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Justice in retreat: A report on the independence of the legal profession and the rule of law in Sri Lanka

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Executive Summary

This is the executive summary of the report of a fact-finding mission to the Democratic Socialist Republic of Sri Lanka ('Sri Lanka') carried out by a high-level International Bar Association Human Rights Institute ('IBAHRI') delegation between 28 February and 6 March 2009. The IBAHRI's decision to visit Sri Lanka was prompted by concerns regarding the status of the rule of law, the independence of the judiciary and the ability of the legal profession to exercise its professional duties freely. These concerns arose following reports of tensions between the executive and the judiciary regarding the execution of judgements and the ongoing non-implementation of the 17th Amendment to the Constitution, reports of an increase in threats and attacks against lawyers and the impact of Sri Lanka's state of emergency and counter terrorism legislation on the rule of law and the administration of justice. The IBAHRI was also concerned about the situation of the media and freedom of expression following reports of murders and harassment of journalists.

The delegation comprised Lord Goodhart QC, member of the House of Lords and former Vice President of the International Commission of Jurists; Mr YeoYang Poh, barrister at law and former President of the Malaysian Bar Association; Mr Alex Wilks, IBAHRI Programme Lawyer and Ms Michelle Butler, barrister at law and mission rapporteur.

The terms of reference of the mission were:

(i) to examine the current status of lawyers and judges in Sri Lanka and their ability to carry out their professional duties freely;

(ii) to examine the legal guarantees for the effective functioning of the justice system, including the independence of the judiciary and whether these guarantees are respected in practice;

(iii) to investigate impediments, either in law or practice, that jeopardise the administration of justice and the respect for the rule of law and national and international human rights standards; and

(iv) to make recommendations with respect to the above.

The delegation met with a wide range of government officials and members of the judiciary and the attorney general's office, the legal profession, media and civil society. Delegates also benefited from meetings with representatives of various foreign embassies and international organisations. The delegation wishes to express its sincere gratitude for the assistance and hospitality given by all those it met.

The full conclusions and recommendations of the mission are included in Chapter 7 of this report.

Summary of conclusions

Many of the problems identified in the 2001 IBAHRI Report continue to affect the independence of the legal profession and the rule of law in Sri Lanka and in some respects the situation has deteriorated significantly. Judicial independence, the increase in threats and attacks against lawyers filing fundamental rights applications, representing terrorist suspects and taking anti-corruption cases, and the situation of journalists are areas of particular concern.

The courts and judiciary

The Government's continuing failure to fully implement the 17th Amendment and re-establish the Constitutional Council has reduced public confidence in its commitment to independent institutions and the rule of law. The prompt implementation of the 17th Amendment and the re-establishment of the Constitutional Council would ensure critical independent oversight of the proper functioning of Sri Lanka's key institutions, including the Judicial Services Commission, and resolve several of the constitutional and governance issues currently facing Sri Lanka.

There is a widespread perception of the lack of independence of the judiciary, which has had a detrimental impact on the functioning of the justice system in Sri Lanka. The lack of independent oversight and practice of executive presidential discretion over judicial appointments makes the judiciary vulnerable to executive interference and jeopardises its independence.

The current procedures for disciplining and removing judges at all levels of the judiciary are in urgent need of review in order to rebuild both the morale of the judiciary and public confidence in it. The requirement for parliamentary approval for impeachment of senior judiciary by a simple majority makes it vulnerable to politicisation. The Judicial Services Commission does not have adequate safeguards to ensure the transparency and independence of its decision-making process and is not able to guarantee a fair hearing for judges and judicial officers under investigation.

The IBAHRI is disturbed by several reports of lower court judges being arbitrarily threatened with removal from the bench or with baseless disciplinary or criminal proceedings. These threats appear to have been carried out in some circumstances and have forced resignations in others.

The judiciary is currently vulnerable to two forms of political influence: from the Government and from the Chief Justice himself. The nature and degree of influence oscillates between the two and depends on the relationship between them at the time. The perception that the judiciary suffers from political influence has arisen in recent years due to the excessive influence of the Chief Justice, the apparently inconsistent jurisprudence of the Supreme Court in relation to certain issues, and through tensions between the judiciary and the executive.

Chief Justice Silva is perceived to be a domineering personality who is very much in control of all aspects of the functioning of the judiciary. As a result of his control over the listing of cases in the Supreme Court, it is commonly believed that he has used the administration of the case allocation procedure as a tool to sideline senior Supreme Court judges from hearing politically sensitive cases. The perceived close relationship between the Chief Justice and the Government has from time to time made individual judges reluctant to return judgements which may be perceived to be critical of

the executive. This may be illustrated by the scarcity of dissenting judgements during his tenure in office.

The IBAHRI is concerned that the recent expansion of the concept of the doctrine of locus standi and of the constitutional right to equality in fundamental rights cases is based on the inclination of the Chief Justice to pronounce on populist issues rather than on a sound rationalisation of legal principles. Furthermore, the apparent decline in the number of fundamental rights applications being lodged in recent years is a matter of significant concern.

The legal profession

The increase in attacks against lawyers filing fundamental rights applications, representing terrorist suspects and taking anti-corruption cases has created an escalating climate of fear amongst the legal profession which was not apparent at the time of the last visit.

The threats and attacks against these lawyers are not considered to be isolated events but rather form part of a pattern of intimidation routinely expressed against members of civil society, including journalists, academics and NGO workers, who are perceived to be critical or challenging of the Government or its policies, particularly with respect to the conflict with the LTTE. The brazen nature of some of the attacks, the lack of prompt and effective investigation or prosecution, and the consequential sense of impunity surrounding these incidents, have exacerbated this climate of fear.

This has created a 'chilling effect' which permeates the legal profession. Lawyers are forced to consider relinquishing cases which may be perceived as politically sensitive, some are forced to leave the country for fear of their own personal safety, and others are deterred from taking up such cases. Lawyers are frequently subject to harassment by police officers, including verbal and physical threats. Bringing complaints against the police is considered to be a dangerous activity. This is a worrying indication of the deterioration in the independence of the legal profession and the rule of law in Sri Lanka over recent years.

The IBAHRI is alarmed by the article entitled 'Who are the human rights violators?' published on the Sri Lankan Ministry of Defence's website, which includes the names of lawyers representing terrorist suspects and implies that they themselves are connected with terrorist activity. Apart from being misleading as to the outcome of the cases mentioned and inaccurate in other respects, the publication of this type of rhetoric on a government website is deeply inappropriate and, particularly in the current context of an increased risk of threats and attacks against lawyers, is potentially inflammatory, jeopardising the physical safety of those named.

The article also creates the impression that this represents the Government's position on lawyers who take on such cases. The IBAHRI was assured by government representatives that the article had been removed; however, it was still accessible on the Ministry of Defence's website at the time of writing.

The arbitrary use of contempt powers by the courts and the broad and ambiguous definitions of terrorism-related offences contained in Sri Lanka's counter-terrorism legislation constitute further threats against the independence of the profession.

Whilst the Bar Association of Sri Lanka (BASL) has been reactive to the existence of these threats, it is clear that there is a real need for the Bar to be more proactive, not only with respect to threats to its members but also on wider rule of law issues.

It appears that at present there are gaps in the curriculum for persons training to become lawyers, in the field of human rights and in the study of English. Both areas are critical in understanding and ensuring compliance with the fundamental rights set down in the Sri Lankan Constitution, which are derived from internationally accepted standards and jurisprudence.

At present, the legal aid system in Sri Lanka does not appear to have been made fully available to those charged with terrorism-related offences. This deficiency in the provision of legal aid means that some members of Sri Lankan society, particularly those of Tamil ethnicity, are unprotected within the criminal justice system.

The media

Whilst there have been some media-related reforms which have taken place since the IBAHRI's last visit, overall the situation with respect to freedom of expression in Sri Lanka has deteriorated significantly since 2001.

The IBAHRI is concerned by continuing governmental control and influence over the media and reiterates the conclusion of the previous visit that Sri Lanka would benefit from an independent, pluralistic media which is free from state ownership and political influence. The use of criminal law, in particular under the counter-terrorism legislation, to detain and prosecute journalists who are considered to be critical of the Government is unacceptable.

The situation regarding the physical safety of journalists has deteriorated significantly since 2001, and the IBAHRI is disturbed to hear reports of journalists who have been murdered, and many others who are consequently leaving the country. The climate of fear which presently pervades the journalistic community, particularly amongst those who express critical views on either side of the conflict, has had the effect of stifling free and open debate.

The IBAHRI regrets that no prosecutions have been forthcoming in any of the recent cases relating to the murders of journalists and is concerned that this has fostered an atmosphere of impunity amongst those responsible for these serious crimes.

The combination of continued government control and interference, the use of repressive criminal legislation to prosecute journalists, and an increase in attacks against the media have had a chilling effect on freedom of expression in Sri Lanka. This has in many cases led to self-censorship – one of the most insidious forms of persecution. It is imperative for the maintenance of the rule of law and a strong democracy in Sri Lanka for Tamil, Sinhalese and English language journalists to operate freely, including conducting robust investigative reporting, without fear of retributive attack or incrimination.

The Emergency Regulations and the Prevention of Terrorism Act

The Emergency Regulations and the Prevention of Terrorism Act have a negative impact in practice on the right to freedom of expression, both for lawyers and journalists, and also impinge on several fundamental legal guarantees, in particular the principle of legality, pre-trial rights during arrest and detention and due process guarantees in criminal cases.

Many of the legislative and regulatory provisions represent such a wholesale reduction of the essence of fundamental due process guarantees that it is unlikely they are 'strictly necessary to deal with the threat to the life of the nation' and 'proportionate' in their nature and extent. The long term application of these exceptional legislative provisions has led to a significant deterioration in the rule of law and public confidence in it, and has contributed to the development of a perception of institutional impunity within the Sri Lankan legal system.

The IBAHRI was, however, heartened that all of the government representatives it met with acknowledged that these extraordinary legislative and regulatory provisions are 'exceptional' measures which are intended to be repealed as soon as the armed conflict is over.

Recommendations

The courts and the judiciary

- The IBAHRI welcomes the fact that the Supreme Court appears to be pressing for the prompt re-establishment of the Constitutional Council. The IBAHRI calls on the President to immediately appoint the nominees already agreed on by the various political parties.
- A return to the system of independent oversight of appointments of superior court judges with nominations being made or approved by the Constitutional Council will significantly help to restore public confidence in the independence and impartiality of the process. These measures are of particular importance for the upcoming appointment of a new Chief Justice in June 2009.
- The appointment, transfer, dismissal or retirement of judges at all levels must be determined by a transparent and accountable system. Built into this system must be the opportunity for a fair hearing in which proceedings are recorded and a copy given to the judge in question followed by a reasoned decision, with a right of appeal.
- In relation to senior judges, the impeachment procedure currently in place should be reviewed and amended to ensure judicial, and not parliamentary, supervision over judicial conduct. In relation to lower court judges, the independence and impartiality of the Judicial Service Commission's operations must be greatly improved, for example through the strengthening of its internal procedures and the publication of criteria governing the appointments and disciplining of judges.
- It would considerably enhance confidence in the independence and impartiality of the Judicial Service Commission's operations if its membership were expanded to include representatives of the legal profession and civil society.

The IBAHRI expresses hope that the new Chief Justice, who is due to be appointed in June 2009,

adopts internationally accepted best practice in his or her stewardship of the Supreme Court in order to assist in boosting standards of judicial independence in Sri Lanka.

The IBAHRI is disappointed that several of the recommendations contained in the IBAHRI 2001 report have not as yet been implemented. The IBAHRI therefore reiterates the importance of those recommendations which it considers relevant in the current context to the new Chief Justice.[1]

The IBAHRI makes the following further recommendations to the new Chief Justice:

- To create a judicial environment where all extraneous influences on judicial decision making – whether originating from the executive, the JSC, within the judiciary or from any other quarter – are strongly discouraged and successfully repelled.
- To issue guidelines to all judicial officers on the appropriate exercise of their inherent powers of contempt, including guidance for judges as to the conduct of contempt proceedings and the range of penalties which are considered proper in the event of a conviction.
- To ensure the conscientious application of legal principles to the facts of cases before the courts, unencumbered by extraneous influences and supported by detailed reasoning, in particular with respect to fundamental rights applications involving the doctrine of locus standi and the right to equality.
- To adopt the practice whereby reasoned judgements are provided when refusing leave to proceed in fundamental rights applications.

The IBAHRI makes the following recommendations to the Government of Sri Lanka:

- To enact legislation circumscribing the court's inherent powers of contempt.
- To ensure that it promptly and fully implements all past and future court orders.
- To refrain from making criticisms or making public statements which are, or may be perceived to be, intimidating and contrary to the principles of judicial independence.

The legal profession

The IBAHRI makes the following recommendations to the Government of Sri Lanka:

- The Government must comply with its international obligations to protect and promote the independence of the legal profession and to ensure that lawyers are able to perform all professional functions without intimidation, hindrance, harassment or improper interference.
- The Government is encouraged to expedite the police investigations into the threats and attacks upon lawyers, and to ensure that they are independent, thorough and effective. The Government is urged to take preventative steps to ensure the security of lawyers under threat.
- The Government must refrain from publishing potentially inflammatory rhetoric against lawyers representing terrorist suspects, and from identifying attorneys with their clients' causes. The article entitled 'Who are the human rights violators?' must be withdrawn from the website of the

1 See pp 89-90

Ministry of Defence with immediate effect and must also be removed from its archive.

- The Government is urged to ensure the proper functioning of the committee to oversee the code regarding the presence of lawyers at police stations. Proper disciplinary proceedings should also be taken against police officers regarding allegations of harassment and threats against lawyers by police officers.
- The Government, in conjunction with the various institutions for legal education in Sri Lanka including the Bar Association of Sri Lanka, should strengthen the training for prospective attorneys-at-law as part of its long term commitment to the legal profession and the rule of law.
- The Government and international donor organisations should review the practicalities of the Legal Aid Commission's grant system in order to ensure that persons subjected to allegations of terrorism are in practice afforded their right to legal counsel.
- The Government should take steps to improve access to justice for the more vulnerable members of the Sri Lankan population, such as those of Tamil ethnicity, who have a statistically greater likelihood of being accused of a terrorism-related offence.

The IBAHRI makes the following recommendations to the Bar Association of Sri Lanka:

- The leaders of the Bar Association of Sri Lanka (BASL) should strive towards acting with greater independence from the Government. BASL should also undertake further strategies aimed at strengthening the capacity of attorneys to function with dignity and without fear.
- Leaders of BASL are encouraged to speak out not only to protect its members, but also to speak out on wider rule of law and human rights issues. BASL is encouraged to be more proactive than reactive on these issues. The strength of any bar association depends on the active participation of all its members.
- Particular initiatives which the IBAHRI encourages BASL to pursue include amicus curiae interventions in fundamental rights cases, following up on BASL resolutions with meetings with affected parties, and adopting a more concerted approach to collective action whenever one of its members is threatened.
- BASL, in conjunction with civil society organisations, should provide additional continuing legal education on human rights issues as well as courses administered in English for lawyers who are already in practice.

Media

- Extensive state ownership of media outlets should be reduced, and all forms of governmental pressure on media outlets and journalists should cease.
- Criminal legislation touching on freedom of expression, including the Prevention of Terrorism Act and the Emergency Regulations, should be carefully reviewed to ensure that it is in conformity with Sri Lanka's international obligations. Any provisions of national laws which impinge upon legitimate media freedom should be repealed.

- Any pending prosecutions against journalists for alleged terrorism-related offences should be reviewed in order to ensure that they do not breach Sri Lanka's international obligations, and future arrests or detention of journalists should be carried out in compliance with due process and human rights guarantees. Any labelling of media outlets or journalists as 'terrorists' by government agencies must cease. The Ministry of Defence must withdraw the article entitled 'Deriding the war heroes for a living – the ugly face of "Defence Analysts" in Sri Lanka' from its website with immediate effect (and from its archives).
- Independent, thorough and timely investigations, with a view to securing appropriate criminal charges, should be carried out in relation to each and every attack on journalists. There should be proper coordination between the law enforcement agencies with respect to the current investigations into the assassinations of journalists with a view to ensuring prompt and effective prosecutions.

Emergency Regulations and the Prevention of Terrorism Act

Planning should commence immediately – at the time of writing the armed hostilities in the northeast appear to be becoming less intense – for the gradual removal of the emergency regulations as quickly as possible after the cessation of the armed conflict in order to ensure that as little long term damage as possible is caused to Sri Lanka's democratic order.

The Government should repeal any aspects of the Emergency Regulations and the Prevention of Terrorism Act which are not strictly necessary and proportionate to the apparently decreasing security threat currently being faced, with particular regard to basic due process guarantees. The IBAHRI emphasises the importance of ensuring independent judicial oversight over detentions and legal representation at all stages of criminal proceedings.

The IBAHRI emphasises that if armed hostilities with the LTTE do cease over the coming months, caution must be exercised in order to prevent a sense of triumphalism from becoming dominant throughout the Sinhalese community.

The IBAHRI also recommends that thorough investigations be conducted into alleged breaches of international humanitarian law on both sides of the conflict in order to assist in national reconciliation and to restore public confidence in the rule of law which has been seriously eroded as a result of the conflict.

Chapter 1: Introduction

1.1 This report is the result of a fact-finding mission to Sri Lanka carried out by a high-level International Bar Association Human Rights Institute (IBAHRI) delegation between 28 February and 6 March 2009. The mission was funded by the Open Society Institute, the IBAHRI is grateful for this financial support.

1.2 The IBA is the world's largest lawyers' representative organisation comprising 30,000 individual lawyers and over 195 bar associations and law societies. In 1995, the IBA established the IBAHRI under the Honorary Presidency of Nelson Mandela. The IBAHRI is non-political and works across the Association, helping to promote, protect and enforce human rights under a just rule of. law and to preserve the independence of the judiciary and the profession worldwide[2].

1.3 The IBAHRI's decision to visit Sri Lanka was prompted by concerns regarding the status of the rule of law, the independence of the judiciary and the ability of lawyers to exercise their professional duties freely. These concerns arose following reports of tensions between the executive and the judiciary regarding the execution of judgments and the ongoing non-implementation of the 17th Amendment to the Constitution, reports of an increase in threats and attacks against lawyers and the impact of Sri Lanka's counter terrorism legislation on the rule of law and the proper administration of justice. The IBAHRI was also concerned about the situation of the media and freedom of expression following reports of murders and harassment of journalists.

1.4 The terms of reference for the mission were:

(i) to examine the current status of lawyers and judges in Sri Lanka and their ability to carry out their professional duties freely;

(ii) to examine the legal guarantees for the effective functioning of the justice system, including the independence of the judiciary and whether these guarantees are respected in practice;

(iii) to investigate impediments, either in law or practice, that jeopardise the administration of justice and the respect for the rule of law and international and national human rights standards; and

(iv) to make recommendations with respect to the above.

The IBAHRI would like to emphasise that issues relating to the humanitarian crisis in the north-east of the country were outside the terms of reference.

1.5 The IBAHRI is extremely grateful to the delegation members who accepted the invitation to take part in this mission. The delegation comprised:

(i) Lord Goodhart QC, Member of the House of Lords. Appointed Queen's Counsel in 1979

2 For more information on the IBA and the IBAHRI please visit **www.int-bar.org**

and former Vice President of the International Commission of Jurists;

(ii) Mr Yeo Yang Poh, barrister at law and former President of the Malaysian Bar Association;

(iii) Mr Alex Wilks, IBAHRI Programme Lawyer;

(iv) Ms Michelle Butler, Mission Rapporteur, barrister at law, Matrix Chambers, London.

1.6 On 11 February 2009, Lord Goodhart and Mr Alex Wilks met with High Commissioner Jayasinghe and Deputy High Commissioner Nakandala at the Sri Lankan High Commission in London. The IBAHRI would like to express its appreciation to the High Commission and the Sri Lankan Government for giving its support to the mission and to the High Commission for facilitating the visa application process. Prior to the visit, the IBAHRI also met with national and international stakeholders in London, including the Commonwealth Secretariat.

1.7 During the visit the delegation consulted widely with government officials, judges (including removed judges), the Bar Association of Sri Lanka, individual lawyers, parliamentarians, journalists, academics, embassy officials, and members of both non-governmental and international organisations. Representatives from the Sri Lankan Government and justice system whom the delegation met included the Minister for Foreign Affairs, the Minister for Constitutional Affairs and National Integration, the Secretary to the Minister of Justice, the Chief Justice of the Supreme Court and the Acting Attorney-General. The delegation sought meetings with a representative from the Sri Lankan defence establishment, in particular from the Ministry of Defence, Public Security, Law and Order; however, unfortunately no-one was available at the time of the visit. The delegation also met with representatives from the United Kingdom and Australian High Commissions, the Canadian, US, Swiss, Norwegian, Dutch and German Embassies, the European Commission and the World Bank. The delegation would like to express its sincere gratitude for the warmth, hospitality and assistance given by all those it met.

1.8 This report is based upon an analysis of information gathered from those the delegation met with and the relevant Sri Lankan and international laws and standards. Chapter 7 outlines the delegation's key conclusions which include, where considered appropriate, a number of recommendations in relation to the issues discussed in the earlier chapters. On 8th May 2009 the IBAHRI sent a copy of this report to the Sri Lankan Government via the High Commission in London. It was indicated to the Government that the IBAHRI would welcome any comments it would wish to make, and that, subject to length, any comments would be appended to the published version of the report. The IBAHRI had not been received by the deadline provided. However, the IBAHRI would like to express its willingness to publish on its website any comments the Sri Lanka Government may wish to make on the report.

Chapter 2: Background

Basic geography and demographics[3]

2.1 The Democratic Socialist Republic of Sri Lanka (formerly known as Ceylon) is an island in the Indian Ocean about 18 miles off the south-eastern coast of India. Prior to independence in 1948, it was a British colony and was renamed upon becoming a republic in 1972. Sri Lanka has a population of approximately 20 million with density highest in the west where Colombo, the country's capital, is located.

2.2 Sri Lanka is ethnically, linguistically and religiously diverse. Sinhalese make up 74 per cent of the population and are concentrated in the densely populated southwest. Sri Lankan Tamils, citizens whose South Indian ancestors have lived on the island for centuries, total about 12 per cent, live throughout the country, and predominate in the Northern Province. Indian Tamils, who were brought to Sri Lanka in the 19th century by the British as tea and rubber plantation workers, represent about five per cent of the population and are mainly concentrated in south-central Sri Lanka.[4] Other minorities include Muslims (both Moors and Malays), at about seven per cent of the population; Burghers (descendants of European colonists), and aboriginal Veddahs. Most Sinhalese are Buddhist; most Tamils are Hindu. The majority of Sri Lanka's Muslims practice Sunni Islam. Sizable minorities of both Sinhalese and Tamils are Christians, most of whom are Roman Catholic.

2.3 The official languages of Sri Lanka are Sinhala, an Indo-European language, and Tamil, part of the South Indian Dravidian linguistic group. English is also spoken by many people, particularly in Colombo.

The Constitution

2.4 The Constitution of the Democratic Socialist Republic of Sri Lanka was adopted in 1978 ('Constitution') and has been subject to 17 amendments, the last in September 2002. A revised draft Constitution was presented to the Parliament in 2000 following multi-party talks and reform proposals developed in 1997. However, it did not receive sufficient support from members of Parliament and the Bill lapsed when Parliament was dissolved at the end of its six-year term in August 2000. A referendum on constitutional reform was then planned for August 2001 but was later postponed to October 2001 and ultimately cancelled.

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3 This section was compiled from the following sources: US State Department Report on Sri Lanka, September 2008, **http://www.state.gov/p/sca/ci/ce/**; Economist Country Briefing on Sri Lanka, 20 January 2009, **http://www.economist.com/countries/SriLanka/**; Library of Congress Country Study on Sri Lanka, **http://lcweb2.loc.gov/frd/cs/lktoc.html**; Central Intelligence Agency World Factbook on Sri Lanka, **https://www.cia.gov/library/publications/the-world-factbook/geos/ce.html**.

4 In accordance with a 1964 agreement with India, Sri Lanka granted citizenship to 230,000 16 'stateless' Indian Tamils in 1988. Under the pact, India granted citizenship to the remainder, some 200,000 of whom now live in India. Another 75,000 Indian Tamils, who themselves or whose parents once applied for Indian citizenship, chose to remain in Sri Lanka and have since been granted Sri Lankan citizenship: US State Department Report on Sri Lanka, 2008, **http://www.state.gov/p/sca/ci/ce/**.

The executive

2.5 The President of Sri Lanka, who is elected by popular vote for a six-year term (and is eligible for a second term), serves as head of the state, head of the executive, head of the government and commander in chief of the armed forces.[5] He or she has the power to appoint persons to the largely deputorial role of Prime Minister,[6] the capacity to assign himself or herself any function,[7] the ability to declare a referendum (including in relation to bills which have been rejected by Parliament),[8] and also broad powers to determine the cabinet of ministers (which he heads) and their functions.[9] The President is responsible to Parliament for the 'due exercise, performance and discharge of his powers, duties and functions under the Constitution and any written law, including the law for the time being relating to public security'.[10] He or she is conferred immunity in respect of 'anything done or omitted to be done by him either in his official or personal capacity' during the Presidential term of office.[11] The current President is the Honourable Mahinda Rajapakse of the United People's Freedom Alliance (UPFA) who was elected on 17 November 2005. The Prime Minister is the Honourable Ratnasiri Wickramanayake.

The legislature[12]

2.6 Parliament is a unicameral 225-member legislature, including 29 nominees from the national list, elected by universal suffrage and proportional representation to a six-year term.[13] Parliament has responsibility over the executive in relation to matters of public finance,[14] and supervises the proclamation of an emergency which is necessary for issuing emergency regulations under the Public Security Ordinance.[15]

2.7 In the last elections, held on 2 April 2004, the UPFA, a coalition of the People's Alliance (PA) and the Marxist Janatha Vimukthi Peramuna (JVP – People's Liberation Front), won 46.4 per cent of the vote, gaining 105 out of the 225-seat parliament, but falling short of a majority. In 2005 the JVP left the Government, reducing it to a minority. The current Government has a majority in the Parliament through a coalition with a number of small minority parties and the backing of 17 dissident United National Party (UNP) members and a few JVP members who crossed over to join the Government.

5 Article 30 of the Constitution

6 Articles 37 and 43 of the Constitution.

7 Article 44, ibid

8 Articles 85-87, ibid

9 Article 44, ibid

10 Article 42, ibid

11 Article 35, ibid

12 This section was compiled from the following sources: US State Department Report on Sri Lanka, September 2008, **http://www.state.gov/p/sca/ci/ce/;** Economist Country Briefing on Sri Lanka, 20 January 2009, **http://www.economist.com/countries/SriLanka/**; Library of Congress Country Study on Sri Lanka, **http://lcweb2.loc.gov/frd/cs/lktoc.html**; Central Intelligence Agency World Factbook on Sri Lanka, **https://www.cia.gov/library/publications/the-world-factbook/geos/ce.html**.

13 Article 62 of the Constitution.

14 Articles 148-154, ibid

15 Article 155, ibid

The judiciary

2.8 Sri Lanka's legal system reflects diverse cultural influences and retains a complex mixture of English common law, Roman-Dutch law, Kandyan law, and Jaffna Tamil law. Its judicial structure consists of a Supreme Court, a Court of Appeal, High Courts, and courts of first instance[16] (including District Courts, Magistrates Courts and Primary Courts).[17] The Supreme Court, which is made up of a Chief Justice and six to ten Judges, serves as the court of last appeal. It additionally has the authority to assess the lawfulness of legislation, provide advisory opinions to the President, and determine cases alleging breaches of the fundamental rights guaranteed by Articles 10 to 17 of the Constitution.[18] The present Chief Justice is the Honourable Sarath Nanda Silva, whose term of office expires in June 2009.

The legal profession

2.9 In order to practice law in Sri Lanka one must be admitted and enrolled as an Attorney-at-Law of the Supreme Court of Sri Lanka.[19] This is achieved by successfully completing law exams and taking a practical training course at the Sri Lanka Law College,[20] and undertaking a six month apprenticeship under the supervision of a practicing attorney of at least eight years' standing. Prior to taking exams at the Sri Lanka Law College, prospective Sri Lankan attorneys must either study law at the College for three years, or gain a Bachelor of Laws (LLB) from a local or foreign university. Upon qualification, attorneys are entitled to join the Bar Association of Sri Lanka (BASL), the representative body of the legal profession.[21]

2.10 By the 8th Amendment to the Constitution the President of Sri Lanka has the power 'to appoint as President's Counsel, Attorneys-at-Law who have reached eminence in the profession and have maintained high standards of conduct and professional rectitude'.[22] This is the equivalent of the rank of Queen's Counsel in the United Kingdom, which was in use in Ceylon (Sri Lanka) until 1972 when Sri Lanka became a republic. There are presently 81 President's Counsel in Sri Lanka, of whom four are women.

2.11 The Attorney General of Sri Lanka is the Sri Lankan Government's chief legal advisor and its primary lawyer in the Supreme Court of Sri Lanka. The Attorney General is usually a highly-respected senior advocate, and is appointed by the government. The former Deputy President of BASL, Mr Mohan Peiris PC, was sworn in as Attorney-General on 18 December 2008. The Attorney General is assisted by the Solicitor General of Sri Lanka and four Additional Solicitors General. The current Solicitor General is Ms Shanthi Eva Wanasundera PC.

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16 Article 105, ibid

17 Judicature Act No 2 of 1978.

8 Articles 119-132 of the Constitution

19 Section 40 of the *Judicature Act*, no 2 of 1978 provides for the Supreme Court to admit and enrol as Attorneys-at-Law, persons of good repute and of competent knowledge and ability, in accordance with Part VII of the Rules of the Supreme Court Rules, 1978 published in the Government Gazette No. 9/10 of November 08, 1978. Section 41 of the Judicature Act provides that every Attorney-at-Law shall be entitled to assist and advise clients and to appear, plead or act in every court or other institution established by law for the administration of justice.

20 The Sri Lanka Law College was established in 1874 as the Ceylon Law College under the Council of Legal Education (itself established in 1873) in order to impart a formal legal education.

21 See Chapter 4 for more information.

22 Article 33(c) of the Constitution.

Armed conflict[23]

2.12 Since 1983, Sri Lanka has suffered from an on-off civil war between government armed forces and Tamil Tiger separatists (LTTE) who want an independent homeland in the north and east. Tens of thousands have died in this ethnic conflict. After almost two decades of fighting, the Government and LTTE formalised a cease-fire in February 2002, with Norway brokering peace negotiations. The ceasefire began to collapse in 2005 and violence between the LTTE and government forces intensified in 2006; the Government regained control of the Eastern Province in 2007. In January 2008, the Government officially withdrew from the ceasefire, and by early 2009 the LTTE only remained in control of a small and shrinking area of Mullaitivu district in the North. At the time of preparation of this report, thousands of civilians remain trapped in this area and calls have been made by the United Nations and other international agencies for a temporary cessation of hostilities in order to allow civilians to escape the fighting.

2.13 Attacks also take place outside of the north and east, both in Colombo and throughout other regions of Sri Lanka. For example, on 20 February 2009 the LTTE carried out an air raid on Colombo, killing two people and injuring 45 others; and on 10 March 2009 at least 14 people were killed and 35 injured by an LTTE suicide bomb attack in Akuressa in southern Sri Lanka.[24]

Obligations under international humanitarian and human rights law

2.14 Although Sri Lanka has not ratified the 1977 *Second Additional Protocol to the Geneva Convention relating to non-international armed conflicts*, it remains bound by the customary international humanitarian law obligations pertaining to internal armed conflicts, including but not limited to the guarantees contained within common Article 3 to the *Geneva Conventions of 1949*.

2.15 Sri Lanka has ratified the core international human rights instruments, including: the *Convention on the Prevention and Punishment of the Crime of Genocide; the International Convention on the Prevention and Punishment of all forms of Racial Discrimination; the International Covenant on Civil and Political Rights* (ICCPR) and both of its Optional Protocols; the International *Covenant on Economic, Social and Cultural Rights* (ICESCR) and its Optional Protocol; the *Convention on the Rights of the Child* (CROC) and both of its Optional Protocols; *the Convention on the Elimination of all forms of Discrimination against Women* (CEDAW) and its Optional Protocol; the *Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment* (CAT) and its Optional Protocol; the *Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity; the International Convention on the Suppression and Punishment of the Crime of Apartheid; the International Convention against Apartheid in Sports; the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; the Convention on the Rights of Persons with Disabilities and its Optional Protocol; and the International Convention for the Protection of all Persons from Enforced Disappearance.*

23 This section was compiled from the following sources: US State Department Report on Sri Lanka, September 2008, **http://www.state.gov/p/sca/ci/ce/**; Economist Country Briefing on Sri Lanka, 20 January 2009, **http://www.economist.com/countries/SriLanka/**; Library of Congress Country Study on Sri Lanka, **http://lcweb2.loc.gov/frd/cs/lktoc.html,**; Central Intelligence Agency World Factbook on Sri Lanka, 19 March 2009, **https://www.cia.gov/library/publications/the-world-factbook/geos/ce.html**.

24 BBC News, 19 'Sri Lanka suicide bomb kills 14' , 10 March 2009, **http://news.bbc.co.uk/1/hi/world/south_asia/7934095.stm**.

2.16 As a member of the UN General Assembly, Sri Lanka has committed itself to the provisions of the *Universal Declaration of Human Rights* (UDHR), the *UN Basic Principles on the Independence of the Judiciary,* the *UN Basic Principles on the Role of Lawyers, and the UN Guidelines on the Role of Prosecutors*. Sri Lanka is also a member of the Commonwealth and is therefore committed to upholding the Commonwealth's fundamental values contained in the Harare Declaration.[25] Additionally, the Sri Lankan Constitution contains many important safeguards for the rights and freedoms that are guaranteed in the international human rights instruments to which Sri Lanka is a party.[26]

Sri Lanka's compliance with its international obligations

2.17 Sri Lanka's compliance with its obligations under international humanitarian and human rights law has received considerable scrutiny by the international community in recent years. The United Nations (UN) Human Rights Council has identified deficiencies in the capacity of domestic human rights structures to safeguard against breaches, the ability of national legislation to properly implement international human rights treaties and the lack of investigations undertaken into violations of human rights norms.[27] During 2008, Sri Lanka lost its bid for re-election at the UN Human Rights Council.

2.18 Furthermore, the UN High Commissioner for Human Rights has expressed her growing concern at the increasing number of civilians reported killed and injured in the conflict in the north of the country and the apparent disregard being shown for their safety by both sides. She has stated that certain actions undertaken by the Sri Lankan military and by the LTTE may constitute violations of international human rights and humanitarian law.[28]

2.19 The European Commission has also expressed concern that Sri Lankan national legislation incorporating international human rights conventions, particularly the ICCPR and the CAT, is not being effectively implemented.[29] In October 2008, the European Commission initiated an investigation with respect to the implementation of certain international conventions required under the EU 'GSP+' scheme. The EU 'GSP+' Scheme is part of the EU Generalised Scheme of Tariff Preferences providing duty-free access to the EU Market in exchange for ratification and implementation of 27 specified international conventions relating to human rights, core labour standards, sustainable development and good governance. The investigation forms part of the process of determining whether Sri Lanka's membership of the scheme will be extended or whether there will be a withdrawal of benefits.

2.20 In February 2007, the International Independent Group of Eminent Persons (IIGEP) was formed to observe at the invitation of the President of Sri Lanka the work of the Commission of Inquiry to Investigate and Inquire into Serious Violations of Human Rights, which had been

25 Harare Commonwealth Declaration 1991,issued by Heads of Government in Harare, Zimbabwe on 20 October 1991.

26 See Chapter III of the Constitution. Further, under Article 27 (2)(a) (Directive Principles of State Policy and Fundamental Duties), the State is pledged to establish a democratic socialist society whose objectives include the full realisation of the rights and freedoms of all persons.

27 United Nations General Assembly, Human Rights Council Report of the Working Group on the Universal Periodic Review of Sri Lanka, 5 June 2008, UN Doc A/HRC/8/46, **http://lib.ohchr.org/HRBodies/UPR/Documents/Session2/LK/A_HRC_8_46_SriLanka_E.pdf.**

28 UN Press Release 16 April 2009 **http://www.un.org/News/Press/docs/2007/sgsm11024.doc.htm**.

29 EC Decision of 14 October 2008 (2008/803/EC) pursuant to article 18(2) of Council Regulation (EC) No 980/2005.

established in November 2006. The principal directive of the mandate given to the IIGEP, chaired by Justice PN Bhagwati, former Chief Justice of India, was to observe the work of the Commission 'with a view to satisfying that such inquiries are conducted in a transparent manner and in accordance with basic international norms and standards pertaining to investigations and inquiries'. The IIGEP was not able to conclude that the Commission fulfilled international standards. In April 2008, the IIGEP decided to terminate its mission amid frustrations inter alia at the involvement of the Attorney-General's Department and the lack of transparency and timeliness of the proceedings.[30]

IBAHRI 2001 mission to Sri Lanka

2.21 The previous IBAHRI mission to Sri Lanka was in August 2001. The purpose of the visit was to identify the circumstances surrounding the calling of a referendum on the Constitution and to examine the guarantees for the independence of judiciary following attempted impeachment of the Chief Justice. During the visit the delegation also became aware of serious threats to freedom of speech and included an assessment of the situation in its report.[31] The executive summary of the 2001 IBAHRI mission is included at Annex 1 of this report.

30 IIGEP public statement of 15 April 2008 at **http://www.iigep.org/prelease/estatement7.pdf**
31 IBAHRI, 'Sri Lanka: Failing to protect the rule of law and the independence of the Judiciary' , IBA Report November 2001, pp 50-57.

Chapter 3: The Courts and Judiciary

Introduction

3.1 An independent judiciary functions as a critical institutional mechanism providing a check and balance on the executive and legislative branches of a democratic society. The independence of this organ is vital, not only to ensure that the judiciary is able to discharge its functions without fear or favour, but to uphold public confidence in the legal system as a whole and the due administration of justice. The need to develop and preserve an independent judiciary free from political influence and with adequate guarantees to maintain its impartiality is of prime importance to the protection of the rule of law.

3.2 The right to a fair hearing in criminal and civil proceedings before an independent and impartial tribunal is universally recognised as a fundamental human right.[32] The notion of judicial independence means that the judiciary must not only be institutionally independent from the other branches of government, but also that individual judges are capable of deciding cases before them according to the law and principles of justice while being free from reprisal of any kind. It is well-established in international law that the independence of the judiciary is to be ensured with particular regard to the manner in which judges are appointed and the duration of their terms of office, as well as the conditions governing their promotion, manner of qualification, salaries, discipline and the transfer and cessation of their functions.[33]

3.3 The Sri Lankan Constitution guarantees the independence of the judiciary in Article 107, which provides for the removal of judges of the Supreme Court and Court of Appeal upon an order of the President supported by a majority of Parliament on the grounds of 'proven misbehaviour or incapacity'.

3.4 Chapter XV of the Constitution contains further provisions relating to the judiciary including the establishment of courts, public sittings, salaries of judges, the performance of duties and functions by judges, the appointment, removal and disciplinary control of judges, the Judicial Services Commission (JSC), and the jurisdiction, rules and Registry of the Supreme Court and Court of Appeal.

3.5 Further interpretative guidance regarding the independence of the judiciary can be found in international guidelines and declarations, such as the *UN Basic Principles on the Independence of the Judiciary and the Beijing Principles on the Independence of the Judiciary*[34], which, insofar as they reflect principles of customary international law are, for the purposes of this report, also considered relevant benchmarks.

32 See for example ICCPR, Article 14; UN Basic Principles; Universal Declaration of Human Rights, Article 10.

33 See CCPR General Comment, No 13, 22 Equality before the courts and the rights to a fair and public hearing by an independent court established by lawSection 1 (Article 14) adopted 21st session 1984.

34 See Annex 2

The 17th Amendment to the Constitution

Background

3.6 On 3 October 2001, the Parliament passed the 17th Amendment to the Constitution which establishes a Constitutional Council (CC), a ten-member body comprising five members 'of high integrity and standing' who are nominated jointly by the Prime Minister and the leader of the opposition, while the sixth member is nominated by the other smaller parties in Parliament.[35] The President appoints the seventh member[36] and is obliged to make the six appointments outlined above once the nominations are forwarded to him[37]. The remaining three members of the CC are ex officio members and constitute the leader of the opposition, the Prime Minister, and the Speaker of the Parliament who acts as Chairman of the CC.[38] The 17th Amendment can be read in full in Annex 4 of this report.

3.7 The CC has the power to make recommendations to or approve appointments to the independent commissions and to approve the appointment of persons to senior positions in the public service. These positions include the Attorney-General, the Inspector General of Police, the Chief Justice and other judges of the Court of Appeal and Supreme Court.[39] The CC is also empowered to make the nominations of members to several independent constitutional commissions, including the JSC, the National Police Commission, the Human Rights Commission, the Election Commission and the Public Service Commission.[40] Once the CC approves or makes these nominations the President is authorised to make the appointment.

3.8 In this way, the 17th Amendment provides for important checks and balances on extensive executive presidential powers which, prior to its enactment, granted the President constitutional authority to make such appointments without any further independent approval procedure. The lack of independent scrutiny over appointments and transfers of key public officials had been a matter of concern to the 2001 IBAHRI delegation which concluded that substantial constitutional reform was needed to establish (a) 'much stronger parliamentary control of government as against the present constitutional system of a strong presidential executive government' and (b) 'the introduction of five commissions dealing with justice, media, police, elections and constitution. These are independent commissions designed to ensure fair and efficient working between the executive and these institutions themselves'.[41]

3.9 The 17th Amendment has been allowed to fall into abeyance by the Government despite vocal national and international criticism that in bypassing it the executive is politicising key public institutions.[42] The non-implementation of the 17th Amendment represents one of the most

35 Article 41A(1)(e) & (f) of the Constitution.
36 Article 41A(1)(d) ibid
37 Article 41A(5) ibid
38 Article 41A(1)(a), (b) and (c) ibid
39 Article 41C ibid
40 Article 41B ibid
41 2001 Report, pp48-49.
42 See for example, Kishali Pinto-Jayawardena, 'The rule of law in decline: Study on the prevalence, determinants and causes of torture and other forms of cruel, inhuman and degrading treatment or punishment in Sri Lanka', Rehabilitation and Research Centre for Torture Victims, 2009, at page 73. See also, International Crisis Group, Sri Lanka: Politicised Courts, Compromised Rights, February 2009

critical unresolved rule of law issues in the country, and necessarily affects the independence of the judiciary.

The non-implementation of the 17th Amendment

3.10 It is important to note that the CC functioned properly in its first term, from 2002 to 2005, and recommended the nominations of members, primarily on the basis of merit and seniority, to the Public Service Commission, the Human Rights Commission and the National Police Commission. The Election Commission, as envisaged in the 17th Amendment, was never constituted as the CC's nominations were not accepted by the President. After the expiry of its three-year term in March 2005, six seats on the CC had to be vacated, and the CC was allowed to lapse without new appointments being made. Initially, this was attributed to the inability of the smaller political parties to reach agreement on their nominee. Subsequently, despite consensus being reached within Parliament in 2007 as to the respective nominations, the President continued to refrain from making the various appointments. The rationale given for not making the appointments was that as of July 2006 a Parliamentary Select Committee was studying the need for overall changes to the 17th Amendment. This Select Committee submitted an interim report after nine meetings, on 9 August 2007. Its proceedings have been significantly delayed by the crossing-over of 17 members of the opposition party within Parliament, two of whom were members of the committee. At the time of writing the Committee's work is still ongoing.

3.11 The delegation learnt that, in the absence of a properly-convened CC, since 2005 the President has reverted to the system prior to the 17th Amendment whereby he has made appointments without external scrutiny to vacancies arising in the public service, the appellate judiciary, the Human Rights Commission and the National Police Commission. The delegation heard from many the view that these appointments have significantly reduced both the perceived and actual independence of these important public institutions and that the ongoing non-implementation of the 17th Amendment was considered to be one of the most serious systemic threats to the rule of law in Sri Lanka.

3.12 The delegation heard from critics of the 17th Amendment that due to its hasty drafting, the 17th Amendment is a flawed and ill-conceived tool for ensuring adequate checks and balances on the powers of the executive presidency. These defects include an over-reliance on parliamentary consensus and a lack of alternative mechanisms where such consensus cannot be reached.

3.13 Whilst it can be said that there is room for improvement in the manner in which some provisions of the 17th Amendment are drafted, in the IBAHRI's view these imperfections cannot be a reasonable or acceptable justification for abandoning the 17th Amendment altogether, thereby forfeiting the immense usefulness of many of its features and instead reverting to the previous procedures that are far inferior in terms of the important provision of checks and balances. The IBAHRI considers that the prompt implementation of the 17th Amendment and the re-establishment of the CC would resolve many of the constitutional and governance issues faced in Sri Lanka at present.

Supreme Court litigation regarding non-implementation of the 17th Amendment

3.14 The President's actions in not constituting the CC cannot be directly challenged in court, as the Executive President has immunity from such suits under Article 35 of the Constitution. However, in 2008 two prominent lawyers/civil society activists (Ravi Jayawardena and Professor Sumanasari Liyanage) filed fundamental rights petitions before the Supreme Court alleging that the non-implementation of the 17th Amendment violated their rights to equality before the law. These petitions were filed in response to an indication given by the Chief Justice that the Court would consider a fundamental rights application on the matter. This indication was made during the hearing of a separate older case also concerning the 17th Amendment, in which the Centre for Policy Alternatives (CPA), an NGO, had made writ applications to the Court of Appeal to seek its implementation.

3.15 There have been several interlocutory hearings in relation to this petition, with the Supreme Court ordering on 17 December 2008 that the Prime Minister and the Leader of the Opposition should expedite action to reconstitute the CC by the 15 January 2009. The delegation understands that a further extension of time was given to the Attorney-General to implement this order in January 2009. In February 2009, the Chief Justice ordered that if agreement could not be reached by consensus as to the five outstanding members of the CC, then a decision with regard to the same should be arrived at by majority vote.

3.16 During the delegation's visit, on 2 March 2009, the Supreme Court had a further hearing at which the merits of potential nominees for the six vacant positions were examined, and a further extension of time was granted. At this hearing, the Chief Justice ordered that the Prime Minister and the Speaker of the Parliament convene a meeting of all parliamentarians to confirm their nominations and to send a joint communication containing these to the President.

3.17 At the time of writing, the IBAHRI understands that this order has not yet been followed. It remains unclear as to whether the Chief Justice has the power to make actual appointments to the CC in the event that the President fails to make such appointments himself. At the time of writing, the fundamental rights case is ongoing and the CC remains unconstituted.

The appointment, discipline and removal of judges

Appointment of the senior judiciary

3.18 Prior to the 17th Amendment, the President appointed the Chief Justice and Supreme Court and Court of Appeal judges at his executive discretion, but the delegation learned that in practice, these appointments were made in consultation with the Chief Justice.[43] There are no specified criteria for appointments, although in some circumstances the Supreme Court can restrain the President from making appointments which were otherwise unconstitutional or

43 Article 107(1) of the 1978 Constitution.

manifestly inappropriate.[44]

3.19 With the entry into force of the 17th Amendment, presidential nominees then had to be approved by the CC before appointment to their posts.[45] The delegation heard reports that since the operation of the CC ceased in 2005, presidential nominations of judges have not been the subject of any additional appraisal and approval process prior to formal appointment. This lack of independent oversight and practice of exclusive presidential discretion over judicial appointments makes the judiciary vulnerable to executive interference and jeopardises its independence. Indeed, the IBAHRI observed in its 2001 report that 'appointments of judges by the President, without the proscribed requirement of an independent process of assessment by an independent body or representative, was seen by the delegation as lacking objectivity and transparency'.[46]

3.20 Accounts given to the delegation acknowledged that many would not dispute the merits of the President's appointments post 2006, as they had largely consisted of the promotion to the superior courts of judges who had been due for such promotion in any event. However, the IBAHRI remains extremely concerned at the lack of institutional safeguards for the independence of judicial appointments, and considers that the bypassing of constitutional processes by the executive has had an adverse impact on the perceived independence of the judiciary in Sri Lanka.

Appointment of judges of the High Court and First Instance Courts

3.21 High Court judges are also appointed by the President but are subject to disciplinary control by the President on the recommendation of the Judicial Services Commission (JSC)[47]. The JSC has responsibility for the promotion, discipline, transfer and dismissal of all High Court and lower court judges, as well as the appointment of lower court judges.[48] It comprises the Chief Justice, who sits as an ex officio chair, and two other Supreme Court Judges appointed by the President. The JSC has the authority to make any provisions for such matters as are necessary or expedient for the discharging of its duties.[49] This includes the power to adopt rules of procedure on the recruitment and appointment of judges.

3.22 The criteria for and procedures regarding such appointments are not publicly available; however, the delegation learnt that it was an established custom that appointments are made on the basis of seniority. The delegation was informed that the current Chief Justice exercises de facto control over JSC appointments and that this custom had often been ignored in practice. The delegation heard that anomalies might have arisen because decisions reached were neither recorded nor followed and is gravely concerned at the lack of transparency of JSC

44 See for example, Kishali Pinto-Jayawardena, 'The rule of law in decline: Study on the prevalence, determinants and causes of torture and other forms of cruel, inhuman and degrading treatment or punishment in Sri Lanka' , Rehabilitation and Research Centre for Torture Victims, 2009, p73. See also, International Commission of Jurists, Statement following the Report of the UN Special Rapporteur on the Independence of Judges and Lawyers, 11 June 2007, **http://www.icj.org/news.php3?id_article=4173&lang=en**

45 Article 41C of the Constitution 1978

46 2001 Report, pp33-34, paragraph 2.40

47 Article 111(2) of the Constitution

48 Article 114 (5), ibid

49 Article 112(8), ibid

appointments procedures. It is recalled that international standards require that the promotion of judges should be based on objective factors, in particular ability, integrity and experience. [50]

Removal of senior judges

3.23 Article 107 of the Constitution provides that Supreme Court judges (including the Chief Justice) and the Court of Appeal judges hold office during 'good behaviour' and allows for removal upon an order of the President supported by a simple majority of Parliament on grounds of 'proven misbehaviour or incapacity'. The delegation was told that this impeachment procedure has been used three times in Sri Lanka's history: first, against Chief Justice Neville Samarakoon in the early 1980s for making remarks critical of government policy during a public speech; and more recently, on two occasions against Chief Justice Sarath Silva citing instances of alleged misconduct and partiality towards the Government.[51] These attempts at impeachment were unsuccessful as a Parliamentary Select Committee determined that Chief Justice Samarakoon's conduct was not sufficiently grave to invite impeachment, and President Chandrika Kumaratunge dissolved the parliamentary session considering the allegations against Chief Justice Silva leading to the automatic lapsing of the impeachment charges. After the lapsing, the charges were not revived.

3.24 The delegation heard that a Cabinet Sub-Committee, chaired by Professor GL Peiris, was appointed in late 2008 to consider the contents of a speech by Supreme Court Justice Saleem Marsoof PC with a view to bringing impeachment proceedings in Parliament. The speech in question, delivered in August 2008 as the inaugural KC Kamalasabaysan PC Memorial Oration, was entitled 'Some thoughts on the sovereignty of the people and the rule of law'. In this speech, Justice Marsoof criticised the Government's failure to implement the 17th Amendment by failing to appoint the CC as a breach of the rule of law. Reports to the delegation indicated that no further action against Justice Marsoof was taken by Parliament as a result of the sub-committee's deliberations.

3.25 The IBAHRI notes that whilst it is inappropriate for a judge to comment on substantive and specific matters which are at issue in proceedings pending before the court, it is of fundamental importance to a robust, independent judiciary that its members are not afraid to acknowledge and speak out against threats to the rule of law. Indeed, UN Basic Principles on the Independence of the Judiciary enshrine the freedom of expression of individual judges so long as they conduct themselves in a manner as to 'preserve the dignity of their office and the impartiality and independence of the judiciary'.[52] The IBAHRI agrees that Justice Marsoof's comments should not have formed the basis for an impeachment inquiry and considers that his speech was an entirely proper exercise of the right to freedom of expression. However, the IBAHRI is concerned that the threat of impeachment proceedings in this case, even though ultimately not carried out, may in itself have a chilling effect on other members of the judiciary wishing to speak out on similar or other rule of law-related issues in the future.

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50 Principle 13 of the UN Basic Principles on the Independence of the Judiciary. See also: Principle 17 of the Beinjing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (Beijing Principles), Principle 3 of the IBA Minimum Standards of Judicial Independence (IBA Minimum Standards) included at Annex 2.

51 IBA Report 2001, pp26-28.

52 Principle 8 of the Basic Principles on the Independence of the Judiciary

3.26 The IBAHRI also observes that the constitutionally established impeachment procedure for superior court judges in Sri Lanka is not ideal in ensuring an independent judiciary. Parliamentary approval by a simple majority over the impeachment of judges makes the removal process vulnerable to politicisation and therefore jeopardises its independence.[53] The impeachment procedure currently in place should be reviewed and amended to include a higher threshold for approval than a simple parliamentary majority. This will help ensure that judges can only be removed for proper and objective reasons and not because of any action or the expression of any views that may not find favour with the executive or the majority of the governing politicians of the day. The IBAHRI notes that international standards require that judges should only be subject to suspension or removal 'for reasons of incapacity or behaviour which renders them unfit to discharge their duties'.[54]

Removal of judges from the High Court and First Instance Courts

3.27 As outlined above, the JSC has responsibility for the discipline, transfer and dismissal of all High Court and lower court judges.[55] In addition, the Chief Justice as Chair of the JSC or any judge of the Supreme Court authorised by the Chief Justice can inspect records and hold an inquiry into any matter concerning first instance courts.[56]

3.28 The IBAHRI again notes that there does not appear to be any publicly-available records of the criteria for or procedure regarding the discipline, transfer and dismissal of High Court and lower court judges by the JSC. This lack of transparency and accountability in the workings of the JSC reduces public confidence in it and is detrimental on the morale of individual judges and the independence of the judiciary as a whole.

3.29 In its 2001 report the IBAHRI noted that it 'was not confident that the JSC is acting entirely without outside interference' and recommended that judges should be appointed with an independent process of assessment.[57] In 2009, this delegation was concerned to hear several complaints levelled at the decisions of the JSC for being unfair and arbitrary.

3.30.1 In particular, the delegation heard reports that the Chief Justice has misused his role on the JSC in order to summarily dismiss or transfer judges without any apparent or objective reasons. The delegation also heard that the Chief Justice has brought about the resignation of several judicial officers by threatening them, reportedly without good reasons, with disciplinary action or criminal prosecutions.

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53 See also United Nations Human Rights Committee, Concluding Observations on Sri Lanka (2003), UN Doc. CCPR/CO/79/LKA, 1 December 2003, at paragraph 16: The Committee expresses concern that the procedure for the removal of judges of the Supreme Court and the Courts of Appeal as set out in article 107 of the Constitution, read together with Standing Orders of Parliament, is incompatible with article 14 of the Covenant, in that it allows Parliament to exercise considerable control over the procedure for removing judges. The State Party should strengthen the independence of the judiciary by providing for judicial, rather than parliamentary, supervision and discipline of judicial conduct.

54 See for example principle 18 of the United Nations Basic Principles on the Independence of the Judiciary which provides that: 'Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.'; see also Principle 22 of the Beijing Principles and Principle 30 of the IBA Minimum Standards

55 Article 114 (5) of the Constitution.

56 Ibid

57 IBA Report 2001, pp56-57, Recommendations 13

3.30.2 Accounts were given to the delegation of the joint resignation of both of the JSC's junior members in early 2006. Justices Bandaranayake and Weerasuriya, both Supreme Court judges, resigned from their JSC posts for reasons 'of conscience'.[58] The delegation understands that Justices Bandaranayake and Weerasuriya were prepared to publicly disclose their reasons for resigning in the event that a parliamentary inquiry was initiated. No such inquiry was forthcoming and as a result the full reasons for their resignation remain unknown. However, the IBAHRI is concerned at this joint resignation and the extent to which it may be illustrative of the questionable state of independence and proper functioning of the JSC.

3.31 The delegation was told of specific instances where lower court judges had been wrongfully and/or arbitrarily dismissed or disciplined, including the cases of District Judges Sunil Perera, Geraldin Ganlath, Harold Wijesiri Liyanage, DM Siriwardhana, DMTBI Dissanayake and Magistrates NV Karunathilake and Hiran Ekanayake. The delegation also heard numerous accounts of lower court judges being forced to resign by the Chief Justice, confronted with the undignified prospect of having to face disciplinary or criminal proceedings if they refused to do so, no matter how baseless the allegations against them may have been. A selection of the cases reported to the delegation is as follows:

CASE 1

A District Court Judge was summoned before the JSC by Chief Justice Silva and was taken to task in relation to the substance of a judicial order which he had made in the course of his official duty. The Judge argued with the JSC and pointed out that Chief Justice Silva was in fact wrong in seeking to assess the contents of a judicial order, which was not the function of the JSC. The Chief Justice directed the Attorney-General's Department to bring charges against the Judge for being discourteous to the Commission. Due to fear of further harassment and in the hope of maintaining a future judicial post, this Judge left Sri Lanka after obtaining approval for two years' leave of absence without pay. The Judge was later served with post vacation notice of dismissal.

CASE 2

A District Court Judge had ordered the confiscation of cattle and two lorries for illegally transporting cattle without a permit. These lorries belonged to a prominent businessman who then personally complained to the Chief Justice about this confiscation order. The Judge was then summoned before the JSC and threatened that if he did not voluntarily retire from his position disciplinary steps would be taken against him. The Judge refused to give in to this directive but was nevertheless subsequently compulsorily retired. There was never any disciplinary charges laid against this judge nor was any formal inquiry ever held into any allegations against the judge.

58 See also: Supreme Court Judges may testify before Select Committee, Lanka Newspapers, 9 February 2006, **http://www.lankanewspapers.com/news/2006/2/5543.html**

CASE 3

A magistrate was transferred to Kandy after serving four years in a geographically remote location. When Chief Justice Silva was appointed the magistrate was immediately transferred to an even more distant outpost than where he had previously served. The magistrate understood that the reason for this unfavourable transfer was that he had acquitted a former Minister of the UNP Government of criminal charges against him after a proper and lawful trial. After the second transfer, the Magistrate's salary increments were suspended without a reason being provided. The Magistrate was subsequently issued with a baseless disciplinary charge and was threatened by the Chief Justice that if he did not resign he would be 'taught a lesson'. The magistrate, due to fear of further reprisals at the hands of the Chief Justice, opted to resign.

3.33 It is neither appropriate nor within the mandate of the delegation to determine the merits of these and other cases. However, the existence of so many accounts by or concerning different persons, all exhibiting a pattern of similarities, makes it equally inappropriate to dismiss them as fanciful concoctions. The IBAHRI is deeply concerned about each of these incidents and notes that at the very least, they give rise to questions as to whether the JSC is exercising its functions in a fair and objective manner according to, and respecting, established standards of judicial conduct.[59]

3.34 The disciplinary proceedings of the JSC have also been called into question by the UN Human Rights Committee. The delegation was informed of the dismissal of Mr Soratha Bandaranayake from his position as a High Court Judge which the Human Rights Committee found to be arbitrary, unreasonable and procedurally unfair. In the course of its determination the Human Rights Committee observed that Sri Lanka's dismissal procedures under the JSC for lower court judges do not adhere to the requirements of basic procedural fairness and fail to ensure that individual judges benefit from the necessary guarantees to which they are entitled in their capacity as judges, thus constituting an attack on the independence of the judiciary.[60]

3.35 These findings are consistent with the above-mentioned accounts of alleged wrongful dismissal or arbitrary disciplinary procedures provided to the delegation and indicate alarming weaknesses in the JSC. The delegation notes that there are at least two further cases involving the alleged wrongful dismissal of lower court judges currently pending before the United Nations Human Rights Committee.

3.36 The delegation is of the view that existing disciplinary and removal procedures for all judges must be urgently reviewed, in order to generate a greater sense of security amongst serving

59 Principles 17 to 19 of the Basic Principles on the Independence of the Judiciary, Principles 22, 26, 27 of the Beijing Principles, Principles 27-30 of the IBA Minimum Standards.

60 In relation to Mr Bandaranayake's case, it held at paragraph 7.2: The Committee finds that the JSC's failure to provide the author with all of the documentation necessary to ensure that he had a fair hearing, in particular its failure to inform him of the reasoning behind the Commission of Inquiry's guilty verdict, on the basis of which he was ultimately dismissed, in their combination, amounts to a dismissal procedure which did not respect the requirements of basic procedural fairness and thus was unreasonable and arbitrary. For these reasons, the Committee finds that the conduct of the dismissal procedure was conducted neither objectively nor reasonably and it failed to respect the author's right of access, on general terms of equality, to public service in his country. Consequently there has been a violation of article 25(c) of the Covenant. *Soratha Bandaranayake v Sri Lanka,* United Nations Human Rights Committee, Communication No 1376/2005, 24 July 2008, UN Doc. CCPR/C/93/D/1376/2005.

members of the bench and maintain public confidence in independence of the judiciary. In order to uphold the independence of Sri Lanka's judiciary, procedures for the removal and disciplining of judges at all levels should be made transparent, accountable, fair and free from interference by the executive or legislature.

Politicisation of the judiciary

3.37 The need to develop and maintain a judiciary free from political influence and with adequate guarantees to maintain its impartiality and independence is of prime importance in the protection of the rule of law and constitutional democracy. In its 2001 report, the IBAHRI noted that 'not only is there a perception that the judiciary is not independent, there may indeed be some basis in fact for the existence of such a viewpoint in relation to a minority of the judiciary.'[61] The IBAHRI is saddened to hear that in 2009 that politicisation of the judiciary continues. Indeed, the IBAHRI found that the judiciary is currently vulnerable to two types of political influence, from the Government and from the Chief Justice himself. The extent and type of influence oscillates between the two and depends on the relationship between the Chief Justice and the Government at any point in time. The nature and degree of politicisation of the judiciary can best be illustrated by reviewing (a) the behaviour of the Chief Justice (b) the jurisprudence of the Supreme Court and (c) the relationship between the judiciary and the executive from time to time.

The behaviour of the Chief Justice

3.38 In 1999 Attorney General Sarath Silva was appointed Chief Justice. There were questions raised regarding his appointment due to two motions alleging misconduct pending against him at the time. The Supreme Court appointed two committees of inquiry to look into these allegations but his appointment was made in any event. Later, two impeachment motions were filed against Chief Justice Silva alleging specific instances of abuse of power in 2001 and 2003. These motions were then effectively annulled by President Kumaratunga by dissolving the Parliamentary sessions due to consider them. The circumstances surrounding Chief Justice Silva's appointment and subsequent aborted impeachments were explored in detail by the IBAHRI in its 2001 report and will not be dealt with again here. However, it is worth noting that doubt concerning the conduct of the head of the judiciary that is not promptly and convincingly cleared but is instead allowed to linger does not invite public confidence.

3.39 By all accounts Chief Justice Silva is perceived to be a domineering personality. It is a widely shared view that he is clearly a person of influence, within the judicial, political and religious[62] sectors of Sri Lankan society. Indeed, the breadth of the Chief Justice's influence can be seen both in the allocation of judges to hear cases and the degree of deference that he is shown by his colleagues on the bench.

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61 IBA Report 2001, p33, paragraph 2.39.

62 The delegation was informed that Chief Justice Silva hosts a weekly television programme in which he gives a sermon on Buddhism.

ALLOCATION OF JUDGES TO CASES

3.40 The Supreme Court usually sits in benches of three judges for the hearing of each case. The Chief Justice approves the bench list which is initially prepared by the Listing Registrar and nominates judges for benches consisting of three judges or appoints a fuller bench of five judges for special matters warranting a Divisional Bench. No rotation system is in place, with the Chief Justice effectively exercising exclusive authority over case allocations. The IBAHRI in its 2001 report criticised the Chief Justice for exercising this power arbitrarily and noted that:

> 'the public needs to be assured that the judiciary shall ensure at all times that it avoids either bias or the impression of bias... in the manner in which particular panels of judges are selected or proceedings listed'[63]

and that:

> 'the panels of three Supreme Court judges who hear fundamental rights applications should be subject to an appropriate system of rotation of the different judges. Clearly the presider should be the most senior judge. Every attempt should be made for the junior judges to sit regularly with the most senior judges'.[64]

3.41 The delegation was disappointed to hear that the Chief Justice is perceived to be continuing with the practice of allocating politically sensitive cases to himself and to the most junior Supreme Court Judges available at the time. The delegation heard from several sources that the more senior judges, who are regarded as more independently minded, are routinely excluded from politically sensitive cases. Indeed, the most senior judge of the time, Justice M.D.H. Fernando, who had been bypassed as a result of the appointment of Silva as Chief Justice, had been excluded in almost all important constitutional cases over a period of several years. This led to his premature retirement in early 2004, two and a half years before he was due to retire. The delegation was informed that a letter was written to the Prime Minister by 45 leading civil society organisations calling for the appointment of a Parliamentary Select Committee to examine the circumstances that led to Justice Fernando's resignation. To the delegation's knowledge, no action was taken in response to this letter.

CULTURE OF DEFERENCE TO THE CHIEF JUSTICE

3.42 The delegation was told that the Chief Justice's excessive influence over other members of the judiciary, and particularly over most other Supreme Court judges, means that there is a real, though unspoken, reluctance for judges to issue dissenting opinions, with fewer than five reported opinions dissenting from the Chief Justice having been issued in the past ten years in the Supreme Court.

3.43 The perceived closeness of the Chief Justice to the executive branch for most of the period of his tenure was also cited as an unwanted influence on other members of the judiciary. Several reports were received by the delegation that this closeness had allowed an environment

63 IBA Report 2001, paragraph 2.54.

64 IBA Report 2001, p39.

to flourish where judges are reluctant to criticise the government, as this could lead to the withholding of promotions or lucrative appointments to various executive commissions post judicial retirement. The delegation also heard reports that individual judges were generally more reluctant to return critical judgments at times when the Chief Justice had a close relationship with the Government.

3.44 The delegation finds that the culture of excessive deference to the Chief Justice is widely accepted as common wisdom amongst civil society and considers that this has had a detrimental impact on the independence of judiciary at all levels and on public confidence in it.

The Jurisprudence of the Supreme Court

3.45 The case law of the Supreme Court has been criticised for being, on occasion, inconsistent,[65] with certain cases being determined according to political considerations and/or alleged national interest rather than strict legal considerations.[66] This has been illustrated by its recent decisions on the International Covenant on Civil and Political Rights (ICCPR), its determinations on fundamental rights petitions and in its approach to contempt of court proceedings.

COMPLIANCE WITH INTERNATIONAL HUMAN RIGHTS STANDARDS

3.46 One of the key judgments of the Supreme Court attracting controversy regarding Sri Lanka's compliance with international human rights standards is the case of *Singarasa v Attorney General.*[67] In this case, the bench which was led by Chief Justice Silva held that while the accession of Sri Lanka to the ICCPR was legal and valid and bound Sri Lanka to international law, in and of itself this created no additional justifiable rights for Sri Lankans in the absence of domestic enabling legislation.[68] The Supreme Court then went on to hold that Sri Lanka's accession to the First Optional Protocol of the ICCPR, which allows individuals to address complaints of violations of the ICCPR to the United Nations Human Rights Committee, was unconstitutional and *ultra vires.*

3.47 The delegation was told that following this decision, Chief Justice Silva came under intense political pressure from the Government as there was concern that the outcome of this case, amongst other factors, could lead to the withdrawal of the GSP+ scheme.[69] Almost immediately thereafter, the Government adopted the ICCPR Act (No 56 of 2007) to purportedly give effect to the rights recognised by the ICCPR at domestic law, where such rights were not already recognised by the Constitution or existing Sri Lankan law.

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65 Rohan Edrisinha, and Asanga Welikala, GSP Plus and the ICCPR: A critical appraisal of the official position of Sri Lanka in respect of compliance requirements, Centre for Policy Alternatives and Friedrich Ebert Stiftung, GSP+ and Sri Lanka: Economic, Labour and Human Rights Issues, Colombo, October 2008, at p82.

66 International Crisis Group, Sri Lanka: Politicised Courts, Compromised Rights, February 2009, pp 31-33: 'The GSP+ judgment conscripts the Court into a diplomatic and political campaign to evade international opprobrium for the country's manifest shortfalls in rights terms. The decision was soon hailed in the government press as a landmark ruling endorsing Sri Lanka's human rights commitments'. Like Singarasa, it thus elevates national sovereignty and executive power over an honest reckoning of the nation's human rights situation.

67 SC Spl (LA) No 187/99 Judgment of 15 September 2006.

68 Supra, pp13-14.

69 Supra p15 paragraph 2.19

3.48 The Government also engaged the consultative jurisdiction of the Supreme Court to seek an advisory opinion as to the extent of compliance with the ICCPR by the Sri Lankan Constitution and domestic laws. The Supreme Court, again with a bench led by the Chief Justice, communicated its advisory opinion to the Government in March 2008, following a hearing at which the Attorney General and several interveners made oral and written submissions. The Court came to the conclusion that

> 'the provisions of the Constitution and of other law, including the decisions of the Superior Courts of Sri Lanka give adequate recognition to the civil and political rights contained in the ICCPR and adhere to the general premise of the Covenant that individuals within the territory of Sri Lanka derive the benefit and guarantee of rights contained in the Covenant'.

Importantly it also held that 'the aforesaid rights recognised in the Covenant are justiciable through the medium of the legal and constitutional processes prevailing in Sri Lanka'.[70]

3.49 It is clear that the 2008 advisory opinion reached conclusions which some might consider as inconsistent with the conclusions reached in the 2006 Singarasa decision.[71] The Court appears to have premised its reasoning in its 2008 advisory opinion on the enactment of the ICCPR Act in 2007 in order to conclude that any previous gaps in domestic coverage of ICCPR rights have now been filled. However, the IBAHRI notes that the ICCPR Act only contains four rights conferring provisions (compared to the 22 rights recognised in the ICCPR): the right to be recognised as a person before the law, the entitlement of alleged offenders to various fair trial rights, certain rights of the child, and the right of access to state benefits.[72] Furthermore, the rights articulated in the ICCPR Act are formulated in a manner which is different from, and arguably more restrictive than, the corresponding provisions of the ICCPR.[73]

DECLINING NUMBER OF FUNDAMENTAL RIGHTS APPLICATIONS

3.50 The delegation received widespread reports from lawyers and civil society activists that the number of fundamental rights petitions lodged before the Supreme Court has reduced considerably over the past 10 years. This decline is said to coincide with the appointment of Chief Justice Silva to the Supreme Court. The delegation heard that the majority of fundamental rights petitions which were filed during this period were dismissed at the leave to proceed stage, with inadequate reasons to explain the deliberative process leading to or rationale for the dismissal. In contrast to the practice before Chief Justice Silva's appointment, whereby detailed reasons for dismissal were given at the leave to proceed stage, most cases are now struck out with a simple annotation that 'leave to proceed is refused'. As there are then fewer cases proceeding to the substantive judgment stage, the body of jurisprudence in the field

70 In the matter of a reference under article 129(1) of the Constitution, SC Ref No 01/2008, p13.

71 NB. The Supreme Court does not refer to its earlier decision in its subsequent advisory opinion.

72 See articles 2, 4, 5 and 6 of ICCPR Act 2007.

73 Rohan Edrisinha, and Asanga Welikala, GSP Plus and the ICCPR: 'A critical appraisal of the official position of Sri Lanka in respect of compliance requirements', Centre for Policy Alternatives and Friedrich Ebert Stiftung, GSP+ and Sri Lanka: Economic, Labour and Human Rights Issues, Colombo, October 2008, at p82.

of fundamental rights has shrunk with the significant reduction in the number of fundamental rights substantive judgments.

3.51 The delegation heard that this situation, combined with the increase in threats and attacks made against lawyers filing fundamental rights petitions[74], has contributed to a feeling from the majority of attorneys that there is no use in pursuing such petitions and therefore their numbers have reduced significantly. The delegation tried to obtain statistics relating to fundamental rights applications from the Supreme Court administration; however, these statistics were not forthcoming at the time of writing. According to the Asian Human Rights Commission, the number of fundamental rights cases lodged in 2004 was 626, in 2005 was 517, and in 2006 was 342.[75] The delegation heard informally from various sources that these numbers have reduced even further since 2006.

THE EXPANDING CONCEPT OF LOCUS STANDI

3.52 The delegation heard that Chief Justice Silva is considered to be a populist judge, particularly with respect to pronouncements on broader governance issues which would traditionally be considered outside the jurisdiction of the Supreme Court. In particular, the delegation heard that the Chief Justice has used an expanded concept of locus standi as traditionally understood in fundamental rights cases under Article 126 of the Constitution to adjudicate on a range of populist issues. As a result, claims that have been criticised as not meeting the strict test for legal standing under Sri Lankan law have nevertheless been granted leave to proceed as fundamental rights cases. Examples of such petitions which lack what traditionally may be regarded as locus standi include the petroleum prices decision, which led to an order to the Government to reduce petrol prices for consumers (discussed in further detail below), and a case brought by the Wildlife Protection Society to block the transfer of an elephant to Armenia.

3.53 The IBAHRI understands that these cases have established the principle that any executive or administrative action which is considered to be irrational falls within the right to equality enshrined in Article 12 of the Constitution. The IBAHRI is concerned that this expansion of the right to equality, in conjunction with the expansion of the doctrine of locus standi, is not based on any proper rationalisation of the law in this area, but appears to be a tool to provide the Chief Justice with the opportunity to pronounce on populist issues. The delegation heard that the current expanded notion of locus standi does not form a valid precedent and is unlikely to be continued once a new Chief Justice is appointed to the Supreme Court in mid-2009.

Contempt of court

3.54 It was reported to the delegation that the inherent contempt of court powers of the Supreme Court have been used inappropriately, particularly by Chief Justice Silva to stifle criticism from civil society. A prominent example of this is the case of Anthony Fernando, a lay-litigant who

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74 See subsequent discussion in Chapter 4.

75 'Sri Lanka: State and Rights collapsing amidst growing violence and injustice', The State of Human Rights in Eleven Asian Nations, Asian Human Rights Commission, 2006 at p288.

had made the Chief Justice a party in a fundamental rights case and who on 6 February 2003 was sentenced to one year's hard labour for raising his voice in court and filing repetitious petitions. The UN Human Rights Committee, in considering a communication submitted by Mr Fernando under the Optional Protocol to the ICCPR, concluded that Mr Fernando's right to a fair trial under Article 9(1) had been violated.[76] The Human Rights Committee found that the penalty was 'arbitrary' and 'draconian' and noted that it had been imposed 'without adequate explanation and without independent procedural safeguards'.[77]

3.55 The delegation was alarmed to hear that the case of Anthony Fernando is far from being an isolated incident and that the use of contempt laws has been expanded even to behaviour outside of the courtroom.[78] Indeed, the delegation heard reports of journalists being detained for commenting adversely on court decisions or judicial behaviour and that as a result self-censorship is now commonplace when reporting on court proceedings. One journalist the delegation spoke with described the court's arbitrary use of the contempt powers against journalists as being like 'the sword of Damocles hanging over one's head'.

3.56 The delegation was also informed that the contempt laws have a chilling effect upon the legal profession, with attorneys subject to an implicit fear that they may be found in contempt of court in the course of discharging their professional duties. This fear appears to stem from the fact that the notion of contempt of court is not clearly circumscribed by law and, as such, is open to misuse by judges. A draft contempt law providing clarification as to the contempt of court power was prepared and approved by BASL, and sent to the Government for consideration in March 2006. However, the delegation understands that there have been no efforts by the Government or Parliament to legislate on this important issue.

The relationship between the judiciary and the executive

3.57 The relationship between the executive and the judiciary is a key indicator of the state of any justice system. Politically motivated criticisms of the judiciary as a whole, or of individual members of the judiciary, by the executive place this relationship under considerable stress and can in particular have a detrimental impact on the ability of judges to adjudicate politically sensitive cases impartially and independently. Likewise, the failure by the Government to implement court orders fundamentally undermines the rule of law and the administration of justice. Both issues are matters of concern in Sri Lanka.

Executive criticism of the judiciary

3.58 Executive criticism of the judiciary in Sri Lanka is not a new phenomenon. In its 2001 report the IBAHRI concluded that: 'politically motivated criticism of the judiciary and, in particular, [of] the Supreme Court by politicians is regarded by the delegation as contrary to the interests

76 *Anthony Fernando v. Sri Lanka*, Communication No. 1189/2003, United Nations Human Rights Committee, U.N. Doc. CCPR/C/83/D/1189/2003 (2005).

77 At paragraph 9.2

78 See for example the case of *HDCP Wijeardena v Geological Survey and Mines Bureau and others*, SC Application No 81/2004 in which several individuals who were not parties to the proceedings were convicted of contempt of court for carrying out mining in violation of the Court's interim order.

of justice and to the independence of the judiciary' [79] and recommended that 'no politician, including the President, should engage in gratuitous or unsupported allegations against members of the judiciary'.[80]

3.59 The delegation was disappointed to hear that in a public meeting on 9 December 2008 the President complained that a series of Supreme Court decisions had reduced the status of the president to 'less than that of a magistrate', and commented that 'many of the judgments [of the Supreme Court] may place us in a difficult situation in the future'. The President further stated that '[the] Gentlemen of the judiciary might have forgotten about the time when the homes of the judicial officers were stoned and impeachment motions brought against three Supreme Court judges'.[81] The IBAHRI understands this to be a reference to a situation in the early 1980s where a vigilante group associated with the ruling party (UNP) attacked the houses of members of the Supreme Court who also had unsuccessful impeachment motions brought against them following a judgement against the police for excessive use of force in the suppression of an anti-government protest. The IBAHRI considers this public statement to be intimidatory and contrary to the interests of judicial independence.

Enforcement of judgements

3.60 The recent failure of the Government to implement an interim decision of the Supreme Court is a worrying sign that the rule of law in Sri Lanka is taking a peculiar turn. The decision in question, 'the petroleum price decision', which followed a complex piece of litigation, was handed down in December 2008 and required the Government to reduce petrol prices from Rs122 (US$1.07) per litre to Rs100 (US$0.8) per litre. The decision was made in a fundamental rights petition premised on the right to equality in Article 12 of the Constitution in which the Petitioners had complained that the Ceylon Petroleum Corporation had not reduced petrol prices in Sri Lanka despite world crude prices falling.

3.61 The delegation was informed that the Government has not fully implemented the order, and has instead reduced the price by only two rupees to Rs120 rupees (US$1.05). This move led to the Supreme Court revoking all its interim orders in the case, the effect of which is to expose the Government to substantial compensation claims by local and international banks with which the Government had entered into complex price hedging arrangements. The Government has publicly stated that it would not fully implement the initial order as this would be 'contrary to the war effort'.

3.62 As mentioned earlier, judicial intervention in a matter such as the fixing of petrol prices appears to be an unwarranted encroachment into the proper realm of the executive. Nevertheless, the executive's response in refusing to fully implement the court order, though triggered by that unusual exercise of judicial power in the first place, does create a dangerous precedent that the executive can choose to ignore a court order. This unhealthy tug of war

79 IBA Report 2001, p37, paragraph 2.53.
80 IBA Report 2001, p40, paragraph 10.
81 'War against the Sri Lankan Judiciary, Asia Human Rights Commission', 19 December 2008 (**http://www.upiasia.com/Human_Rights/2008/12/19/war_against_the_sri_lankan_judiciary/6171/**)

between the two branches of government is not a positive contribution to the rule of law in Sri Lanka.

Chapter 4: The Legal Profession

Introduction

4.1 In conjunction with an independent judiciary and a free media, a robust and independent legal profession is essential for maintaining the rule of law and ensuring the protection of human rights in a democratic society. In order to discharge their professional duties effectively, lawyers must be accorded all the domestic and international law guarantees which allow them to represent the interests of their clients in an independent and effective manner in civil and criminal proceedings, as well as the other fundamental rights and freedoms which allow them to work without fear of harassment or other kinds of intimidation.

4.2 The right to legal assistance is well-established in international law as an essential component of the right to a fair trial, and minimum procedural guarantees are set out in Article 14(3) of the ICCPR and other regional instruments.[82] Furthermore, the *UN Basic Principles on the Role of Lawyers*[83] set out detailed principles designed to promote and ensure the proper functioning of the legal profession. Importantly, the Basic Principles provide that governments shall ensure that lawyers are able to perform all of their professional functions freely and without intimidation,[84] that where the security of lawyers is threatened they shall be adequately safeguarded by the authorities,[85] and that lawyers shall not be identified with the causes of their clients as a result of discharging their functions.[86]

4.3 Article 13 of the Sri Lankan Constitution enshrines the right to a fair trial and to legal representation in criminal cases. Additional fundamental rights articulated within Chapter III of the Constitution provide for the other guarantees which allow lawyers to operate freely, such as freedom of speech, association, assembly and movement,[87] freedom of thought, conscience and religion,[88] and freedom from arbitrary arrest, detention and punishment[89]. Article 126(2) of the Constitution also importantly provides the right for an attorney to bring petitions before the Supreme Court for alleged breaches of these fundamental rights.

The Bar Association of Sri Lanka

4.4 The Bar Association of Sri Lanka (BASL) which was formed in 1974 is a non-statutory body established under its own constitution. It has a network of 73 branches all over the country and in 2008 had 8,562 life members and 1,137 ordinary members. On being called to the bar, all practitioners are eligible to practice and become members of the Bar Association. However, there is no compulsion on practitioners to be fully paid-up members of BASL and many have

82 See also Article 10 ECHR and Article 8 ACHR
83 See Annex 2
84 Principle 16 of the UN Basic Principles on the Role of Lawyers see also: Principle 1 of the International Bar Association's General Principles for the Legal Profession (IBA General Principles).
85 Principle 17 of the UN Basic Principles on the Role of Lawyers.
86 Principle 18 of the UN Basic Principles on the Role of Lawyers.
87 Article 14 of the Constitution.
88 Article 10 of the Constitution
89 Articles 13(1), (2) and (4) of the Constitution.

chosen to stay out of the activities of the bar. The current President of BASL is Mr Wagachige Dayaratne. The former Deputy President of BASL, Mr Mohan Peiris PC, was sworn in as Attorney-General on 18 December 2008.

4.5 Article 2 of the BASL Constitution outlines as its organisational objectives:

...

'(b) the promotion and protection of the interests, rights and privileges of the Bar;

(c) the promotion of good relations and cooperation between the bar and the public;

(d) the extension of co-operation and support towards the maintenance of the honour and independence of the judiciary of Sri Lanka;

(e) the consideration of matters of national importance relating to the rule of law and administration of justice and if need be, making of representations thereon to the government and/or any other relevant authority and taking any further steps in respect thereof including filing of actions or intervening in actions in courts of justice

...

(j) the furtherance of legal education and study of the law'

4.6 BASL has been active in a number of areas, notably in the field of legal education and public outreach. In 2008 it held seminars on criminal, civil and company law throughout the country; published unreported criminal law appeal judgments for the benefit of the wider legal profession; and convened a National Law Conference, a Junior Law Conference and an Information and Communication Technology Conference. During 2008 BASL also held bi-weekly radio programmes on access to justice, legal awareness seminars in various cities, and established library facilities in the regions and more remote areas of the country.[90]

4.7 In the past year, BASL has faced a number of difficulties, arising from the harassment of and attacks against its members owing to their involvement in fundamental rights applications, cases brought under the emergency regulations and bribery and anti-corruption issues. These incidents and the response of BASL and other relevant agencies will be examined in further detail below.

Threats and harassment of lawyers

4.8 The IBAHRI was extremely concerned to hear reports of threats, harassment and physical attacks against lawyers filing fundamental rights applications, representing individuals charged with terrorism offences under the emergency regulations and taking bribery and anti-corruption cases. These incidents have generated a climate of fear amongst those lawyers which has a serious impact on their ability to discharge their professional duties freely, as well as on the rights of the individuals they are seeking to represent. Furthermore, it has had a deterrent

90 Bar Association of Sri Lanka, Leaflet, 'Synopsis of the services rendered to the members and the public by the Bar Association of Sri Lanka 2008'.

effect on other members of the legal profession who do not necessarily specialise in these areas, from taking up these cases. Some of these incidents are outlined below.

Harassment of lawyers by police

4.9 The delegation heard reports of the harassment of lawyers in the course of their professional duties by police officers, including verbal and physical abuse as well as other forms of intimidation such as plain-clothes policemen waiting outside lawyers' offices in white vans with no registration plates.

4.10 The delegation was informed that on 24 October 2008, attorney-at-law, Mr DWC Mahotti, was harassed by police officers at the Bambilipitya police station when he accompanied his client there regarding an alleged robbery. Mr Mahotti was assaulted and verbally abused by police officers while trying to represent his client. On 22 November 2008, BASL met and passed a resolution in relation to Mr Mahotti, condemning the acts of the police officer and calling for the Inspector General of Police and the National Police Commission to take adequate disciplinary measures against the officer and to ensure the physical safety, self-respect and dignity of members of the legal profession in their dealings with the police. BASL was informed by the National Police Commission on 11 December 2008 that charges were being prepared against the police officer in question and that disciplinary action would be instituted after a preliminary inquiry into the matter had been completed.

4.11 A fundamental rights petition was filed in the Supreme Court relating to these allegations and leave was granted to proceed.[91] Subsequently a settlement was suggested to introduce a code of rules to be followed in relation to the presence of lawyers at police stations. This settlement was supported by BASL which provided suggestions to the Supreme Court as to the content of the code, including for the establishment of a special committee made up of representatives of the police, the Attorney-General's department and the BASL to monitor and facilitate compliance with the code. The IBAHRI is pleased to learn that since its visit, the Attorney-General's department has approved the code and that it is due to be implemented shortly.

4.12 The delegation heard widespread dissatisfaction with policing standards and accounts of intimidatory behaviour of police officers towards lawyers at police stations. Whilst the delegation was unable to meet with a representative from the police administration nor was it within its mandate to conduct an analysis of the policing system, it was concerned at the negative impact such behaviour has on the ability of the lawyers to represent their clients effectively and the extent to which the reports it received are illustrative of the general situation regarding the behaviour of law enforcement officials in Sri Lanka. The IBAHRI has learnt subsequent to the delegation's visit that a lawyer representing an individual in a case involving bribery and torture by police officers was recently unable to attend the court hearing due to threats received from the police.[92]

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91 SC (FR) Application No 527/2008.

92 On 11 March 2009, Ms Jayawardena, was threatened by the police to stop her from defending her client whom the police was alleged to have tortured: **http://www.ahrchk.net/ua/mainfile.php/2009/3129**

4.13 The delegation also noted that the poor treatment of lawyers by the police might in part be the result of the courts' failure to uphold the right to counsel at the investigative and pre-trial stages of criminal proceedings. The delegation was concerned to hear that the constitutional right to legal representation in criminal cases has been construed by the courts in order to limit the right to counsel to the trial stage of proceedings. The delegation notes that the pre-trial stage is a critical stage of the legal representation process, particularly in Sri Lanka where there are alarmingly high numbers of reports of involuntary confessions being given under threat of torture at police stations.[93]

4.14 The delegation was also concerned to hear that police officers are frequently present during client – lawyer meetings, sometimes sitting at the same table and taking notes on the conversation. This clearly restricts the ability of the lawyer and the client to communicate freely and violates the basic principle of client confidentiality, an important element of the right to a fair trial and fundamental to the proper exercise of the lawyer's professional duties.[94]

Threats to lawyers by the 'Mahason Balakaya' death squad

4.15 The delegation heard that a notice had been sent to the registrars of all lower courts and a number of attorneys-at-law specialising in human rights cases on 21 October 2008 from a group calling itself 'Mahason Balakaya' ('The battalion of the ghost of death'). This notice threatened lawyers representing suspected terrorists, calling them 'traitors' and warning them that they will meet the 'same fate' as innocent victims killed by terrorists. The notice also warned those it addressed that the group had the names and addresses of these 'traitors'.

4.16 The delegation was relieved to hear that none of these threats have yet been carried out but is extremely concerned at the contribution of such threats to the increasingly hostile environment in which lawyers representing terrorist suspects are currently operating. At the time of the delegation's visit, investigations by the authorities had not resulted in the identification of the members of 'Mahason Balakaya'.

Publication of lawyers' names in Ministry of Defence article 'Who are the human rights violators'?

4.17 The delegation was alarmed to hear of the publication of an article on the Ministry of Defence's website on 14 November 2008 entitled 'Who are the human rights violators?'[95] This article includes the names and in some cases photos of the lawyers filing fundamental rights petitions in 11 terrorism 'case studies'. The delegation heard evidence that the article is partially inaccurate in its identification of the lawyers instructed in the various cases to which it refers and mostly inaccurate as to the actual outcome of each of these proceedings. This has created the misleading impression that these cases have been dismissed on their merits as they were

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93 UN Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: mission to Sri Lanka, 26 February 2008. A/HRC/7/3/Add.6. Online. UNHCR Refworld, available at: **http://www.unhcr.org/refworld/docid/47d683cf2.htm**

94 Article 14 (3) ICCPR, Principles 8 and 22 UN Basic Principles on the Role of Lawyers; see also Human Rights Committee, General Comments 13 and 32 and principle 4 IBA General Principles.

95 Ministry of Defence website, 'Who are the human rights violators?', 14 November 2008, **http://www.defence.lk/new.asp?fname=20090130_05.**

found to be without basis. This is not correct. In fact, all of the cases which have been dismissed were done on a pro forma basis following withdrawal of the petitions by the petitioners as their complaints had been addressed by the authorities before the courts were required to adjudicate on their merits.

4.18 For example, in relation to case study III, which relates to the 'Alleged involvement in the bomb blast in Dehiwala', the petitioner, Sakarapillai Karthick, was released from custody on 10 September 2008 subsequent to an Attorney General's direction to discharge him as he was found not to be involved in the incident. The fundamental rights petition was accordingly withdrawn and it was marked on the court records as being pro forma dismissed.[96] Similar discharges by the Attorney General leading to release of the petitioners and subsequent withdrawals of their fundamental rights petitions also took place in relation to case studies VII,[97] VIII[98] and X.[99] Likewise, the petitioner in case study II was released prior to an indictment being filed by the Chief Magistrate of Colombo.[100] Finally, the petition referred to in case study XI, which related to amendments to the Emergency Regulations extending the maximum period of detention to 18 months, was withdrawn by the petitioner after the Supreme Court granted interim relief by staying the operation of the amendments and ordering that the unamended regulations continue in force.[101] In the other cases referred to on the website, the fundamental rights petitions remain pending at the time of writing.[102]

4.19 Most disconcerting is the statement in the article that those supporting the human rights of the named individuals who are accused of terrorism offences are 'the anti national, anti social, organizations that are supporting the LTTE, under cover of protecting human rights', implying that those lawyers who represent terrorism suspects are themselves connected with terrorist activity. In the context of the current political climate and the threats currently being faced by lawyers this rhetoric is inflammatory and seriously compromises the physical safety of those lawyers named. Furthermore, it demonstrates a clear inability, or unwillingness, on the part of

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96 FR Application No: SC (FR) 341/2008.

97 See: Case Study VII, 'Alleged funding the suspects of Philyandala bus bomb' , Suspect – Gnanadurai Ponnampalam, FR Application No: SC (FR) 456/2008 (the suspect was released on 11 December 2008 after the Supreme Court granted leave to proceed on the FR petition; accordingly the FR petition was withdrawn and pro forma dismissed).

98 See: Case Study VIII, 'Alleged providing of lodging for an LTTE suicide cadre' , Suspect – Munusamy Parameswari (Journalist), FR Application No: SC (FR) 45/2008 (After the Supreme Court granted leave to proceed on the FR petition, the suspect was released on 22 March 2007 on the recommendation of the Attorney General, accordingly she withdrew the FR petition and it was pro forma dismissed by the Court).

99 Case Study X, 'Aiding and Abetting the LTTE', Suspect – BM Dushantha Bandara Basnayaka, FR Application No: SC (FR) 351/2008 (The suspect was discharged by the Attorney General and on 27 March 2008 she was released, accordingly the FR petition was withdrawn by the Petitioner and was pro forma dismissed).

100 Case Study II, 'Alleged involvement in transportation of lethal explosive for mass crimes', Suspect – Alwapillai Balasundaram, FR Application No: SC (FR) 327/2007 (the FR petition was dismissed as the suspect was discharged without an Indictment being filed on 9 July 2008 by the Chief Magistrate of Colombo in Case No. B/3909/2).

101 Case Study XI, 'Against the emergency regulations', Petitioners: Centre for Policy Alternatives, P Saravanamuttu, FR Application No: SC (FR) 351/2008 (The petition related to amendments made to the Emergency Regulations by Gazette No 1561/11 of 5 August 2008 which, inter alia, extended the maximum period of detention to 18 months. On 15 December 2008 the Supreme Court granted relief to the Petitioner by staying the operation of the impugned Gazette and ordering that the earlier regulations continue in operation without the 5 August 2008 amendments).

102 See for example: Case Study I, 'Alleged importation of lethal chemical weapon substance', Suspect – Sokkar Nandakumar, FR Application No: SC (FR) 225/2008 (the FR petition was dismissed but the Magistrate's Court case determining the underlying criminal charges in this case study is still pending); Case Studies V & VI, 'Alleged aiding and abetting the LTTE propaganda work', Suspects – Vettivel Jasikaran and Vadivel Valarmathi, FR Application No: SC (FR) 208/2008 & 209/2008 (these two FR petitions are still pending before the Supreme Court);

the author to separate lawyers from the causes of their clients.[103] The IBAHRI considers that the publication of such material on the Ministry of Defence website is deeply inappropriate and creates the impression that this represents the Government's position on lawyers who take such cases.

4.20 The delegation was informed that on 20 February 2009 a committee comprising senior members of the legal profession[104] approved a letter to be sent from the BASL to the Ministry of Defence requesting the immediate removal of this article from its website. The delegation is not aware of any response by the Ministry of Defence. The delegation was assured in its meetings with government officials that the article would be removed immediately. However, at the time of writing, the article was still available on the website.[105]

Physical attacks against lawyers

4.21 In addition to threats and harassment of lawyers the delegation was extremely concerned to hear of physical attacks that had been made over the past year. Details of two of the most prominent attacks are outlined below.

4.22 On 27 September 2008, Mr JC Weliamuna suffered a grenade attack on his family home. Mr Weliamuna is the Executive Director of Transparency International Sri Lanka and a Supreme Court advocate, acting in many fundamental rights cases, some of which involve allegations of torture, extra-judicial killings and disappearances. Two grenades were thrown at Mr Weliamuna's house, which is in close proximity to the Kohywala police station has many checkpoints in the vicinity. Only one of the grenades exploded, damaging part of his house and the wall of a neighbouring house. Mr Weliamuna and his family were fortunately unharmed in the attack.

4.23 The delegation was informed that this attack followed Mr Weliamuna's movement of a resolution at the BASL Executive Committee meeting that morning regarding the intimidation of and threats against litigants and a lawyer, Mr Ariyaratne (see below for further discussion) in a case involving allegations of bribery and torture by police officers.

4.24 On 29 September 2008 an emergency meeting of the BASL was convened and a press release was issued condemning the attack. Representatives of the BASL then attended a demonstration of lawyers and civil society organisations gathered near the Supreme Court on 30 September 2008 calling for an investigation into the incident and for steps to be taken to prevent such attacks occurring in future. The President of the BASL met with President Mahinda Rajapaksa and representatives of the police, Attorney-General and Ministries of Justice and Defence on 3 October 2008. At this meeting, the President directed the Inspector General of the Police and the Secretary to the Ministry of Defence to urgently investigate the incident. On 11 October 2008 a special general meeting of the BASL took place and a resolution was passed 'universally condemning' the attack, demanding that the matter be 'expeditiously, fully, honestly and

103 Principle 18 of the UN Basic Principles on the Role of Lawyers.
104 See below for more information.
105 See Annex 3.

impartially investigated' and calling upon the State authorities to 'take meaningful and effective steps to have the perpetrators brought to justice and to prevent any future recurrence of attempted intimidation against any member of the legal profession'. The investigation has not yet resulted in the identification of any suspects and the delegation is unaware of any preventative steps against future attacks that have been taken by the authorities.

4.25 The delegation was alarmed to hear from the Chief Justice that, in his view, Mr Weliamuna had somehow brought the attack upon himself through his high-profile advocacy on bribery and anti-corruption issues as Executive Director of Transparency International Sri Lanka. The suggestion that the incident might not have been entirely related to Mr Weliamuna's activities as a lawyer is, to the delegation, irrelevant. It is a fundamental principle that lawyers, like all other citizens, are entitled to freedom of expression, belief and association and should be free to engage in such activities without fear of harassment or intimidation.[106] The delegation was surprised to hear such views from the head of the court responsible for adjudicating complaints relating to fundamental rights and constitutional matters. The IBAHRI respectfully reminds all judicial officers in Sri Lanka that the judiciary, as agents of the administration of justice, have an important role to play in supporting the independence of the Sri Lankan legal profession as a whole.

4.26 The delegation was alarmed to hear of the grave threats made to the life of attorney-at-law, Mr Amitha Ariyaratne, an experienced human rights defender acting on behalf of the Right to Life organisation representing indigent clients in the lower courts. One of Mr Ariyaratne's clients was Mr Sugath Perera, who was pursuing several cases against Negombo police for assaults occasioned against him by police officers and was shot dead by an unidentified gunman on 20 September 2008. On 24 September 2008 Mr Ariyaratne received a telephone call stating that if he continued to appear in the cases of the late Mr Perera he would suffer the same fate. A similar threat was also contained in a letter received at the Right to Life organisation on 21 September 2008 and a further telephone threat was made to the Right to Life office on 26 September 2008. These threats were raised by Mr Weliamuna at the meeting of the BASL on 27 September 2008.

4.27 On 27 September 2008 Mr Ariyaratne travelled to Negombo police station in the course of representing Mr Perera's wife; and he was assaulted and verbally abused by a senior police officer, on one occasion in view of the officer in charge of the police station. Mr Ariyaratne made a formal complaint about this conduct by telephone to police headquarters later that day and followed this up with a letter on 28 January 2009.

4.28 In the evening of 30 January 2009 Mr Ariyaratne's office was set on fire and he and his family moved to a safe house. Mr Ariyaratne made several complaints to the police that evening and on subsequent days. However, investigations were not commenced by the police until 2 February 2009. In Mr Ariyaratne's fundamental rights petition arising from this incident he states that he believes that the fire was a planned attack against him with the aim of intimidating him and preventing him from duly attending to his professional commitments. [107] At the time

106 Article 14((1)(a) of the Constitution; see also Principle 23 of the UN Basic Principles on the Role of Lawyers; see also Principle 1 of the IBA General Principles.

107 The petition was given leave to proceed by the Supreme Court on 6 March 2009

of the visit the delegation was informed that Mr Ariyaratne had left the country for fear of his personal safety.

A pattern of intimidation against members of the legal profession

4.29 Government representatives with whom the delegation met considered these threats and attacks to be isolated incidents. However, lawyers and civil society activists informed the delegation that these attacks were indicative of a pattern of intimidation of lawyers filing fundamental rights applications, representing those accused of terrorist offences or involved in bribery and anti-corruption cases that have been developing in recent years. The delegation also found a widespread perception that in addition to taking up such cases, making complaints against the police and/or other authorities has become an increasingly dangerous activity over the past 12 months.

4.30 The delegation was particularly alarmed at the brazen nature of the physical attacks mentioned above, the lack of effective investigations and prosecutions in any of the cases, and the rhetoric contained in the article on the Ministry of Defence's website. The IBAHRI is of the view that these incidents cannot be dismissed as isolated or coincidental, and is concerned that a pattern of intimidation against those lawyers filing fundamental rights applications, representing terrorist suspects or taking bribery and anti-corruption cases has developed. Since the delegation's visit, the IBAHRI has become aware of further death threats against lawyers in Sri Lanka.

4.31 In addition to severely restricting the ability of these lawyers to discharge their professional duties freely, this has created a serious chilling effect not only on other members of the legal profession who may wish to take up such cases in the future, but also on NGOs and civil society activists who work on such issues. This poses a serious threat to the independence of the legal profession as a whole and the rule of law in Sri Lanka, particularly in view of the fact that all of these incidents have occurred with impunity.

Governmental response to threats to the independence of the legal profession

4.32 Various organisations have called on the Government of Sri Lanka to ensure that proper investigations are conducted into these incidents. The IBAHRI itself has previously written an open letter to President Mahinda Rajapaksa calling on the Sri Lankan authorities to 'ensure a full investigation into these allegations', 'ensure protection for all lawyers working to uphold the rule of law in Sri Lanka' and 'take steps to ensure all professionals defending the rule of law are able to carry out their work without fear of harassment and violence' in accordance with their international obligations.[108]

4.33 The delegation was told that although the police have instigated investigations into each of the incidents outlined above, none of the perpetrators have been identified and as a result, there are no charges laid or prosecutions pending in any of these cases. This has fostered a sense of

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108 Letter from IBAHRI Co-Chairs Justice Richard Goldstone and Ambassador Emilio Cardenas, re: Death Threats to Sri Lankan lawyers dated 4 November 2008, available at: **http://www.ibanet.org/Human_Rights_Institute/About_the_HRI/HRI_Activities/HRI_Media/HRI_Interventions/SriLanka_DeathThreats.aspx**

impunity and has contributed significantly to the danger felt by lawyers who undertake these cases. The lack of progress in these investigations was raised by the delegation in each meeting with representatives of government departments. The official response during each meeting comprised expressions of disappointment that the investigations had not yet succeeded, an observation that police investigations had not yet been concluded, and a statement that nothing more can be done by the Government until the investigations are finished. One official also pointed to the present lack of witness protection measures in Sri Lanka which necessarily affects the number of individuals who are willing to come forward to assist police in their investigations. The IBAHRI acknowledges that the lack of witness protection measures presents a significant impediment to effective police investigations in Sri Lanka and was encouraged to hear that a Witness Protection Bill is currently before Parliament.

4.34 While the IBAHRI understands the reluctance of governmental agencies to interfere in individual police investigations, where a number of related police investigations have been inexorably delayed and in cases which appear to follow a similar pattern – the targeting of lawyers working on similar issues – further steps must be taken by the Government to bring the perpetrators to justice. It is unsatisfactory for the Attorney-General's Department to merely make its officials available to the police in the event that the police decide to seek advice as to the conduct of their investigation. The IBAHRI considers that further steps could be taken in order to expedite and increase the effectiveness of the ongoing investigations. In this regard, the IBAHRI notes that there are various police oversight mechanisms available in Sri Lanka which do not yet appear to have been utilised in relation to these ineffective investigations. These bodies include the Police Commission, which is empowered to investigate failures by the police in their official duties, the Special Investigations Unit, which investigates allegations against the police, and the Inspector-General, who can be directed by the Attorney-General to review instances of poor performance by police.

BASL's response to threats to the independence of the legal profession

4.35 The IBAHRI notes that such threats to Sri Lankan lawyers have occurred in the past. Between 1987 and 1990, during the second JVP insurgency, a number of lawyers active in the human rights field were killed, mainly by the police or armed forces. In informal discussions between the delegation and a number of different individuals the estimated number of deaths in that period varied from seven to more than 20. The delegation was also told that a number of other lawyers fled the country at that time.

BASL has taken steps in defence of its members faced with the current threat. In addition to issuing resolutions it has assisted with fundamental rights litigation and has suggested the creation of a set of rules for the protection of lawyers visiting police stations and an executive body to monitor compliance with these rules.

4.37 However, there is a widely held view that whilst BASL has responded to the existence of the threats, it has not been sufficiently proactive in exerting meaningful and consistent pressure on the Government to act to protect its membership. The delegation heard that a reason for this reluctance is because there is a considerable degree of politicisation amongst some of its

senior members, which has led to a reluctance to engage in any activity which may be critical of the government and inconsistent responses to the threats against its members. For example, the delegation noted that BASL has not adopted an active role in intervening in fundamental rights litigation, or cases dealing with contempt of court or discipline of lawyers, even though amicus curiae interventions are both within BASL's mandate and would be permitted by the Sri Lankan courts. The IBAHRI also agrees with the widespread view that BASL should not restrict itself to representing the interests of its members and should adopt a more prominent role in advocating on wider rule of law and human rights-related issues, particularly in view of the challenging environment in which civil society is currently operating. The IBAHRI is aware that BASL has in the past played a proactive and dynamic role in speaking out to protect the independence of its members as well as wider rule of law issues.

4.38 The delegation learnt that a group of 'concerned' senior attorneys has been established to look into these incidents. The delegation understands that although this group is separate from BASL, it will work closely with BASL on these issues. The group has recently sent a letter to the Ministry of Defence regarding the inappropriate article on its website entitled 'Who are the Human Rights Violators?'. The creation of this committee appears to be a positive step and will, it is hoped, provide valuable guidance to BASL.

Legal education

4.39 The delegation heard reports of low standards in some of the institutions providing legal education in Sri Lanka, which has led to declining standards of professionalism, as well as a lack of interest in human rights or pro bono casework. Dissatisfaction was particularly expressed in relation to a relative lack of familiarity with the English language by the more recent graduates compared to the more senior lawyers, the shortage of textbooks and law reports in Sinhala and Tamil and the lack of specific human rights modules at the Sri Lanka Law College. The delegation applauds recent government initiatives to enhance the study of English within legal education, which will hopefully encourage law students to access a wide range of legal materials. It also acknowledges the importance of having a common language in order to develop a full understanding of any legal system and the critical nature of human rights training for all prospective lawyers, regardless of their future practice area.

Legal aid and access to justice

4.40 There are a number of ways in which indigents can obtain legal services in Sri Lanka. Firstly, the Courts will assign counsel to defendants charged with serious criminal offences and some types of civil cases. Counsel acting in this capacity will receive small payments from the state for this service by virtue of the Legal Aid Commission, which is primarily funded by donations from the United Nations Development Programme (UNDP). Secondly, individual members of the BASL provide pro bono legal assistance in some fundamental rights cases. Thirdly, there is a small number of NGOs which provide free legal services in fundamental rights cases.

4.41 The delegation was told that although the provisions of legal aid outlined above appear to be adequate, in practice it does not provide equal access to justice. This is because the

Legal Aid Commission has an unwritten policy of not funding lawyers for terrorism charges brought under the Prevention of Terrorism Act and the Emergency Regulations. This policy is reportedly not acknowledged publicly as it could jeopardise continued funding of the Legal Aid Commission from the United Nations. The IBAHRI is alarmed by these reports, as it is precisely those individuals whose cases fall within the Prevention of Terrorism Act and the Emergency Regulations who are most at risk of a conviction resulting from a trial process that tilts heavily in favour of the prosecution. Prima facie, this practice appears to run contrary to Article 14(3)(d) of the ICCPR and principles 2, 3 and 6 of the UN Basic Principles on the Role of Lawyers which provide for the right to free legal assistance for indigent persons in full equality and without discrimination.

Chapter 5: The Media

Introduction

5.1 A free media provides one of the strongest safeguards for upholding the rule of law, the public accountability of elected officials, and good governance in any society. Indeed, as Napoleon Bonaparte once said 'I fear three newspapers more than a hundred thousand bayonets.'[109] Together with an independent judiciary and a robust legal profession, an effective and vigilant media is critical to preventing impunity for state abuses of power.[110]

5.2 Article 14(1)(a) of the Constitution upholds every citizen's entitlement to 'freedom of speech and expression including publication' as a fundamental right. The right to freedom of speech is also well-established as a norm of customary international law. It is recognised in all major international human rights instruments[111] and is viewed as an essential element of democracy.[112] The UN Special Rapporteur on Freedom of Opinion and Expression has noted that 'the exercise of the right to freedom of opinion and expression is a significant indicator of the level of protection and respect of all other human rights in a given society'.[113]

5.3 Courts around the world recognise the importance of free expression as an essential foundation of democratic society, as do elected political leaders. The European Court of Human Rights has noted that 'freedom of expression constitutes one of the essential foundations of a [democratic] society'[114] and has acknowledged the centrality of the press in upholding this guarantee, describing the media as 'a purveyor of information and public watchdog'.[115]

5.4 The United Kingdom House of Lords has emphasised the potent and honourable 'role of the press in exposing abuses and miscarriages of justice'[116], and the necessity for a 'free, active, professional and inquiring' media for the 'proper functioning of a modern participatory democracy'.[117] Furthermore, the Supreme Court of India has held that:

> 'Freedom of speech and of the press lie at the foundation of all democratic organizations, for without free political discussion no public education, so essential for the proper functioning of the process of popular government, is possible'[118]

and the Constitutional Court of South Africa that 'The manner in which the media carry out their constitutional mandate will have a significant impact on the development of [our]

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109 Bird, G L, Maton Mervin, F, *The Newspaper and Society: A Book of Reading,* Prentice-Hall, 1949, p254.

110 *Surek v Turkey* (No 2), ECtHR, Judgment of 8 July 1999, Application No 245222/94, paragraph 29.

111 See for example Article 19 of the UDHR: Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers; see also Article 19 ICCPR, Article 10 ECHR, Article 12 ACHR and Article 9 AfCHR

112 Barendt, E, 'Freedom of speech in an era of mass communication', in Birks, P, (ed) Criminal Justice and Human Rights Pressing Problems in the Law, Vol 1, (OUP, 1995), p110.

113 Report of Ambeyi Ligabo, Special Rapporteur on freedom of opinion and expression, submitted in accordance with UN Commission on Human Rights Resolution 2003/42, UN Doc. E/CN.4/2004/62, 12 December 2003, paragraph 79.

114 *Handyside v United Kingdom* (1981) 1 EHRR 737 ECtHR, at paragraph 49.

115 *Barthold v Germany* (1985) 7 EHRR 383, ECtHR, at paragraph 58.

116 R v Shayler [2003] 1 AC 247, HL at paragraph 21 per L.Bingham

117 *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277, HL at 290G 291A per L. Bingham.

118 *Romesh Thapar v State of Madras,* A.I.R. 1950 SC 194 per Shastri CJ;

democratic society'.[119]

5.5 These principles have also been applied by the Sri Lankan Supreme Court which has found that:

> 'the right to support or criticise Governments and political parties, policies and programmes is fundamental to the democratic way of life and the freedom of speech and expression is one which cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions'.[120]

5.6 President Rajapakse himself has highlighted his Government's commitment to media freedom by publicly stating:

> 'In functioning democracies, the people are the masters and the elected governments are their servants or trustees. An important function of the media is to ensure that the servants don't try to become masters and transform the masters into servants. It is the responsibility of a free press to keep the people informed about the conduct of their trustees – the elected governments and their officers. It has always been my conviction that if a person has chosen the career of a public officer or politician, he or she must be ready to face the glare of the spotlight at all times. Media freedom therefore is an important instrument for the protection of democracy, and an insurance against a possible drift towards authoritarian rule.'[121]

Restrictions to free speech

5.7 While the right to freedom of expression is of fundamental importance in any society, it is not an absolute right.[122] Any restrictions on the right to freedom of speech must be (a) provided for by law; (b) for a legitimate purpose (that is, to respect the rights or reputations of others or for reasons of public order, public health or morality); (c) necessary to achieve that legitimate purpose.[123] Importantly, the scope of a limitation cannot be interpreted so as to jeopardize the essence of the right concerned.[124] Where a restriction is imposed for reasons of national security, any limiting measure cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there are adequate safeguards and effective remedies against abuse.[125] Finally, even if a limitation is imposed as a derogation in a public emergency, the severity, duration, and geographic scope of any such derogating measure must be 'strictly necessary to deal with the threat to the life of the nation' and 'proportionate' in its nature and

119 *Khumalo v Holomis* CCT 53/01, per O' Regan J at p21

120 *Amaratunge v. Simiral and others*, 1993 (1) SLR, page 265 per Fernando J; see also *Leo Samson v. Sri Lankan Airlines Ltd. and others*, 1 2001 (1) SLR, page 12. per Fernando J

121 Speech of His Excellency Mahinda Rajapaksa, President of Sri Lanka, at the Award Ceremony of the UNESCO – Guillermo Cano World Press Freedom Prize held in connection with the World Press Freedom Day 2006, on 3rd May 2006 at 4.00 pm at the Main Hall of the BMICH, Colombo, available at: **http://www.president.gov.lk/speech_arc_03_05_2006.asp**, last accessed: 7 April 2009.

122 See Article 19 (3) ICCPR

123 *Womah Mukong v. Cameroon,* Communication No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991 (1994), United Nations Human Rights Committee, 51st Session, 21 July 1994.

124 United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights* ('Siracusa Principles'), Annex, UN Doc E/CN.4/1984/4 (1984).

125 See Principles 29-32 of the Siracusa Principles. See also Principles 1-3 of the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, 1 October 1995.

extent.[126]

5.8 In the Sri Lankan Constitution the right to freedom of expression is constrained by Article 15(2) which provides that it is subject to 'such restrictions as may be prescribed by law in the interests of racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence'.[127] A further limitation to the freedom of the media is contained in Article 16 of the Constitution, which maintains the validity of existing laws notwithstanding their inconsistency with fundamental rights. *Prima facie* review of these restrictions raises concern that they are broader than the permissible constraints on freedom of expression under international law.[128]

5.9 Several provisions of the *Emergency (Miscellaneous Provisions and Powers) Regulation No 1 of 2005* (ER 2005), the *Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulations No 7 of 2006* (ER 2006) *and the Prevention of Terrorism (Temporary Provisions) Act of 1979* (PTA) enable the Government to restrict the right to freedom of expression. The measures contained within this legislation, which in some circumstances create criminal offences, prohibit the possession or distribution of information which might be prejudicial to national security, public order or the maintenance of essential services.[129] These measures have been criticised as being unduly broad and vague and creating the pre-conditions for self-censorship and a chilling effect on the freedom of the press.[130]

Media freedom in Sri Lanka since the 2001 IBA mission

5.10 The IBAHRI had expressed concern regarding the freedom of the media in its 2001 report noting then that not only was overt state censorship of the press in evidence, but that some members of the press had also suffered intimidation by state agents. It concluded that steps should be taken by the Government to divest itself of state ownership of the media; that national laws limiting freedom of expression be reviewed to ensure that they are in conformity with Sri Lanka's international obligations; that attacks on the media should be investigated and those responsible brought to justice; and that a variety of institutional changes be made to develop and support the freedom of the press.[131] The IBAHRI 2001 additionally recommended that the law of criminal defamation, which had been unlawfully used to limit criticism and to stifle public debate, be repealed.[132]

126 See Principles 39-57 of the *Siracusa Principles*.

127 This provision has also been remarked upon negatively by the United Nations Human Rights Committee. Human Rights Committee, Comments on Sri Lanka, U.N. Doc. CCPR/C/79/Add.56 (1995), 27 July 1995: 'The Committee is also concerned that Article 15 (2) of the Constitution allows the right to freedom of expression to be restricted in relation to parliamentary privilege, particularly in view of the fact that the Parliament (Power and Privileges) Act as amended in 1978 gives Parliament the power to impose penalties for breaches of this Act.'

128 See for example Article 19 ICCPR

129 See for example: Regulations 15 (Power to restrict publication or transmission of specific matters) , 18(1)(vi) (Power to restrict a person's movements in relation to the dissemination of news); 26 (Offence of advocating unlawful overthrow of the Government); 27 (Prohibition of affixing certain posters or distributing certain handbills); 28 (Prohibition of spreading rumours likely to cause public alarm or disorder); 29 (Offence of publishing documents related to certain matters); and 33 (Offence of possessing writing prejudicial to public order, national security etc) *ER 2005*; Regulation 9 (Prohibition of the provision of information detrimental to or prejudicial to national security) *ER 2006*; and section 14 (Prohibition of publications) *PTA 1979*.

130 International Commission of Jurists, 'Sri Lanka: Briefing Paper – Emergency Laws and International Standards', February 2009, pp4, 9-12.

131 IBA Report 2001, pp54-56

132 IBA Report 2001, pp56-57, recommendation 1.

5.11 The IBAHRI was pleased to learn that criminal defamation has since been repealed and that other initiatives had taken place, for example the creation of a Press Complaints Commission and the repeal of the state-ownership laws. However, the IBAHRI is disappointed with the lack of progress over the past eight years with respect to the other identified problem areas and is extremely concerned that in some cases there has been a deterioration in the situation.

Governmental interference with media reporting

5.12 The delegation noted that many of the main broadcasters still remain state-owned, including two major TV stations and radio networks operated by the Sri Lanka Broadcasting Corporation (SLBC). The delegation heard that in practice this extensive state ownership over the broadcast media has a negative impact on the independent media and on free and open debate.

5.13 The delegation was told by stakeholders that the Government's influence over the media extends beyond state ownership. Sinhalese, Tamil and English language journalists all reported that there is little room within the Sri Lankan media for dissenting viewpoints on 'sensitive issues', due to excessive governmental control and interference. The delegation was informed that the President holds monthly meetings with the editors and owners of all media institutions and that these meetings were used as a means of pressuring the media and ensuring compliance with the government position on issues relating to the armed conflict with LTTE.

5.14 The IBAHRI is concerned to hear accounts of other forms of governmental pressure, such as interference with the other businesses (by way of punitive taxation measures or the shutting down of those businesses) owned by particular publishers and broadcasters or the professional marginalisation of experienced journalists working within the state media who are considered to be critical of the Government.

5.15 Many of the IBAHRI's concerns about the restrictions imposed on free speech by the Constitution and the counter-terrorism legislation were borne out by reports received during the delegation's meetings with both journalists and members of civil society. The IBAHRI was extremely concerned to hear that in practice these restrictions go beyond the prevention of dissemination of information which could genuinely threaten national security and are used by the Government as a tool to stifle legitimate expression of critical debate on military operations and issues relating to the conflict with the LTTE as well as preventing frank discussion of human rights issues which are the corollary of that conflict. Furthermore, the delegation was informed that as a result of these broad and sweeping restrictions, both private and state-owned organisations frequently engage in self-censorship for fear of prosecution or reprisals.

5.16 The delegation also heard that the oblique nature of the judicial contempt laws also has a chilling effect and encourages self-censorship, see discussion of the contempt laws above in Chapter 3.[133]

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133 *Colombo Times,* 'Media prevented from reporting on Sri Lanka war casualties', 28 April 2008, **http://www.thecolombotimes.com/2008/04/media-prevented-from-reporting-on-sri.html**,; International Federation of Journalists, Media prevented from reporting on Sri Lanka war casualties', 28 April 2008, **http://www.ifj.org/en/articles/media-prevented-from-reporting-on-sri-lanka-war-casualties**.

Detentions and criminal charges

5.17 The IBAHRI is highly concerned to hear reports of journalists being improperly detained and/or charged with criminal offences under the provisions of the Emergency Regulations and the PTA. One prominent example of such treatment is the case of JS Tissainayagam, an ethnic Tamil columnist with *The Sunday Times* newspaper and editor of the Outreach website.

The cases of Tissainayagam, Jesiharan and Valarmarthi

5.18 On 6 March 2008, Mr N Jesiharan, the co-director of Outreach Media and the owner of E-Kwality Printing Press, together with his wife Valamarthi, was arrested. Four of Mr Tissainayagam's other Outreach colleagues were also arrested in March 2008 but were released soon afterwards. Mr Tissainayagam went to the premises of the Terrorist Investigation (TID) in order to enquire into the reasons for their detention and was taken into custody under the Emergency Regulations for 30 days. An application for bail was rejected by the Supreme Court and a TID request to extend the detention order was granted by the Colombo Magistrates Court.[134] After being held for five months without charge, Mr Tissainayagam was indicted by the High Court on 25 August 2008 for editing, printing and publishing the *North Eastern Monthly* magazine, of which he was previously an editor, and for aiding and abetting terrorist organisations through raising money for the magazine.[135]

5.18 Mr and Mrs Jesiharan were served with their indictments on 27 August 2008. Mr Jesiharan's indictment is the same as Mr Tissainayagam's and Mrs Jesiharan has been charged with aiding and abetting her partner in the 'furtherance of terrorism'. All three indictments relate to acts carried out in July and November 2006, which fall during a period when the Ceasefire Agreement was valid. Under the Ceasefire Agreement, the Government made a commitment not to detain or arrest anyone under the Prevention of Terrorism Act. On this basis alone, the indictments appear to be open to question.

5.19 On 22 December 2008 the Ministry of Defence published on its website an article entitled 'Background: Thissanayagam Case and Others' which labels them as terrorists and outlines the prosecution's case against Mr Tissainayagam and Mr and Mrs Jesiharan, including a quotation

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134 'Attacks ease against SLRC workers but Tissainayagam remains in custody', 9 April 2008, **http://www.ifj.org/en/articles/attacks-ease-against-slrc-workers-but-tisseinayagam-remains-in-custody**, last accessed 2 April 2009.

135 'Indictment of Tissainayagam an assault on press freedom in Sri Lanka', 20 August 2008, **http://asiapacific.ifj.org/en/articles/indictment-of-tissainayagam-an-assault-on-press-freedom-in-sri-lanka**, last accessed 2 April 2009. The indictment quotes the following passages from the North Eastern Monthly as grounds for the charges:

1. In a July 2006 editorial, under the headline, 'Providing security to Tamils now will define northeastern politics of the future,' Tissainayagam wrote: 'It is fairly obvious that the government is not going to offer them any protection. In fact it is the state security forces that are the main perpetrator of the killings.'

2. Part of a November 2006 article on the military offensive in Vaharai in the east said, 'Such offensives against the civilians are accompanied by attempts to starve the population by refusing them food as well as medicines and fuel, with the hope of driving out the people of Vaharai and depopulating it. As this story is being written, Vaharai is being subject to intense shelling and aerial bombardment.'

from an alleged confession by Mr Tissainayagam.[136]

Despite the considerable outcry this article has generated amongst international and national bodies, it was still accessible on the Ministry of Defence's website at the time of writing. The delegation considers that this kind of publication on a governmental website is highly inappropriate while proceedings on the criminal charges are pending.[137]

5.19 The delegation understands from reports received during its meetings with other journalists that there have been considerable procedural irregularities in the post-detention treatment of Mr Tissainayagam which amount to violations of due process under national and international law. To the IBAHRI's knowledge, these irregularities have not been investigated and Mr Tissainayagam and Mr and Mrs Jesiharan remain in pre-trial detention at the time of writing.

5.20 The IBAHRI is concerned by this case which appears to be targeted at restraining particular members of the press who are perceived to be critical of the Government from reporting on the conflict. As a result of the delegation's meetings with several journalists and members of civil society, the IBAHRI is also deeply concerned that this case has had the effect of intimidating other members of the media into self-censorship.

Nadesapillai Vidyatharan

5.22 A further concerning incident occurred on 26 February 2009, two days before the delegation's arrival. Nadesapillai Vidyatharan, an ethnic Tamil and editor of the Sudar Oli and Uthayan newspapers, was arrested on suspicion of helping the LTTE to launch its 20 February 2009 air attack on Colombo. Mr Vidyatharan's arrest took place by means of a forced abduction from a funeral which he was attending by three unidentified men in an unmarked white van.[138] The delegation was informed that the police initially treated the case as an abduction. It was only several hours after the abduction that government sources admitted that Mr Vidyatharan was being held in police custody and was in fact under arrest. The fact that a person can be arrested in full view of the public in a manner the police themselves would characterise as abduction raises serious questions about the authorities' respect for personal liberty and dignity.

5.23 The IBAHRI has since learnt that Mr Vidyatharan has been released without charge and observes that journalists in the course of their professional duties frequently come into contact with representatives of LTTE. Mere contact with LTTE members for pure media reporting

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136 Sri Lankan Ministry of Defence, 'Background: Thissanayagam Case and Others', 22 December 2008, **http://www.defence.lk/new.asp?fname=20081222_01**. The article states that:

'Terrorists usually lure people who are already work in the media through money or other benefits or attractions, to make them to carry out propaganda work using the platform of the mass media. These media willing or unwilling agents of terrorism always appear to act as independent journalists and some even as the self-proclaimed crusaders of media freedom in order to prevent disclosure of their true motives. ... These self-proclaimed media freedom fighters often file reports full of invective, quoting various incidents of what they call "attacks on independent media workers". These reports invariably contain false facts related to the quoted incidents or expose only the half-truths to support the hidden agenda of their originators. This report filed by defence.lk exposes the true facts of a few such incidents, often quoted as the gravest attacks on media freedom in Sri Lanka by bogus media rights groups.'

137 See Annex 3

138 *The Times*, 'Sri Lankan editor arrested at funeral over kamikaze Tigers air raid', 26 February 2009, **http://www.timesonline.co.uk/tol/news/world/asia/article5808214.ece**, last accessed 2 April 2009.

purposes should not be considered a criminal offence.[139] Furthermore, such an arbitrary means of arrest which does not afford the detainee proper due process guarantees is contrary to both national and international standards. The IBAHRI considers this to be of particular concern in a country where disappearances are commonly reported and for the most part remain unexplained.[140]

Threats and physical attacks on journalists

5.24 The situation regarding the physical safety of journalists in Sri Lanka has been a matter of grave concern for some time.[141] The IBAHRI was extremely concerned to note that the situation appears to have deteriorated significantly over recent years, and disturbed to hear reports that several journalists have left Sri Lanka for fear of their own personal safety.

5.25 The delegation heard that Tamil journalists face a similar risk of retributive attacks if they are perceived to adopt a stance critical of the LTTE as their Sinhalese and English language counterparts would if they are perceived to adopt an anti-government stance. The delegation was saddened to note that expressing dissent on either side of the conflict continues to be considered a life-threatening activity.[142]

Labelling of journalists as 'traitors' on the Ministry of Defence website

5.26 The delegation was informed that often the precursor to a threat or physical attack against a journalist is the labelling of that person or his media outlet by the Government, and particularly by the Ministry of Defence, as a 'Tiger sympathiser', 'LTTE supporter' or 'terrorist'.[143] The delegation heard that his type of labelling is used by the Government to stigmatise and de-legitimise the views of journalists who express anti-war sentiments and directly exposes them to the possibility of violent reprisals. Indeed, the Ministry of Defence has accused specific media outlets of such behaviour and all have since come under attack: Sirasa TV, The Sunday Leader, The Morning Leader and Irudina (the Sinhala-language Sunday weekly edition of The Leader Group).[144] The delegation was informed that when journalists are subsequently threatened there is a lack of public outrage as many people have already been encouraged to regard them

139 See *Siracusa Principles* discussed above, in particular 31 & 32: '31.National security cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exists adequate safeguards and effective remedies against abuse. 32. The systematic violation of human rights undermines true national security and may jeopardize international peace and security. A state responsible for such violation shall not invoke national security as a justification for measures aimed at suppressing opposition to such violation or at perpetrating repressive practices against its population'.

140 The delegation was told that approximately 400 people have been taken away in white vans just within the Colombo area alone in the past two years. Approximately ten per cent of those abducted have been located (usually having been released directly by police), but most of these individuals remain missing. See also: *Report on the visit to Sri Lanka by a member of the Working Group on Enforced or Involuntary disappearances,* (25-29 October 1999), UN Doc E/CN.4/2000/64/Add 1, 21 December 1999.

141 See *Concluding Observations of the Human Rights Committee, Sri Lanka,* U.N. Doc. CCPR/CO/79/LKA (2003), 6 November 2003 at paragraph 18; see also UN Press Release, 'Sri Lanka: UN experts deeply concerned at suppression of criticism and unabated impunity', 9 February 2009.

142 See IBA Report 2001, paragraph 4.2

143 Sri Lankan Ministry of Defence, 'Stop media treachery against armed forces members!', 31 May 2008, **http://www.defence.lk/new.asp?fname=20080531_04**; Sri Lankan Ministry of Defence, 'Deriding the war heroes for a living - the ugly face of defence analysts in Sri Lanka', 4 June 2008, **http://www.defence.lk/new.asp?fname=20080603_06**.

144 Dietz, B, 'Sri Lanka Special Report: Failure to investigate', Committee to protect journalists, 23 February 2009, **http://cpj.org/reports/2009/02/failure-to-investigate-sri-lankan-journalists-unde.php.**

as ‘unpatriotic’, allowing any violence carried out against them to be perceived as legitimate.[145] A chilling example of this rhetoric, which bears similarities with the naming of lawyers in the website article ‘Who are the human rights violators?’, appeared on the Ministry of Defence’s website in an article entitled ‘Deriding the war heroes for a living – the ugly face of ‘Defence Analysts’ in Sri Lanka’, in June 2008. The article, which was still accessible on the website at the time of writing, stated:

> ‘Whoever attempts to reduce the public support to the military by making false allegations and directing baseless criticism at armed forces personnel is supporting the terrorist organisation that continuously murders citizens of Sri Lanka. The Ministry will continue to expose these traitors and their sinister motives and does not consider such exposure as a threat to media freedom. Those who commit such treachery should identify themselves with the LTTE rather than showing themselves as crusaders of media freedom’.[146]

Lasantha Wickramatunga

5.27 A prominent reprisal attack against a journalist for his anti-government views is the case of Sri Lankan newspaper editor Lasantha Wickramatunga. Mr Wikramatunga was a lawyer and former editor in chief of *The Sunday Leader*. He was assassinated by eight gunmen riding four motorcycles, while driving to work on 8 January 2009.[147] His murder has deeply affected the legal and journalistic community. He was a critic of the erosion of civil liberties in the Government’s campaign against the LTTE. A few days prior to his death he had written an ‘obituary’ for himself entitled ‘And then they came for me’, which stated ‘when finally I am killed, it will be the Government that kills me... today it is the journalists, tomorrow it will be the judges’. President Rajapaksa commented in response to Mr Wickramatunga’s killing that ‘despite grave threats of this nature, my government reiterates its commitment to upholding the principles of Media Freedom and Freedom of Expression, even under the most trying circumstances, as we have witnessed today’.[148] However, the article on the Ministry of Defence’s website referred to in the preceding paragraph is no reflection of this commitment.

5.28 Despite the good intentions by President Rajapska, unfortunately the killing of Lasantha Wickramatunga was not an isolated incident.[149] Indeed, the delegation was informed that

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145 Reporters Without Borders, ‘Defence ministry brands media as internal enemy in war against Tamil Tigers’, 7 June 2008, **http://www.rsf.org/print.php3?id_article=27362**.

146 Sri Lankan Ministry of Defence, ‘Deriding the war heroes for a living - the ugly face of “Defence Analysts” in Sri Lanka’, 4 June 2008, **http://www.defence.lk/new.asp?fname=20080603_06**.

147 BBC News, ‘Top Sri Lankan editor shot dead’, 8 January 2009, **http://news.bbc.co.uk/1/hi/world/south_asia/7817422.stm,**.

148 Statement made in the Asian Tribune, 57 Sri Lanka President condemns the killing of Lasantha WickramatungaSection 1 , 1 January 2009, available at: **http://www.asiantribune.com/?q=node/15071**.

149 Note also the explosive attack on the independently owned TV station ‘Sirasa TV’ on 6 January 2009 by 15 to 20 masked armed men. See further, the attack against Upali Tennakoon, editor of the Sinhala language, pro-government weekly Rivira and his wife Dhammika on 23 January 2009. The couple were driving to his office when motorcyclists forced their car to stop and smashed its window, then stabbed at Mr Tennakoon with a knife and metal bar. Fortunately, they survived the attack and have now fled to another country: Dietz, B, ‘Sri Lanka Special Report: Failure to investigate’, Committee to Protect Journalists, 23 February 2009, **http://cpj.org/reports/2009/02/failure-to-investigate-sri-lankan-journalists-unde.php.**

in the past two years approximately 16 journalists have been killed.[150] Many of these killings have occurred in broad daylight by armed individuals. Although there have been police investigations into these incidents, not a single prosecution has been forthcoming. The delegation found that the response of government officials during their meetings to questions about the ineffectiveness of the investigations was unsatisfactory. Each agency simply noted that in all these cases police investigations remained ongoing and that it was not appropriate to scrutinise the evidence while investigations have not concluded.

5.29 The IBAHRI considers the lack of prosecutions surprising, particularly in relation to the attacks which have taken place in Colombo where there is a considerable presence of security personnel and many checkpoints throughout the city. This lack has lead to a serious deterioration in public confidence in the criminal justice system and even to speculation that the perpetrators of such acts must be enjoying impunity courtesy of persons in positions of authority. The IBAHRI considers that this spate of unsolved murders of journalists constitutes a serious threat to freedom of expression in Sri Lanka and that the manner in which the investigations are being conducted warrants urgent and effective scrutiny and independent oversight.

5.30 Indeed, the administration's failure to accord sufficient weight to these attacks is illustrated by the response of one government official who, when questioned about the killings, took the view that the journalists had somehow brought about their own fate by having previously campaigned for repeal of the criminal defamation laws. In his view, these laws played a protective role in determining the propriety of media publications and in their absence it was to be expected that some journalists would face extreme danger from people who were offended by their publications and wanted to take the law into their own hands. The IBAHRI is concerned at such a cavalier rationalisation of the attacks on and murders of journalists and the extent to which it pervades the law enforcement establishment. The IBAHRI considers that a lack of public trust in the criminal justice system and the rule of law as a whole is more likely to encourage individuals to take the law into their own hands.

150 There has also been a series of attacks against staff members of the Sri Lanka Rupavahini Corporation and an arson attack on the printing press of the Sunday Leader, the Morning Leader and Irudina. See: International Federation of Journalists, 'Attacks Ease Against SLRC Workers But Tisseinayagam Remains in Custody' , 9 April 2008, **www.ifj.org/en/articles/attacks-ease-against-slrc-workers-but-tisseinayagam-remains-in-custody**,. Colombo Times, 'Leader press burnt by Government charges JVP', 13 April 2008, **www.thecolombotimes.com/2008/04/leader-press-burnt-by-govt-charges-jvp.html**,.

Chapter 6: The Emergency Regulations (ERs) and the Prevention of Terrorism Act (PTA)

Introduction

6.1 Sri Lanka has been in an almost constant state of emergency since 1971. The legal provision for a state of emergency presents a fundamental challenge for those who uphold human rights and democratic ideals at all costs. This is because the need to ensure safeguards for the fundamental rights of Sri Lanka's individual citizens must be balanced with a recognition that the Sri Lankan Government ought to be empowered to take extraordinary steps to deal with the violence and crises threatening the life of the nation. The delegation acknowledges this dichotomy and recognises that Sri Lankan governments have faced challenges over the past three decades in trying to get this balance right.

6.2 The constitutional framework governing states of emergency is set out in Chapter XVIII of the Constitution. The power to promulgate emergency regulations is granted to the executive under Part II of the Public Security Ordinance No 25 of 1947 (PSO). The actual state of emergency is brought into being by a Presidential Proclamation which must then be approved by Parliament and may subsequently be extended by Parliament every month.[151] There are a large number of emergency regulations currently in force, dealing with various matters including terrorist activities, special administrative arrangements, high security zones, procurement and other issues. However, two emergency regulations have the greatest impact on the basic legal guarantees of Sri Lankan citizens, ERs 2005 and 2006. Both of these sets of regulations were promulgated in the wake of particular acts of terrorism,[152] and both have been criticised for not according the appropriate balance between legitimate national security and public order considerations on the one hand, and the rule of law and fundamental human rights on the other.[153] Broadly speaking, the ER 2005 deals with powers of arrest, detention, search and seizure, trial procedure, evidence and admissibility of confessions and various other amendments to ordinary criminal procedure, while the ER 2006 seeks to define 'terrorism' and 'specified terrorist activity' and to create offences in relation to terrorism related activities.

6.3 Further special anti-terrorism powers are provided for in the PTA. The powers contained in this Act are not governed by the emergency regulations regime and despite being enacted as a temporary measure have been in force almost continuously since their initial enactment. The Act provides for detention without charge for extended periods of time at irregular places of detention, the admissibility of confessions in judicial proceedings with limited procedural

151 Article 155 of the Constitution.

152 The August 2005 assassination of Foreign Minister Lakshman Kadirgamar, and the December 2006 attempted assassination of Defence Secretary Gotabhaya Rajapakse, respectively.

153 See for example: International Commission of Jurists, Sri Lanka Briefing Paper: Emergency Laws and International Standards, April 2009

safeguards, the shifting of the evidential burden of proof to the defendant, among other matters.

6.4 The ERs and the PTA have been subject to extensive international criticism for overriding many basic human rights norms.[154] Whilst this is clearly a matter of extreme concern, the IBAHRI notes that at least one other international organisation has already conducted a broad human rights based analysis of the emergency regulations and the PTA.[155] Therefore, in order to avoid repetition and ensure complementarity of efforts, the delegation's consideration of the counter-terrorism legislation will limit itself to a brief discussion of the basic legal guarantees and the right to freedom of expression and how these have been impacted in practice by the emergency regulations and the PTA.

6.5 The IBAHRI also wishes to note at the outset that even though the ERs have been relied upon for reasons of national security in a state of emergency, this does not mean that the Sri Lankan Government is free to entirely negate the basic legal guarantees and the right to freedom of expression. At international law, the scope of any such limitation on a customary international law right cannot be interpreted in a way that jeopardises the essence of the right concerned.[156] In particular, where a restriction is imposed for reasons of national security, any limiting measure cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there are adequate safeguards and effective remedies against abuse.[157] Finally, even if a limitation is imposed as a derogation in a public emergency, the severity, duration, and geographic scope of any such derogating measure must be 'strictly necessary to deal with the threat to the life of the nation' and 'proportionate' in its nature and extent.[158]

Impact of the ERs and the PTA on basic legal guarantees

6.6 The IBAHRI observes that the ERs and the PTA have a negative impact in practice on the right to freedom of expression, both for lawyers and for journalists, and also impinge on several fundamental legal guarantees, in particular the principle of legality, pre-trial rights during arrest and detention and due process guarantees in criminal cases. Each of these issues will be dealt with in turn.

Freedom of expression

6.7 As outlined in Chapter 5, the measures within the ER 2005, the ER 2006 and the PTA, which

154 See for example: Concluding observations of the Human Rights Committee: Sri Lanka, 1 December 2003, UN Doc 01/12/2003, CCPR/CO/79/LKA, paragraph 13; Human Rights Committee, Comments on Sri Lanka, UN Doc CCPR/C/79/Add 56 (1995); International Commission of Jurists, Sri Lanka Briefing Paper: Emergency Laws and International Standards, April 2009; International Crisis Group, Sri Lanka's Human Rights Crisis, Asia report No 135, 14 June 2007.

155 See for example: International Commission of Jurists, Sri Lanka Briefing Paper: Emergency Laws and International Standards, April 2009.

156 United Nations, Economic and Social Council, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights 'Siracusa Principles', Annex, UN Doc E/CN.4/1984/4 (1984).

157 See Principles 29-32 of the Siracusa Principles. See also Principles 1-3 of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information (Johannesburg Principles), 1 October 1995, developed by a group of experts in international law, national security, and human rights convened by Article 19, the International Centre Against Censorship, in collaboration with the Centre for Applied Legal Studies of the University of the Witwatersrand, in Johannesburg.

158 See Principles 39-57 of the Siracusa Principles.

in some circumstances create criminal offences, prohibit the possession or distribution of information which might be prejudicial to national security, public order or the maintenance of essential services.[159] These measures have been criticised as being unduly broad and vague and creating the pre-conditions for self-censorship as well as a chilling effect on the freedom of the press.[160] As discussed in Chapter 5, there have been several prominent journalists who appear to have been arbitrarily arrested under the emergency regulations and the PTA simply for carrying out their professional duties.

Principle of legality

6.8 The principle of legality requires that criminal offences be defined in language which is clear and unambiguous. A variety of provisions of the emergency regulations and the PTA appear to be in breach of this principle.[161] One prominent example can be seen in relation to the broad definition of 'terrorism' under the ER 2006 and the various terrorism-related offences created by it. The delegation received reports that some lawyers are frightened of being prosecuted under these provisions as sections 7 and 8 of the ER 2006 criminalise 'advising' terrorists and 'engaging in any transaction in any manner whatsoever' with terrorists. There is no express exemption for legal representation of terrorist suspects and no guidance issued to police and/ or military personnel to exclude this possibility. The delegation heard accounts that this has led to a situation where persons charged with terrorism-related offences are unable to obtain legal representation as there are very few lawyers willing to assist these individuals due to fear for their own circumstances.

Pre-trial rights during arrest and detention

6.9 The IBAHRI was extremely concerned to hear of the extent to which pre-trial rights of suspected terrorists are abrogated by the ERs and the PTA. It received reports that the ER 2005 enables the arrest and detention for up to one year without access to judicial review of persons 'acting in any manner prejudicial to national security or the maintenance of public order or... essential services'.[162] This detention, which is acknowledged to be preventative in nature, rather than arising from the commission of a criminal offence, can be challenged through an advisory committee consisting of persons appointed by the president but is not susceptible to judicial review.[163] Likewise, persons may be detained for up to 18 months or indefinitely pending trial

159 See for example: Regulations 15 (Power to restrict publication or transmission of specific matters); 18(1)(vi) (Power to restrict a person's movements in relation to the dissemination of news); 26 (Offence of advocating unlawful overthrow of the Government); 27 (Prohibition of affixing certain posters or distributing certain handbills); 28 (Prohibition of spreading rumours likely to cause public alarm or disorder); 29 (Offence of publishing documents related to certain matters); and 33 (Offence of possessing writing prejudicial to public order, national security, etc). ER 2005; Regulation 9 (Prohibition of the provision of information detrimental to or prejudicial to national security) ER 2006; and section 14 (Prohibition of publications) PTA.

160 International Commission of Jurists, 'Sri Lanka: Briefing Paper – Emergency Laws and International Standards', April 2009, pp4, 9-12.

161 See for example: Regulations 6 (Creates an offence of engaging in terrorism or acts of terrorism); 7 (Creates an offence for wearing the insignia of, taking part in a meeting, event or activity with a terrorist group); 8 (Creates an offence of engaging in any transaction whatsoever with a terrorist); 9 (Prohibition of the provision of information detrimental to or prejudicial to national security); and 20 (Provides an extremely broad definition of terrorism) of the ER 2006.

162 See Regulation 19 (Power to detain persons for up to one year) of the ER 2005.

163 See Regulation 19(4) and (10) (Power to detain persons for up to one year) of the ER 2005.

under the PTA.[164] The delegation was additionally concerned by accounts that the detention of such individuals is permitted on an irregular basis and can take place anywhere, including outside police stations, recognised detention centres or penal institutions.[165] Interrogations are also allowed to be conducted by military personnel[166] who are not sufficiently trained in normal policing functions and who are not held accountable for any violations of human rights which they may choose to carry out in the course of attempting to extract confessions. These provisions are clearly contrary to international human rights norms and represent a severe curtailment of the basic legal guarantees which the right to a fair trial encompasses at the pre-trial stage of proceedings.

Due process guarantees in criminal cases

6.10 The delegation learnt that the provisions of the ER 2005 undermine the right against self-incrimination and the right to silence, by allowing the use of confessional evidence in court[167] and creating a 'duty' on the suspects to answer police questions during interview.[168] Further provisions reverse the normal burden of proof and require suspects to bear the onus of proving their innocence[169] and the presumption that bail is always to be favoured over detention is additionally reversed.[170] These provisions are clearly in violation of the fair trial rights of Sri Lankans which must remain protected even during states of emergency.[171] Indeed, in the view of the IBAHRI these legislative and regulatory provisions represent such a wholesale reduction of the essence of the basic fair trial guarantees that it must be queried whether they are in fact 'strictly necessary to deal with the threat to the life of the nation' and 'proportionate' in their nature and extent.

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164 See sections 9(1) (Detention Orders) and 15(A)(1) (Trial) of the PTA. Section 9(1) of the PTA enables the Minister of Defence to order a person be detained for up to 18 months 'in such place and subject to such conditions as may be determined by the Minister'. Section 15(1)(a) of the PTA enables the Secretary to the Minister of Defence to order that persons held on remand, after indicted or pending appeal, should be 'kept in the custody of any authority, in such place and subject to such conditions as may be determined by him' having regard to national security and public order.

165 See for example: Regulations 19(3), 21, 49(a)(i), 68(2) of the ER 2005 and Section 7(3)(a) of the PTA.

166 See Regulations 52 (Powers of police may be exercised by authorised members of the armed forces or other persons authorised by the President) and 68 (Power to question detained person and duty on that person to answer) of the ER 2005.

167 See for example, Regulation 41(4) of the ER 2005 which allows the use of confessional evidence and reverses the burden of proof against the maker of the statement; the burden is on the maker of the statement to attempt to 'reduce or minimise' the weight to be attached to it. This is similar to section 16 of the PTA which puts the burden on the maker of a statement to prove that the statement is 'irrelevant' . Notably, in *Nallaratnam Singarasa v Sri Lanka* the United Nations Human Rights Committee held that the application of section 16(2) of the PTA violated article 14(3)(g) of the ICCPR which provides that no one shall be compelled to testify against himself or to confess guilt: *Singarasa v Sri Lanka*, UN Doc CCPR/1033/2004, Adoption of Views on 23 August 2004.

168 See regulation 68(1) of the ER 2005 that makes it the duty of a person questioned by the police to answer the question addressed to him. See also Regulation 49(b) of the ER 2005 which states that a person detained for questioning shall truthfully answer all questions put to him.

169 See regulation 48 of the ER 2005 which provides that any documents found in the possession, custody or control of a person suspected of an offence under any emergency regulation 'shall be submitted in evidence against such person without proof thereof . Similarly, section 18(1)(b) of the PTA provides that the contents of such documents 62 shall be evidence of the facts stated there-in'.

170 See regulations 19(1)(A) and 62(2) of the ER 2005 which provide that persons shall not be released on bail except with the consent of the Attorney General. Section 19(a) of the PTA also provides that those convicted of an offence and pending appeal shall be kept on remand until determination of the appeal. The UN Human Rights Committee criticised the PTA provisions on bail as being incompatible with article 9(3) of the ICCPR in its concluding observations on Sri Lanka in 2003: Concluding Observations of the United Nations Human Rights Committee, UN Doc CCPR/CO/79/LKA, 1 December 2003, at paragraph 13.

171 The United Nations Human Rights Committee considers that 'the principles of legality and the rule of law require that fundamental guarantees of a fair trial must be respected during a state of emergency': UN Human Rights Committee, General Comment No 29, States of Emergency (article 4), UN Doc. CCPR/C/21/Rev.1/Add.11 (2001), paragraph 16.

Conclusion

6.11 The chilling effect of the ERs and the PTA on the right to freedom of expression, and their explicit overriding of the basic legal guarantees which are fundamental in democratic societies have a detrimental effect on the rule of law in Sri Lanka. Indeed, in the view of the IBAHRI, the long term application of these exceptional legislative provisions has contributed to the development of a perception of institutional impunity within the Sri Lankan legal system.

Present and future need for the ERs and the PTA

6.12 The IBAHRI observes that it is implicit within the notions of 'emergency' and 'temporary' powers that they are the short-term exception to the rule. Accordingly, despite the longevity of the ERs and the PTA the Government in Sri Lanka must not regard these legislative and regulatory instruments as the 'norm' within its constitutional democracy. As a result, the IBAHRI takes the view that planning should commence now – at a time when the armed hostilities in the northeast appear to be coming to an end – for the removal of these emergency and terrorism-related measures as quickly as possible in order to ensure that as little long-term damage as possible is caused to the democratic order. The IBAHRI was heartened by the agreement with this view of the Chief Justice and the Secretaries of the Ministry of Justice and Constitutional Affairs.

6.13 Indeed, the Government is encouraged to take note of the fact that the provisions of international humanitarian law which are applicable to internal armed conflicts, such as that currently taking place in Sri Lanka,[172] require criminal proceedings against persons no longer taking part in hostilities (including those being detained by the Government) to be afforded all of the 'judicial guarantees which are recognised as indispensable by civilized peoples'. Customary international law indicates that this includes the right to legal assistance as well as the right to a fair hearing before an independent and impartial tribunal. Consideration of this position should add further impetus to the urgent need to scale back the provisions of the ERs and the PTA which deprive Sri Lankans of their fundamental legal guarantees.

6.14 Planning for the removal of the ERs and the PTA would also be consistent with the public statement of President Mahinda Rajapaksa:

> 'In the settlement of the conflict we cannot for short-term expediency sacrifice our cherished democratic values and our commitment to the rule of law. Nor can we ignore the human rights standards sweeping through every corner of the globe. ... The rule of law; and, basic decency in the conduct of those in authority are also core values that we must safeguard'.[173]

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172 See for example common Article 3 to the Geneva Convention of 1949

173 President addresses first joint meeting of All Party Representative Committee and Panel of Experts, 11 July 2006, **http://www.president.gov.lk/speech_latest_11_07_2006.asp,.**

Chapter 7: Conclusions and Recommendations

THE COURTS AND THE JUDICIARY

17th Amendment to the Constitution

7.1 The 17th Amendment is to be welcomed despite any perceived drafting defects. When operative, it provides an important check and balance on the powers of the executive presidency and significantly strengthens protection of the democratic tradition in Sri Lanka.

7.2 The core of the protection contained within the 17th Amendment is a functional Constitutional Council. The Government's continuing failure to reestablish the Constitutional Council since 2005 has reduced public confidence in the Government's commitment to independent institutions and the rule of law. The difficulty or delay in filling the one remaining vacancy is in the delegation's view not a convincing explanation for the prolonged suspension of its functions. Once the Constitutional Council was established, any subsequent need to fill a vacancy cannot mean that the Council has suddenly ceased to exist.

7.3 It is the IBAHRI's view that prompt reconstitution of the Constitutional Council will assist in providing critical independent oversight of the proper functioning of Sri Lanka's key institutions, thereby alleviating the perception of politicisation and institutional impunity with respect to those institutions which appear to have developed since 2005.

Recommendations

- The IBAHRI welcomes the fact that the Supreme Court appears to be pressing for the prompt re-establishment of the Constitutional Council. The IBAHRI calls on the President to immediately appoint the nominees already agreed to by the various political parties. The IBAHRI also considers that the Constitutional Council should be able to function if its statutory quorum is achieved when it proceeds to business.
- The IBAHRI hopes that once the Constitutional Council is re-established all of the commissions will be permitted to function independently and without inappropriate external interference. The previously unconstituted Election Commission should be established as soon as possible.
- With respect to any perceived drafting defects of the 17th Amendment, appropriate amendments could be introduced in the future to further strengthen aspects of the 17th Amendment. However, this desire for further improvement must not be used as a pretext for not implementing the existing provisions.

The appointment, disciplining and removal of judges

7.4 The 2001 IBAHRI delegation concluded that the perception of a lack of independence of the

judiciary was in danger of becoming widespread. The IBAHRI is disappointed to conclude that there is now a widespread perception that the independence of the judiciary is lacking and that this has had a detrimental impact on public confidence in the rule of law in Sri Lanka.

7.5 The qualification of judges and judicial officers appointed to the bench does not appear to be at issue. However, appointments of superior court judges that were made post-17th Amendment, but outside the Constitutional Council processes, are arguably open to question regarding their constitutionality. The lack of independent oversight and the practice of exclusive presidential discretion over judicial appointments also make the judiciary vulnerable to executive interference and jeopardise its independence. Furthermore, there are significant shortcomings in the transparency of the judicial appointments procedure, as at present there are no publicly available criteria regarding the President's appointments to the superior courts or regarding the Judicial Services Commission's appointments to the lower courts.

7.6 The current procedures for disciplining and removing judges at all levels of the judiciary are in urgent need of review in order to rebuild both the morale of the judiciary and public trust in it. All disciplinary and removal procedures must be accountable, fair and free from interference by the executive or legislature. For this reason the IBAHRI is concerned, as it was in 2001, that the removal of senior judges is subject to parliamentary approval by a simple majority. Parliamentary oversight in this manner of the judiciary makes the removal process vulnerable to politicisation and jeopardises its independence.

7.7 The IBAHRI is similarly concerned, as in 2001, about the independent operation of the Judicial Services Commission and is disturbed to hear several reports of lower court judges being arbitrarily threatened with removal from the bench or with baseless disciplinary or criminal proceedings. These threats appear to have been carried out in some circumstances and in others have exerted so much pressure that they have forced resignations.

7.8 The Judicial Services Commission, even when constituted according to the 17th Amendment nomination procedure, does not have adequate procedural safeguards to ensure the transparency and independence of its decision making process and is not able to ensure a fair hearing for judges and judicial officers who are under investigation. In addition to the lack of publicly-available criteria regarding appointments and disciplinary procedures, the practice of not instantly and formally recording the decisions made at its meetings is alarming.

Recommendations

- A return to the system of independent oversight of appointments of superior court judges with nominations being made or approved by the Constitutional Council will significantly help to restore public confidence in the independence and impartiality in the process. Similarly, publishing objective criteria in advance of judicial appointments will assist in improving its transparency. These measures are of particular importance for the upcoming appointment of a new Chief Justice in June 2009. Appointments that continue to cause crucial stakeholders in the justice system to suspect the presence of the unseen hand of favouritism or political/executive influence will be both detrimental to the rule of law and unfair to the appointees concerned.

- As recommended in 2001, the appointment, transfer, dismissal or retirement of judges at all levels must be determined by a transparent and accountable system. Built into this system must be the opportunity for a fair hearing in which proceedings are recorded and a copy given to the judge in question followed by a reasoned decision, with a right of appeal.
- In relation to superior court judges, the impeachment procedure currently in place should be reviewed and amended to ensure judicial, and not parliamentary, supervision over judicial conduct. In relation to lower court judges, the independence and impartiality of the Judicial Service Commission's operations must be greatly improved, for example, through the strengthening of its internal procedures and the publication of criteria governing the appointments and disciplining of judges.
- Furthermore, it would considerably enhance confidence in the independence and impartiality of the Judicial Service Commission's operations if its membership were expanded to include representatives of the legal profession and civil society.

The politicisation of the judiciary

7.9 The IBAHRI notes that despite the fact that many judges are striving to operate independently in difficult circumstances, there is a pervasive belief throughout the legal system that some judges at all levels have submitted to external pressure in the determination of sensitive cases. The judiciary is currently vulnerable to two types of political influence, from the Government and from the Chief Justice himself. The nature and degree of influence oscillates between the two and depends on the relationship between the Chief Justice and the Government at any point in time. The perception that the judiciary suffers from political influence has arisen in recent years due to the excessive influence of the Chief Justice, the apparently inconsistent jurisprudence of the Supreme Court in relation to certain issues and through tensions between the judiciary and the executive.

7.10 Chief Justice Silva is perceived to be a domineering personality who is very much in control of all aspects of the functioning of the judiciary. As a result of his control over the listing of cases in the Supreme Court, it is commonly believed that he has used the administration of the case allocation procedure as a tool to sideline senior Supreme Court judges from hearing politically sensitive cases. The perceived closeness of the Chief Justice with the executive branch has made individual judges reluctant to return judgements which may be perceived to be critical of the executive. Finally, the extent of deference to the Chief Justice is such that there has been a scarcity of dissenting opinions during his tenure and, consequently, a missed opportunity for jurisprudential enrichment.

7.11 The Supreme Court's jurisdiction over human rights issues is of fundamental importance to the rule of law in Sri Lanka. However, its recent decisions on Sri Lanka's compliance with the ICCPR, appear to be inconsistent and raise questions as to whether they have been determined according to political considerations and/or alleged national interest rather than strict legal considerations. The wealth of jurisprudential reasoning in fundamental rights matters would also be vastly improved if there were reasons provided for refusals to allow leave to proceed in

fundamental rights cases.

7.12 The IBAHRI is concerned that the recent expansion of the concept of the doctrine of locus standi and of the constitutional right to equality in fundamental rights cases is based on the inclination of the Chief Justice to pronounce on populist issues rather than on a sound rationalisation of legal principles. Furthermore, the apparent decline in the number of fundamental rights applications being lodged in recent years is also a matter of significant concern.

7.13 The court's contempt powers are not sufficiently circumscribed by law and, as such, are open to abuse by judges. Their arbitrary use has not only had the effect of subjecting the legal profession to an implicit fear that they may be found in contempt in the course of discharging their professional duties but also has encouraged self-censorship amongst the journalistic community.

7.14 Politically motivated criticism of the judiciary by the executive branch has had a negative effect on the independence of the judiciary. Statements such as the one made by the President on 9 December 2008, which reminds judges about the time when the homes of certain judges were attacked and impeachment proceedings brought against them, are intimidatory and contrary to the interests of judicial independence. The failure of the Government to implement the petroleum prices decision by the Supreme Court, though triggered by an unusual exercise of judicial power in the first place, does create a dangerous precedent that the executive can choose to ignore a court order. This unhealthy tug of war between the two branches of government is not a positive contribution to the rule of law in Sri Lanka.

Recommendations to the new Chief Justice

A Chief Justice ought to assume the role of first among equals. He or she ought to inspire independence in his or her fellow judges and lead them in overcoming any threats against, or attempts at undue influence over, the bench.

The IBAHRI expresses hope that the new Chief Justice, who is due to be appointed in June 2009, adopts internationally-accepted best practice in his or her stewardship of the Supreme Court in order to assist in boosting standards of judicial independence in Sri Lanka. In this regard, the IBAHRI notes the importance of the UN Basic Principles on the Independence of the Judiciary and the Beijing Statement of Principles on the Independence of the Judiciary referred to in this report.

The IBAHRI is saddened to note that the situation regarding judicial independence in Sri Lanka remains largely unchanged since its last visit, and that in some aspects it appears to have deteriorated. The IBAHRI is disappointed that several of the recommendations contained in its 2001 report remain unimplemented. The IBAHRI therefore reiterates the importance of those recommendations which it considers relevant in the current context to the new Chief Justice[174]:

(i) The judiciary at all levels should be the subject of an annual report signed by the Chief Justice setting out, for public information, full details on the functioning of the courts,

174 IBA Report 2001, pp39-40, recommendations 5 - 12

data on the number and type of cases and their disposal, and the detailed functioning of the JSC;

(ii) Fundamental rights under the Sri Lankan Constitution should be protected as to their enforcement before the Supreme Court by a coherent statement of principle, on the basis of which leave will be granted or refused. The absence of such a statement of principle runs the risk that different panels of the Supreme Court will adopt different criteria for the granting or refusal of leave.

(iii) The administration of the Supreme Court should collate and publish data on the number and type of fundamental rights cases disposed of, and with regard to particular panels of the bench, so as to determine whether there has been a reduction in the number of cases granted leave. But in any event, such data serves to clarify the basis on which jurisdiction is being exercised quantitatively and qualitatively. This should be reviewed by a body separate from judicial administration.

(iv) The panels of three Supreme Court judges who hear fundamental rights applications should be subject to an appropriate system of rotation of the different judges. Clearly the most senior judge should preside. Every attempt should be made for the junior judges to sit regularly with the most senior judges.

(v) While judges and the courts are not exempt from public debate, it is contrary to the interests of justice for debate to descend to politically motivated criticism which has the effect of undermining the stature and independence of the judiciary.

(vi) Such support from the executive and the legislature must be matched by the judiciary ensuring that, at all times, it avoids both bias and the impression of bias, whether in the course of proceedings, or in the manner in which particular panels of judges are selected or proceedings listed or conducted.

The IBAHRI makes the following further recommendations to the new Chief Justice:

- To create a judicial environment where all extraneous influences on judicial decision making – whether originating from the executive, the JSC, within the judiciary or from any other quarter – are strongly discouraged and successfully repelled. This will allow a culture of true judicial independence to flourish in which individual judicial officers feel confident enough to make decisions or prepare dissenting opinions without fear of adverse consequences.

- To issue guidelines to all judicial officers on the appropriate exercise of their inherent powers of contempt, including guidance for judges as to the conduct of contempt proceedings and the range of penalties which are considered proper in the event of a conviction. These guidelines must, inter alia, stress that powers of contempt must never be exercised or threatened to be exercised so as to intimidate lawyers and litigants who wish to pursue a course of action that does not find favour with the court, or to punish them for having done so.

- To ensure the conscientious application of legal principles to the facts of cases coming before the courts, unencumbered by extraneous influences and supported by detailed reasoning, in

particular with respect to fundamental rights matters dealing with the doctrine of locus standi and the right to equality.

- To adopt the practice whereby reasoned judgments are provided when refusing leave to proceed in fundamental rights applications.

The IBAHRI makes the following recommendations to the Government of Sri Lanka:

- To enact legislation circumscribing the court's inherent powers of contempt.
- To ensure that it promptly and fully implements all past and future court orders.
- To refrain from making criticisms or public statements which are, or may be perceived to be, intimidatory and contrary to the principles of judicial independence.

THE LEGAL PROFESSION

Threats, harassment and attacks against lawyers

7.15 There is an escalating climate of fear amongst those members of the legal profession filing fundamental rights applications, representing individuals charged with terrorism offences under the emergency regulations and taking bribery and anti-corruption cases. This is caused by an increase in incidents of intimidation, threats and attacks that have occurred in the past year. The IBAHRI notes that such a climate of fear was not apparent at the time of the IBAHRI's last visit and is a worrying sign of a deterioration in the independence of the legal profession and the rule of law in Sri Lanka over recent years.

7.16 The IBAHRI is of the view that these threats and attacks against lawyers are not isolated events but form part of a pattern of intimidation expressed routinely against members of civil society, also including journalists, academics and NGO workers, who are perceived to be critical or challenging of the Government and its policies. This constitutes a serious threat to the independence of the legal profession as a whole and is severely detrimental to the effective functioning of the justice system and the rule of law in Sri Lanka.

7.17 The lack of prompt and effective investigations and the consequential sense of impunity surrounding these incidents have exacerbated this climate of fear. The IBAHRI is particularly concerned by the brazen nature of the attacks against Mr Weliamuna and Mr Ariyaratne. This climate of fear is forcing lawyers to consider relinquishing cases which may be perceived as politically sensitive, has forced some lawyers to leave the country for fear of their own personal safety and deters other members of the profession from taking up such causes. This has created a 'chilling effect' that permeates the profession. The IBAHRI applauds with deep respect the courage of those committed lawyers and members of civil society undertaking human rights and public interest work in such challenging circumstances.

7.18 The IBAHRI reiterates the fundamental principle that lawyers, like all other citizens, are entitled to freedom of expression, belief and association and notes that both the President and the Leader of the Opposition are lawyers themselves.

7.19 The harassment of lawyers by police and the presence of police officers during client interviews impede the ability of lawyers to represent their clients in an independent and efficient manner and hinders the free exercise of the right to legal representation. The IBAHRI is particularly concerned by reports of lawyers being forced to abandon court hearings as a result of threats received from the police. The IBAHRI is encouraged to hear subsequent to its visit of the approval of the code for the presence of lawyers at police stations by the Attorney-General's department and hopes that it will be promptly and effectively implemented.

7.20 The IBAHRI is alarmed by the article 'Who are the human rights violators?' which was still available on the Ministry of Defence's website at the time of writing, and its association of lawyers with the causes of their clients. The publication of this type of rhetoric on a government website is deeply inappropriate and, particularly in the current context of an increased risk of threats and attacks against lawyers, is potentially inflammatory and jeopardises the physical safety of those named. It also creates the impression that this represents the Government's position on lawyers who take such cases. The IBAHRI was assured by governmental representatives that the article had been removed. However, it was still accessible on the website at the time of writing.

7.21 International standards require that where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities, and that any investigations into such criminal offences must be prompt and effective. Whilst the IBAHRI appreciates the complexities in conducting police investigations, it is disappointed at the delayed progress in the cases of Mr Weliamuna and Mr Ariyaratne, and at the apparent lack of preventative steps to avoid such attacks occurring in the future.

7.22 Further threats against the independence of lawyers emanate from the misuse of contempt powers by some judges and judicial officers, and the broad and ambiguous definitions of terrorism-related offences contained in Sri Lanka's counter-terrorism legislation.

7.23 The IBAHRI notes that despite the existence of a perceived politicisation of some members of the BASL executive, BASL has made commendable efforts in promoting and protecting the interests of its members in recent times. The IBAHRI was also encouraged by the establishment of a committee of concerned senior members of the profession to speak out on harassment and threats against lawyers. The IBAHRI also hopes that this committee will provide valuable guidance to other members of BASL on these issues.

7.24 However, it is clear that there is a need for BASL to be more proactive and to robustly engage with the government and civil society as a whole in order to uphold the independence of lawyers and the human rights and fundamental freedoms all Sri Lankans are entitled to under national and international law. There appears to be a widespread perception that some leaders of BASL operate under an unspoken cloud of fear or reluctance to speak out on these issues, a perception the delegation invites all BASL leaders to promptly dispel by their actions.

Recommendations

The IBAHRI recommends to the Government of Sri Lanka:

- The Government must comply with its international obligations to protect and promote the independence of the legal profession and to ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference.
- The Government is encouraged to expedite the police investigations into the threats and attacks upon lawyers and ensure that they are independent, thorough and effective. The Government is urged to take preventative steps to ensure the security of lawyers under threat.
- The Government must refrain from publishing potentially inflammatory rhetoric against lawyers representing terrorist suspects and from identifying lawyers with their clients' causes. The article 'Who are the human rights violators?' must be withdrawn from the website of the Ministry of Defence with immediate effect (including removing it from its archive). The Government is further urged to initiate public campaigns to increase awareness of the rights of all citizens, and the importance of having an active and independent legal profession available to them to protect such rights.
- The Government is urged to ensure the proper functioning of the committee to oversee the code regarding the presence of lawyers at police stations. The Government is urged to ensure that proper disciplinary proceedings are taken against police officers regarding allegations of harassment and threats against lawyers by police officers.
- The Government is urged to provide by way of legislative amendment express provisions affirming the right of every individual to be represented by lawyers at the stages of arrest, investigation, detention, and prior to being charged in court. The practice of having police officers present at meetings between detainees and their lawyers must be discontinued forthwith.

The IBAHRI recommends to BASL:

- BASL should not let this critical juncture in Sri Lanka's history pass without a full mobilisation of the legal profession, both to protect and promote the rights of individual lawyers to undertake their duties without facing threat or interference, and to ensure its pre-eminence as an organisation amongst lawyers and civil society for protecting the professional standards of the entire legal profession, human rights and the rule of law.
- The IBAHRI therefore recommends that the leaders of BASL strive towards acting with greater independence from the Government, and that BASL undertake further strategies aimed at strengthening the capacity of lawyers to function with dignity and without fear.
- Leaders of BASL are encouraged not only to protect its members, but also to speak out on wider rule of law and human rights issues. BASL needs to be more proactive rather than reactive on these issues.
- Particular initiatives which the delegation encourages BASL to pursue include amicus curiae interventions in fundamental rights cases, following up on BASL resolutions with meetings with affected parties, and adopting a more concerted approach to collective action whenever one of its members is threatened.

- Individual lawyers, even those who do not practice human rights issues, should act to continually emphasise the importance of the role of lawyers in protecting civil liberties and to educate the public on the need for lawyers to be able to exercise their professional duties without fear of injury or reprisal. The strength of any bar association depends on the active participation of all its members.

Legal training

7.25 Comprehensive legal training is critical for ensuring high professional standards amongst Sri Lankan lawyers. It appears that at present there are gaps in the curriculum for persons training to become attorneys, in the field of human rights and in the study of English. The IBAHRI is of the view that both areas are critical in understanding and ensuring compliance with the fundamental rights set down in the Sri Lankan Constitution which are derived from internationally accepted standards and jurisprudence.

Recommendations

- The Government, in conjunction with the various institutions for legal education in Sri Lanka including BASL, should strengthen these elements of training for prospective attorneys-at-law as part of its long-term commitment to the legal profession and the rule of law.
- BASL in conjunction with civil society organisations should provide additional continuing legal education on human rights issues as well as courses administered in English for lawyers who are already in practice.

Access to justice and legal aid

7.26 Adequate protection of the human rights and fundamental freedoms to which all Sri Lankans are entitled requires effective access to legal services provided by an independent legal profession. The lack of a properly functioning legal aid system available to all severely restricts the constitutional right to legal representation.

7.27 At present, the legal aid system in Sri Lanka does not appear to have been made fully available to those charged with terrorism related offences. This deficiency in the provision of legal aid means that some members of Sri Lankan society, particularly those of Tamil ethnicity, are unprotected within the criminal justice system.

Recommendations

- The Government and the UNDP should review the practicalities of the Legal Aid Commission's grants system in order to ensure that persons subjected to allegations of terrorism are in practice afforded their right to legal counsel.
- The IBAHRI recommends that steps should be taken to ensure better access to justice for the more vulnerable members of the Sri Lankan population, such as those of Tamil ethnicity, who have a statistically greater likelihood of being accused of a terrorism related offence.

THE MEDIA

Conclusions

7.28 The IBAHRI welcomes the media-related reforms which have taken place since the IBA's last visit, for example the repeal of criminal defamation laws and legislation relating to state-ownership of the media and the creation of Press Complaints Commission. However, the IBAHRI regretfully concludes that overall the situation with respect to freedom of expression in Sri Lanka has deteriorated significantly since 2001.

7.29 The IBAHRI is concerned by continuing governmental control and influence over the media, often in subtle forms. The IBAHRI reiterates the conclusion of the previous visit that Sri Lanka would benefit from an independent, pluralistic media which is free from state ownership and political influence.

7.30 The use of the criminal law, in particular under the counter-terrorism legislation, to prosecute journalists who are considered to be critical of the Government is unacceptable. The IBAHRI is firmly of the view that in a literate, modern democracy, there must be only limited and narrowly-defined restrictions on publication and these must be free from political interference. The IBAHRI emphasises that any detention and prosecution of journalists must take place in accordance with principles of natural justice and the due process guarantees contained within the international treaties to which Sri Lanka is party.

7.31 The situation regarding the physical safety of journalists has deteriorated significantly since the last visit, and the delegation is disturbed to hear reports of journalists having been murdered and many others consequently leaving the country. The IBAHRI strongly condemns the murders, threats and attacks against journalists and media agencies in recent years. The climate of fear which presently pervades the journalistic community, particularly amongst those who express critical views on either side of the conflict, has had the effect of stifling free and open debate.

7.32 Any intimidation of, or violence towards, the media is unacceptable in a democratic society. The response of any government should be a prompt and effective investigation. The IBAHRI regrets that no prosecutions have been forthcoming in any of the recent cases relating to the assassinations of journalists and is concerned that this has fostered a sense of impunity amongst those responsible for these serious crimes.

7.33 The IBAHRI was impressed by the high standards of journalistic integrity amongst those whom it met and heartened by their commitment to continue the exercise of their profession despite the extreme difficulties faced in their daily work. The delegation urges the media to continue to investigate and report fairly and responsibly. With the exercise of the right to freedom of expression comes responsibility, and the delegation reiterates the view of the previous mission that the relationship between the Government and the media would be improved if there were greater and proper recognition of this on both sides.

7.34 IBAHRI concludes that the combination of continued government control and interference, the use of repressive criminal legislation to prosecute journalists, and an increase in attacks against the media have had a chilling effect on freedom of expression in Sri Lanka. This has in many cases led to self-censorship, one of the most insidious forms of persecution. It is imperative for the maintenance of the rule of law and a strong democracy in Sri Lanka for Tamil, Sinhalese and English language journalists to operate freely, including conducting robust investigative reporting, without fear of retributive attack or incrimination.

Recommendations

- Extensive state ownership of broadcast media outlets should be reduced and all forms of Governmental pressure on media outlets and journalists should cease.
- Criminal legislation touching on freedom of expression, including the PTA and the ERs, should be carefully reviewed to ensure that it conforms with Sri Lanka's international obligations. Any provisions of national laws which impinge upon legitimate media freedom should be repealed. As recommended in Chapter 6, the Government should in any case start planning for the repeal of the ERs.
- Any pending prosecutions against journalists for alleged terrorism-related offences should be reviewed in order to ensure that they do not breach Sri Lanka's international obligations, and future arrests or detention of journalists should be carried out in compliance with due process and human rights guarantees. Any labelling by government agencies of media outlets or journalists as 'terrorists' must cease. The Ministry of Defence must withdraw the article 'Deriding the war heroes for a living – the ugly face of "Defence Analysts" in Sri Lanka' from its website with immediate effect (and from its archives).
- Independent, thorough and timely investigations, with a view to securing appropriate criminal charges, should be carried out in relation to each and every attack on journalists. There should be proper coordination between the law enforcement agencies with respect to the current investigations into the assassinations of journalists with a view to ensuring prompt and effective prosecutions. There must be political will to this end, backed by concrete and urgent action. Political will must be illustrated by going beyond mere public statements.

THE PREVENTION OF TERRORISM ACT AND THE EMERGENCY REGULATIONS

Conclusions

7.35 The IBAHRI observes that the ERs and the PTA have a negative impact in practice on the right to freedom of expression, both for lawyers and for journalists, and also impinge on several fundamental legal guarantees, in particular the principle of legality, pre-trial rights during arrest and detention and due process guarantees in criminal cases. Many of the legislative and regulatory provisions represent such a wholesale reduction of the essence of fundamental due process guarantees that it is unlikely they are 'strictly necessary to deal with the threat to the life of the nation' and 'proportionate' in their nature and extent.

7.36 The broad and vague definition of terrorism has had a chilling effect on journalists. The IBAHRI is particularly concerned at the effect of the scope of the definition of terrorism on lawyers and their ability to represent clients, having received reports that some lawyers are scared of being prosecuted under provisions that criminalise 'advising' terrorists and 'engaging in any transaction in any manner whatsoever' with terrorists. There is no express exemption for legal representation of terrorist suspects and no guidance issued to police and/or military personnel to exclude this possibility. This has led to a situation where persons charged with terrorism-related offences are unable to obtain legal representation as there are very few lawyers willing to assist these individuals due to fear for their own circumstances.

7.37 The view of the IBAHRI, the long-term application of these exceptional legislative provisions has led to a significant deterioration in the rule of law and public confidence in it, and has contributed to the development of a perception of institutional impunity within the Sri Lankan legal system.

7.38 The IBAHRI was heartened that all of the Government representatives it met with acknowledged that these extraordinary legislative and regulatory provisions are 'exceptional' measures which are intended to be repealed as soon as the armed conflict is over. That wish, however, must be transformed into action in the near future.

Recommendations

- Planning should commence immediately – at a time when the armed hostilities in the northeast appear to be becoming less intense – for the gradual removal of the emergency regulations as quickly as possible after the cessation of the armed conflict in order to ensure that as little long-term damage as possible is caused to Sri Lanka's democratic order.
- The Government should repeal any aspects of the ERs and the PTA which are not strictly necessary and proportionate to the apparently decreasing security threat currently being faced, with particular regard to basic due process guarantees. The IBAHRI emphasises the importance of ensuring independent judicial oversight over detentions and legal representation at all stages of criminal proceedings.
- The IBAHRI additionally invites the Government to consider whether the Ministry of Defence remains the best institution to administer these legislative and regulatory measures, or whether they could be viewed with a more critical eye by the Ministry of Justice in order to more closely monitor their continued necessity and proportionality.
- The IBAHRI emphasises that if armed hostilities with the LTTE do cease over the coming months, caution must be exercised in order to prevent a sense of triumphalism becoming dominant throughout the Sinhalese community.
- The IBAHRI also recommends that thorough investigations be conducted into alleged breaches of international humanitarian law on both sides of the conflict in order to assist in national reconciliation and to restore public confidence in the rule of law which has been seriously eroded as a result of the conflict.

Annex 1

Executive Summary of the 2001 IBAHRI Report

EXECUTIVE SUMMARY

The following is a summary of the conclusions and recommendations of the International Bar Association (IBA) delegation following its mission to Sri Lanka between 28 August 2001 and 31 August 2001. During this period the delegation held meetings with lawyers, the Bar Association, representatives of the media, judges academics, professionals and politicians.

The mission was organised by the Human Rights Institute of the IBA. The purpose of the visit was twofold:

(1) to identify the circumstances surrounding the calling of a referendum on the Constitution, assess the constitutional position of such action and the implications for the rule of law;

(2) in the light of recent cases seeking to disbar the Chief Justice from practising as a lawyer and attempts by over one-third of MPs to have him impeached, to examine the guarantees for the independence of the judiciary, and the practical respect these guarantees receive.

During its visit the delegation also became aware that there are serious threats to freedom of speech and the press in Sri Lanka. Given the importance of free speech to the accountability of elected representatives, civil servants and the judiciary, and to the rule of law and democratic process, the delegation felt compelled to assess the situation and report on its findings.

The findings, conclusions and recommendations of the delegation are summarised as follows.

Independence of the Judiciary

The delegation was of the view that the perception of a lack of independence of the judiciary was in danger of becoming widespread and that it was extremely harmful to respect for the rule of law by ordinary citizens. It was concerned that not only is there a perception that the judiciary is not independent, there may indeed be some basis in fact for the existence of such a viewpoint in relation to a minority of the judiciary. There were also serious concerns expressed about the discipline, retirement, appointment, transfer and promotion of judges under the auspices of the Judicial Services Commission (JSC). The delegation was not confident that the JSC is acting entirely without outside interference. The delegation recommends:

1. Appointments of judges by the President and without an independent process of

assessment should be ceased. All judges should be appointed by an independent process of assessment, based on merit, with names being forwarded to the President or Minister of Justice for final appointment.

2. The appointment, transfer, discipline, dismissal or retirement of judges of whatever rank must be determined by a transparent and accountable system. Built into this system must be the opportunity for a fair hearing, at which the proceedings are recorded and a copy given to the judge in question followed by a reasoned decision, and with a right of appeal.

3. The JSC must be independent. To ensure this, consideration should be given to the following:

   i) Membership should be expanded to include a range of other appointees such as members of the independent legal profession. There must be a greater number of members of the judiciary on the body than any other constituent group.

   ii) Appointments to the JSC should not be made by the executive.

   iii) The method of selecting members for the JSC must be transparent and independent.

4. The salaries, security of tenure and conditions of appointment of judges should be such as to attract the best candidates for a judicial career.

5. The judiciary, at all levels, should be the subject of an annual report, signed by the Chief Justice, and setting out for public information, full details of the functioning of courts, data on the number and type of cases and their disposal, and of the detailed functioning of the JSC.

6. Fundamental rights under the Sri Lankan Constitution should be protected as to their enforcement before the Supreme Court by a coherent statement of principle, on the basis of which leave will be granted or refused. The absence of such a statement of principle runs the risk that different panels of the Supreme Court will adopt different criteria for the granting or refusal of leave.

7. The administration of the Supreme Court should collate and publish data on the number and type of fundamental rights cases disposed of, and in regard to particular panels of the bench, so as to determine whether there has been a reduction in the number of cases granted leave. But in any event, such data serves to clarify the basis on which jurisdiction is being exercised quantitatively and qualitatively. This should be reviewed by a body separate to judicial administration.

8. The panels of three Supreme Court judges who hear fundamental rights applications should be subject to an appropriate system of rotation. Clearly the presider should be the most senior judge. Every attempt should be made for the junior judges to sit regularly with the most senior judges.

9. Any proceedings or inquiries concerning the position of the Chief Justice when Attorney-General, and in connection with his appointment as Chief Justice, should be resolved by decision or appropriate judicial action and not left in abeyance. Further, any continuation of the present, or future impeachment proceedings of the Chief Justice should be dealt with rapidly and with due process of law.

10. No politician, including the President, should engage in gratuitous or unsupported allegations against members of the judiciary.

11. While judges and the courts are not exempt from public debate, it is contrary to the interests of justice for debate to descend to politically-motivated criticism which has the effect of undermining the stature and independence of the judiciary.

12. Such support from the executive and the legislature must be matched by the judiciary ensuring that at all times it avoids either bias or the impression of bias, whether in the course of proceedings, or in the manner in which particular panels of judges are selected or proceedings listed or conducted.

Constitutional Reform

It was concluded by the delegation that constitutional reform is provided for in the Sri Lankan Constitution under Article 82 and Article 83. In both instances, the support of a two-thirds majority in Parliament is required. Constitutional reform via referendum is, in the view of the delegation, unconstitutional. As to the applicability of the doctrine of necessity, the delegation recognises that in the most serious and urgent situations, courts have recognised the extra-constitutional action but does not believe these to be applicable to the situation facing modern Sri Lanka The delegation concluded that:

13. Constitutional reform must take place through constitutional means.

14. The doctrine of necessity can rarely, if ever, be used to justify constitutional change in a democratic society. Legal norms, established by the Constitution, must be, by and large, obeyed and if not obeyed, applied, otherwise legal order as a whole would lose its validity.

15. The Government's call for a referendum as a route for constitutional change was:

    i) Constitutionally inappropriate.

    ii) Framed in terms that were not readily comprehensible to lawyers and certainly not to electors.

16. The appropriate constitutional route under the present Constitution is:

    i) By Article 82, whereby Parliament would be the vehicle for constitutional change given a two-thirds majority.

    ii) Alternatively, under Article 83, reform of certain 'core' provisions require the calling of a public referendum and agreement by a two-thirds majority of Parliament.

17. What is neither appropriate, nor constitutionally proper is to call for constitutional reform

through a referendum when the Constitution provides no route for implementation of any constitutional reform other than through Parliament.

18. It appeared to the delegation that the vast majority of those consulted, including those from opposing political parties, accepted the need for substantial constitutional reform so as to establish:

i) Much stronger parliamentary control of government as against the present constitutional system of a strong presidential executive government.

ii) The introduction of five commissions dealing with justice, media, police, elections and the Constitution. These are independent commissions designed to ensure fair and efficient working relationships between the executive and the institutions themselves.

19. The delegation would also like to recommend that any reform of the Constitution should be accompanied by any necessary changes to accommodate a settlement of the Tamil problem.

20. Such reforms should, in the view of the delegation, take into account:

    i) An adequate balance between central and regional government.

    ii) Adequate autonomy, especially in the Tamil area.

    iii) The defined role of central government in the fields of defence, foreign affairs, national security, taxation and any other appropriate area.

The Media

The delegation was very firmly of the view that Sri Lanka would benefit from an independent, pluralistic media which is free from overly repressive state regulation. The media must be free to publish or broadcast the stories its journalists have uncovered in the public interest, without fear of censorship, recrimination or being sued. Ideally there must be only limited and narrowly defined restrictions on publication and these must be free from political interference.

In return, the media itself should investigate and report fairly and reasonably and always in the national interest.

The delegation concluded:

21. The use of criminal defamation is contrary to the fundamental human rights set out within Sri Lanka's Constitution and is an affront to a free media. As to the exercise of the prosecution powers by the Attorney-General in relation to criminal defamation, it is unclear on what principles the Attorney-General should act so as to ensure he acts fairly and objectively and seeks to avoid unjust pressure on the media.

22. The use of licensing controls and pressure on advertisers, tactics purportedly used by the Government to close down TV stations, is unacceptable.

23. In a literate modern democracy, there is no need for government control of the press, TV

or radio and certainly not by way of state ownership. The capacity of any government and executive to manipulate the media to its own ends and particularly to stifle free debate is obvious and cannot be justified.

24. The delegation rejects, in the strongest possible terms, the use of interrogation and harassment by the police of security forces of media employees as a means of controlling free speech.

25. The delegation noted that all the politicians whom it met were supportive of a free media. However, this willingness to support the right to freedom of speech and bring about reform must be guaranteed regardless of which political party is in power.

26. The media itself should investigate and report fairly and reasonably and always in the national interest. With a free media comes responsibility and the delegation feels that the relationship between the Government and the media would be improved if there was greater trust and recognition of this.

The delegation recommends:

27. There must be a repeal of the law of criminal defamation. It offends the fundamental right of freedom of expression. Its survival since the 1978 Constitution is an anachronism arising from the provision preserving pre-Constitution laws. It is inimical to a free media and represents a continued use of colonial legislation in the free modern democracy of Sri Lanka. It has led to:

    i) A system of prosecution of the media at the instigation of the Attorney- General and the Government.

    ii) The use of criminal penalties to stifle, gag and punish the media.

    iii) The involvement of the judiciary in a process which is entirely inappropriate as it becomes a quasi-arbiter in political disputes between the Government and media.

28. A National Press Association should be formed which is free from party interest or influence. It should include a diverse range of members from both within and outside the industry. This body must be both constitutionally and factually free from influence from the executive or legislature.

29. It is imperative that the proposals to set up a media commission are seen through to fruition and that the reforms proposed are considered seriously and in the interests of protecting a free media.

30. There should be a National Advisory Council for the media, independent of the Government and independent of any new constitutional commission, which should issue an annual report on the state of the media and its relations with Government, Parliament and the people. It could include members from abroad who are eminent in the field.

31. It is vital that the media is supported by all political parties to include a genuine and detailed guarantee of the freedom of the press and a willingness to effect change, regardless of which party is in power.

32. Laws relating to freedom of expression should be reviewed to ensure that they are in conformity with Sri Lanka's international obligations.

33. After the elections, the new Government should take steps to divest itself of ownership of the state media.

Conclusion

There is no democracy in which these matters can be taken for granted. The delegation's proposals are meant to assist and contribute constructively to the future progress of Sri Lanka. A better future for Sri Lanka depends on a stable democracy supported by an expanding economy. This aim requires an independent judiciary, a free media and a constitutional framework that commands confidence. Underpinning all this must be a respect for the rule of law and its application to all aspects of life and society in Sri Lanka.

Annex 2

Basic Principles on the Independence of the Judiciary

Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985

Whereas in the Charter of the United Nations the peoples of the world affirm, inter alia, their determination to establish conditions under which justice can be maintained to achieve international co-operation in promoting and encouraging respect for human rights and fundamental freedoms without any discrimination,

Whereas the Universal Declaration of Human Rights enshrines in particular the principles of equality before the law, of the presumption of innocence and of the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

Whereas the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights both guarantee the exercise of those rights, and in addition, the Covenant on Civil and Political Rights further guarantees the right to be tried without undue delay,

Whereas frequently there still exists a gap between the vision underlying those principles and the actual situation,

Whereas the organization and administration of justice in every country should be inspired by those principles, and efforts should be undertaken to translate them fully into reality,

Whereas rules concerning the exercise of judicial office should aim at enabling judges to act in accordance with those principles,

Whereas judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens,

Whereas the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, by its resolution 16, called upon the Committee on Crime Prevention and Control to include among its priorities the elaboration of guidelines relating to the independence of judges and the selection, professional training and status of judges and prosecutors,

Whereas it is, therefore, appropriate that consideration be first given to the role of judges in relation to the system of justice and to the importance of their selection, training and conduct,

The following basic principles, formulated to assist Member States in their task of securing and promoting the independence of the judiciary should be taken into account and respected by

Governments within the framework of their national legislation and practice and be brought to the attention of judges, lawyers, members of the executive and the legislature and the public in general. The principles have been formulated principally with professional judges in mind, but they apply equally, as appropriate, to lay judges, where they exist.

Independence of the judiciary

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.
4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.
5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.
6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.
7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

Freedom of expression and association

8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.
9. Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence.

Qualifications, selection and training

10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

Conditions of service and tenure

11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.

14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration. Professional secrecy and immunity

15. The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.

16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

Discipline, suspension and removal

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and

those of the legislature in impeachment or similar proceedings.

Basic Principles on the Role of Lawyers

Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990

Whereas in the Charter of the United Nations the peoples of the world affirm, inter alia, their determination to establish conditions under which justice can be maintained, and proclaim as one of their purposes the achievement of international cooperation in promoting and encouraging respect for human rights and fundamental freedoms without distinction as to race, sex, language or religion,

Whereas the Universal Declaration of Human Rights enshrines the principles of equality before the law, the presumption of innocence, the right to a fair and public hearing by an independent and impartial tribunal, and all the guarantees necessary for the defence of everyone charged with a penal offence,

Whereas the International Covenant on Civil and Political Rights proclaims, in addition, the right to be tried without undue delay and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

Whereas the International Covenant on Economic, Social and Cultural Rights recalls the obligation of States under the Charter to promote universal respect for, and observance of, human rights and freedoms,

Whereas the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that a detained person shall be entitled to have the assistance of, and to communicate and consult with, legal counsel,

Whereas the Standard Minimum Rules for the Treatment of Prisoners recommend, in particular, that legal assistance and confidential communication with counsel should be ensured to untried prisoners,

Whereas the Safe guards guaranteeing protection of those facing the death penalty reaffirm the right of everyone suspected or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings, in accordance with article 14 of the International Covenant on Civil and Political Rights,

Whereas the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power recommends measures to be taken at the international and national levels to improve access to justice and fair treatment, restitution, compensation and assistance for victims of crime,

Whereas adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession,

Whereas professional associations of lawyers have a vital role to play in upholding professional standards and ethics, protecting their members from persecution and improper restrictions and infringements, providing legal services to all in need of them, and cooperating with governmental and other institutions in furthering the ends of justice and public interest, The Basic Principles on the Role of Lawyers, set forth below, which have been formulated to assist Member States in their task of promoting and ensuring the proper role of lawyers, should be respected and taken into account by Governments within the framework of their national legislation and practice and should be brought to the attention of lawyers as well as other persons, such as judges, prosecutors, members of the executive and the legislature, and the public in general. These principles shall also apply, as appropriate, to persons who exercise the functions of lawyers without having the formal status of lawyers.

Access to lawyers and legal services

1. All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.

2. Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status.

3. Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall cooperate in the organization and provision of services, facilities and other resources.

4. Governments and professional associations of lawyers shall promote programmes to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental freedoms. Special attention should be given to assisting the poor and other disadvantaged persons so as to enable them to assert their rights and where necessary call upon the assistance of lawyers.

Special safeguards in criminal justice matters

5. Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence.

6. Any such persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services.

7. Governments shall further ensure that all persons arrested or detained, with or without

criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.

8. All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials.

Qualifications and training

9. Governments, professional associations of lawyers and educational institutions shall ensure that lawyers have appropriate education and training and be made aware of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognized by national and international law.

10. Governments, professional associations of lawyers and educational institutions shall ensure that there is no discrimination against a person with respect to entry into or continued practice within the legal profession on the grounds of race, colour, sex, ethnic origin, religion, political or other opinion, national or social origin, property, birth, economic or other status, except that a requirement, that a lawyer must be a national of the country concerned, shall not be considered discriminatory.

11. In countries where there exist groups, communities or regions whose needs for legal services are not met, particularly where such groups have distinct cultures, traditions or languages or have been the victims of past discrimination, Governments, professional associations of lawyers and educational institutions should take special measures to provide opportunities for candidates from these groups to enter the legal profession and should ensure that they receive training appropriate to the needs of their groups.

Duties and responsibilities

12. Lawyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice.

13. The duties of lawyers towards their clients shall include:

    (a) Advising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients;

    (b) Assisting clients in every appropriate way, and taking legal action to protect their interests;

    (c) Assisting clients before courts, tribunals or administrative authorities, where appropriate.

14. Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession.

15. Lawyers shall always loyally respect the interests of their clients.

Guarantees for the functioning of lawyers

16. Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.

17. Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities.

18. Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.

19. No court or administrative authority before whom the right to counsel is recognized shall refuse to recognize the right of a lawyer to appear before it for his or her client unless that lawyer has been disqualified in accordance with national law and practice and in conformity with these principles.

20. Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority.

21. It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time.

22. Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.

Freedom of expression and association

23. Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession.

Professional associations of lawyers

24. Lawyers shall be entitled to form and join self-governing professional associations to represent

Annex 2

THE BANGALORE PRINCIPLES

OF JUDICIAL CONDUCT

2002

(The Bangalore Draft Code of Judicial Conduct 2001
adopted by the Judicial Group on Strengthening Judicial Integrity,
as revised at the Round Table Meeting of Chief Justices
held at the Peace Palace, The Hague, November 25-26, 2002)

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Preamble

WHEREAS the *Universal Declaration of Human Rights* recognizes as fundamental the principle that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of rights and obligations and of any criminal charge.

WHEREAS the *International Covenant on Civil and Political Rights* guarantees that all persons shall be equal before the courts, and that in the determination of any criminal charge or of rights and obligations in a suit at law, everyone shall be entitled, without undue delay, to a fair and public hearing by a competent, independent and impartial tribunal established by law.

WHEREAS the foregoing fundamental principles and rights are also recognized or reflected in regional human rights instruments, in domestic constitutional, statutory and common law, and in judicial conventions and traditions.

WHEREAS the importance of a competent, independent and impartial judiciary to the protection of human rights is given emphasis by the fact that the implementation of all the other rights ultimately depends upon the proper administration of justice.

WHEREAS a competent, independent and impartial judiciary is likewise essential if the courts are to fulfil their role in upholding constitutionalism and the rule of law.

WHEREAS public confidence in the judicial system and in the moral authority and integrity of the judiciary is of the utmost importance in a modern democratic society.

WHEREAS it is essential that judges, individually and collectively, respect and honour judicial office as a public trust and strive to enhance and maintain confidence in the judicial system.

WHEREAS the primary responsibility for the promotion and maintenance of high standards of judicial conduct lies with the judiciary in each country.

AND WHEREAS the *United Nations Basic Principles on the Independence of the Judiciary* are designed to secure and promote the independence of the judiciary, and are addressed primarily to States.

THE FOLLOWING PRINCIPLES are intended to establish standards for ethical conduct of judges. They are designed to provide guidance to judges and to afford the judiciary a framework for regulating judicial conduct. They are also intended to assist members of the executive and the legislature, and lawyers and the public in general, to better understand and support the judiciary. These principles presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards, which are themselves independent and impartial, and are intended to supplement and not to derogate from existing rules of law and conduct which bind the judge.

Value 1:
INDEPENDENCE

Principle:

Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

Application:

1.1 A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.

1.2 A judge shall be independent in relation to society in general and in relation to the particular parties to a dispute which the judge has to adjudicate.

1.3 A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom.

1.4 In performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions which the judge is obliged to make independently.

1.5 A judge shall encourage and uphold safeguards for the discharge of judicial duties in order to maintain and enhance the institutional and operational independence of the judiciary.

1.6 A judge shall exhibit and promote high standards of judicial conduct in order to reinforce public confidence in the judiciary which is fundamental to the maintenance of judicial independence.

Value 2:
IMPARTIALITY

Principle:

Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.

Application:

2.1 A judge shall perform his or her judicial duties without favour, bias or prejudice.

2.2 A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.

2.3 A judge shall, so far as is reasonable, so conduct himself or herself as to minimise the occasions on which it will be necessary for the judge to be disqualified from hearing or deciding cases.

2.4 A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process. Nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue.

2.5 A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where

2.5.1 the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;

2.5.2 the judge previously served as a lawyer or was a material witness in the matter in controversy; or

2.5.3 the judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy:

Provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice.

Value 3:
INTEGRITY

Principle:

Integrity is essential to the proper discharge of the judicial office.

Application:

3.1 A judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer.

3.2 The behaviour and conduct of a judge must reaffirm the people's faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done.

Value 4:
PROPRIETY

Principle:

Propriety, and the appearance of propriety, are essential to the performance of all of the activities of a judge.

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Application:

4.1 A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

4.2. As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular, a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office.

4.3. A judge shall, in his or her personal relations with individual members of the legal profession who practise regularly in the judge's court, avoid situations which might reasonably give rise to the suspicion or appearance of favouritism or partiality.

4.4 A judge shall not participate in the determination of a case in which any member of the judge's family represents a litigant or is associated in any manner with the case.

4.5 A judge shall not allow the use of the judge's residence by a member of the legal profession to receive clients or other members of the legal profession.

4.6 A judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.

4.7 A judge shall inform himself or herself about the judge's personal and fiduciary financial interests and shall make reasonable efforts to be informed about the financial interests of members of the judge's family.

4.8 A judge shall not allow the judge's family, social or other relationships improperly to influence the judge's judicial conduct and judgment as a judge.

4.9 A judge shall not use or lend the prestige of the judicial office to advance the private interests of the judge, a member of the judge's family or of anyone else, nor shall a judge convey or permit others to convey the impression that anyone is in a special position improperly to influence the judge in the performance of judicial duties.

4.10 Confidential information acquired by a judge in the judge's judicial capacity shall not be used or disclosed by the judge for any other purpose not related to the judge's judicial duties.

4.11 Subject to the proper performance of judicial duties, a judge may:

4.11.1 write, lecture, teach and participate in activities concerning the law, the legal system, the administration of justice or related matters;

4.11.2 appear at a public hearing before an official body concerned with matters relating to the law, the legal system, the administration of justice or related matters;

4.11.3 serve as a member of an official body, or other government commission, committee or advisory body, if such membership is not

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inconsistent with the perceived impartiality and political neutrality of a judge; or

4.11.4 engage in other activities if such activities do not detract from the dignity of the judicial office or otherwise interfere with the performance of judicial duties.

4.12 A judge shall not practise law whilst the holder of judicial office.

4.13 A judge may form or join associations of judges or participate in other organisations representing the interests of judges.

4.14 A judge and members of the judge's family, shall neither ask for, nor accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done by the judge in connection with the performance of judicial duties.

4.15 A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or authority, to ask for, or accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done in connection with his or her duties or functions.

4.16 Subject to law and to any legal requirements of public disclosure, a judge may receive a token gift, award or benefit as appropriate to the occasion on which it is made provided that such gift, award or benefit might not reasonably be perceived as intended to influence the judge in the performance of judicial duties or otherwise give rise to an appearance of partiality.

Value 5:
EQUALITY

Principle:

Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.

Application:

5.1 A judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes ("irrelevant grounds").

5.2 A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds.

5.3 A judge shall carry out judicial duties with appropriate consideration for all persons, such as the parties, witnesses, lawyers, court staff and judicial colleagues, without differentiation on any irrelevant ground, immaterial to the proper performance of such duties.

5.4 A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or control to differentiate between persons concerned, in a matter before the judge, on any irrelevant ground.

5.5 A judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on irrelevant grounds, except such as are legally relevant to an issue in proceedings and may be the subject of legitimate advocacy.

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Value 6:
COMPETENCE AND DILIGENCE

Principle:

Competence and diligence are prerequisites to the due performance of judicial office.

Application:

6.1 The judicial duties of a judge take precedence over all other activities.

6.2 A judge shall devote the judge's professional activity to judicial duties, which include not only the performance of judicial functions and responsibilities in court and the making of decisions, but also other tasks relevant to the judicial office or the court's operations.

6.3 A judge shall take reasonable steps to maintain and enhance the judge's knowledge, skills and personal qualities necessary for the proper performance of judicial duties, taking advantage for this purpose of the training and other facilities which should be made available, under judicial control, to judges.

6.4 A judge shall keep himself or herself informed about relevant developments of international law, including international conventions and other instruments establishing human rights norms.

6.5 A judge shall perform all judicial duties, including the delivery of reserved decisions, efficiently, fairly and with reasonable promptness.

6.6 A judge shall maintain order and decorum in all proceedings before the court and be patient, dignified and courteous in relation to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity. The judge shall require similar conduct of legal representatives, court staff and others subject to the judge's influence, direction or control.

6.7 A judge shall not engage in conduct incompatible with the diligent discharge of judicial duties.

IMPLEMENTATION

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By reason of the nature of judicial office, effective measures shall be adopted by national judiciaries to provide mechanisms to implement these principles if such mechanisms are not already in existence in their jurisdictions.

DEFINITIONS

In this statement of principles, unless the context otherwise permits or requires, the following meanings shall be attributed to the words used:

"*Court staff*" includes the personal staff of the judge including law clerks.

"*Judge*" means any person exercising judicial power, however designated.

"*Judge's family*" includes a judge's spouse, son, daughter, son-in-law, daughter-in-law, and any other close relative or person who is a companion or employee of the judge and who lives in the judge's household.

"*Judge's spouse*" includes a domestic partner of the judge or any other person of either sex in a close personal relationship with the judge.

Explanatory Note

1. At its first meeting held in Vienna in April 2000 on the invitation of the United Nations Centre for International Crime Prevention, and in conjunction with the 10th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, the Judicial Group on Strengthening Judicial Integrity (comprising Chief Justice Latifur Rahman of Bangladesh, Chief Justice Bhaskar Rao of Karnataka State in India, Justice Govind Bahadur Shrestha of Nepal, Chief Justice Uwais of Nigeria, Deputy Vice-President Langa of the Constitutional Court of South Africa, Chief Justice Nyalali of Tanzania, and Justice Odoki of Uganda, meeting under the chairmanship of Judge Christopher Weeramantry, Vice-President of the International Court of Justice, with Justice Michael Kirby of the High Court of Australia as rapporteur, and with the participation of Dato' Param Cumaraswamy, UN Special Rapporteur on the Independence of Judges and Lawyers) recognized the need for a code against which the conduct of judicial officers may be measured. Accordingly, the Judicial Group requested that codes of judicial conduct which had been adopted in some jurisdictions be analyzed, and a report be prepared by the Co-ordinator of the Judicial Integrity Programme, Dr Nihal Jayawickrama, concerning: (a) the core considerations which recur in such codes; and (b) the optional or additional considerations which occur in some, but not all, such codes and which may or may not be suitable for adoption in particular countries.

2. In preparing a draft code of judicial conduct in accordance with the directions set out above, reference was made to several existing codes and international instruments including, in particular, the following:

(a) The Code of Judicial Conduct adopted by the House of Delegates of the American Bar Association, August 1972.
(b) Declaration of Principles of Judicial Independence issued by the Chief Justices of the Australian States and Territories, April 1997.
(c) Code of Conduct for the Judges of the Supreme Court of Bangladesh, prescribed by the Supreme Judicial Council in the exercise of power under Article 96(4)(a) of the Constitution of the People's Republic of Bangladesh, May 2000.
(d) Ethical Principles for Judges, drafted with the cooperation of the Canadian Judges Conference and endorsed by the Canadian Judicial Council, 1998.
(e) The European Charter on the Statute for Judges, Council of Europe, July 1998.
(f) The Idaho Code of Judicial Conduct 1976.
(g) Restatement of Values of Judicial Life adopted by the Chief Justices Conference of India, 1999.
(h) The Iowa Code of Judicial Conduct.
(i) Code of Conduct for Judicial Officers of Kenya, July 1999.
(j) The Judges' Code of Ethics of Malaysia, prescribed by the Yang di-Pertuan Agong on the recommendation of the Chief Justice, the President of the Court of Appeal and the Chief Judges of the High Courts, in the exercise of powers conferred by Article 125(3A) of the Federal Constitution of Malaysia, 1994.
(k) The Code of Conduct for Magistrates in Namibia.
(l) Rules Governing Judicial Conduct, New York State, USA.
(m) Code of Conduct for Judicial Officers of the Federal Republic of Nigeria.
(n) Code of Conduct to be observed by Judges of the Supreme Court and of the High Courts of Pakistan.
(o) The Code of Judicial Conduct of the Philippines, September 1989.

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(p) The Canons of Judicial Ethics of the Philippines, proposed by the Philippines Bar Association, approved by the Judges of First Instance of Manila, and adopted for the guidance of and observance by the judges under the administrative supervision of the Supreme Court, including municipal judges and city judges.

(q) Yandina Statement: Principles of Independence of the Judiciary in Solomon Islands, November 2000.

(r) Guidelines for Judges of South Africa, issued by the Chief Justice, the President of the Constitutional Court, and the Presidents of High Courts, the Labour Appeal Court, and the Land Claims Court, March 2000.

(s) Code of Conduct for Judicial Officers of Tanzania, adopted by the Judges and Magistrates Conference, 1984.

(t) The Texas Code of Judicial Conduct

(u) Code of Conduct for Judges, Magistrates and Other Judicial Officers of Uganda, adopted by the Judges of the Supreme Court and the High Court, July 1989.

(v) The Code of Conduct of the Judicial Conference of the United States.

(w) The Canons of Judicial Conduct for the Commonwealth of Virginia, adopted and promulgated by the Supreme Court of Virginia, 1998.

(x) The Code of Judicial Conduct adopted by the Supreme Court of the State of Washington, USA, October 1995.

(y) The Judicial (Code of Conduct) Act, enacted by the Parliament of Zambia, December 1999.

(z) Draft Principles on the Independence of the Judiciary ("Siracusa Principles"), prepared by a committee of experts convened by the International Association of Penal Law, the International Commission of Jurists, and the Centre for the Independence of Judges and Lawyers, 1981.

(aa) Minimum Standards of Judicial Independence adopted by the International Bar Association, 1982.

(bb) United Nations Basic Principles on the Independence of the Judiciary, endorsed by the UN General Assembly, 1985.

(cc) Draft Universal Declaration on the Independence of Justice ("Singhvi Declaration") prepared by Mr L.V. Singhvi, UN Special Rapporteur on the Study on the Independence of the Judiciary, 1989.

(dd) The Beijing Statement of Principles of the Independence of the Judiciary in the Lawasia Region, adopted by the 6th Conference of Chief Justices, August 1997.

(ee) The Latimer House Guidelines for the Commonwealth on good practice governing relations between the Executive, Parliament and the Judiciary in the promotion of good governance, the rule of law and human rights to ensure the effective implementation of the Harare Principles, 1998.

(ff) The Policy Framework for Preventing and Eliminating Corruption and Ensuring the Impartiality of the Judicial System, adopted by the expert group convened by the Centre for the Independence of Judges and Lawyers, February 2000.

At its second meeting held in Bangalore in February 2001, the Judicial Group (comprising Chief Justice Mainur Reza Chowdhury of Bangladesh, Justice Claire L'Heureux Dube of Canada, Chief Justice Reddi of Karnataka State in India, Chief Justice Upadhyay of Nepal, Chief Justice Uwais of Nigeria, Deputy Chief Justice Langa of South Africa, Chief Justice Silva of Sri Lanka, Chief Justice Samatta of Tanzania, and Chief Justice Odoki of Uganda, meeting under the chairmanship of Judge Weeramantry, with Justice Kirby as rapporteur, and with the participation of the UN Special Rapporteur and Justice Bhagwati, Chairman of the UN Human Rights Committee, representing the UN High Commissioner for Human Rights) proceeding by

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way of examination of the draft placed before it, identified the core values, formulated the relevant principles, and agreed on the Bangalore Draft Code of Judicial Conduct. The Judicial Group recognized, however, that since the Bangalore Draft had been developed by judges drawn principally from common law countries, it was essential that it be scrutinized by judges of other legal traditions to enable it to assume the status of a duly authenticated international code of judicial conduct.

The Bangalore Draft was widely disseminated among judges of both common law and civil law systems and discussed at several judicial conferences. In June 2002, it was reviewed by the Working Party of the Consultative Council of European Judges (CCJE-GT), comprising Vice-President Reissner of the Austrian Association of Judges, Judge Fremr of the High Court in the Czech Republic, President Lacabarats of the Cour d'Appel de Paris in France, Judge Mallmann of the Federal Administrative Court of Germany, Magistrate Sabato of Italy, Judge Virgilijus of the Lithuanian Court of Appeal, Premier Conseiller Wiwinius of the Cour d'Appel of Luxembourg, Juge Conseiller Afonso of the Court of Appeal of Portugal, Justice Ogrizek of the Supreme Court of Slovenia, President Hirschfeldt of the Svea Court of Appeal in Sweden, and Lord Justice Mance of the United Kingdom. On the initiative of the American Bar Association, the Bangalore Draft was translated into the national languages, and reviewed by judges, of the Central and Eastern European countries; in particular, of Bosnia-Herzegovina, Bulgaria, Croatia, Kosovo, Romania, Serbia and Slovakia.

The Bangalore Draft was revised in the light of the comments received from CCJE-GT and others referred to above; Opinion no.1 (2001) of CCJE on standards concerning the independence of the judiciary; the draft Opinion of CCJE on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality; and by reference to more recent codes of judicial conduct including the Guide to Judicial Conduct published by the Council of Chief Justices of Australia in June 2002, the Model Rules of Conduct for Judges of the Baltic States, the Code of Judicial Ethics for Judges of the People's Republic of China, and the Code of Judicial Ethics of the Macedonian Judges Association.

The revised Bangalore Draft was placed before a Round-Table Meeting of Chief Justices (or their representatives) from the civil law system, held in the Peace Palace in The Hague, Netherlands, in November 2002, with Judge Weeramantry presiding. Those participating were Judge Vladimir de Freitas of the Federal Court of Appeal of Brazil, Chief Justice Iva Brozova of the Supreme Court of the Czech Republic, Chief Justice Mohammad Fathy Naguib of the Supreme Constitutional Court of Egypt, Conseillere Christine Chanet of the Cour de Cassation of France, President Genaro David Gongora Pimentel of the Suprema Corte de Justicia de la Nacion of Mexico, President Mario Mangaze of the Supreme Court of Mozambique, President Pim Haak of the Hoge Raad der Nederlanden, Justice Trond Dolva of the Supreme Court of Norway, and Chief Justice Hilario Davide of the Supreme Court of the Philippines. Also participating in one session were the following Judges of the International Court of Justice: Judge Ranjeva (Madagascar), Judge Herczegh (Hungary), Judge Fleischhauer (Germany), Judge Koroma (Sierra Leone), Judge Higgins (United Kingdom), Judge Rezek (Brazil), Judge Elaraby (Egypt), and Ad-Hoc Judge Frank (USA). The UN Special Rapporteur was in attendance. The "Bangalore Principles of Judicial Conduct" was the product of this meeting.

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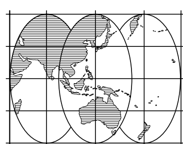
Beijing Statement

OF PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY IN THE LAWASIA REGION



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INTRODUCTION

Every two years since 1985, a conference of Supreme Court Chief Justices from the Asia Pacific region has been held in cooperation with the Judicial Section of LAWASIA, the Law Association for Asia and the Pacific. Since its inception, the conference has served as a useful forum for sharing information and discussing issues of mutual concern among the Chief Justices of the region.

At the 6th Conference of Chief Justices, held in Beijing in August 1997, 20 Chief Justices first adopted a joint Statement of Principles of the Independence of the Judiciary. This Statement was further refined during the 7th Conference of Chief Justices, held in Manila in August 1997. It has now been signed by 32 Chief Justices throughout the Asia Pacific region.

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FOREWORD

The Beijing Statement of Principles of the Independence of the Judiciary finds its origins in 1982 in a statement of principles formulated by the Law Association for Asia and the Pacific (LAWASIA) Human Rights Standing Committee and a small number of Chief Justices and other Judges at a meeting in Tokyo ("the Tokyo Principles"). The decision to formulate the current Statement was made at the 4th Conference of Chief Justices of Asia and the Pacific in Perth, Western Australia in 1991. The Secretary of the LAWASIA Judicial Section, The Honourable Justice R D Nicholson, and I undertook the drafting of the Statement, a first draft of which was presented to the 5th Conference in Colombo, Sri Lanka, in 1993. In light of comments received at that conference and subsequently, and following further consideration at the conference in Beijing in August 1995, the Statement of Principles was adopted by the Chief Justices from 20 countries in the Asia Pacific. A revised version of the Statement as it is presented here was adopted in its final form at the 7th Conference of the Chief Justices in Manila in August 1997. The Statement has now been signed and subscribed to by 32 countries in the Asia Pacific region.

The Statement is a tribute to the determination of all signatories to leave aside differences in both legal and social traditions to formulate a single Statement on the Independence of the Judiciary.

The Honourable David K Malcolm
Chairman, Judicial Section, LAWASIA
Chief Justice of Western Australia

In every region of the globe, countries are wrestling with the complex challenges of legal and judicial reform, including the key question of developing and refining the role and functions of the judiciary. In this regard, the coming together of 32 Supreme Court Chief Justices from throughout the Asia Pacific region to issue a joint statement on the independence of the judiciary represents a significant step forward in addressing a crucial worldwide issue.

The Asia Foundation's role in this effort dates back to 1984, when The Asia Foundation's Senior Advisor for Judicial Administration and Judicial Systems, Judge J Clifford Wallace of the US Ninth Circuit Court of Appeals, recommended the establishment of a Conference of Chief Justices of Asia to provide a forum for interaction and cross-fertilization on important common issues. At the request of The Asia Foundation, the Judicial Section of LAWASIA agreed to be a co-sponsor. The first conference was held in Malaysia, in August 1985, and conferences (later adding the Pacific nations) have been held every two years since, ***most recently in the Philippines in 1997***. As the conference series has developed, it has become increasingly more effective both in its information-sharing role and in taking on important issues affecting legal development and reform in the region, as exemplified in the Chief Justices' joint statement.

The Asia Pacific Chief Justices conference is now self-supporting, but The Asia Foundation is proud to have provided the necessary funding during its formative years to help the conference become established as an important regional forum. And we are extremely pleased now to have arranged for the printing of this important document.

William P Fuller
President, The Asia Foundation

PREAMBLE TO STATEMENT OF PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY

Beijing, 19 August 1995

Whereas the *Charter of the United Nations* the peoples of the world affirm, *inter alia*, their determination to establish conditions under which justice can be maintained to achieve international cooperation in promoting and encouraging respect for human rights and fundamental freedoms without any discrimination;

Whereas the *Universal Declaration of Human Rights* enshrines in particular the principles of equality before the law, of the presumption of innocence and of the right to a fair and public hearing by a competent, independent and impartial tribunal established by the law;

Whereas the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights* both guarantee the exercise of those rights, and in addition the *Covenant on Civil and Political Rights* further guarantees the right to be tried without undue delay;

Whereas the organisation and administration of justice in every country should be inspired by those principles, and efforts should be undertaken to translate them fully into reality;

Whereas rules concerning the exercise of judicial office should aim at enabling judges to act in accordance with those principles;

Whereas the 6th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, by its resolution 16, called upon the Committee on Crime Prevention and Control to include among its priorities the elaboration of guidelines relating to the independence of judges and the selection, professional training and status of judges and prosecutors;

Whereas the 7th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, at its meeting in Milan, Italy, from 26 August to 6 September 1985, adopted the *Basic Principles on the Independence of the Judiciary* by consensus;

Whereas the 7th United Nations Congress on the Prevention of Crime and the Treatment of Offenders recommended the *Basic Principles on the Independence of the Judiciary* for national, regional and interregional action and implementation, taking into account the political, economic, social and cultural circumstances and traditions of each country;

Whereas on 17-18 July 1982 the LAWASIA Human Rights Standing Committee met in Tokyo, Japan and in consultation with members of the judiciary formulated a *Statement of Principles on the Independence of the Judiciary in the LAWASIA Region* ("the *Tokyo Principles*") in the context of the history and culture of the region;

Whereas the 5th Conference of Chief Justices of Asia and the Pacific at Colombo, Sri Lanka on 13-15 September 1993 recognised that it was desirable to revise the *Tokyo Principles* in the light of subsequent developments with a view to adopting a clear statement of principles of the independence of the judiciary, and considered a first draft of a *Revised Statement of Principles on the Independence of the Judiciary* and requested the Acting Chairman of the Judicial Section of LAWASIA to prepare a second draft of the *Revised Statement* taking into account the views expressed at the 5th Conference of the Chief Justices and comments and suggestions to be made by the Chief Justices or their representatives; and

Noting that the 6th Conference of Chief Justices of Asia and the Pacific was held in Beijing in conjunction with the 14th LAWASIA Biennial, the primary object of which is:

> "To promote the administration of justice, the protection of human rights and the maintenance of the rule of law within the region."

The 6th Conference of the Chief Justices of Asia and the Pacific:

Adopts the *Statement of Principles on the Independence of the Judiciary* contained in the annex to this resolution to be known as the *Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region*.

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Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region

(As Amended at Manila, 28 August 1997)

INDEPENDENCE OF THE JUDICIARY

1. The Judiciary is an institution of the highest value in every society.

2. The Universal Declaration of Human Rights (Art. 10) and the International Covenant on Civil and Political Rights (Art. 14(1)) proclaim that everyone should be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. An independent judiciary is indispensable to the implementation of this right.

3. Independence of the Judiciary requires that;

   a) The judiciary shall decide matters before it in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source; and
   b) The judiciary has jurisdiction, directly or by way of review, over all issues of a justiciable nature.

4. The maintenance of the independence of the judiciary is essential to the attainment of its objectives and the proper performance of its functions in a free society observing the rule of law. It is essential that such independence be guaranteed by the State and enshrined in the Constitution or the law.

5. It is the duty of the judiciary to respect and observe the proper objectives and functions of the other institutions of government. It is the duty of those institutions to respect and observe the proper objectives and functions of the judiciary.

6. In the decision-making process, any hierarchical organisation of the judiciary and any difference in grade or rank shall in no way interfere with the duty of the judge exercising jurisdiction individually or judges acting collectively to pronounce judgement in accordance with Article 3 (a). The judiciary, on its part, individually and collectively, shall exercise its functions in accordance with the Constitution and the law.

7. Judges shall uphold the integrity and independence of the judiciary by avoiding impropriety and the appearance of impropriety in all their activities.

8. To the extent consistent with their duties as members of the judiciary, judges, like other citizens, are entitled to freedom of expression, belief, association and assembly.

9. Judges shall be free, subject to any applicable law, to form and join an association of judges to represent their interests and promote their professional training and to take such other action to protect their independence as may be appropriate.

OBJECTIVES OF THE JUDICIARY

10. The objectives and functions of the judiciary include the following:

    a) To ensure that all persons are able to live securely under the rule of law;
    b) To promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and
    c) To administer the law impartially among person and between persons and the State.

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APPOINTMENT OF JUDGES

11. To enable the judiciary to achieve its objectives and perform its functions, it is essential that judges be chosen on the basis of proven competence, integrity and independence.

12.The mode of appointment of judges must be such as will ensure the appointment of persons who are best qualified for judicial office. It must provide safeguards against improper influences being taken into account so that only persons of competence, integrity and independence are appointed.

13. In the selection of judges there must no discrimination against a person on the basis of race, colour, gender, religion, political or other opinion, national or social origin, marital status, sexual orientation, property, birth or status, expect that a requirement that a candidate for judicial office must be a national of the country concerned shall not be considered discriminatory.

14. The structure of the legal profession, and the sources from which judges are drawn within the legal profession, differ in different societies. In some societies, the judiciary is a career service; in others, judges are chosen from the practising profession. Therefore, it is accepted that in different societies, difference procedures and safeguards may be adopted to ensure the proper appointment of judges.

15. In some societies, the appointment of judges, by, with the consent of, or after consultation with a Judicial Services Commission has been seen as a means of ensuring that those chosen judges are appropriate for the purpose. Where a Judicial Services Commission is adopted, it should include representatives the higher Judiciary and the independent legal profession as a means of ensuring that judicial competence, integrity and independence are maintained.

16. In the absence of a Judicial Services Commission, the procedures for appointment of judges should be clearly defined and formalised and information about them should be available to the public.

17. Promotion of judges must be based on an objective assessment of factors such as competence, integrity, independence and experience.

TENURE

18. Judges must have security of tenure.

19. It is recognised that, in some countries, the tenure of judges is subject to confirmation from time to time by vote of the people or other formal procedures.

20. However, it is recommended that all judges exercising the same jurisdiction be appointed for a period to expire upon the attainment of a particular age.

21. A judge's tenure must not be altered to the disadvantage of the judge during his or her term of office.

22. Judges should be subject to removal from office only for proved incapacity, conviction of a crime, or conduct that makes the judge unfit to be a judge.

23. It is recognised that, by reason of differences in history and culture, the procedures adopted for the removal of judges may differ in different societies. Removal by parliamentary procedures has traditionally been adopted in some societies. In other societies, that procedure is unsuitable; it is not appropriate for dealing with some grounds for removal; it is rarely, if ever, used; and its use other than for the most serious of reasons is apt to lead to misuse.

24. Where parliamentary procedures or procedures for the removal of a judge by vote of the people do not apply, procedures for the removal of judges must

be under the control of the judiciary.

25. Where parliamentary procedures of procedures for the removal of a judge by vote of the people do not apply and it is proposed to take steps to secure the removal of a judge, there should, in the first instance, be an examination of the reasons suggested for the removal, for the purpose of determining whether formal proceedings should be commenced only if the preliminary examination indicates that there are adequate reasons for taking them.

26. In any event, the judge who is sought to be removed must have the right to a fair hearing.

27. All disciplinary, suspension or removal proceedings must be determined in accordance with established standards of judicial conduct.

28. Judgements in disciplinary proceedings, whether held in camera or in public, should be published.

29. The abolition of the court of which a judge is a member must not be accepted as a reason or an occasion for the removal of a judge. Where a court is abolished or restructured, all existing members of the court must be reappointed to its replacement or appointed to another judicial office of equivalent status and tenure. Members of the court for whom no alternative position can be found must be fully compensated.

30. Judges must not be transferred by the Executive from one jurisdiction or function to another without their consent, but when a transfer is in pursuance of a uniform policy formulated by the Executive after due consultation with the judiciary, such consent shall not be unreasonably withheld by an individual judge.

JUDICIAL CONDITIONS

31. Judges must receive adequate remuneration and be given appropriate terms and conditions of service. The remuneration and conditions of service of judges should not be altered to their disadvantage during their term of office, except as part of a uniform public economic measure to which the judges of a relevant court, or a majority of them, have agreed.

32. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

JURISDICTION

33. The judiciary must have jurisdiction over all issues of a justiciable nature and exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

34. The jurisdiction of the highest court in a society should not be limited or restricted without the consent of the members of the court.

JUDICIAL ADMINISTRATION

35. The assignment of cases to judges is a matter of judicial administration over which ultimate control must belong to the chief judicial officer of the relevant court.

36. The principal responsibility for court administration, including appointment, supervision and disciplinary control of administrative personnel and support staff must vest in the judiciary, or in a body in which the judiciary is represented and has an effective role.

37. The budget of the courts should be prepared by the courts or a competent authority in collaboration with the

courts having regard to the needs of the independence of the judiciary and its administration. The amount allotted should be sufficient to enable each court to function without an excessive workload.

RELATIONSHIP WITH THE EXECUTIVE

38. Executive powers which may affect judges in their office, their remuneration or conditions or their resources, must not be used so as to threaten or bring pressure upon a particular judge or judges.

39. Inducements or benefits should not be offered to or accepted by judges if they affect, or might affect, the performance of their judicial functions.

40. The Executive authorities must at all times ensure the security and physical protection of judges and their families.

RESOURCES

41. It is essential that judges be provided with the resources necessary to enable them to perform their functions.

42. Where economic constraints make it difficult to allocate to the court system facilities and resources which judges consider adequate to enable them to perform their functions, the essential maintenance of the rule of law and the protection of human rights nevertheless require that the needs of the judiciary and the court system be accorded a high level of priority in the allocation of resources.

EMERGENCY

43. Some derogations from independence of the judiciary may be permitted in times of grave public emergency which threaten the life of the society but only for the period of time strictly required by the exigencies of the situation and under conditions prescribed by law, only to the extent strictly consistent with internationally recognised minimum standards and subject to review by the courts. In such times of emergency, the State shall endeavour to provide that civilians charged with criminal offences of any kind shall be tried by ordinary civilian courts and detention of person administratively without charge shall be subject to review by courts of other independent authority by way of *habeus corpus* or similar procedures.

44. The jurisdiction of military tribunals must be confined to military offences. There must always be a right of appeal from such tribunals to a legally qualified appellate court of tribunals to a legally qualified appellate court or tribunal or other remedy by way of an application for annulment.

It is the conclusion of the Chief Justices and other judges of Asia and Pacific listed below that these represent the minimum standards necessary to be observed in order to maintain the independence and effective functioning of the judiciary.

SIGNATORIES AT BEIJING, 19 AUGUST 1995

The Hon Sir Gerard Brennan AC KBE
Chief Justice of Australia

The Hon Mr Justice A. T. M. Afzal
Chief Justice of Bangladesh

HE Mr Wang Jingrong
Vice-President, Supreme People's Court of the People's Republic of China
(Representing HE President Ren Jianxin, President of the Supreme People's Court)

The Hon Sir Ti Liang Yang
Chief Justice of Hong Kong, SAR

The Hon Shri Justice S. C. Agrawal
Justice of the Supreme Court of India
(Representing The Hon Mr Justice A. M. Ahmadi, Chief Justice of India)

The Hon Justice S. H. Soerjono
Chief Justice of Indonesia

The Hon Yun Kwan
Chief Justice of the Republic of Korea

The Hon D. Dembereltseren
Chief Justice of Mongolia

The Hon U Aung Toe
Chief Justice of the Supreme Court of The Union of Myanmar (Burma)

The Rt Hon Mr Justice Biswanath Upadhyaya
Chief Justice of Nepal

Monsieur Le Premier Président Olivier Aimot
Premier Président of the Court of Appeal of New Caledonia

The Rt Hon Sir Thomas Eichelbaum GBE
Chief Justice of New Zealand

The Hon Mr Justice Sajjad Ali Shah
Chief Justice of Pakistan

The Hon Sir Arnold K. Amet
Chief Justice of Papua New Guinea

The Hon Andres R. Narvasa
Chief Justice of the Philippines

The Hon Justice Yong Pung How
Chief Justice of Singapore

The Hon Mr Justice P. R. P. Perera
Justice of the Supreme Court of Sri Lanka
(Representing The Hon Mr Justice G. P. S. De Silva, Chief Justice of Sri Lanka)

The Hon Charles Vaudin D'Imecourt
Chief Justice of Vanuatu

The Hon Mr Justice Pham Hung
Chief Justice of Vietnam

Tiavaasue Falefatu Maka Sapolu
Chief Justice of Western Samoa

SUBSEQUENT SIGNATORIES:

The Hon Sir Timoci Tuivaga
Chief Justice of Fiji

The Hon Kim Yong Joon
President of the Constitutional Court of Korea

The Hon Tun Dato Sri Mohd Eusoff b. Chin
Chief Justice of Malaysia

The Hon Justice V Allear
Chief Justice of the Republic of the Seychelles

The Hon Sir John Muria
Chief Justice of the Solomon Islands

The Hon Nigel Hampton
Chief Justice of Tonga

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SIGNATORIES AT MANILA, 28 AUGUST 1997:

The Hon Richard Brunt Lussick
Chief Justice of the Republic of Kiribati

The Hon Daniel Cadra
Chief Justice of the High Court
(Representing the Hon Allan Fields Chief
Justice of the Marshall Islands)

Chief Justice Sir Gaven Donne
Chief Justice of Nauru and Tuvalu

Chief Justice Vyacheslav M. Lebedev
Chief Justice of the Supreme Court Russian
Federation

SUBSEQUENT SIGNATORIES:

The Hon Toru Miyoshi
Chief Justice of Japan
(Subject to reservation in attached Statement,
as regards Article 9.)

The Hon Justice Sadka Mokkamakkul
President of the Supreme Court of Thailand

9

Supreme Court of Japan, Tokyo

THE OPINION OF THE CHIEF JUSTICE OF JAPAN

Concerning "Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region"

The independence in exercising the judicial function is firmly guaranteed to all the judges in Japan by the Constitution along with their compensation and status. This constitutional guarantee turns it unnecessary for the judges to make efforts to improve their working and economic conditions unlike workers in other professions, standing on an equal footing with their employers, who need to demand improvement against them. There are, therefore, no rights for the judges to form or join a labour union.

On the other hand, regarding the question of whether or not the judges are able to "form and join an association of judges to represent their interests and promote their professional training and to take such other action to protect their independence as may be appropriate" other than a labour union, it is understood as follows. The judges are especially required to be politically neutral to perform their duties, and it is also demanded that not only trial and judgement should be fair but also attitudes of judges must be relied on to be fair by the general public. Because of these conditions, the judges are not permitted to form or join an association that takes on a political coloration and arouses people's suspicion about fairness. And it may cause danger of raising a doubt about political neutrality that the judges, who are firmly guaranteed their status and independence as mentioned before and enjoy their, so to speak, special status, "form and join an association of judges to represent their interests and promote their professional training and to take such other action to protect their independence as may be appropriate." To take into consideration the abovementioned factors, it is understood that there are some cases where those actions are deemed undesirable.

On the basis of the understanding that Article 9 of the Statement is not contrary to the law and system that are mentioned above, I express my agreement to "BEIJING STATEMENT OF PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY IN THE LAWASIA REGION."

ABOUT LAWASIA

LAWASIA is a professional association of representatives of Bar Councils and law associations, individual lawyers, law firms, and corporations principally from the Asia Pacific region. LAWASIA facilitates its members' participation in the fastest growing economic region in the world.

The Association provides an invaluable opportunity for lawyers to come together to exchange ideas and information on regional issues and to establish a network of working relationships in the dynamic Asia Pacific region.

LAWASIA's primary objective is to foster professional and business relationships between lawyers, businesses and government representatives in the region.

It also promotes the rule of law in a diverse range of political, cultural, social and economic contexts throughout the region.

ABOUT THE ASIA FOUNDATION

The Asia Foundation is a private, non-government organisation dedicated to supporting programs that contribute to a peaceful, prosperous, and open Asia Pacific community. Drawing on four decades of experience in Asia, the Foundation collaborates with partners from the public and private sectors in the region to support through grants and other programs the development of institutions, leadership, and policy in four broad program areas: governance and law; economic reform and development; women's political participation; and regional relations.

With a network of 13 offices throughout Asia, an office in Washington DC and headquarters in San Francisco, the Foundation funds programs in these areas at both a country and regional level.

The Asia Foundation is funded by contributions from corporations, foundations, individuals, governmental organisations in the US and Asian, and an annual appropriation from the US Congress.

IBA MINIMUM STANDARDS OF JUDICIAL INDEPENDENCE
(Adopted 1982)

A JUDGES AND THE EXECUTIVE

1 a) Individual judges should enjoy personal independence and substantive independence.
   b) Personal independence means that the terms and conditions of judicial service are adequately secured so as to ensure that individual judges are not subject to executive control.
   c) Substantive independence means that in the discharge of his/her judicial function a judge is subject to nothing but the law and the commands of his/her conscience.

2 The Judiciary as a whole should enjoy autonomy and collective independence vis-à-vis the Executive

3 a) Participation in judicial appointments and promotions by the executive or legislature is not inconsistent with judicial independence provided that appointments and promotions of judges are vested in a judicial body in which members of judiciary and the legal profession form a majority.
   b) Appointments and promotions by a non-judicial body will not be considered inconsistent with judicial independence in countries where, by long historic and democratic tradition, judicial appointments and promotion operate satisfactorily.

4 a) The Executive may participate in the discipline of judges only in referring complaints against judges, or in the initiation of disciplinary proceedings, but not the adjudication of such matters. The power to discipline or remove a judge must be vested in an institution, which is independent of the Executive.
   b) The power of removal of a judge should preferably be vested in a judicial tribunal.
   c) The Legislature may be vested with the powers of removal of judges, preferably upon a recommendation of a judicial commission.

5 The Executive shall not have control over judicial functions.

6 Rules of procedure and practice shall be made by legislation or by the Judiciary in co-operation with the legal profession subject to parliamentary approval.

7 The State shall have a duty to provide for the executive of judgements of the Court. The Judiciary shall exercise supervision over the execution process.

8 Judicial matters are exclusively within the responsibility of the Judiciary, both in central judicial administration and in court level judicial administration.

9 The central responsibility for judicial administration shall preferably be vested in the Judiciary or jointly in the Judiciary and the Executive.

10 It is the duty of the State to provide adequate financial resources to allow for the due administration of justice.

11 a) Division of work among judges should ordinarily be done under a predetermined plan, which can be changed in certain clearly defined circumstances.
b) In countries where the power of division of judicial work is vested in the Chief Justice, it is not considered inconsistent with judicial independence to accord to the Chief Justice the power to change the predetermined plan for sound reasons, preferably in consultation with the senior judges when practicable.
c) Subject to (a), the exclusive responsibility for case assignment should be vested in a responsible judge, preferably the President of the Court.

12 The power to transfer a judge from one court to another shall be vested in a judicial authority and preferably shall be subject to the judge's consent, such consent not to be unreasonably withheld.

13 Court services should be adequately financed by the relevant government.

14 Judicial salaries and pensions shall be adequate and should be regularly adjusted to account for price increases independent of executive control.

15 a) The position of the judges, their independence, their security, and their adequate remuneration shall be secured by law.
b) Judicial salaries cannot be decreased during the judges' services except as a coherent part of an overall public economic measure.

16 The ministers of the government shall not exercise any form of pressure on judges, whether overt or covert, and shall not make statements which adversely affect the independence of individual judges or of the Judiciary as a whole.

17 The power of pardon shall be exercised cautiously so as to avoid its use as interference

18 a) The Executive shall refrain from any act or omission which pre-empts the judicial resolution of a dispute or frustrates the proper execution of a court judgement.

b) The Executive shall not have the power to close down or suspend the operation of the court system at any level.

B JUDGES AND THE LEGISLATURE

19 The Legislature shall not pass legislation which retroactively reverses specific court decisions.

20 a) Legislation introducing changes in the terms and conditions of judicial services shall not be applied to judges holding office at the time of passing the legislation unless the changes improve the terms of service.

b) In case of legislation reorganising courts, judges serving in these courts shall not be affected, except for their transfer to another court of the same status.

21 A citizen shall have the right to be tried by the ordinary courts of law, and shall not be tried before *ad hoc* tribunals.

C TERMS AND NATURE OF JUDICIAL APPOINTMENTS

22 Judicial appointments should generally be for life, subject to removal for cause and compulsory retirement at an age fixed by law at the date of appointment.

23 a) Judges should not be appointed for probationary periods except for legal systems in which appointments of judges do not depend on having practical experience in the profession as a condition of the appointment.

b) The institution of temporary judges should be avoided as far as possible except where there exists a long historic democratic tradition.

24 The number of the members of the highest court should be rigid and should not be subject to change except by legislation.

25 Part-time judges should be appointed only with proper safeguards.

26 Selection of judges shall be based on merit.

27 The proceedings for discipline and removal of judges should ensure fairness to the judge and adequate opportunity for hearing.

28 The procedure for discipline should be held *in camera*. The judge may however request that the hearing be held in public, subject to final and reasoned disposition of this request by the disciplinary tribunal. Judgements in disciplinary proceedings, whether held *in camera* or in public, may be published.

29 a) The grounds for removal of judges shall be fixed by law and shall be clearly defined.
b) All disciplinary actions shall be based upon standards of judicial conduct promulgated by law or in established rules of court.

30 A judge shall not be subject to removal unless by reason of a criminal act or through gross or repeated neglect or physical or mental incapacity he/she has shown himself/herself manifestly unfit to hold the position of judge.

31 In systems where the power to discipline and remove judges is vested in an institution other than the Legislature the tribunal for discipline and removal of judges shall be permanent and be composed predominantly of members of the Judiciary.

32 The head of the court may legitimately have supervisory powers to control judges on administrative matters.

E THE PRESS, THE JUDICIARY AND THE COURTS

33 It should be recognised that judicial independence does not render the judges free from public accountability, however, the press and other institutions should be aware of the potential conflict between judicial independence and excessive pressure on judges.

34 The press should show restraint in publications on pending cases where such publication may influence the outcome of the case.

F STANDARDS OF CONDUCT

35 Judges may not, during their term of office, serve in executive functions, such as ministers of the government, nor may they serve as members of the Legislature or of municipal councils, unless by long historical traditions these functions are combined.

36 Judges may serve as chairmen of committees of inquiry in cases where the process requires skill of fact-finding and evidence-taking.

37 Judges shall not hold positions in political parties.

38 A judge, other than a temporary judge, may not practice law during his term of office.

39 A judge should refrain from business activities, except his personal investments, or ownership of property.

40 A judge should always behave in such a manner as to preserve the dignity of his office and the impartiality and independence of the Judiciary.

41 Judges may be organised in associations designed for judges, for furthering their rights and interests as judges.

42 Judges may take collective action to protect their judicial independence and to uphold their position.

G SECURING IMPARTIALITY AND INDEPENDENCE

43 A judge shall enjoy immunity from legal actions and the obligation to testify concerning matters arising in the exercise of his official functions.

44 A judge shall not sit in a case where there is a reasonable suspicion of bias or potential bias.

45 A judge shall avoid any course of conduct which might give rise to an appearance of partiality.

H THE INTERNAL INDEPENDENCE OF THE JUDICIARY

46 In the decision-making process, a judge must be independent vis-à-vis his judicial colleagues and supporters.

The above standards are subject to periodic review by the appropriate committee or committees of the International Bar Association and amendment from time to time by the International Bar Association in plenary sessions as circumstances may warrant or require.

IBA General Principles for the Legal Profession

Adopted by the International Bar Association on 20 September 2006

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General Principles for the Legal Professional

Adopted by the International Bar Association on 20 September 2006

Lawyers throughout the world are specialised professionals who place the interests of their clients above their own, and strive to obtain respect for the Rule of Law. They have to combine a continuous update on legal developments with service to their clients, respect for the Courts, and the legitimate aspiration to maintain a reasonable standard of living. Between these elements there is often tension. These principles aim at establishing a generally accepted framework to serve as a basis on which codes of conduct may be established by the appropriate authorities for lawyers in any part of the world. In addition, the purpose of adopting these General Principles is to promote and foster the ideals of the legal profession. These General Principles are not intended to replace or limit a lawyer's obligation under applicable laws or rules of professional conduct. Nor are they to be used as criteria for imposing liability, sanctions, or disciplinary measures of any kind.

1. **Independence**
   A lawyer shall maintain and be afforded protection of independence to allow him or her to give his or her clients unbiased advice or representation. A lawyer shall exercise his or her independent, unbiased professional judgment upon advising his or her client as to the likelihood of success of the client's case and upon the client's representation

2. **Honesty, integrity and fairness**
   A lawyer shall at all times maintain the highest standards of honesty, integrity and fairness towards the Court, his or her colleagues and all those with whom he or she comes professionally into contact.

3. **Conflicts of interest**
   A lawyer shall not place himself or herself in a position in which his or her client's interests conflict with those of himself or herself, his or her partners or another client, unless otherwise permitted by law or, if permitted, by client's authorisation.

4. **Confidentiality/ professional secrecy**
   A lawyer shall at all times maintain and be afforded protection of confidentiality regarding the affairs of his or her present or former clients, unless otherwise required or permitted by law or, if permitted, by client's authorisation.

5. **Clients' interest**
   A lawyer shall treat the interests of his or her clients as paramount, subject always to his or her duties to the Court and the interests of justice, to observe the law and to maintain ethical standards.

6. **Lawyers' undertaking**

   A lawyer shall honour any undertaking given in the course of his or her practice, until the undertaking is performed, released or excused.

7. **Clients' freedom**

   A lawyer shall respect the freedom of clients to be represented by the lawyer of their choice. Unless prevented by professional rules or by law, a lawyer shall be free to take on or reject a case.

8. **Property of clients and third parties**

   A lawyer shall account faithfully for any property of his or her clients or a third party which come into his or her trust, and shall keep it separate from his or her own property.

9. **Competence**

   A lawyer shall carry out his or her work in a competent and timely manner and shall not take on work which he or she does not reasonably believe he or she will be able to carry out in that manner.

10. **Fees**

    A lawyer is entitled to a reasonable fee for his or her work. A Lawyer shall not generate unnecessary work.

Annex 3

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Who are the Human Rights violators?

We present 08 case studies which reveal, if not for the remarkable investigative talents of the security forces and the Police horrendous crimes against humanity would have been committed by the agents of the LTTE posing off as civilians.

The significant fact is having attempted to commit acts of human rights violations against society, those LTTE agents seek the protection of the clauses embedded in our constitution to protect the human rights of citizens.

This shows the respect Sri Lanka has for human rights, enabling those who infringe human rights, the opportunity of defending themselves by seeking the protective clauses of the human rights. Such is our rule of law.

Strangely, LTTE foreign funded NGO's are silent on these aspects while forever complaining of human rights violations by Sri Lanka. They do so because their existence is dependant on acquiring funds from their foreign masters only if they agitate for human rights against Sri Lanka. These are the anti national, anti social, organizations that are supporting the LTTE, under cover of protecting human rights.

Case Study I
Importing of lethal chemical weapon substance

Department of Customs seized on 15th May 2008 some chemicals namely Thyonile Chloride which had not been declared to the Department of Customs. Institute of Industrial technology analyzed the chemical as Thyonile Chloride which can be converted to a chemical weapon substance that can create a choking effect. The substance was imported to Sri Lanka from Chennai, India. The name that appeared was discovered during the investigations was of V S K Enterprises of No 87/12, Mahawatta road, Colombo 14 which had imported the substance concealed as toys. Finally, Customs found 728 liters of Thyonile Chloride secretly hidden among the toys. Investigation revealed that, owner of the above company as Balasubramanium Suresh Kumar is a laborer in a factory at Wattala. The company name and address were false and bears an address of a shanty house at Wattala.

Finally CID arrested the following suspects and detained on a detention order during the course of investigation;

1. Balasubramanium Suresh Kumar
2. Sokkar Nandakumar
3. Shiabu Zubair
4. Bertum Dunstan

But, the main suspects of the above case were Subash Peiris and Meera Mohideen who are absconding and believed to be in India. It was also revealed that Subash Peiris had imported 150 bottles of the same chemical in the year 2007. Further inquiries revealed that a factory at Kosgama has been operated by the above suspects as a chemical laboratory. Investigations found many chemicals worth of millions of rupees, equipments, protective masks and attire which were used for manufacturing of chemical weapon substance inside the premises in Kosgama.

The suspect, Sokkar Nandakumar has filed a FR application (225/08) against his arrest. In his petition he alleged that the CID arrested him without sufficient and reasonable grounds and he has been detained without being produced before a court of law. He has further stated in his petition that his Fundamental Rights guaranteed by constitution have been infringed by the respondents. The petition was filed by Attorney at Law, Gowrey Shankary Thavarasa on 23 June 08 and leave to proceed was granted by the Supreme Court. The case was dismissed on 26 Sept 08.

Case Study II
Transportation of lethal explosives for mass crimes
An explosive laden light vehicle (EPGH 8886) was seized by the Borella police on 5th June 07 on information received close to Obeysekara Pura. Borella police seized the vehicle and a person namely Mailavaganam Indravasan of Pallei and two other suspects Pararajasingham Sivakumar and Rajadeepan and took them to custody. Police found 22 Kg of C4 explosives hidden inside the fuel tank of the vehicle.

The vehicle was officially issued to Alvar Pillai Balasundaram, Assistant Government Agent, Kilinochchi. The driver of this vehicle M Indravasan and the AGA left from Kilinochchi and arrived at Anuradhapura on 22 June 2007. They stayed for two days at Anuradhapura and left to Colombo on 25th June 2007. The driver dropped the AGA at Wellawatta and brought the vehicle to Obeysekarapura, Borella where the two LTTE members had rented a house. Police arrested them when they were trying to remove the fuel tank to get the explosive out from the vehicle and subsequently arrested the AGA too.

The suspect, Alvar Pillai Balasundaram had filed a Fundamental Rights application (327/07) on 19 Sept 07. The petitioner has alleged that he was illegally arrested and detained without evidence. The case was filed on 12 Oct 07 by attorneys Mr. Thirunavukkarasu and Velupillai Ponnambalam. The case was heard by the Chief Justice and two other judges. Case was dismissed without leave to proceed being granted.

Case Study III

To bomb a train

Two bombs exploded in Dehiwala police area on 4th June 2008. Those were place at the Ebenezer road at Dehiwala and closed to the rail track directed at a moving train traveling in the direction of the Dehiwala railway station. Investigations revealed one Jegadeesan was involved in these bomb blasts and he was arrested at the Vavunia road block when he attempted to enter the unliberated area. He admitted that he is responsible for the bomb explosions in Dehiwala. Two other suspects, Nishanthan and Karthick also were arrested at 36th lane in Wellawatta whom were roommates of Jegadeesan. Explosives and weapons were also recovered in the same premises. The above suspects are detained under the detention orders.

Suspect Sangarapillai Karthick filed the Fundamental Rights Application in the Supreme Court on 27 Aug 08 through his attorney, Gowrey Shankari Thavarasa. Petitioner alleged that he was arrested by police without proper evidence and detained unlawfully without granting bail.

The case was dismissed on 8th Oct 2008.

Case Study IV

To blow up Kelanitissa Power Station

Arumugam Kandasamy alias Spring Kandasamy was responsible for the original transportation of explosive from Mannar to Negombo. He was later arrested on 20 April 99 at a lodge in Vavunia. Kandasamy kept the explosives with him and later brought it to Colombo and handed it over to LTTE suspects. These LTTE suspects later attempted to explode the fuel tank in the Kelanithissa power station and were subsequently arrested.

Arumugam Kandasamy has filed a Fundamental Rights Application on the 19th June 2001 through his Attorney Eugene Marianpillai in the Supreme Court alleging that he was tortured by the police and illegally arrested and detained violating his fundamental rights.

This case was heard and dismissed on 27th May 2003.

Case study V

Aiding and Abetting the LTTE propaganda work

The suspect Vettivel Jaseekaran, Batticaloa was running a printing press at No. 317, Jampettah Street Kotahena, Colombo 13 and printing literature against the government by aiding and abetting the LTTE propaganda work thus damaging the reputation of the Sri Lankan government. Police conducted further investigations and sealed off the printing press and also took the van used by the suspect into custody. Hon. Attorney General has filed indictment in the high court of Colombo against the suspect under case No.4426/08. The case is pending presently. The fundamental Rights Application (208/2008) has been filed by his Attorney Gowrey Shankary Thawarasa on 23 June 2008. Leave to proceed has been granted and next date of hearing is 14 Nov 2008.

Case study VI

Aiding and Abetting the LTTE Propaganda work

The suspect Vadivelu Vaiarmathi, Avarangal West, Puttur who is supposed to be an associate (finance handler) of Jaseekaran, the owner of the printing press at No. 317, Jampattah road, Kotahena. The

suspect has aided and abetted to LTTE in the propaganda work of the LTTE. Further investigations are conducted by the police and indictment has been filed against her in the high court of Colombo under case No. 4426/08 which is pending.

Attorney at Law, Gowrey Shankari Thawarasa has filed the Fundamental Rights Application (209/2008) on 23 June 2008. Leave to proceed has been granted. Further hearing is fixed for 14 Nov 2008.

Case Study VII

Funding the suspects of Piliyandala bus bomb blast

The suspect Gnanadurai Ponnampalam, Dehiwala was arrested by the Police in connection with the bomb blast in a bus at Piliyandala area. An investigation conducted by the police has revealed that Gnanadurai Ponnampalam has aided and abetted the LTTE in their activities in Colombo. He has funded the LTTE suspects who were involved in the Piliyandala bomb blast on the instructions of LTTE. Attorney at Law, Gowry Shankary Thawarasa has filed the Fundamental Rights Application (456/2008). Leave to proceed has been granted. Next date of hearing is 20 Nov 2008.

Case Study VIII

Providing lodging for an LTTE Suicide Cadre

The suspect Munusamy Parameswari, Gampola has been arrested by the Special Task Force on 23 Nov 2006 for aiding and abetting an LTTE suicide women cadre Thambirasa Susanthi by providing lodging in Colombo. Further investigations by the police revealed that she is not a reporter of news papers “Weerakesari” or “ Mawbima”, as she claimed. The Fundamental Rights Application (45/2007) has been filed by Attorney at Law, Gowry Shankari Thawarasa on 25 Feb 2007. Leave to proceed was granted and this case was dismissed on 30 Feb 2007.

To be continued...

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Deriding the war heroes for a living - the ugly face of "Defence Analysts" in Sri Lanka

There has been much controversy among the media and political circles over the stance taken by the Ministry of Defence on the media freedom in this country. Some have even called it a government's war on media; some call it an anti democratic stance taken by the government. Whatever it is, the Ministry stands affirm on its stance over the irresponsible defence reportage and will assure to take all necessary measures to stop this journalistic treachery against the country. Though, the defence.lk has many a times explained the grounds of its stance, the Ministry finds that certain sections of media and political interlopers continue to mislead the public over the issue. Therefore, the Ministry being the institution responsible for national security informs all the media personnel and whoever other interested parties, the concerns it has over the behaviour of media in the context defence.

First of all, the Ministry clarifies that it has no concerns over media work other than those related to the national security and solidarity. No political battles, scandals, controversies, etc unrelated to the defence reportage does not come under the Ministry's purview. The following are the Ministry's concerns that all the responsible media personnel are expected to comprehend.

1. Sri Lanka is at a war. The citizens of this country are facing a serious threat from one of the most atrocious terrorists groups in the world and therefore they have the right to defend themselves like citizens of any other country in the world. The armed forces members of this country are engaged in the noble mission of liberating the country from the clutches of terrorism. Media personnel may have their individual reservations of the war against terror, but success of any war effort needs public support. Thus, whoever attempts to reduce the public support to the military by making false allegations and directing baseless criticism at armed forces personnel is supporting the terrorist organization that continuously murder citizens of Sri Lanka. The Ministry will continue to expose these traitors and their sinister motives and does not consider such exposure as a threat to media freedom. Those who commit such treachery should identify themselves with the LTTE rather than showing themselves as crusaders of Media Freedom.

2. There are 4 main issues that the Ministry concerns most about in defence reportage i.e. criticising military operations, promotion schemes, procurement and using unethical measures to obtain defence information.

i. Criticism over military operations-

Military operations are planned and conducted by the officers with 30-40 years of service. These officers are battle hardened and also equipped with the sound knowledge in warfare obtained by experience and professional education. The Ministry is in the view, that it is no one other than the military officers who are qualified to plan, conduct, and analyse military operations. Also, the Ministry does not consider those who call themselves "defence analysts" in the media profession in this country possess any military education or military experience to make any serious defence analysis. Therefore, those defence reporters should take the maximum effort to do their work under the pure reporting rules than misleading the public with inane comments that they are not qualified to make. The Ministry welcomed constructive criticism and new ideas, but does not wish to entertain mere doomsayers who always try to undermine the soldier's commitment.

Ministry views baseless criticisms over military operations as attempts to create semblance that the military is run by a set of incompetent or mediocre officers. If allowed to do so for a long time, such work will reduce the public confidence over the armed forces and ultimately lead to the loss of public support. On the other hand, the soldiers themselves are embarrassed and the country may loose the opportunity to get the best out of them. Hence, the Ministry will continue to counter such foul defence reportage that helps the terrorist, whether the so called "Media Rights Groups", call it a "hateful campaign" or not.

ii. Criticism over promotion schemes

The human resource of an organization is considered to be the most vital resource even in non-military organizations. This is an extremely important success factor in the military, as those commanders who lead the battle have to take their men to the field with the knowledge that they may even lose their lives. Thus, the officers' capability in leading the battle goes far beyond the mere seniority and media popularity. Thus, the Ministry wants the media to understand the simple logic that the commander must have the freedom to choose the best team for his mission to make it a successful one. There are laid down procedures in making promotion decisions for senior officers in armed forces and there are other grievance procedures available for all the members of the armed forces to redress their grievances. Thus, there is hardly any reason for military person to take their problems to media and bring disgrace upon the organization that looked after them for many long years.

On the other hand, such criticism on internal promotions does the same damage to the armed forces as mentioned above by embarrassing those officers who run the actual battle. They are being introduced to the public as those who are not qualified to hold their appointments and therefore they may not be able to carryout their duties in a happy environment. Also, public may look at the military as an organization run by incompetent people.

iii. Criticism over military procurement

It has been observed that many self-assumed defence analysts in this country are speculating frauds in each and every military procurement that the Ministry makes. If they are correct the military is the most corrupted organization in this country run by the most corrupted people. Thus, armed forces have no war heroes other than thieves who steal public money, according to these bogus defence analysts. The Ministry has serious concerns over this issue not because of the question of media's right to expose the frauds, but of the biased reporting on military procurements.

For instance, none of these "defence analysts" informs the public over the requirements of the armed forces and the urgency of meeting them when commenting on military procurement. Generally, they refer to the numbers and speculate some sort of a fraud without any base as to show the public that the funds are stolen and wasted. Ministry considers this type of reporting is highly damaging to an organization which plays a vital role for the benefit of the public and that requires public support more than anything else to play its role effectively. Hence, the Ministry urges those reporters to reveal the full story without concealing facts to the public when commenting on the defence procurement. The facts such as, the procurements were made on the requirements submitted by the tactical commanders, and on the recommendations made by expert technical evaluation boards should not be concealed from the public. It is a basic professional standard in journalism to verify facts from all the relevant parties particularly when publishing information damaging to the public image of an institution or even of an individual.

iv. Using unethical measures to obtain information

The final but the most serious concern the Ministry has on the defence reportage is the unethical measures that have been used to obtain information by some of these so called "defence analysts". It has been observed that some disgruntle personnel have been lured by these media people to give away even some of the most sensitive information to the national security. Some "analysts" even go on inducing heroism to their informants in armed forces as to show them as some sort of a rebels or freedom fighters fighting a secret battle against their "incompetent and corrupted" authorities.

On this issue the Ministry requests both the public as well as all media professional to understand the difference between a civilian organization and a military organization. In military there is no room for trade unionists, dissidents, rebels, freedom fighters and other similar odd personalities often found in civilian organizations. This is because of very good grounds, for a soldier is a defender of the nation but not his own personal interests. To defend the nation, the soldiers must possesses absolute and uncompromising loyalty towards the nation and also be partial to the government irrespective of the person who runs it. Therefore, the Ministry requests all discernible media professionals to understand that military is a vital national asset. A large amount of public money is being spent on the training, education, salaries, and other benefits on military personnel not because the public want them to be informants to the media agencies but to stay loyal to the nation, to fight for her and to safeguard the good order and the military discipline. Thus, military if lost discipline is nothing but a group of dependents that eat out public money without giving

anything back to the country.

Any journalist that lures a soldier to give away information he is not authorised to give is instigating him or her to breach the military discipline. Likewise, if such journalists lure the soldier by exploiting his/her personal grievances, weaknesses, ego, and personal disputes or even by bribery; the journalist is inflicting an irreparable damage to one of the most valuable national asset. Thus, such journalists or "defence analysts" are no heroes but the enemies of the state that aims at destroying the most valuable public asset of a country at a war. The Ministry is in the view that if it is not the ignorance that causes any such journalist to engage in such irresponsible behaviour there should be no other reason than they are being hired by the terrorists, for they are doing a job of the enemy.

Above are the concerns that the Ministry has on the media work in the context of national defence. The Ministry expects all the responsible media professionals to comprehend that soldiers are in a noble mission; i.e: to rid the country from the scourge of terrorism.

Thus, the Ministry does not find any other word better than a "Traitor" to call whoever attempts to show the soldiers as thieves or fools by making false allegations and raising baseless criticism against them.

Related article : Stop Media treachery against armed forces members!

Annex 4

The Constitution Sri Lanka

SEVENTEENTH AMENDMENT TO THE CONSTITUTION OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

[Certified on 3rd October, 2001]

L. D. - O. 47/2001.

AN ACT TO AMEND THE CONSTITUTION OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

BE it enacted by the Parliament of the Democratic Socialist Republic of Sri Lanka as follows :-

Short title.

1. This Act may be cited as the Seventeenth Amendment to the Constitution.

Insertion of Chapter VIIA in the Constitution of the Democratic Socialist Republic of Sri Lanka.

2. The Constitution of the Democratic Socialist Republic of Sri Lanka (hereinafter referred to as the "Constitution") is hereby amended by the insertion immediately after Article 41 of the Constitution of the following new Chapter, which shall have effect as Chapter VIIA of the Constitution :-

'CHAPTER VIIA

THE CONSTITUTIONAL COUNCIL

Constitution of the Constitutional Council.

41A. (1) There shall be a Constitutional Council (in this Chapter referred to as the "Council") which shall consist of the following members :-

(a) the Prime Minister ;

(b) the Speaker ;

(c) the Leader of the Opposition in Parliament ;

(d) one person appointed by the President ;

(e) five persons appointed by the President, on the nomination of both the Prime Minister, the Leader of the Opposition;

(f) one person nominated upon agreement by the majority of the Members of Parliament belonging to political parties or independent groups other than the respective political parties or independent groups to which the Prime Minister and the Leader of the Opposition belongs and appointed by the President.

(2) The Speaker shall be the Chairman of the Council.

(3) In nominating the five persons referred to in subparagraph (e) of paragraph (1) of this Article, the Prime Minister and the Leader of the Opposition shall consult the leaders of the political parties and independent groups represented in Parliament. Three of such persons shall, in consultation with the Members of Parliament who belong to the respective minority communities, be nominated to represent minority interests.

(4) The persons to be appointed or nominated as the case may be, under sub-paragraphs (d), (e) and (f) of paragraph (1) of this Article, shall be persons of eminence and integrity who have distinguished themselves in public life and who are not members of any political party.

(5) The President shall upon receipt of a written communication of the nominations under sub-paragraph (e) or sub-paragraph (f) of paragraph (1) of this Article, forthwith, make the respective appointments.

(6) (a) On the dissolution of Parliament, notwithstanding the provisions of paragraph (2) of Article 64 of the Constitution, the Speaker shall continue to hold office as a member of the Council, until a Member of Parliament is elected to be the Speaker under paragraph (1) of the aforesaid Article ;

(b) Notwithstanding the dissolution of Parliament, the Leader of the Opposition shall continue to hold office as a member of the Council, until such time after a General Election following such dissolution, a Member of Parliament is recognised as the Leader of the Opposition in Parliament.

(7) Every member of the Council appointed under sub-paragraph (e) and sub-paragraph (f) of paragraph (1) of this Article, shall hold office for a period of three years from the date of appointment as such member, unless he earlier resigns his office by writing addressed to the President, or is removed from office by the President on both the Prime Minister and the Leader of the Opposition forming an opinion that such member is physically or mentally incapacitated and is unable to function further in office, or is convicted by a court of law for any offence involving moral turpitude or if a resolution for the imposition of civic disability upon him has been passed in terms of Article 81 of the Constitution or is deemed to have vacated his office under paragraph (7) of Article 41E.

(8) In the event of there being a vacancy among the members appointed under sub-paragraph (e) or sub-paragraph (f) of paragraph (1) of this Article, the President shall, within two weeks of

the occurrence of such vacancy and having regard to the provisions of the aforementioned sub-paragraphs, appoint another person to succeed such member. Any person so appointed, shall hold office during the unexpired part of the period of office of the member whom he succeeds.

(9) The member, appointed under sub-paragraph (d) of paragraph (1) of this Article shall, unless earlier removed from office by the President, hold office for a period of three years.

(10) A Member appointed under sub-paragraph (e) or sub-paragraph (f) of paragraph (1) of this Article, shall not be eligible for re-appointment under those sub-paragraphs.

(11) The appointments made by the President under sub-paragraph (d), sub-paragraph (e) and sub-paragraph (f) of paragraph (1) of this Article shall be communicated to the Speaker.

Council to recommend appointments.

41B. (1) No person shall be appointed by the President as the Chairman or a member of any of the Commissions specified in the Schedule to this Article, except on a recommendation of the Council.

(2) The provisions of paragraph (1) of this Article shall apply in respect of any person appointed to act as the Chairman or a member of any such Commission.

(3) It shall be the duty of the Council to recommend to the President persons for appointment as Chairmen or members of the Commissions specified in the Schedule to this Article, whenever the, occasion for such appointment arises, and such recommendations shall reflect the different ethnic groups.

(4) No person appointed under paragraph (1) of this Article or a person appointed to act as the Chairman or a member of any such Commission shall be removed except as provided for in the Constitution or in any law, and where no such provision is made, such person shall be removed by the President only with the prior approval of the Council.

SCHEDULE

(a) The Election Commission.

(b) The Public Service Commission.

(c) The National Police Commission.

(d) The Human Rights Commission of Sri Lanka.

(e) The Permanent Commission to Investigate Allegations of Bribery or Corruption.

(f) The Finance Commission.

(g) The Delimitation Commission.

Council to approve appointments.

41C. (1) No person shall be appointed by the President to any of the Offices specified in the Schedule to this Article, unless such appointment has been approved by the Council upon a recommendation made to the Council by the President.

(2) The provisions of paragraph (1) of this Article shall apply in respect of any person appointed to act for a period exceeding fourteen days in any office specified in the Schedule to this Article.

(3) No person appointed to any Office specified in the Schedule to this Article or to act in any such Office, shall be removed from such Office except as provided for in the Constitution or in any law.

(4) In the discharge of its functions relating to the appointment of Judges of the Supreme Court and the President and Judges of the Court of Appeal, the Council may obtain the views of the Chief Justice and the Attorney-General.

SCHEDULE

PART I

(a) The Chief Justice and the Judges of the Supreme Court.

(b) The President and the Judges of the Court of Appeal.

(c) The Members of the Judicial Service Commission other than the Chairman.

PART II

(a) The Attorney-General.

(b) The Auditor-General.

(c) The Inspector-General of Police.

(d) The Parliamentary Commissioner for Administration (Ombudsman).

(e) The Secretary-General of Parliament.

Secretary and other officers of the Council.

41D. (1) There shall be a Secretary to the Council who shall be appointed by the Council.

(2) The Council may appoint such officers as it considers necessary for the discharge of its functions, on such terms and conditions as shall be determined by the Council.

Meetings of the Council.

41E. (1) The Council shall meet as often as may be necessary to discharge the functions assigned to the Council by the provisions of this Chapter or by any other law, and such meetings shall be summoned by the Secretary to the Council in the direction of the Chairman of the Council.

(2) The Chairman shall preside at all meetings of the Council, and in the absence of the Chairman, the Prime Minister, and in the absence of the Prime Minister, the Leader of the Opposition shall preside at the meetings of the Council. Where the Chairman, the Prime Minister and the Leader of the Opposition are all absent from any such meeting, the members present shall elect a member from among themselves to preside at such meeting.

(3) The quorum for any meeting of the Council shall be six members.

(4) The Council shall endeavour to make every recommendation, approval or decision it is required to make by unanimous decision, and in the absence of an unanimous decision, no recommendation, approval or decision made shall be valid, unless supported by not less than five members of the Council present at such meeting.

(5) The Chairman shall not have an original vote, but in the event of an equality of votes on any question for decision at any meeting of the Council, the Chairman or other member presiding at such meeting, shall have a casting vote.

(6) The procedure in regard to meetings of the Council and the transaction of business at such meetings shall be determined by the Council, including procedures to be followed in regard to the recommendation or approval of persons suitable for any appointment under Article 41B or Article 41C.

(7) Any member of the Council appointed under sub-paragraph (e) of paragraph (1) of Article 41A, who without obtaining prior leave of the Council absents himself from two consecutive meetings of the Council, shall be deemed to have vacated office with effect from the date of the second of such meetings.

Council to perform other duties.

41F. The Council shall perform and discharge such other duties and functions as may be imposed or assigned to the Council by the Constitution, or by any other law.

Expenses to be charged on the Consolidated Fund.

41G. The expenses incurred by the Council shall be charged on the Consolidated Fund.

Finality of decisions of the Council.

41H. Subject to the provisions of paragraphs (1), (2), (4), and (5) of Article 126, no court shall have the power or jurisdiction to entertain, hear or decide or call in question on any ground whatsoever, or in a any manner whatsoever, any decision of the Council or any approval or recommendation made by the Council, which decision, recommendation or approval shall be final and conclusive for all purposes.'.

Amendment of Article 52 of the Constitution.

3. Article 52 of the Constitution is hereby amended by the repeal of paragraph (7) of that Article, and the substitution therefor of the following paragraph :-

"(7) For the purposes of this Article -

(a) the Office of the Secretary-General of Parliament, the Office of the Parliamentary Commissioner for Administration (Ombudsman), the Constitutional Council, the Public Service Commission, the Election Commission, the National Police Commission and the Office of the Secretary to the Cabinet of Ministers; and

(b) the Department of the Auditor-General,

shall be deemed not to be departments of Government.".

Replacement of Chapter IX of the Constitution.

4. Chapter IX of the Constitution is hereby replaced and the following Chapter substituted therefor :-

'CHAPTER IX - THE EXECUTIVE

The Public Service

Public Service Commission.

54. (I) There shall be a Public Service Commission (in this Chapter referred to as the "Commission") which shall consist of nine members appointed by the President on the recommendation of the Constitutional Council, of whom not less than three members shall be persons who have had over fifteen years experience as a public officer. The President on the recommendation of the Constitutional Council shall appoint one member as its Chairman.

(2) No person shall be appointed as a member of the Commission or continue to hold office as such member if he is or becomes a member of Parliament, a Provincial Council or a local authority.

(3) Every person who immediately before his appointment as a member of the Commission was a public officer in the service of the State or a judicial officer, shall, upon such appointment taking effect cease to hold such office and shall be ineligible for further appointment as a public officer or a judicial officer:

Provided that any such person shall, until he ceases to be a member of the Public Service Commission, or while continuing to be a member, attains the age at which he would, if he were a public officer or a judicial officer, as the case may be, be required to retire, be deemed to be a public officer or a judicial officer and to hold a pensionable office in the service of the State, for the purpose of any provision relating to the grant of pensions, gratuities and other allowances in respect of such service.

(4) Every member of the Commission shall hold office for a period of three years from the date of his appointment, unless he becomes subject to any disqualification under paragraph (2) of this Article or earlier resigns from his office by writing addressed to the President or is removed from office by the President on the recommendation of the Constitutional Council or is convicted by a court of law of any offence involving moral turpitude or if a resolution for the imposition of civic

disability upon him has been passed in terms of Article 81 or is deemed to have vacated his office under paragraph (5) of this Article.

(5) A member of the Commission shall be eligible for reappointment as a member, but shall not be eligible for appointment as a public officer or a judicial officer after the expiry of his term of office as a member. No member shall be eligible to hold office as a member of the Commission for more than two terms.

(6) A member of the Commission who without obtaining prior leave of the Commission absents himself from three consecutive meetings of the Commission, shall be deemed to have vacated office with effect from the date of the third of such meetings, and shall not be eligible thereafter to be reappointed as a member of the Commission.

(7) The President may grant a member leave from the performance of his duties relating to the Commission for a period not exceeding two months and shall for the duration of such period on the recommendation of the Constitutional Council, appoint a person qualified to be a member of the Commission to be a temporary member for the period of such leave.

(8) A member of the Commission shall be paid such emoluments as may be determined by Parliament. The emoluments paid to a member of the Commission shall be charged on the Consolidated Fund and shall not be diminished during the term of office of such member.

(9) The Commission shall have the power to act notwithstanding any vacancy in its membership, and no act, proceeding or decision of the Commission shall be or be deemed to be invalid by reason only of such vacancy or any defect in the appointment of a member.

(10) There shall be a Secretary to the Commission who shall be appointed by the Commission.

(11) The members of the Commission shall be deemed to be public servants, within the meaning and for the purposes of Chapter IX of the Penal Code.

Powers and Functions of Cabinet of Ministers and of the Commission.

55. (1) The appointment, promotion, transfer, functions of disciplinary control and dismissal of public officers shall be vested in the Commission.

(2) The Commission shall not derogate from the functions and powers of the Provincial Public Service Commissions established by law.

(3) Notwithstanding the provisions of paragraph (1) of this Article, the appointment, promotion, transfer, disciplinary control and dismissal of all Heads of Departments shall vest in the Cabinet of Ministers, who shall exercise such powers after ascertaining the views of the Commission.

(4) Subject to the provisions of the Constitution, the Cabinet of Ministers shall provide for and determine all matters of policy relating to public officers.

(5) The Commission shall be responsible and answerable to Parliament in accordance with the provisions of the Standing Orders of Parliament for the exercise and discharge of its powers and

functions, and shall forward to Parliament in each calendar year, a report of its activities for such year.

Committees of the Commission.

56. (1) The Commission may delegate to a Committee consisting or three persons (not being members of the Commission) appointed by the Commission, the powers of appointment, promotion, transfer, disciplinary control and dismissal of such categories of public officers as are specified by the Commission.

(2) The Commission shall cause the appointment, of any such Committee to be published in the Gazette.

(3) The procedure and quorum for meetings of any such Committee shall be as determined by the Commission by rules made in that behalf. The Commission shall cause such rules to be published in the Gazette.

(4) There shall be a Secretary to each Committee, who shall be appointed by the Commission.

Delegation of powers to a public officer.

57. (1) The Commission may delegate to a f Powers to public officer, subject to such conditions and procedure as may be determined by the Commission, its powers of appointment, promotion, transfer, disciplinary control and dismissal of such category of public officers as are specified by the Commission.

(2) The Commission shall cause any such delegation to be published in the Gazette, including the conditions and procedure determined by the Commission for such purpose.

Right of Appeal.

58. (1) Any public officer aggrieved by an order relating to a promotion, transfer, dismissal or an order on a disciplinary matter made by a Committee or any public officer under Article 56 or Article 57, in respect of the officer so aggrieved, may appeal to the Commission against such order in accordance with such rules made by the Commission from time to time, relating to the procedure to be followed in the making, hearing and determination of an appeal made to the Commission and the period fixed within which an appeal should he heard and concluded.

(2) The Commission shall have the power upon such appeal to alter, vary, rescind or confirm an order against which an appeal is made, or to give directions in relation thereto, or to order such further or other inquiry as to the Commission shall seem fit.

(3) The Commission shall cause to be published in the Gazette the rules made by it under paragraph (1) of this Article.

Administrative Appeals Tribunal.

59. (1) There shall be an Administrative Appeals Tribunal appointed by the Judicial Service Commission.

(2) The Administrative Appeals Tribunal shall have the power to alter, vary or rescind any order or decision made by the Commission.

(3) The constitution, powers and procedure of such Tribunal, including the time limits for the preferring of appeals, shall be provided for by law.

Commission not to exercise power where there is delegation.

60. Upon delegation of any of its powers to a Committee or a public officer appointed under Article 56 or Article 57 as the case may be, the Commission shall not, while such delegation is in force, exercise or perform its functions or duties in regard to the categories of public officers in respect of which such delegation is made, subject to the provisions contained in paragraphs (1) and (2) of Article 58.

Procedure at meetings.

61. (1) The quorum for a meeting of the Commission shall be five members.

(2) All decisions of the Commission shall be made by a majority of votes of the members present at the meeting. In the event of an equality of votes, the member presiding at the meeting shall have a casting vote.

(3) The Chairman of the Commission shall preside at all meetings of the Commission, and in his absence, a member elected by the members present from amongst themselves, shall preside at such meeting.

Immunity from legal proceedings.

61A. Subject to the provisions of paragraphs (1), (2), (3), (4) and (5) of Article 126, no court or tribunal shall have power or jurisdiction to inquire into or pronounce upon or in any manner call in question any order or decision made by the Commission, a Committee, or any public officer, in pursuance of any power or duty conferred or imposed on such Commission, or delegated to a Committee or public officer, under this Chapter or under any other law.

Savings of rules and regulations in force.

61B. Until the Commission otherwise provides, all rules, regulations and procedures relating to the public service as are in force on the date of the coming into operation of this Chapter, shall, mutatis

mutandis, be deemed to continue in force as rules, regulations and procedures relating to the public service, as if they had been made or provided for under this Chapter.

Interference with the Commission.

61C. (1) Every person who, otherwise than in the course of such person's lawful duty, directly or indirectly by himself or by or with any other person, in any manner whatsoever influences or attempts to influence or interferes with any decision of the Commission, or a Committee or a public officer to whom the Commission has delegated any power under this Chapter, or to so influence any member of the Commission or a Committee, shall be guilty of an offence and shall on conviction be liable to a fine not exceeding one hundred thousand rupees or to imprisonment for a term not exceeding seven years, or to both such fine and imprisonment.

(2) Every High Court established under Article 154P of the Constitution shall have jurisdiction to hear and determine any matter referred to in paragraph (1) of this Article.

Oath or affirmation of office.

61D. A person appointed to any office referred to in this Chapter shall not enter upon the duties of his office until he takes and subscribes the oath or makes and subscribes the affirmation set out in the Fourth Schedule to the Constitution.

Appointments by the President.

61E. The President shall appoint -

(a) the Heads of the Army, the Navy and the Air Force; and

(b) subject to the provisions of Article 41C, the Attorney General and the Inspector General of Police.

Interpretation.

61F. For the purposes of this Chapter "public officer" does not include a member of the Army, Navy, or Air Force, an officer of the Election Commission appointed by such Commission, a police officer appointed by the National Police Commission or a scheduled public officer appointed by the Judicial Service Commission.'.

Amendment of Article 65 of the Constitution.

5. Article 65 of the Constitution is hereby amended as follows :-

(1) in paragraph (1) of that Article, by the substitution for the words "shall be appointed by the President", of the words "shall, subject to the provisions of Article 41C, be appointed by the President " ; and

(2) in paragraph (6) of that Article, by the substitution for the words "President may appoint a person", of the words "President may, subject to the provisions of Article 41C, appoint a person".

Amendment of Article 89 of the Constitution.

6. Article 89 of the Constitution is hereby amended in paragraph (j) of that Article, by the substitution for the words and figures "Article 116"of the words and figures "Article 116 or Article 111C, as the case may be".

Amendment of Article 91 of the Constitution.

7. Article 91 of the Constitution is hereby amended in paragraph (1) thereof, as follows :-

(1) by the insertion immediately after sub-paragraph (d) (iv) of that paragraph, of the following new sub-paragraph :-

"(iva) a member of a Provincial Public Service Commission,"

(2) by the substitution for subparagraph (d) (v) of that paragraph, of the following sub-paragraph :-

"(v) the Commissioner-General of Elections,";

(3) by the insertion immediately after sub-paragraph (d) (v) of that paragraph, of the following new sub-paragraphs :-

"(va) a member of the Election Commission,

(vb) a member of the Constitutional Council,

(vc) a member of the National Police Commission," ; and

(4) by the insertion immediately after sub-paragraph (d) (viiia) of that paragraph, of the following new sub-paragraph :-

"(viiia) an officer of a Provincial Public Service holding any office created after February 01,1988, the initial of the salary scale of which is, on the date of the creation of that office, not less than such amount as determined by resolution of Parliament, or such other amount per annum as would, under any subsequent revision of such salary scales, correspond to such initial,".

Repeal of Articles 103 and 104 of the Constitution.

8. Article 103 and Article 104 of the Constitution are hereby repealed.

Insertion of Chapter XIVA in the Constitution.

9. The following new Chapter is hereby inserted immediately after Article 102 of the Constitution and shall have effect as Chapter XIVA of the Constitution :-

'CHAPTER XIVA - ELECTION COMMISSION

Election Commission.

103. (1) There shall be an Election Commission (in this Chapter referred to as the "Commission") consisting of five members appointed by the President on the recommendation of the Constitutional Council, from amongst persons who have distinguished themselves in any profession or in the fields of administration or education. The President shall on the recommendation of the Constitutional Council, appoint one member as its Chairman.

(2) The object of the Commission shall be to conduct free and fair elections and Referenda.

(3) No person shall be appointed as a member of the Commission or continue to hold office as such member if he is or becomes a member of Parliament, a Provincial Council or a local authority, or is or appointed a judicial officer or public officer, or is or enters into the employment of the State in any capacity whatsoever.

(4) The provisions of the Constitution and any other law relating to the removal of judges of the Supreme Court and the Court of Appeal from office shall, mutatis mutandis, apply to the removal of a member of the Commission from office.

(5) A member of the Commission who without obtaining prior leave of the Commission, absents from three consecutive meetings of the Commission, shall be deemed to have vacated office with effect from the date of the third of such meetings.

(6) A member of the Commission shall hold office for a period of five years from the date of appointment, unless he becomes subject to any disqualification under paragraph (3) of this Article or earlier resigns from office by writing addressed to the President or is removed from office under paragraph (4) of this Article, or is convicted by a court of law of any offence involving moral turpitude, or if a resolution for the imposition of civic disability upon him has been passed in terms of Article 81 or is deemed to have vacated office under paragraph (5) of this Article.

(7) The President may grant a member leave from the performance of his duties relating to the Commission for a period not exceeding two months and may appoint a person qualified to be a member of the Commission to be a temporary member for the period of such leave. Every such appointment shall be made on the recommendation of the Constitutional Council.

(8) A member of the Commission shall be paid such emoluments as may be determined by Parliament. The emoluments paid to a member of the Commission shall be charged on the Consolidated Fund and shall not be diminished during the term of office of the member.

(9) All members of the Commission shall be deemed to be public servants within the meaning and for the purposes of Chapter IX of the Penal Code.

Meetings of the Commission.

104. (1) The quorum for any meeting of the Commission shall be three members.

(2) (a) The Chairman of the Commission shall preside at all meetings of the Commission and, in the absence of the Chairman from any meeting of the Commission, a member elected by the members present from amongst themselves shall preside at such meeting.

(b) Decisions of the Commission shall be by a majority of the members present and voting at the meeting at which the decision is taken, and in the event of an equality of votes, the Chairman or the member presiding at the meeting shall have a casting vote.

(3) The Commission shall have power to act notwithstanding any vacancy in the membership of the Commission, and no act or proceeding or decision of the Commission shall be invalid or be deemed to be invalid by reason only of such vacancy or any defect in the appointment of a member.

Finality of decisions and immunity from suit.

104A. Subject to the jurisdiction conferred on the Supreme Court under paragraph (1) of Article 126, Article 104H and Article 130, and on the Court of Appeal by Article 144, and the jurisdiction conferred on any court by any law to hear and determine election petitions or Referendum petitions,-

(a) no court shall have the power or jurisdiction to entertain or hear or decide or call in question on any ground and in any manner whatsoever, any decision, direction or act of the Commission, made or done or purported to have been made or done under the Constitution or under any law relating to the holding of an election or the conduct of a Referandum as the case may be, which decisions, directions or acts shall be final and conclusive; and

(b) no suit or prosecution or other proceeding shall lie against any member or officer of the Commission for any act or thing which in good faith is done or purported to be done by him in the performance of his duties or the discharge of his functions under the Constitution or under any law relating to the holding of an election or the conduct of a Referandum as the case may be.

Powers, functions and duties of the Commission.

104B. (1) The Commission shall exercise, perform and discharge all such powers, duties and functions conferred or imposed on or assigned to-

(a) the Commission; or

(b) the Commissioner-General of Elections,

by the Constitution, and by the law for the time being relating to the election of the President, the election of Members of Parliament, the election of members of Provincial Councils, the election of members of local authorities and the conduct of Referenda, including but not limited to all the powers, duties and functions relating to the preparation and revision of registers of electors for the purposes of such elections and Referenda and the conduct of such elections and Referenda.

(2) It shall be the duty of the Commission to secure the enforcement of all laws relating to the holding of any such election or the conduct of Referenda, and it shall be the duty of all authorities of the State charged with the enforcement of such laws, to co-operate with the Commission to secure such enforcement.

(3) The Commission shall be responsible and answerable to Parliament in accordance with the provisions of the Standing Orders of Parliament for the exercise, performance and discharge of its powers, duties and functions, and shall forward to Parliament for each calendar year a report of its activities for such year.

(4) (a) The Commission shall have the power during the period of an election, to prohibit the use of any movable or immovable property belonging to the State or any public corporation -

(i) for the purpose of promoting or preventing the election of any candidate or any political party or independent group contesting at such election ;

(ii) by any candidate or any political party or any independent group contesting at such election.

by a direction in writing by the Chairman of the Commission or of the Commissioner-General of Elections on the instruction of the Commission.

(b) It shall be the duty of every person or officer in whose custody or under whose control such property is for the time being, to comply with and give effect to such direction.

(5) (a) The Commission shall have the power to issue from time to time, in respect of the holding of any election or the conduct of a Referendum, such guidelines as the Commission may consider appropriate to any broadcasting or telecasting operator or any proprietor or publisher of a newspaper as the case may be, as the Commission may consider necessary to ensure a free and fair election.

(b) It shall be the duty of the Chairman of the Sri Lanka Broadcasting Corporation and the Chairman of the Sri Lanka Rupavahini Corporation, to take all necessary steps to ensure compliance with any guidelines as are issued to them under sub-paragraph (a).

(c) Where the Sri Lanka Broadcasting Corporation and the Sri Lanka Rupavahini Corporation as the case may be, contravenes any guidelines issued by the Commission under sub-paragraph (a), the Commission may appoint a Competent Authority by name or by office, who shall, with effect from the date of such appointment, take over the management of such Broadcasting Corporation or Rupavahini Corporation as the case may be, in respect of all political broadcasts or any other broadcast, which in the opinion of the Commission impinge on the election, until the conclusion of the election and the Sri Lanka Broadcasting Corporation and the Sri Lanka Rupavahini Corporation, shall not, during such period, discharge any function connected with or relating to such management which is taken over by the Competent Authority.

(d) Parliament may by law provide for the powers and functions of the Competent Authority appointed under subparagraph (c).

Deployment of Police by the Commission.

104C. (1) Upon the making of an Order for the holding of an election or the making of a Proclamation requiring the conduct of a Referendum, as the case may be, the Commission shall notify the Inspector-General of Police of the facilities and the number of police officers required by the Commission for the holding or conduct of such election or Referendum, as the case may be.

(2) The Inspector-General of Police shall make available to the Commission the facilities and police officers specified in any notification made under paragraph (1) of this Article.

(3) The Commission may deploy the police officers and facilities made available to the Commission in such manner as is calculated to promote the conduct of a free and fair election or Referendum, as the case may be.

(4) Every police officer made available to the Commission under paragraph (2) of this Article, shall be responsible to and act under the direction and control of the Commission during the period of an election.

(5) No suit, prosecution or other proceeding, shall lie against any police officer made available to the Commission under this Article for any lawful act or thing in good faith done by such police officer, in pursuance of a direction of the Commission or his functioning under the Commission.

Deployment of Armed Forces.

104D. It shall be lawful for the Commission, upon the making of an Order for the holding of an election or the making of a Proclamation requiring, the conduct of a Referendum, as the case may be, to make recommendations to the President regarding the deployment of the armed forces of the Republic for the prevention or control of any actions or incidents which may be prejudicial to the holding or conducting of a free and fair election or Referendum, as the case may be.

Commissioner-General of Elections and other officers of the Commission.

104E. (1) There shall be a Commissioner-General of Elections who shall, subject to the approval of the Constitutional Council, be appointed by the Commission on such terms and conditions as shall be determined by the Commission.

(2) The Commissioner-General of Elections shall be entitled to be present at meetings of the Commission, except where any matter relating to him is being considered by the Commission. He shall have no right to vote at such meetings.

(3) The Commission may appoint such other officers to the Commission on such terms and conditions as may be determined by the Commission.

(4) The salaries of the Commissioner-General of Elections and the other officers of the Commission, shall be determined by the Commission and shall be charged on the Consolidated Fund.

(5) The Commissioner-General of Elections shall, subject to the direction and control of the Commission, implement the decisions of the Commission and exercise supervision over the officers of the Commission.

(6) The Commission may delegate to the Commissioner-General of Elections or other officer of the Commission, any power, duty or function of' the Commission, and the Commissioner-General of Elections or such officer shall exercise, perform and discharge such power, duty or function, subject to the direction and control of the Commission.

(7) The office of the Commissioner-General of Elections shall become vacant-

(a) upon his death ;

(b) on his resignation in writing addressed to the Commission ;

(c) on his attaining the age of sixty five years ;

(d) on his removal by the Commission on account of ill health or physical or mental infirmity ; or

(e) on his removal by the Commission on the presentation of an address of Parliament in compliance with the provisions of paragraph (8), for such removal on the ground of proved misbehaviour or incapacity.

(8) (a) The address referred to in sub-paragraph (e) of paragraph (7) of this Article shall be required to be supported by a majority of the total number of Members of Parliament (including those not present) and no resolution for the presentation of such an address shall be entertained by the Speaker or placed on the Order Paper of Parliament, unless notice of such resolution is signed by not less than one-third of the total number of Members of parliament and sets out full particulars of the alleged misbehaviour or incapacity

(b) Parliament shall by law or by Standing Orders, provide for all matters relating to the presentation of such an address, including the procedure for the passing of such resolution, the investigation and proof of the alleged misbehaviour or incapacity and the right of the

Commissioner-General of Elections to appear and to be heard in person or by representatives.

Returning Officers.

104F. (1) The Commission shall from time to time by notice published in the Gazette appoint by name or by office a person to be a Returning Officer to each electoral district, and may appoint by name or by office one or more persons to assist the Returning Officer in the performance of his duties.

(2) Every Officer appointed under paragraph (1) shall in the performance and discharge of such duties and functions as are assigned to him, be subject to such directions as may be issued by the Commission and shall be responsible and answerable to the Commission therefor.

Public officers.

104G. All public officers performing duties and functions at any election or Referenda shall act in the performance and discharge of such duties and functions under the directions of the Commission, and shall be responsible and answerable to the Commission therefor.

Power of Supreme Court to issue writs.

104H. (1) The jurisdiction conferred on the Court of Appeal under Article 140 of the Constitution shall, in relation to any matter that may arise in the exercise by the Commission of the powers conferred on it by the Constitution or by any other law, be exercised by the Supreme Court.

(2) Every application invoking the jurisdiction referred to in paragraph (1), shall be made within one month of the date of the commission of the act to which the application relates. The Supreme Court shall hear and finally dispose of the application within two months of the filing of the same.

Interpretation.

104J. In this Chapter "during the period of an election" shall mean the period commencing on the making of a Proclamation or Order for the conduct of a Referendum or for the holding of an election, as the case may be, and ending on the date on which the result of poll taken at such Referendum or election, as the case may be, is declared.'.

Amendment of Article 107 of the Constitution.

10. Article 107of the Constitution is hereby amended in paragraph (1) of that Article, by the substitution for the words "shall be appointed by the President of the Republic by warrant under his hand.", of the words "shall, subject to the provisions of Article 41C, be appointed by the President by

warrant under his hand.".

Amendment of Article 109 of the Constitution.

11. Article 107 of the Constitution is hereby amended as follows :-

(1) in paragraph (1) of that Article, by the substitution for the words "the President shall appoint", of the words "the President shall, subject to the provisions of Article 41C, appoint" ; and

(2) in paragraph (2) of that Article, by the substitution for the words "the President may appoint", of the words "the President may, subject to the provisions of Article 41C, appoint".

Amendment of Article 111 of the Constitution.

12. Article 111 of the Constitution is hereby amended as follows :-

(1) by the repeal of paragraph (2) of that Article and the substitution therefore of the following paragraph :-

"(2) The Judges of the High Court shall –

(a) on the recommendation of the Judicial Service Commission, be appointed by the President by warrant under his hand and such recommendation shall be made after consultation with the Attorney-General ;

(b) be removable and be subject to the disciplinary control of the President on the recommendation of the Judicial Service Commission." ; and

(2) by the addition immediately after paragraph (3) of that Article, of the following new paragraph :-

"(4) Any Judge of the High Court may resign his office by writing under his hand addressed to the President.".

Amendment the Article 111A of the Constitution.

13. Article 111A of the Constitution is hereby amended in paragraph (1) of that Article, by the substitution for the words "the President may, by warrant, appoint" of the words "the President may, on the recommendation of the Judicial Service Commission, by warrant, appoint ".

Insertion of new Article 111B of the Constitution.

14. The following Article is hereby inserted immediately after Article 111A of the Constitution, and shall have effect as Article 111B of the Constitution :-

"Fiscal for the whole island.

111B. There shall be a Fiscal, who shall be the Fiscal for the whole Island and who shall exercise supervision and control over Deputy Fiscals attached to all Courts of First Instance.".

Re-numbering of Article 116 of the Constitution as Article 111C.

15. Article 116 of the Constitution is hereby re-numbered as Article 111C of the Constitution.

Insertion of Chapter XVA in the Constitution.

16. The following new Chapter is hereby inserted immediately after Article 111C of the Constitution, and shall have effect as Chapter XVA of the Constitution :-

'CHAPTER XVA - JUDICIAL SERVICE COMMISSION

Constitution of the Judicial Service Commission

111D. (1) There shall be a Judicial Service Commission (in this Chapter referred to as the "Commission") consisting of the Chief Justice and two other Judges of the Supreme Court appointed by the President, subject to the provisions of Article 41C.

(2) The Chief Justice shall be the Chairman of the Commission.

Meetings of the Commission.

111E. (1) The quorum for any meeting of the Commission shall be two members of the Commission.

(2) A Judge of the Supreme Court appointed as a member of the Commission shall, unless he earlier resigns his office or is removed therefrom as hereinafter provided or ceases to be a Judge of the Supreme Court, hold office for a period of three years from the date of his appointment, but shall be eligible for re-appointment.

(3) All decisions of the Commission shall be made by a majority of the members present, and in the event of an equality of votes, the Chairman of the meeting shall have a casting vote.

(4) The Commission shall have power to act notwithstanding any vacancy in its membership and no act or proceeding of the Commission shall be, or be deemed to be invalid by reason only of such vacancy or any defect in the appointment of a member.

(5) President may grant to any member of the Commission leave from his duties and may appoint on the recommendation of the Constitutional Council, a person qualified to be a member of the Commission to be a temporary member for the period of such leave.

(6) The President may, on the recommendation of the Constitutional Council, for cause assigned, remove from office any member of the Commission.

Allowances of members of the Commission

111F. A member of the Commission shall be paid such allowances as may be determined by Parliament. Such allowances shall be charged on the Consolidated Fund and shall not be reduced during the period of office of a member, and shall be in addition to the salary and other allowances attached to, and received from, the substantive appointment:

Provided that until the amount to be paid as allowances is determined under the provisions of this Article, the members of the Commission shall continue to receive as allowances, such amount as they were receiving on the day immediately preceding the date on which this Chapter comes into operation.

Secretary to the Commission.

111G. There shall be a Secretary to the Commission who shall be appointed by Commission from among senior judicial officers of the Courts of First Instance.

Powers of the Commission.

111H. (1) The Judicial Service Commission is hereby vested with the power to-

(a) transfer judges of the High Court ;

(b) appoint, promote, transfer, exercise disciplinary control and dismiss judicial officers and scheduled public officers.

(2) The Commission may make -

(a) rules regarding training of Judges of the High Court, the schemes for recruitment and training, appointment, promotion and transfer of judicial offices and scheduled public officers;

(b) provision for such matters as are necessary or expedient for the exercise, performance and discharge of the powers, duties and functions of the Commission.

(3) The Chairman of the Commission or any Judge of the Supreme Court or Judge of the Court of Appeal as the case may be, authorized by the Commission shall have power and authority to inspect any Court of First Instance, or the records, registers and other documents maintained in such Court, or hold such inquiry as may be necessary.

(4) The Commission may by Order published in the Gazette delegate to the Secretary to the Commission the power to make transfers in respect of scheduled public officers, other than transfers involving increase of salary, or to make acting appointments in such cases and subject to such

limitations as may be specified in the Order.

Judicial officers and scheduled public officers may resign.

111J. Any judicial officer or scheduled public officer may resign his office by writing under his hand addressed to the Chairman of the Commission.

Immunity from legal proceedings.

111K. No suit or proceeding shall lie against the Chairman, member or Secretary or officer of the Commission for any lawful act which in good faith is done in the performance of his duties or functions as such Chairman, member, Secretary, or officer of the Commission.

Interference with the Commission is an offence.

111L. (1) Every person who otherwise than in the course of such persons lawful duty, directly or indirectly, alone or by or with any other person, in any manner whatsoever, influences or attempts to influence any decision or order made by the Commission or to so influence any member thereof, shall be guilty of an offence and shall on conviction be liable to a fine not exceeding one hundred thousand rupees or to imprisonment for a term not exceeding three years or to both such fine and imprisonment:

Provided however that the giving of a certificate or testimonial to any applicant or candidate for any judicial office or scheduled public office shall not be an offence.

(2) Every High Court established under Article 154P of the Constitution shall have jurisdiction to hear and determine any matter referred to In paragraph (1).

Interpretation.

111M. (a) In this Chapter-

“appointment” includes the appointment to act in any office referred to in this Chapter.

“judicial officer” means any person who holds office as judge, presiding officer or member of any Court of First Instance, tribunal or institution created and established for the administration of justice or for the adjudication of any labour or other dispute, but does not include a Judge of the Supreme Court or of the Court of Appeal or of the High Court or a person who performs arbitral functions, or a public officer whose principal duty is not the performance of functions of a judicial nature; and

“scheduled public officer” means the Registrar of the Supreme Court, the Registrar of the Court of Appeal, the Registrar, Deputy Registrar or Assistant Registrar of the High Court or any Court of

First Instance, the Fiscal, the Deputy Fiscal of the Court of Appeal or High Court and any Court of First Instance, any public officer employed in the Registry of the Supreme Court, Court of Appeal or High Court or any Court of First Instance included in a category specified in the Fifth Schedule or such other categories as may be specified by Order made by the Minister in charge of the subject of Justice and approved by Parliament and Published in the Gazette.

(b) No court, tribunal or institution shall have jurisdiction to entertain or to determine the question whether or not a person is a judicial Officer within the meaning Of the Constitution, but such question shall be determined solely by the Commission, whose decision thereon shall be final and conclusive.

(c) No act of such person or Proceeding held before such person, prior to such determination as is referred to in sub-paragraph (b), shall be deemed to be invalid by reason of such determination.'.

Repeal of Articles 112, 113, 113A, 114, 115 and 117 of the Constitution.

17. Articles 112, 113, 113A, 114, 115 and 117 of the Constitution are hereby repealed.

Amendment of Article 153 of the Constitution.

18. Article 153 of the Constitution is hereby amended the as follows :-

(1) in paragraph (1) of that Article, by the substitution for the words "shall be appointed by the President", of the words "shall, subject to the provisions of Article 41C, be appointed by the President"; and

(2) in paragraph (4) of that article, by the substitution for the words "the President may appoint", of the words "the President may, subject to the provisions of Article 41C, appoint".

Amendment of Article 154R of the Constitution.

19. Article 154R of the Constitution is hereby amended in sub-paragraph (c) of paragraph (1) of that Article, by the substitution for the words "three other members to represent", of the words "three other members who are appointed by the President on the recommendation of the Constitutional Council, to represent".

Insertion of new Chapter XVIIIA in the Constitution.

20. The following new Chapter is hereby inserted immediately after Article 155 of the Constitution and shall have effect as Chapter XVIIIA of the Constitution :-

"CHAPTER XVIIIA - NATIONAL POLICE COMMISSION

Constitution of the National Police Commission.

155A. (1) There shall be a National Police Commission (in this Chapter referred to as the "Commission") consisting of seven members appointed by the President on the recommendation of the Constitutional Council. The Constitutional Council may, in making its recommendation, consult the Public Service Commission. The President shall on the recommendation of the Constitutional Council appoint one member as the Chairman.

(2) No person shall be appointed as a member of the Commission or continue to hold office as such member if he is or becomes a member of Parliament, a Provincial Council or a local authority.

(3) Every person who immediately before his appointment as a member of the Commission, was a public officer in the service of the State or a judicial officer, shall upon such appointment taking effect, cease to hold such office, and shall be ineligible for further appointment as a public officer or a judicial officer:

Provided that any such person shall, until he ceases to be a member of the Commission, or while continuing to be a member, attains the age at which he would, if he were a public officer or a judicial officer, as the case may be, be required to retire, be deemed to be a public officer or a judicial officer and to hold a pensionable office in the service of the State, for the purpose of any provision relating to the grant of pensions, gratuities and other allowances in respect of such service.

(4) Every member of the Commission shall hold office for a period of three years from the date of his appointment, unless he becomes subject to any disqualification under paragraph (2) of this Article, or earlier resigns from his office by writing addressed to the President or is removed from office by the President on the recommendation of the Constitutional Council or is convicted by a Court of law of any offence involving moral turpitude or if a resolution for the imposition of civic disability upon him has been passed in terms of Article 81 or is deemed to have vacated his office under paragraph (6) of this Article.

(5) A member of the Commission shall be eligible for reappointment as a member, but shall not be eligible for appointment as a public officer or a judicial officer after the expiry of his term of office as a member. No member shall be eligible to hold office as a member of the Commission for more than two terms.

(6) In the event of the Chairman or a member of the Commission absenting himself from three consecutive meetings of the Commission without the prior leave of the Commission, he shall be deemed to have vacated his office from the date of the third of such meetings and shall not be eligible to be reappointed as a member or as a member or as Chairman of the Commission.

(7) The Chairman and members of the Commission shall be paid such allowances as are determined by Parliament. Such allowances shall be charged on the Consolidated Fund and shall not be diminished during the term of office of the Chairman or member.

(8) The Chairman and members of the Commission shall be deemed to be public servants within the meaning and for the purposes of Chapter IX of the Penal Code.

Meetings of the Commission.

155B. (1) The quorum for a meeting of the Commission shall be four members.

(2) The Chairman shall preside at all meetings of the Commission and in his absence a member elected by the members present from amongst the members shall preside at such meeting.

(3) Decisions of the Commission shall be by a majority of members present and voting at the meeting at which the decision is taken, and in the event of an equality of votes the Chairman or the person presiding shall have a casting vote.

(4) The Commission shall have power to act notwithstanding any vacancy in its membership, and any act or proceeding or decision of the Commission shall not be invalid or deemed to be invalid by reason only of such vacancy or any defect in the appointment of the Chairman or member.

Immunity from legal proceedings.

155C. (1) Subject to the jurisdiction conferred on the Supreme Court under paragraph (1) of Article 126, no court or tribunal shall have the power or jurisdiction to inquire into, or pronounce upon or in any manner call in question any order or decision made by the Commission or a Committee, in pursuance of any power or duty, conferred or imposed on such Commission or Committee under this Chapter or under any other law.

Secretary to the Commission.

155D. There shall be a Secretary to the Commission and such other officers appointed by the Commission on such terms and conditions as may be determined by the Commission.

Costs and Expenses.

155E. The costs and expenses of the Commission shall be a charge on the Consolidated Fund.

Interference with the Commission.

155F. (1) Every person who, otherwise than in the course of such person's lawful duty, directly or indirectly by himself or by or with any other person, in any manner whatsoever influences or attempts to influence or interferes with any decision of the Commission or a Committee, or to so influence any member of the Commission or a Committee, shall be guilty of an offence and shall on conviction be liable to a fine not exceeding one hundred thousand rupees or to imprisonment for a term not exceeding seven years, or to both such fine and imprisonment.

(2) A High Court established under Article 154P of the Constitution shall have jurisdiction to hear and determine any matter referred to in paragraph (1).

Powers of the Commission.

155G. (1) (a) The appointment, promotion, transfer, disciplinary control and dismissal of police officers other than the Inspector-General of Police, shall be vested in the Commission. The Commission shall exercise its powers of promotion, transfer, disciplinary control and dismissal in consultation with the Inspector General of Police.

(b) The Commission shall not in the exercise of its powers under this Article, derogate from the powers and functions assigned to the Provincial Police Service Commissions as and when such Commissions are established under Chapter XVIIA of the Constitution.

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

(3) The Commission shall provide for and determine all matters regarding police officers, including the formulation of schemes of recruitment and training and the improvement of the efficiency and independence of the police service, the nature and type of the arms, ammunition and other equipment necessary for the use of the National Division and the Provincial Divisions, codes of conduct, and the standards to be followed in making promotions and transfers, as the Commission may from time to time consider necessary or fit.

(4) The Commission shall exercise all such powers and perform all such functions and duties as are vested in it under Appendix I of List I contained in the Ninth Schedule of the Constitution.

Committees of the Commission.

155H. (1) The Commission may delegate to a Committee (not consisting of members of the Commission) as shall be nominated by the Commission, the powers of appointment, promotion, transfer, disciplinary control and dismissal of such categories of police officers as are specified by the Commission.

(2) The Commission shall cause to be published in the Gazette the appointment of any such Committee.

(3) The procedure and quorum for meetings of such a Committee shall be according to rules made by the Commission. The Commission shall cause such rules to be published in the Gazette.

Delegation of functions by the Commission.

155J. (1) The Commission may, subject to such conditions and procedures as may be prescribed by the Commission, delegate to the Inspector-General of Police or in consultation with the Inspector-General of Police to any Police Officer, its powers of appointment, promotion, transfer, disciplinary control and dismissal of any category of police officer.

(2) The Commission shall cause any such delegation to be published in the Gazette.

Right of appeal.

155K. (1) A police officer aggrieved by any order relating to promotion, transfer or any order on a disciplinary matter or dismissal made by the Inspector-General of Police or a Committee or Police Officer referred to in Article 155H and 155J in respect of himself, may appeal to the Commission against such order in accordance with rules made by the Commission from time to time regulating the procedure and the period fixed for the making, and hearing of an appeal by the Commission.

(2) The Commission shall have the power to alter, vary, rescind or confirm such order upon such appeal, or to give directions in relation there to, or to order such further or other inquiry, as to the Commission shall seem fit.

(3) The Commission shall from time to time cause to be published in the Gazelle, rules made by it under paragraph (1) of this Article.

(4) Upon any delegation to the Inspector-General of Police or a Committee or Police Officer under Article 155H and 155J of this Chapter as the case may be, the Commission shall not whilst such delegation of its powers is in force, exercise or perform its functions or duties in respect of the categories of Police Officers in respect of which such delegation is made, subject to the right of appeal hereinbefore provided.

Appeals to the Administrative Appeals Tribunal.

155L. Any Police Officer aggrieved by any order relating to promotion, transfer, or any order on a disciplinary matter or dismissal made by the Commission, in respect of himself may appeal therefrom to the Administrative Appeals Tribunal established under Article 59, which shall have the power to alter, vary or rescind any order or decision made by the Commission.

Saving of existing rules and regulations.

155M. Until the Commission otherwise provides, all rules, regulations and procedures relating to the police force as are in force shall continue to be operative and in force.

Commission answerable to Parliament.

155N. The Commission shall be responsible and answerable to Parliament in accordance with the provisions of the Standing Orders of Parliament for the exercise, performance and discharge of its powers, duties and functions, and shall forward to Parliament in each calendar year a report of its activities in such year.”.

Amendment Article 156 of the Constitution.

21. Article 156 of the Constitution is hereby amended as follows :-

(1) in paragraph (2) of that Article, by the substitution for the words "shall be appointed by the President", of the words "shall, subject to the provisions of Article 41C, be appointed by the President"; and

(2) in paragraph (5) of that Article, by the substitution for the words "the President shall appoint", of the words "the President shall, subject to the provisions of Article 41C, appoint".

Amendment of Article 170 of the Constitution.

22. Article 170 of the Constitution is hereby amended as follows :-

(1) in the definition of the expression "judicial officer", by the substitution for the words "other than in Article 114,", of the words "other than in Article 111M,"; and

(2) in the definition of the expression "public officer", by the insertion immediately after paragraph (c), of the following new paragraphs :-

"(ca) a member of the Constitutional Council ;

(cb) a member of the Election Commission ;

(cc) a member of the National Police Commission ;

(cd) the Commissioner-General of Elections ;

(ce) officers appointed to the Election Commission, by the Election Commission ;".

Amendment of the Ninth Schedule to the Constitution.

23. The Ninth Schedule to the Constitution is hereby amended in Appendix I to List I as follows :-

(1) by the substitution for item 3 of that Appendix of the following :-

"3. Recruitment to the National Police Division and promotion of Police Officers in the Provincial Divisions to the National Division, shall be made by the National Police Commission.";

(2) in item 6 of that Appendix by the substitution for the words "will be referred to the President,", of the words "will be referred to the National Police Commission,";

(3) in item 7 of that Appendix, by the substitution for the words "with the approval of the President,", of the words "with the approval of the National Police Commission."; and

(4) in item 9:2 of that Appendix, by the substitution for the words "The President may, where he considers it necessary provide for alternate training for members of any Provincial Division", of the

words " The National Police Commission may, where he considers it necessary provide for alternate training for members of any Provincial Division.".

Commissions under repealed Articles 56 and 112 of the Constitution to continue.

24. (1) The persons holding office on the date prior to the date of commencement of this Act, as members of the Public Service Commission and the Judicial Service Commission established by Article 56 and Article 112 respectively, of the Constitution, shall continue to hold office as such members continue to exercise the powers vested in those Commissions under the Constitution, prior to the date of commencement of this Act, until the date on which the members of the Public Service Commission and the Judicial Service Commission respectively, are appointed under Article 54 and Article 111D respectively of the Constitution.

(2) The persons holding office on the day prior to the date of commencement of this Act, as the Secretary to the Public Service Commission and as the Secretary to the Judicial Service Commission appointed under paragraph (7) of Article 56 and Article 113 respectively, of the Constitution, shall continue to hold such office under the same terms and conditions.

Chief Justice, Judges of the Supreme Court, President of the Court of Appeal &c,. to continue to hold office.

25. (a) The Chief Justice and all the Judges of the Supreme Court and the President and all the Judges of the Court of Appeal holding office on the day prior to the date of the commencement of this Act, shall, subject to the provisions of paragraph (3) of Article 41C, continue to hold office.

(b) Every person holding office on the day prior to the date of the commencement of this Act, as the Attorney-General, the Auditor-General, the Inspector-General of Police, the Parliamentary Commissioner for Administration (Ombudsman) and the Secretary-General of Parliament shall, subject to the provisions of paragraph (3) of Article 41C, continue to hold such office under the same terms and conditions.

Judges of the High Court &c., to continue to hold office.

26. Every person holding office on the day prior to the date of the commencement of this Act –

(a) as a Judge of the High Court;

(b) as a judicial officer, a scheduled public officer, a public officer or a police officer,

shall, continue to hold such office under the same terms and conditions.

Substitution and savings.

27. (1) Unless the context otherwise requires, there shall be substituted for the expressions "Commissioner of Elections" and "Department of the Commissioner of Elections" wherever such expressions occur in the Constitution and in any written law or in any contract, agreement or other document, of the expression "Election Commission".

(2) The person holding office as the Commissioner of Elections on the day immediately preceding the date of the commencement of this Act, shall continue to exercise and perform the powers and functions of the office of Commissioner of Elections as were vested in him immediately prior to the commencement of this Act, and of the Election Commission, until an Election Commission is constituted in terms of Article 103, and shall, from and after the date on which the Election Commission is so constituted, cease to hold office as the Commissioner of Elections.

(3) All suits, actions and other legal proceedings instituted by or against the Commissioner of Elections appointed under Article 103 of the Constitution prior to the amendment of such Article by this Act, and pending on the day immediately prior to the date of commencement of this Act, shall he deemed to be suits, actions and other legal proceedings instituted by or against the Election Commission, and shall be continued and completed in the name of the Election Commission.

(4) Any decision or order made, or ruling, given by the Commissioner of Elections appointed under Article 103 of the Constitution prior to the amendment of that Article, by this Act, and under any written law on or before the date of the commencement of this Act, shall be deemed to be a decision or order made or ruling given, by the Election Commission.

Pending matters before the Public Service Commission to stand removed to the National Police Commission.

28. All matters pertaining to the appointment, promotion, transfer, disciplinary control and dismissal of any police officer pending before the Public Service Commission, on or before the date of the commencement of this Act, shall stand removed to the National Police Commission established by Chapter XVIIIA of the Constitution and accordingly such matter shall be continued and completed before such National Police Commission.

Sinhala text to prevail in case of inconsistency.

29. In the event of any inconsistency between the Sinhala and Tamil texts of this Act, the Sinhala text shall prevail.