37(c) declares that every child so deprived of liberty should be treated with humanity and respect. Other international instruments too support this position. But many Sri Lankan children, who are victims of crime, are detained in remand homes indefinitely for various reasons while the adult person who committed the crime is released on bail within a short period of time. The study on the Abused Child cites case of a 13-year-old girl as a typical example for the situation of the Sri Lankan children. Her own father had sexually abused her. On the order of the court she had been detained in the Certified School for Girls at Rammuthugala for more than two years. During this time she had appeared before the court 24 times for trial.

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104 Section 4(1) of the Children and Young Persons Ordinance.

105 When the writer of this article, in collecting data for the report prepared by Dr. Vijaya Samaraweera, interviewed the then Magistrate of the Juvenile Court, Ms. W.C. Pushpamali, she said that court adopts this procedure to obtain some monetary compensation for the child as she is well aware that when the case drags on in the Magistrate’s Court for years, parents lose interest in the case and do not bring the child to the court and ultimately the child does not get anything from the adult offender who sometimes retains a clever lawyer and escapes with minimum punishment.

106 Supra n. 97, p. 83.


108 Supra n. 97, p. 83.
Further, child workers and street children taken into custody by the police are produced before the Juvenile Court which remands them in Remand Homes for boys and girls. Many of these remand homes are locked facilities. Movements of children in these remand homes are limited to the four-corners of the building. These children who are innocent and victims of social problems are detained together with juvenile offenders violating all guarantees given in above stated international instruments. Vijaya Samaraweera points out the case of boys detained at the Boys Remand Home at Kitulampitiya, Galle which is a locked facility consisting of three small rooms and one toilet. On a particular day 24 boys had been detained in these rooms violating all human rights.\textsuperscript{109} It is necessary raise public awareness on Convention standards to put pressure on the government to observe its obligations under the CRC.

The Escort Branch of the Welikada Prison in Colombo has been assigned the responsibility of producing children in Children’s remand homes before courts and transporting them between these remand homes and courts daily. The children so brought are temporarily housed in a small building within the prison premises. This building is a locked facility without proper ventilation and other basic amenities. Due to lack of facilities the children are detained in this collection centre and transported back to remand homes in a prison vehicle together with adult mental patients. Needless to say this is a clear violation of standards set out in the CRC. As many of these children are victims of crimes who need care, rather than being treated as offenders, the Prison Department, which is associated with punitive elements, is not the most suitable institution to handle these children.

Though the substantive law on offences against children has been extensively amended and updated, failure to introduce a child friendly court environment has resulted in denying justice for children who come before criminal courts as offenders, victims and witnesses. The intimidating environment within the courts surrounded by lawyers, the police, court officials and the judge all of whom wearing uniforms dignifying their authority and more importantly the glaring gaze of the accused does not provide a peaceful atmosphere for the child to participate effectively in judicial proceedings. Even the Juvenile Court which was especially created to hear only cases relating to children have not been able to provide a child friendly environment. Until such time action is taken to amend the substantive and procedural laws to introduce a court environment that allows children to participate in the proceedings without fear and a sense of insecurity, justice would be a dream for children who seek justice from courts.

\textsuperscript{109} Supra n. 97, p. 50.
CONCLUSIONS AND RECOMMENDATIONS

The above discussion on the law and procedure relating to children reveals that drastic changes are needed in certain areas.

In order to prevent exploitation of children in employment, the Employment of Women, Young Persons and Children Act needs to be revised. A new amendment to the Act should specify that the minimum age for employment should be 15 years to update our law to fall in line with international standards. Similarly compulsory education rules promulgated by the Government in 1997 needs to be changed, raising the maximum age for compulsory education to 15 years.

Further, exemptions given in the Employment of Women, Young Persons and Children Act (1956) for parents from penal sanctions imposed on other persons for employing children has had the effect of permitting parents to exploit their own children by employing them in family enterprises. Therefore, all provisions in the Act which give exemptions to parents should be repealed. Legislation that act as a deterrent on parents who violate the law and employ children in their business should be introduced.

Similarly, efficient enforcement machinery should be introduced to implement minimum age laws and compulsory education rules by the Departments of Labour and Education respectively. These departments should be equipped with manpower, vehicles and financial resources to carry out their duties. Legislation authorising the officers of these departments to inspect private homes, work places and other places where children are alleged to be employed should be introduced. Heavier punishments should be introduced in the employment laws to deal with violators of the provisions on minimum age for employment.

Mass education programmes should be introduced by the Department of Labour to educate the general public regarding legal provisions on employment of children and the sanctions that are imposed on violators. The wide publicity for hotline telephone facility maintained at the Child Protection Authority to receive information on employment of underage children should be continued. Similarly it is imperative that Children’s and Women’s desks are established in all Police Stations to deal with offenders.

In order to stop employment of children below 15 years in the informal sector, Employment of Women, Young Persons and Children Act should be amended requiring all employers in the informal sector to register the particulars of their employees with a separate unit in the Labour Department. Employment of a person in residences, garages, restaurants, hotels and other small enterprises without registering such employees with the Department of Labour should be prohibited. Severe punishments should be introduced for violating such laws.
As surveys, medical evidence and international standards reveal, setting a minimum age for marriage below 18 years is not in the best interests of both the mother and the child. It is therefore necessary to amend the Muslim Marriage and Divorce Act specifying the minimum age for marriage under that law as 18 years and also requiring the Muslim bride to sign the marriage register. As Muslim law does not recognise a minimum age for marriage, strong resistance could be expected from the Muslim community. Television and radio programmes to educate them regarding adoption of a minimum age for marriage and permitting the Muslim bride to express her consent to marriage by signing the marriage register should be introduced.

Sections 4(2) and 4(3) of the Kandyan Marriage and Divorce Act (1952) permits Kandyan parties who had registered a marriage when they were below the minimum age for marriage by falsely giving an age higher than the minimum age (which would render such marriage invalid) to get it validated by their subsequent conduct. Failure to repeal this section when the minimum age for marriage under Kandyan law was raised to 18 years in 1995 has created an anomaly. Since retention of this section undermines the amended section on minimum age for marriage under Kandyan Law, it should be repealed without delay.

The amendment introduced in 1997 to section 22(1) of the Marriage Registration Ordinance (1907) requiring the consent of parents for marriages of persons below 18 years under the General Law has become superfluous when the minimum age for marriage under that law was raised to 18 years. Since persons below 18 years can no longer contract a valid marriage under this law, retention of this section creates confusion. As such the amendment introduced in 1997 and section 22(1) of the Marriage Registration Ordinance (1907) should be repealed.

Introducing changes in the law on intestate succession is necessary to enable non-marital children to claim intestate succession rights to the property of their natural fathers who admit the paternity of their non-marital children or who have been adjudged as the natural father of the non-marital child. Further, it is necessary to change the format of the birth certificates issued by the Registrar General’s Department by deleting the clause which require parents to declare whether they were married or not. In order to minimise objections from the Muslim community who do not recognise rights of non-marital children, the State should initiate discussion within society to enlighten them regarding the injustice caused to non-marital children by compelling them to pay for the sins of their parents.

The Constitution should be amended recognising the right of children to representation in criminal and juvenile proceedings as a fundamental right. Further, all legislation dealing with children should be revised making provisions for representation of children in criminal and juvenile proceedings at the State’s expense. Similarly, the Civil Procedure Code should be amended making provision for the compulsory appointment of an independent person not related to the child as a guardian *ad litem* to represent the child in all civil proceedings where decisions affecting the child are taken. Parents should be required to bear the cost of
payments for such guardians *ad litem*. Appointment of Welfare Officers in all District Courts will help an independent person to assess the situation of children in divorce and custody disputes and report to the court a best solution untainted with bias.

The Evidence Ordinance should be amended liberalising the competency requirement of children as witnesses in child abuse cases and clarifying that the corroborating evidence of the prosecutrix in rape cases or sexual abuse cases is not compulsory if the trial judge gives proper direction tailored to the facts of the case. This amendment should clarify that any failure on the part of the trial judge to give direction as regards the corroborating the evidence of the prosecutrix should not vitiate the decision of the jury as regards the culpability of the accused if they are convinced that the prosecutrix is telling the truth.

The Children and Young Persons Ordinance should be amended extending the jurisdiction of the Juvenile Court to deal with adult offenders who violate laws relating to children. Any compensation payable for the child should be recovered from such adult offenders as an outright fine payable to the court and deposited in the name of the child in a bank account.

Further, handling of children involved in court actions should be removed from the Prisons Department and should be handed over to a civil agency like the Probation and Child Care Department. This will eliminate various kinds of hardships children undergo while being transported between Remand Homes and the Courts and also at the Escort Branch of the Prisons Department.

A new provision to the Children and Young Persons Ordinance (1939) should be introduced to establish a separate child hearing system as adopted in Scotland. This will help to deal with juvenile offenders in an out of court environment and bring the administration of juvenile justice system in Sri Lanka in line with that of the Convention standards depicted in Article 40(3)(b) of the CRC. Once such a system is introduced, only cases that need care and supervision should be referred to this hearing system, and cases, which involve curtailment of liberty of a juvenile should be referred to the Juvenile Court or Magistrate’s Court. A procedure for such a hearing system should be incorporated in regulations published under the Ordinance. The services of laypersons could be obtained for such a child hearing system and a State Counsel should be assigned to determine the cases that should be referred to it.

In order to introduce a child friendly atmosphere in the ordinary courts, all procedural laws that deal with the administration of criminal and juvenile justice such as the Criminal Procedure Code (1979) should be amended to make provisions for facilities such as one-way closed circuit television in the court which enable the child to give evidence not in the courtroom but in an adjacent room, or use of a screen or one-way glass to cover the accused in criminal cases from the sight of the child. This will help children to actively participate in the proceedings without any fear.
Further, in order to curtail the practice of inflicting inhuman and degrading punishments on children in schools and society, the provisions in the Corporal Punishment Ordinance (1889) which authorises courts to impose corporal punishment on children and adults, provisions in statutes such as the Children and Young Persons Ordinance (1939), the Education Ordinance (1939) and the Penal Code (1883) which empower courts, teachers and parents to impose physical punishments on children and the circular issued by the Ministry of Education which permit school authorities to impose corporal punishment on students should be repealed.
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ASPECTS OF 50 YEARS OF
LAW, JUSTICE AND GOVERNANCE
IN SRI LANKA

A COMPILATION OF PAPERS PRESENTED AT
THE CONFERENCE ON 50 YEARS OF LAW, JUSTICE AND
GOVERNANCE IN SRI LANKA

This book contains a compilation of papers presented at the conference organized by Law & Society
Trust on Law, Justice and Governance at the Taj Samudra Hotel in November 2000 to commemorate
fifty years of independence in Sri Lanka, which fell on 4th February 1998.

The topics included in the publication are, fifty years of civil activism in Sri Lanka; a general overview
of the media in Sri Lanka since independence; the judiciary; the human rights commission and the
ombudsman; the role of the law commission as a legal institution in Sri Lanka; commercial law; fifty
years of Sri Lanka’s participation in international trade; a brief examination of privatisation and the
importance of regulatory regimes; an appraisal of the income tax laws in Sri Lanka: a human rights
perspective; a general overview of the national intellectual property regime in Sri Lanka since
independence; criminal law in Sri Lanka; a general overview of the police system in Sri Lanka; a
general overview of the of labour law in Sri Lanka; tracing fifty years of environmental law in Sri
Lanka; the dilemma of the migrant workers; the story of national security laws and a general overview

This publication is meant to give the readers a general idea of the development of law, justice and
governance since independence, in the specific subject areas covered and it is hoped that the discussion
and analysis would provide interesting reading material.

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