



# **ESTABLISHING A CONSTITUTIONAL COURT THE IMPEDIMENTS AHEAD**

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The Centre for Policy Alternatives (CPA) was formed in the firm belief that there is an urgent need to strengthen institution- and capacity-building for good governance and conflict transformation in Sri Lanka and that non-partisan civil society groups have an important and constructive contribution to make to this process. The primary role envisaged for the Centre in the field of public policy is a pro-active and interventionary one, aimed at the dissemination and advocacy of policy alternatives for non-violent conflict resolution and democratic governance. Accordingly, the work of the Centre involves a major research component through which the policy alternatives advocated are identified and developed.

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There was a time, several decades ago, when Ceylon (as this country was then known) possessed a truly competent, independent and impartial judiciary, buttressed by an equally competent and vibrant legal profession. The citizen could confidently expect not only quality professional representation, but also equal justice under the law. The

judiciary was rarely, if ever, inhibited by the pomp and splendour, or the power and authority, of the state or its agents. Judges of that time remained true to their only guide: the judicial oath. Their personal integrity was never questioned. The fact that the government of the day, even when backed by a two-third majority, might have had a very strong interest in particular litigation left the judiciary unmoved. I know, because I was a member of that profession and practised before that judiciary.

The decline of our judiciary is best exemplified in two judicial decisions that were delivered within a period of fifty years. In 1962, 24 senior military and police officers were charged with conspiring to overthrow the lawfully established government. Under a hurriedly enacted law,<sup>1</sup> the Minister of Justice was empowered to nominate three Judges of the Supreme Court to preside over their Trial-at-Bar. The three Judges heard legal arguments for several days and then held that they had no jurisdiction to proceed with the trial for the very reason that they had been so nominated. The power to nominate judges was part of the judicial power vested in the judiciary. The Minister could not constitute a Bench of the Supreme Court. Even if the view were taken that the power of nomination was *intra vires* the Constitution, it would nevertheless have offended against the cardinal principle that justice must not only be done but must appear to have been done, and they would have been compelled to give way to that principle which, in their view, had become ingrained in the administration of common justice in the country. The Minister was a member of the government which the accused persons were alleged to have conspired to overthrow.<sup>2</sup> Commenting on this judgment, the International Commission of Jurists, which had been represented at the trial by an observer, noted that 'that the attempt of the executive to interfere with judicial independence in Ceylon was unsuccessful is a fact that redounds to the credit of the Supreme Court of Ceylon.' It added 'it is certainly refreshing to all those who subscribe to the Rule of Law, and fight for its establishment and preservation, to find delivered by the judges of a newly-independent country a vital judgment which will always be regarded as an outstanding contribution towards the development of the connected principles of the separation of powers and the independence of the judiciary'.

Fifty years later, following the politically motivated impeachment by Parliament of the then Chief Justice and her unlawful removal from office by the President, five Judges of the Supreme Court nominated by the new 'Chief Justice'<sup>3</sup> purported to 'validate' the unconstitutional removal in a judgment characterised by intemperate language so uncharacteristically injudicious. These judges even made a sweeping condemnation of a previous Supreme Court constitutional determination in the same matter,<sup>4</sup> describing it as 'a blatant distortion of the law', and 'altogether erroneous', preferring instead to enthusiastically echo a simplistic argument made in Parliament by a cabinet minister to validate the impeachment process. The same Judges then proceeded to dismiss several

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<sup>1</sup> The Criminal Law (Special Provisions) Act, No.1 of 1962.

<sup>2</sup> The Queen v. Liyanage (1962). The Judges nominated by the Minister were Justice T. S. Fernando QC, Justice L. B.de Silva and Justice P. Sri Skanda Rajah.

<sup>3</sup> Justice Saleem Marsoof, Justice Chandra Ekanayake, Justice Sathya Hettige, Justice Eva Wanasundera and Justice Rohini Marasinghe.

<sup>4</sup> That determination, on a reference by the Court of Appeal, was made by a Bench comprising Justice Gamini Amaratunge, Justice K. Siripavan and Justice Priyasath Dep.

fundamental rights applications that had been filed against the impeachment. The process of legitimizing the impugned acts of Parliament and of the President had been duly performed by five Judges nominated by the individual whose own legitimacy was the central issue. This event marked the lowest depth in the downward spiral of the Sri Lankan judiciary, and earned the wrath of the international community. 45 Judges from all the continents addressed a letter to President Rajapakse and Speaker Rajapakse condemning the removal of the Chief Justice, and expressing their ‘grave concern’ at actions ‘taken in contravention of the Constitution, international human rights law and standards, and the rule of law’.

The virtual collapse of the Sri Lankan judicial system was not caused by a single event, nor was it set in motion by a single individual. The process began with the change in the medium of legal education from English to Sinhala and Tamil, effected in 1970. That resulted over time in the emergence of a profession that became increasingly unfamiliar with legal literature, both national and international. It was a disability that was carried into judicial office. That process was exacerbated by the amalgamation of the two branches of the legal profession – proctors and advocates – into one unified profession to be known as ‘attorneys-at-law’. Although expected to reduce the cost of litigation, provide the community with easier access to the courts, and enable young lawyers to establish themselves on their own merits, this reform measure led to a massive increase in the number of lawyers, often with little access to even local law reports, but with the right of audience in both original and appellate courts.

The practice of successive Presidents to make appointments to the appellate courts without regard to seniority or merit, and apparently influenced by personal loyalty and friendship, seriously undermined the competence, independence and integrity of the judiciary. Attempts were made by the executive and the legislature to interfere with judicial tenure; judicial decisions were disregarded; and judges abused and maligned. Judges were even subjected to violence with impunity. The critical relationship between the executive and the judiciary was blurred as judges began to enjoy the patronage and hospitality of the executive as well as presidential largesse. The judicial culture that grew and developed under these circumstances was the antithesis of the traditional judicial values. In fact, the judicial culture, especially in the past two decades, was one of extreme deference to the presidential executive. The judiciary capitulated to executive assertions of state security. Neither political opponents of the government, nor members of ethnic minorities, or indeed civil society, derived any tangible benefit by invoking the fundamental rights guaranteed in the Constitution.<sup>5</sup> Sections of the once vibrant Bar also appeared to have been subdued by the power and patronage of the presidency. Elevation to the status of ‘President’s Counsel’ was at the discretion of the President, and scores of lawyers were duly rewarded by the President for their support and loyalty, irrespective of their standing in the profession.<sup>6</sup>

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<sup>5</sup> See Jayantha de Almeida Guneratne, Kishali Pinto-Jayawardena and Gehan Gunatilleke, *The Judicial Mind in Sri Lanka; Responding to the Protection of Minority Rights*.

<sup>6</sup> These aspects are more comprehensively discussed in Nihal Jayawickrama, ‘The Judiciary under the 1978 Constitution’ in Asanga Welikala (ed.), *Reforming Sri Lankan Presidentialism: Provenance, Problems and Prospects*, pp. 119-223, Centre for Policy Alternatives, 2015.

The judiciary has had its own share of problems for well over half a century, with successive governments failing to address them. The trial rolls in original courts are incredibly long, while the backlog in the appellate courts is enormous. The Administration of Justice Laws of 1973 and 1975 sought to introduce major reforms in criminal, civil and appellate procedures, based on very progressive reforms borrowed from Canadian, Australian and British judicial and legal systems, and by implementing many of the recommendations in the Reports of the Civil and Criminal Courts Commissions that had been gathering dust for nearly two decades.<sup>7</sup> However, both reform laws were repealed in 1977 under pressure from the legal profession, following a change of government at the general election of that year, and the Victorian procedural laws of the nineteenth century were reinstated.<sup>8</sup> Complicated and archaic procedural steps mean not only delay, but also several gatekeepers requiring payment to facilitate movement of the case record to the next stage of judicial proceedings. It was in the 1980s that the phenomenon of judicial corruption emerged in Sri Lanka, initially with the disappearance of court records, a cost-cutting alternative to paying lawyers' fees. It is a notorious fact that judges collude with lawyers to grant frequent postponements, to avoid day-to-day trials, and to dispense with jurors. A national survey conducted in 2002 found that corruption was rampant in the Sri Lankan judicial system, and that most judges were aware of its occurrence. While those who had benefited most were reportedly court clerks, followed by police officers and fiscals, lawyers too appeared to have engaged in bribery, both as bribe givers and bribe takers at every stage of court proceedings. The judges identified at least five of their brethren as bribe takers.<sup>9</sup> Meanwhile, contemporary international standards designed to strengthen judicial integrity and establish judicial accountability continue to be ignored by the Sri Lankan judiciary.

The proposal to establish a Constitutional Court, at the apex of our judicial system, may well serve as a catalyst for change, but only if it is realistically constituted and its establishment is accompanied by vitally necessary reforms in respect of the language of the law and in establishing judicial accountability. One immediate consequence of the establishment of a Constitutional Court will also be to enable the other superior and first instance courts to focus entirely on civil, commercial and criminal litigation. That task will, of course, need to be facilitated by long overdue structural and systemic reforms,

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<sup>7</sup> These two Commissions were chaired by Justice C. Nagalingam KC and Justice E. F. N. Gratiaen KC respectively, and both had recommended extensive reforms to civil and criminal procedure.

<sup>8</sup> According to Justice Sarath Silva, when he was appointed President of the Court of Appeal, 'the overload had reached bursting point with an enormous backlog of about 18,500 cases'. *Daily News*, 15 December 1995.

<sup>9</sup> *A System under Siege: An Inquiry into the Judicial System of Sri Lanka* (Marga Institute, Colombo, 2002). The contemporary definition of judicial corruption extends beyond conventional bribery. It is not limited to seeking or accepting money or gifts. An insidious and equally damaging form of corruption arises from the interaction between the judiciary and the executive. For example, the political patronage through which a judge acquires his office, a promotion, an extension of service, preferential treatment, or promise of employment after retirement, gives rise to corruption if, and when, the executive makes demands on such judge. So too does undue familiarity between the judge and members of the legal profession or powerful litigants.

responsibilities which neither the Ministry of Justice, nor the Judiciary, has so far demonstrated any inclination to undertake.

## **THE CONSTITUTIONAL COURT**

The concept of constitutional jurisprudence is now a permanent feature of democratic political systems. It is derived from the principle of the separation of powers. The desire to protect constitutionalism first arose in Europe after the First World War, and led to the establishment of Constitutional Courts in Italy, Germany and Austria, and later in Spain and Portugal. With the fall of the Berlin Wall, the countries that emerged from authoritarian regimes saw law and justice as providing the legitimacy for their transition to democracy. In nearly every country in Eastern and Central Europe, a Constitutional Court was established to demonstrate their strong attachment to democracy and human rights and to provide the leadership in fashioning the social, moral and political fabric of their emerging democracies. Today, a Constitutional Court is a feature common to nearly all contemporary constitutions, whether in Europe, East Asia, Africa, Latin America or in the Russian Federation.

A good example of a Constitutional Court is that of South Africa, established post-Apartheid, and perhaps the most successful and highly respected of them all. It consists of a President, Deputy President and nine other judges. A matter before that court must be heard by at least eight judges. It is the highest court in all constitutional matters, including the protection of fundamental rights; it may decide only constitutional matters and issues connected with decisions on constitutional matters, and makes the final decision on the existence of such a matter; and it makes the final decision on whether an Act of Parliament, a provincial Act, or conduct of the President is constitutional. If the Supreme Court, a High Court, or a court of similar status makes an order of invalidity in respect of any matter, including an Act of Parliament, the confirmation of the Constitutional Court is required before that order has any force.

A Constitutional Court and a Supreme Court form complementary systems of judicial control. They are different in their composition, their functions, and the effects of the decisions taken. The principal task of the Constitutional Court is to examine the constitutionality of laws and, in most countries, their conformity with international obligations. This includes hearing and determining questions relating to the infringement of fundamental rights and freedoms guaranteed by the Constitution. The Constitutional Court does not review decisions of the original or appellate courts, but may do so if a question of great general or public importance arises in the proceedings of any such court. It is a specialized court whose fields of competence are distinct from those of the ordinary courts. It therefore requires of its members expertise which judges of the ordinary courts may not necessarily possess. This is particularly evident when the three principal areas of jurisdiction of a Constitutional Court are examined.

### ***(i) Interpretation of the Constitution***

The rules of statutory interpretation, with which most judges are presumed to be familiar,

do not apply in the interpretation of the Constitution,<sup>10</sup> and the draftsman's intention is irrelevant.<sup>11</sup> A constitution is treated as *sui generis*, calling for principles of interpretation of its own, without necessary acceptance of all the presumptions that are relevant to the interpretation of ordinary law. In the Supreme Court of Canada, Dickson CJ explained why:

*The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American courts 'not to read the provisions of the Constitution like a last will and testament lest it become one'.<sup>12</sup>*

This view is shared by judges in other jurisdictions as well. In the Supreme Court of Namibia, Mahomed CJ observed that a constitution, which is an organic instrument, must be interpreted broadly, liberally and purposively so as to enable it to continue to play 'a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people, and in disciplining its government'.<sup>13</sup> In the Privy Council, Lord Wilberforce called for a

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<sup>10</sup> *Hinds v. The Queen*, Privy Council on appeal from the Court of Appeal of Jamaica (1976) 1 All ER 353, per Lord Diplock at 360.

<sup>11</sup> *Re BC Motor Vehicle*, Supreme Court of Canada, [1985] 2 SCR 486, per Lamer J: 'The draftsman's intention is not the key. We must not freeze the Charter in time. Its potential for growth must be preserved.'; *Missouri v. Holland*, United States Supreme Court, 252 US 416 (1920), per Holmes J: 'The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago'; *Theophanous v. Herald and Weekly Times Ltd*, High Court of Australia, [1994] 3 LRC 369, per Deane J: The intention of the constitution's framers is irrelevant since a constitution is a living force representing the will of contemporary Australians; *State v. Williams*, Constitutional Court of South Africa, [1995] 2 LRC 103, per Langa J: The interpretation of the concepts contained in the constitution involves the making of a value judgment which 'requires objectively to be articulated and identified, regard being had to the contemporary norms, aspirations, expectations and sensitivities . . . and having regard to the emerging consensus of values in the civilized international community' (citing Mahomed AJA in *Ex parte Attorney-General of Namibia, Re Corporal Punishment by Organs of State*, Constitutional Court of South Africa, [1992] LRC (Const) 515 at 527).

<sup>12</sup> *Hunter v. Southam*, Supreme Court of Canada, [1984] 2 SCR 145.

<sup>13</sup> *Government of the Republic of Namibia v. Cultura 2000*, Supreme Court of Namibia, [1993] 3 LRC 175.

generous interpretation avoiding what he described as ‘the austerity of tabulated legislation’.<sup>14</sup> In Australia, Dixon CJ reminded that a constitution ‘should be construed with all the generality which the words used admit’.<sup>15</sup> In Botswana, Aguda JA stressed that the courts must not allow a constitution to be ‘a lifeless museum piece’ but must continue to breathe life into it from time to time when opportune to do so.

*I conceive it that the primary duty of the judges is to make the constitution grow and develop in order to meet the just demands and aspirations of an ever-developing society which is part of the wider and larger human society governed by some acceptable concepts of human dignity.*<sup>16</sup>

## **(ii) Interpretation of a Bill of Rights**

A Bill of Rights (or statement of fundamental rights) is also significantly different from an ordinary law in at least two respects. First, its provisions will usually be derived from the two international human rights covenants. Second, its provisions will be entrenched in the constitution, and it will therefore enjoy a superior status in relation to other domestic laws. Accordingly, the principles of interpretation applicable to a Bill of Rights will also be significantly different from those that apply to ordinary laws. When Parliament chooses to implement a treaty by a law which uses the same words as the treaty, it is reasonable to assume that Parliament intended to import into municipal law provisions having the same effect as the corresponding provisions in the treaty. A provision in municipal law corresponding to a provision in a treaty, which the law is enacted to implement, should be construed by a court in accordance with the meaning to be attributed to the treaty provision in international law. Indeed, to attribute a meaning to the municipal law that is different from the meaning which international law attributes to the treaty is to nullify the intention of Parliament and to invalidate the law in part or in whole. The method of construction of such a law is therefore the method applicable to the construction of the corresponding words in the treaty. The Court of Appeal of Hong Kong observed, with reference to the newly enacted Hong Kong Bill of Rights, that

*the glass through which the interpretation should be viewed is provided by the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The court is no longer guided by the ordinary canons of construction of statutes, nor with the dicta of the common law inherent in the training of judges. The court must look at the aims of the ICCPR and the ICESCR and give full recognition and effect to the statements which commence them. From this*

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<sup>14</sup> *Minister of Home Affairs v. Fisher*, Privy Council on appeal from the Supreme Court of Bermuda, [1980] AC 319, at 328–9.

<sup>15</sup> *R v. The Public Vehicle Licensing Appeal Tribunal of the State of Tasmania, ex parte Australian National Airways Pty Ltd*, High Court of Australia, (1964) 113 Commonwealth Law Reports 207, at 225.

<sup>16</sup> *Dow v. Attorney General*, Supreme Court of Botswana, [1992] LRC (Const) 623 at 668.



*stems the entirely new jurisprudential approach.*<sup>17</sup>

In other respects too, the interpretation of a Bill of Rights is significantly different from that of an ordinary statute. For example, a Bill of Rights is broadly construed in favour of the individual rather than in favour of the state.<sup>18</sup> A purposive interpretation is given; i.e. fundamental rights are interpreted in accordance with the general purpose of having rights, namely the protection of individuals and minorities against an overbearing collectivity.<sup>19</sup> The meaning of a right or freedom is ascertained by an analysis of the purpose of the guarantee; it is understood, in other words, in the light of the interests it is meant to protect. This analysis is undertaken, and the purpose of the right or freedom sought, by reference to the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and, where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Bill of Rights.<sup>20</sup> However, in contrast to the broad and liberal construction given to constitutional provisions generally, and particularly to those directed to the protection of human rights, the proper approach to the interpretation of a savings clause is strict and narrow. Therefore, while fundamental rights provisions are broadly and generously construed, provisions derogating from such rights are restrictively and narrowly interpreted.<sup>21</sup> A hierarchical approach to rights is also avoided.<sup>22</sup>

In interpreting the provisions of a Bill of Rights, a court may seek assistance from

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<sup>17</sup> *R v Sin Yau-ming*, Court of Appeal of Hong Kong, [1992] 1 HKCLR 127, per Silke V-P; *Fothergill v. Monarch Airlines Ltd*, House of Lords, United Kingdom, [1980] 2 All ER 696 at 712, per Lord Scarman: 'Faced with an international treaty which has been incorporated into our law, British courts should now follow broadly the guidelines declared by the Vienna Convention on the Law of Treaties 1969'.

<sup>18</sup> *Patel v. Attorney General*, Supreme Court of Zambia, (1968) Zambia LR 99 at 116; *Commissioner of Taxes v. C W (Pvt) Ltd*, High Court of Zimbabwe, [1990] LRC (Const) 544; *Namasivayam v. Gunawardena*, Supreme Court of Sri Lanka, [1989] 1 Sri LR 394, per Sharvananda CJ: Where a literal interpretation of the period of limitation will defeat the petitioner's right to his constitutional remedy, the one month prescribed for petitioning the court should be calculated, in the case of a person held in detention, from the time that he is under no restraint.

<sup>19</sup> Bertha Wilson, 'The Making of a Constitution: Approaches to Judicial Interpretation' 10 *Public Law* 370, at 380–3; *Okogie v. The Attorney General of Lagos State*, Federal Court of Appeal, Nigeria, [1981] 2 NCLR 337; *Reference re Public Service Employees Relations Act (Alberta)*, Supreme Court of Canada, [1987] 1 SCR 313; *Elliott v. Commissioner of Police*, Supreme Court of Zimbabwe, [1997] 3 LRC 15; *State v. Makwanyane*, Constitutional Court of South Africa, [1995] 1 LRC 269.

<sup>20</sup> *R v. Big M Drug Mart Ltd*, Supreme Court of Canada, [1986] LRC (Const) 332 at 364.

<sup>21</sup> *Mmusi v. Ramantele*, Court of Appeal of Botswana, [2014] 2 LRC 715; *Ndyanabo v. Attorney General*, Court of Appeal of Tanzania, [2002] 3 LRC 541, per Samatta CJ; *Mathew v. State*, Privy Council on appeal from the Court of Appeal of Trinidad and Tobago, [2004] 4 LRC 777.

<sup>22</sup> *Dagenais v. Canadian Broadcasting Corporation*, Supreme Court of Canada, [1994] 3 SCR 835.

jurisprudence other than its own.<sup>23</sup> It may also have regard to international human rights norms and practice elsewhere. For example, in determining whether whipping constituted a form of ‘inhuman or degrading punishment’, the Supreme Court of Zimbabwe considered: (a) the current trend of thinking among distinguished jurists and leading academics; (b) the fact that whipping had already been abolished in many other countries as being a repugnant penalty; and (c) the progressive move of the courts in countries in which whipping was not susceptible to constitutional attack, to restrict its imposition to instances where a serious, cruel, brutal and humiliating crime had been perpetrated.<sup>24</sup> The Constitution of South Africa 1991 requires a court interpreting the fundamental rights provisions ‘to have regard’ to public international law applicable to the protection of the entrenched rights and to comparable foreign case law.<sup>25</sup> Accordingly, in determining whether juvenile whipping was unconstitutional, the Constitutional Court had reference to legal provisions in eight other countries and the jurisprudence of several international and regional tribunals.<sup>26</sup>

Unlike in the interpretation of ordinary statutes, there are several aids to the interpretation of human rights law which judges need to familiarize themselves with. In case of ambiguity or doubt, or where an interpretation appears to conflict with the purpose of the Bill of Rights, recourse to such aids appears to be not only helpful but also necessary. They are (i) the *travaux préparatoires*: the preparatory work of international and regional human rights instruments;<sup>27</sup> (ii) the jurisprudence of the Human Rights Committee and of the Committee on Economic, Social and Cultural Rights; (iii) the jurisprudence of regional human rights institutions, i.e. the European Court of Human Rights, the Inter-American Commission of Human Rights, the Inter-American Court of Human Rights, and the African Commission of Human and People’s Rights; (iv) the jurisprudence of courts of other states; (v) international human rights instruments<sup>28</sup>; (vi)

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<sup>23</sup> *A Juvenile v. The State*, Supreme Court of Zimbabwe, [1989] LRC (Const) 774.

<sup>24</sup> *Ncube v. The State*, Supreme Court of Zimbabwe, [1988] LRC (Const) 442.

<sup>25</sup> The Court is also required to ‘promote the values which underlie an open and democratic society based on freedom and equality’.

<sup>26</sup> *State v. Williams*, Constitutional Court of South Africa, [1995] 2 LRC 103. Langa J observed that ‘While our ultimate definition of these concepts must necessarily reflect our own experience and contemporary circumstances as the South African community, there is no disputing that valuable insights may be gained from the manner in which the concepts are dealt with in public international law as well as in foreign case law.’

<sup>27</sup> *Pinder v. R*, Privy Council on appeal from the Court of Appeal of The Bahamas, [2002] 5 LRC 496, per Lord Nicholls. See also Vienna Convention on the Law of Treaties 1969, Article 32: The drafting history of a treaty may be invoked only to confirm a meaning, or to dispel an ambiguity or a manifestly unreasonable or absurd meaning arising from those other means.

<sup>28</sup> In *Longwe v. Intercontinental Hotels*, [1993] 4 LRC 221, the High Court of Zambia referred to the African Charter on Human and People’s Rights and the Convention on the Elimination of Discrimination against Women in granting relief to a woman who had been refused entry into a hotel bar on the ground that she was unaccompanied. The court held that the hotel’s policy of excluding women unaccompanied by men from entering the bar constituted discrimination on

international human rights guidelines, e.g. the Human Rights Committee and the Privy Council referred to the provisions of the Bangalore Principles of Judicial Conduct in interpreting the concepts of judicial independence and the right to a fair trial; and (vii) the writings of jurists.<sup>29</sup>

### ***(iii) Judicial review of legislation***

If the Constitution is supreme, as it should be, a citizen should be able to question the validity of any executive or legislative act (and that includes an act that is claimed to infringe a fundamental right) on the ground of inconsistency with any provision of the Constitution. It was possible to do so for 25 years under the 1946 Constitution.

The 1972 Constitution deprived the citizens of the right which they had hitherto enjoyed of invoking the jurisdiction of the courts to examine and pronounce upon the validity of a law and of any act performed under such law. The rationale for doing so was that the National State Assembly was declared to be ‘the supreme instrument of State power of the Republic’ (s.5). It was further declared that ‘No court or other institution administering justice shall have the power or jurisdiction in respect of the proceedings of the National State Assembly or of anything done or purported to be done or omitted to be done by or in the National State Assembly’ (s.39). As a necessary corollary to the establishment of a ‘sovereign’ legislature and the prohibition of the *ex post facto* review of legislation, a procedure was prescribed in the Constitution whereby the question whether a Bill or any provision in it was inconsistent with the Constitution could be determined before such Bill was taken up for discussion in the National State Assembly. This jurisdiction was vested solely in a new Constitutional Court.

Under the 1978 Constitution, Parliament was no longer declared to be ‘supreme’. Instead, it was the President who was placed above the law through the provision that ‘no proceedings shall be instituted or continued against him in any court or tribunal in respect of anything done or omitted to be done by him either in his official or private capacity’. Nevertheless, the preamble to the Constitution asserts that the Constitution is the ‘supreme law’. Despite this apparent dichotomy, the 1978 Constitution chose to continue with the prohibition of the *ex post facto* review of legislation. Instead, Bills could be examined, but not by a Constitutional Court, but by the existing Supreme Court in addition to its other tasks.

The concept of anticipatory review of a Bill is intrinsically flawed. It is a procedure whereby a Bill is examined and tested for constitutionality, not with reference to an act performed in the course of its actual implementation, but on a purely hypothetical basis. Assuming that there are vigilant individuals and organizations who regularly scan the Gazette for Bills that are published, and have the time, resources and the legal advice to invoke the jurisdiction of the Supreme Court, it is impossible for anyone, be he private citizen, judge or legislator, to anticipate the multitude of situations that could arise when that Bill is transformed into a law and is then enforced. It is only an individual who is

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the basis of gender.

<sup>29</sup> *Fothergill v. Monarch Airlines Ltd*, House of Lords, United Kingdom, [1980] 2 All ER 696.

aggrieved by an act performed under a law who will be motivated, and have the *locus standi*, to challenge the validity of the law under which that act was purportedly performed. Moreover, the compatibility of legislation with the Constitution is determined by the effect of the legislation rather than its purpose or intent.<sup>30</sup>

If more attention is paid to the drafting of Bills (than is evident today) by trained, professional legal draftsmen (whom we appear to lack today), it is very unlikely that the *ex post facto* review of legislation will have any adverse impact on the workload of the judiciary. During 25 years when the courts of Ceylon exercised that jurisdiction, the only Bills that were challenged were those relating to citizenship, the official language, and the exercise of judicial power. Most national constitutions now state that if a provision in a law is declared to be inconsistent with the constitution and, therefore, void, the aggrieved individual will obtain relief immediately, but that judgment will take effect in respect of others similarly situated only after a period of time, say three or six months or even an year. Alternatively, the judgment will be declared not to have any retrospective effect. The following provision (s.172) in the Constitution of the Republic of South Africa is such an example:

- (1) *When deciding a constitutional matter within its power, a court –*
  - (a) *must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and*
  - (b) *may make an order that is just and equitable, including –*
    - (i) *an order limiting the retrospective effect of the declaration of invalidity; and*
    - (ii) *an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.*

### **Composition of the Constitutional Court**

In considering the model of a Constitutional Court for Sri Lanka, the experience of the so-called Constitutional Court established under the 1972 Constitution should be completely disregarded. It was conceived as an appendage of the National State Assembly, and was even located in its premises. It functioned under severe constraints, and had no permanent head or any clearly defined principles for its constitution or procedure. It lost its credibility when its first panel of judges<sup>31</sup> was forced to resign, and were succeeded by

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<sup>30</sup> *Elliott v. Commissioner of Police*, Supreme Court of Zimbabwe, [1997] 3 LRC 15. See *R v. Big M Drug Mart Ltd*, Supreme Court of Canada, [1986] LRC (Const) 332, at 358: The purpose of the legislation, however, is the initial test of constitutional validity, and its effects are to be considered when the law under review has passed or, at least, has purportedly passed the purpose test. If the legislation fails the purpose test, there is no need to consider further its effects, since it has already been demonstrated to be invalid.

<sup>31</sup> At its inception, the Court consisted of the President of the Court of [Final] Appeal, a Judge of the

'volunteers'<sup>32</sup> whose decisions in politically sensitive references were highly questionable. Perhaps a better model is the short-lived Court of [Final] Appeal that was established in 1971 to replace the Judicial Committee of the Privy Council as this country's highest appellate tribunal. It consisted of a President and not more than six other Judges, each of whom was appointed for a fixed term of five years. Not less than three Judges usually constituted a court. At its inaugural, the Court consisted of a 65-year old retired senior Judge of the Supreme Court who, at the time, was President of the International Commission of Jurists; a retired Judge of the Supreme Court (who was a Tamil), and two who were among the most senior functioning Judges of the Supreme Court (one of whom was a Roman Catholic). The Attorney General (who was a former Judge of the Supreme Court and was later to be Chief Justice) was the fifth member. The criteria adopted in the selection of judges was that the court, which was to be at the apex of the judicial system, should be representative, credible and competent.

If the term of office of judges of the Constitutional Court is fixed at, say, five years, it may be possible to attract senior members of the Bar, and present and former members of the academic community, irrespective of age. It is not an affront to national sovereignty to seek competent judges from other jurisdictions. Both Seychelles and Fiji have, from time to time, secured the services of Sri Lankans to serve on their highest courts. A Ceylonese judge also served with distinction on the Judicial Committee of the Privy Council. Successive governments have invited judges of the superior courts of Egypt, Ghana and Nigeria to serve on Commissions of Inquiry of a quasi-judicial nature. In this regard, the experience of Hong Kong is worthy of serious consideration.

When, with the transfer of sovereignty to China, the right of appeal from the Hong Kong Court of Appeal to the Judicial Committee of the Privy Council ceased, a decision was taken to establish a Court of Final Appeal in that Special Administration Region of China. The Chinese authorities recognized that the continued maintenance of Hong Kong's pre-eminent position as a financial, banking and service centre depended on the credibility of its legal and judicial system. Accordingly, it was agreed that the Court of Final Appeal will consist of judges from both Hong Kong and other common law jurisdictions. Today, the Court consists of four permanent judges from Hong Kong, four non-permanent judges from Hong Kong, and a panel of ten non-permanent judges from other common law jurisdictions, who are usually serving or retired chief justices or senior justices from Australia, New Zealand and the United Kingdom. Five judges constitute a full court. Of them, the Chief Justice and three others are permanent judges from Hong Kong. The fifth is a non-permanent judge from abroad, serving in Hong Kong, in rotation, usually for one month. If, for any reason, a permanent judge from Hong Kong is not available, his place will be filled with a non-permanent judge from Hong Kong. If the Hong Kong model is adopted for the Constitutional Court of Sri Lanka, the participation of foreign judges conversant with the common law, as well as the international law of human rights, drawn from jurisdictions such as Canada, South Africa and India, will

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Court of [Final] Appeal, a Judge of the Supreme Court, a retired Judge of the Supreme Court, and a Lecturer in Law at the Ceylon Law College.

<sup>32</sup> After the first panel of judges examining the constitutionality of the Press Council Bill had been forced to resign before it had completed its hearing, the Chief Justice advised the Judges of the Supreme Court not to agree to serve on the Constitutional Court. One Judge broke ranks, while the Government appointed the others from among those serving as Commissioners of Assize.

undoubtedly enhance the credibility of the highest court in a country that is projected to be the commercial hub of South Asia.

## **THE IMPEDIMENTS AHEAD**

### **The Sri Lankan Language Deficiency**

The immediate, and most serious, impediment to the establishment of a credible Constitutional Court in Sri Lanka today is the astonishing lack of awareness, among both lawyers and judges, of developments in constitutional and human rights jurisprudence beyond the shores of Sri Lanka. An examination of judgments of the Supreme Court in the past decade or so indicate that many judges and lawyers are quite unfamiliar with the jurisprudence of the UN Human Rights Committee, the European Court of Human Rights, the Inter-American Court of Human Rights, or indeed, the relevant judgments of superior courts of even other Commonwealth countries, except perhaps India. This may be due to the lack of access to the relevant law reports, or, more seriously, the lack of familiarity with the language of the law and legal literature.

The change in the medium of legal education from English to Sinhala or Tamil, introduced in the 1970s, resulted in creating lawyers who were deprived of access, not only to the ever-growing mass of global legal literature, but also to our own statutes and to over two centuries of our law reports.<sup>33</sup> The results are evident today, even in the judgments of the Supreme Court. It is rarely that one finds reference to judgments of superior courts of other Commonwealth countries whose laws are often quite similar to ours. One reason could be the inability to read and properly comprehend these judgements. It is even rarer to find any reference to the ever-increasing volume of case law from international, regional and national sources on human rights law.

With the proposal to establish Sri Lanka as a regional commercial hub, the time is now opportune to conduct a reality check in respect of language. While the courts of first instance conduct their proceedings in Sinhala or Tamil, the Court of Appeal and the Supreme Court function in English. The judgments of the two appellate courts are written in English. When the records are sent back to the relevant first instance courts, it would be interesting to ascertain how many of the judges of those courts read and understand why their decisions have either been affirmed or reversed. The law reports of Sri Lanka, spanning over two centuries, have been published, and continue to be published, only in English. In that regard Sri Lanka is in step with all the other countries of the Commonwealth. The entire body of statute law from 1802 is available only in English. In 1972, existing law consisted of 481 enactments published in English in twelve volumes of Legislative Enactments of Ceylon (1956 revised edition), 132 principal and 256 amending Acts printed in English in a supplement covering the period 1956-1966, and 130 other principal and 91 amending Acts; in all 1090 separate enactments. In addition, there were seven volumes of Subsidiary Legislation of general application published in

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<sup>33</sup> From 1945, Sinhala and Tamil had been progressively introduced to replace English as the medium of instruction in primary and secondary schools, commencing in that year with the first school year. This contrasts with the experience of Thailand which, a few years ago, introduced English as the medium of instruction in primary and secondary schools.

English in 1956, and an equally large, but unascertained, number made between 1956 and 1972.

After the enactment of the Official Language Act in 1956, an Official Language Department was established, and work begun on the preparation of glossaries and the translation of text books on technical subjects, including law. The Legal Draftsman's Department employed Sinhala scholars to translate 'core' enactments such as the Penal Code, the Civil and Criminal Procedure Codes, and the Courts Ordinance. A glossary of legal terms was prepared by a committee of civil servants and Sinhala scholars who had had no legal training whatsoever. Consequently, many of the Sinhala words chosen or coined for English legal terms and concepts failed to convey accurately, or even adequately, their technical meanings. An attempt to translate two textbooks for each subject being taught at the Law College and at the Law Faculty of the University of Ceylon, by farming out the work to busy legal practitioners, was also less than successful since a new edition of the original often superseded the translated work before it could even be published. The 'core' enactments were transliterated, rather than translated, by the language specialists in the Legal Draftsman's Department. In their tasks, the translators were, no doubt, gravely handicapped by the fact that they were working in the abstract in an unreal world.

The 1972 Constitution required 'all written laws, including subordinate legislation in force immediately prior to the commencement of the Constitution' to be published in the Gazette 'in Sinhala and in Tamil translation' as expeditiously as possible 'under the authority of the Minister in charge of the subject of Justice'. The laws so published were required to be placed before the National State Assembly, and unless that Assembly otherwise provided, the law published in Sinhala was to be deemed to be the law, superseding the corresponding law in English.<sup>34</sup> I was the Permanent Secretary to the Ministry of Justice when that Constitution came into force. The task of translating the existing laws was entrusted to the Legal Draftsman's Department. That department had already been reorganized to cope with trilingual drafting, and its staff of draftsmen and translators increased. However, being essentially a service department, it was unable to undertake the full burden of this new responsibility. Priority had always to be given to the preparation of new legislation. Accordingly, it was decided, in the first instance, to farm out the work to private lawyers and language specialists elsewhere. By the end of 1976, nearly all the enactments had been translated into Sinhala, although progress in Tamil was much slower.

The next stage was the revision of these renderings into Sinhala. That exercise proved more formidable and frustrating than was at first anticipated. Not only was it necessary to ensure uniformity of language use through the entire body of law, but the meanings acquired by legal concepts through judicial interpretation over the years had also to be accurately reflected in the translations. Law is about language, and the interpretation of language. Most of our laws have been subject to interpretation in the judgments of courts for over two centuries. The identification of a Sinhala or Tamil equivalent of a word in an enactment had necessarily to take account of the judicial interpretation placed on that word. This is not a task that a translator can undertake with accuracy. A committee of judges, academics, practising lawyers and language specialists

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<sup>34</sup> Article 10. The 1978 Constitution contains a similar (but not identical) provision (art.23).

was therefore appointed to assist the Legal Draftsman revise and refine the translations. However, after months of polemics, the committee abandoned the task as being too time-consuming. The responsibility reverted once more to the Legal Draftsman who found that revising an inaccurate translation prepared by another was a more laborious and bewildering exercise than translating it himself. Consequently, when the 1978 Constitution was enacted, no part of the existing laws had yet been published in Sinhala.

Since the publication of the 1956 revised edition of the Legislative Enactments of Ceylon, no revised edition has yet been published. In 1979, the Government appointed a Commissioner to prepare a revised edition of the Legislative Enactments, and authorized him to consolidate the enactments, with an undertaking that he would be empowered to do so by the proposed Revision of Legislative Enactments Bill which, however, 'due to legal and technical difficulties' was never placed before Parliament. Consequently, the twenty volumes of the 1980 Legislative Enactments of Sri Lanka, published only in the English language, describes itself as 'Unofficial'. Even the current updated version of the Constitution published in English is described as 'Unofficial'. The Statutory Reprints Ordinance, which empowers the Minister of Justice to cause consolidated reprints of laws to be published, such reprint being deemed to be the authentic and correct copy of the written law in force on the subject, remains a dead letter. Where the principal enactment is in English, it is not constitutionally valid today to publish the authentic text of a law in a language other than the official language of legislation. Consequently, much inconvenience is caused, especially in consumer-oriented areas such as rent, tenancy and tax laws. This is hardly the foundation upon which a regional commercial hub could be constructed.

The reasons for this deplorable situation, which political leaders refuse to face, is the constitutional injunction contained in article 23 of the Constitution that 'All Laws and subordinate legislation shall be enacted or made and published in Sinhala and Tamil, together with a translation thereof in English'. Unless and until the Constitution enables laws to be published in English as well, it will not be possible to replace the 60-year old Legislative Enactments. If the government is not prepared to invest in a complete restatement and codification of our law, a process that may take decades and enormous expenditure,<sup>35</sup> the Constitution should immediately authorize the consolidation and publication of our legislative enactments in the English language.

An equally fundamental issue is whether legal education should continue to be imparted in a language which is not the language of the law, of law reports, of appellate courts, or, indeed, of global legal literature. In that regard, Sri Lanka stands alone, separate, distinct and isolated from Commonwealth Africa, Asia, the Pacific and the Caribbean. Within Sri Lanka, those who receive their legal education in private institutions which are affiliated to foreign universities, and others who are fortunate enough to receive a grounding in the English language within the confines of their affluent

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<sup>35</sup> In December 1946, a Select Committee of the State Council recommended, inter alia, that the laws of Ceylon be restated and codified in English, and then published, with translations in Sinhala and Tamil, by the end of 1956. No action appears to have been taken to implement this recommendation. In November 1953, the Official Language Commission recommended, inter alia, that a Codification Committee should be appointed to commence without delay the task of codifying the existing law, with arrangements being made to translate that code into Sinhala and Tamil. No action appears to have been taken to implement that recommendation either.



urban homes, enjoy a distinct advantage over law students who remain victimized by a four-decade-old short-sighted state education policy.

### **The lack of Judicial Accountability**

Another serious impediment to the establishment of a credible Constitutional Court is the erosion of judicial integrity and the consequent lack of judicial accountability, and the failure of successive governments to ensure that appropriate remedial measures are adopted by the judiciary. This is not a problem peculiar to Sri Lanka, but in many of the afflicted jurisdictions realistic measures are being adopted to secure judicial accountability. The problem in Sri Lanka is that the judiciary has consistently ignored international initiatives, and appeals, to take note of significant international developments in this area.

Since the enactment of the 1978 Constitution, several progressive developments relating to the judiciary have taken place, both in Sri Lanka and at the international level. In 1978, the Government of Sri Lanka ratified the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Thereby, the government undertook to adopt such legislative measures as may be necessary to give effect to the rights recognized in the two covenants. That has yet to be done. In 1997, the Government of Sri Lanka acceded to the Optional Protocol to the ICCPR. Thereby, the government recognized the competence of the Human Rights Committee (on which a Sri Lankan jurist once served as a member) to receive and consider communications from Sri Lankans who claim to be victims of a violation of any of the rights recognized in the ICCPR. A member of the present Cabinet of Ministers was one such person who successfully availed himself of this right.<sup>36</sup>

A former Chief Justice, Sarath N. Silva, many of whose decisions had been held by the Human Rights Committee to constitute violations of the state's obligations under the ICCPR, held that Sri Lanka's accession to the Optional Protocol was 'inconsistent with the Constitution and in excess of the power of the President.'<sup>37</sup> A distinguished international jurist described this judgment as 'an example of judicial waywardness', which demonstrated a complete misunderstanding of the international legal significance of accession to the Protocol. He observed that it was 'Alice in Wonderland (or perhaps Alice Through the Looking Glass) reasoning'.<sup>38</sup> The Human Rights Committee is not, in any sense, a superior court exercising appellate jurisdiction over Sri Lankan courts. It is the monitoring body established by the states parties to the ICCPR to ensure compliance by the states parties with the obligations undertaken by them under that multilateral treaty. The opportunity for the Chief Justice to make this misguided pronouncement was provided, it is submitted, by an equally ill-advised attempt to seek the intervention of the Supreme Court for 'enforcement' of the 'views' of the Human Rights Committee. The 'views' of the Human Rights Committee are communicated to the executive branch of government for compliance by the executive in terms of its obligations under the Optional

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<sup>36</sup> *S.B. Dissanayake v. Sri Lanka* (2005/2008).

<sup>37</sup> *Singarasa v. Attorney General*, 15 September 2006.

<sup>38</sup> Sir Nigel Rodley, "The Singarasa Case: Quis Custodiet . . . ? A Test for the Bangalore Principles of Judicial Conduct", *Isr. L.Rev.*, vol.41, No.3, 2008, pp.500-521.

Protocol. Measures of compliance in respect of a 'view' that a conviction and sentence of imprisonment are in violation of the Right to a Fair Trial (art.14 of the ICCPR) include a pardon, a remission of the sentence and/or the payment of compensation.

The Sri Lankan judiciary has consistently ignored international initiatives designed to strengthen judicial independence and accountability. Neither the government, nor the legal profession, has encouraged the judiciary to adopt such initiatives. For example, responding to credible evidence that people in many countries, on many continents, considered their judicial systems to be corrupt, the United Nations, in 2000, invited a representative group of Chief Justices – (now known as the Judicial Integrity Group<sup>39</sup>) – to identify the core judicial values and to develop a concept of judicial accountability to complement the principle of judicial independence. Following a consultation process spread over two years and involving senior justices from over 75 countries drawn from all legal systems, the Judicial Integrity Group adopted the Bangalore Principles of Judicial Conduct (named after the city in which the drafting process began). At the request of the United Nations, the Group also prepared a 175-page Commentary on the Bangalore Principles; Measures for the Effective Implementation of the Bangalore Principles; and Principles of Conduct for Judicial Personnel. All four documents now form the basis for the Implementation Guide and Evaluative Framework for Article 11 of the United Nations Convention Against Corruption (UNCAC) which deals with judicial integrity. UNCAC has been ratified by Sri Lanka, and the international monitoring of Sri Lanka's compliance with article 11 will commence this year.

In 2003, the Bangalore Principles of Judicial Conduct were presented to the United Nations Commission on Human Rights by the UN Special Rapporteur on the Independence of Judges and Lawyers. The Commission unanimously resolved to bring the document 'to the attention of Member States for their consideration'. In 2006, the United Nations Economic and Social Council 'invited Member States, consistent with their domestic legal systems, to encourage their judiciaries to take into consideration the Bangalore Principles of Judicial Conduct when reviewing or developing rules with respect to the professional and ethical conduct of members of the judiciary'.<sup>40</sup> The Philippines was among the first judiciaries to adopt the Bangalore Principles and the Principles of Conduct for Judicial Personnel. From Belize in the Caribbean to the Marshall Islands in the Pacific, the Bangalore Principles have been used by judiciaries on all the continents as the model in fashioning their own codes of conduct. In Kenya, the Principles, the Implementation Measures and the Commentary have been re-published and made available to every judge and magistrate.

If international confidence in our judicial system is to be restored, immediate action needs to be taken to implement the Bangalore Principles of Judicial Conduct. Its implementation requires action to be taken by the judiciary and the state. For example, the judiciary must:

- Formulate and disseminate a Code of Judicial Conduct widely in the community, so that legislators, public officials, lawyers, academia, civil society and the media

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<sup>39</sup> Two Sri Lankans serve on the Judicial Integrity Group: Judge C. G. Weeramantry who chairs its meetings, and Dr Nihal Jayawickrama who serves as its coordinator.

<sup>40</sup> ECOSOC Resolution 2006/23 entitled 'Strengthening Basic Principles of Judicial Conduct'.

know and understand the standards of conduct that judges are required to observe.

- Make Judicial Ethics an integral element in the initial and continuing training of judges.
- Establish a Judicial Ethics Advisory Committee to provide judges with advice on issues that are likely to impact on judicial conduct.
- Establish a Judicial Ethics Review Committee to receive, inquire into, and resolve complaints of unethical conduct of members of the judiciary.
- Prescribe a predetermined arrangement for the Assignment of Cases.
- Formulate a Code of Conduct for Court Personnel.
- Facilitate and promote access to justice by ensuring that court-houses are accessible to court-users, and provide standard, user-friendly forms and instructions.
- Adopt modern case management techniques, and monitor and control the movement of a case.
- Actively promote transparency in the judicial process, not only through public hearings, but also by making judgments and court records available to the public.
- Regularly monitor the quality of justice and public satisfaction with the delivery of justice through Case Audits and Surveys of Court Users, and regularly publish the results of such Audits and Surveys.
- Familiarise themselves with International Human Rights and Humanitarian Law, as well as Environmental Law.
- Formulate judicial outreach programmes to educate the public on the role of the justice system in society and address common misconceptions about the system.

The judiciary cannot perform its legitimate functions unless the State also performs its obligations. For example,

- There should be constitutional guarantees of judicial independence.
- The qualifications for judicial office should be prescribed, and these should include not merely legal expertise, but also social sensitivity and other essential personal qualities.
- An independent appointment mechanism should be established with both judicial and non-judicial members.
- Judicial tenure should be guaranteed, and removal from office should only be for proved incapacity, conviction of a serious crime, gross incompetence, or conduct that is manifestly contrary to the independence, impartiality and integrity of the judiciary.
- The judiciary should be provided with sufficient funds to enable it to perform its functions efficiently and without an excessive workload, and
- Judges should receive remuneration commensurate with the status, dignity and responsibility of their office.

A recent plea to implement the Bangalore Principles of Judicial Conduct, made by a newly appointed Judge of the Supreme Court, Justice K. T. Chitrasiri, at a ceremonial sitting at which he was welcomed by the Bar, evoked no response from the Chief Justice, the Bar Association, the media or civil society. Meanwhile, the Sri Lankan judiciary continues to ignore the universally accepted core judicial values, and refuses to be bound by the universal code of judicial conduct.

