



**CIVIL AND POLITICAL RIGHTS IN THE SRI LANKAN
CONSTITUTION AND LAW:
MAKING THE NEW CONSTITUTION IN
COMPLIANCE WITH THE ICCPR**

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A. INTRODUCTION

One of the most important elements of the promised new constitution that is currently being debated in the Constitutional Assembly process is the form and content of the future bill of fundamental rights. In the recent past there have been vigorous debates in policy circles – if not, unfortunately, among the public at large – about the nature and extent of the rights to be enshrined in the new constitution, in particular, whether or not to include socioeconomic rights, and about the means and institutions of rights enforcement, especially the proposal to create a new Constitutional Court and the extension of the powers of judicial constitutional review.

Unlike in relation to these issues, however, there appears to be much less disagreement on the question of strengthening the constitutional protection of civil and political rights. These are claims to individual personal freedoms against society and the state, whether understood as civil liberties in the traditional common law sense, or as positive rights in the republican era, to which our society has been accustomed from the nineteenth century onwards, especially with the entrenchment of an independent judiciary under the Charter of Justice in 1833. The questions that arise in the current reform process therefore are not so much about whether or not to include these rights in the constitution, but about such matters as how to expand the reach of civil and political rights, and how to substantively and procedurally strengthen their effective enforcement.

In looking to strengthen civil and political rights in Sri Lanka, we should aim to ensure that the future bill of rights protects these rights at least to the extent – although there is nothing to prevent us going further – that is required under the basic standards established by the key international treaty in this regard, the International Covenant on Civil and Political Rights (ICCPR). These issues were hotly debated last in 2008, in the context of the then government's application for the continued enjoyment by Sri Lanka of the benefits under the GSP Plus tariff relief scheme of the European Union (EU). One of the requirements to qualify for GSP Plus was and is that the beneficiary country is placed under a general obligation to 'ratify and fully implement' a number of international conventions including the ICCPR. The Rajapaksa regime's measures to meet this standard fell below what was required by the EU, and accordingly, Sri Lanka lost its GSP Plus benefits in 2008. It is coincidental that the new government is currently negotiating with the EU to regain the GSP Plus benefits.

In 2008, the authors of this Working Paper argued that the government should use the opportunity availed by the GSP Plus application for a 'win-win' outcome whereby it could enact reforms, including constitutional amendments, to strengthen civil and political rights in compliance with ICCPR standards which have been long overdue in Sri Lanka, regardless of the economic benefits of GSP Plus (see A. Welikala (Ed.) (2008) *GSP+ and Sri Lanka: Economic, Labour, and Human Rights Issues* (Colombo: Centre for Policy Alternatives and Friedrich Ebert Stiftung); R. Edrisinha & A. Welikala (2008) [*'GSP Plus' Privileges: The Need for Constitutional Amendment*](#)). The case we made in 2008 is now revisited in this Working Paper, with a view to contributing to the current process by restating the

deficiencies in Sri Lankan law in the light of ICCPR standards, so that these may be addressed by the current constitution-making process. The current Sri Lankan law is reflected not only in the constitution but also in judicial pronouncements and statute. Some of the more problematic features of the latter may be addressed directly by the new constitution, although further statutory reforms may also be necessary.

During the previous regime, escalating armed conflict and the deterioration of the legal and political climate relating to human rights protection attracted adverse international attention. More specifically, the decision of the Supreme Court in the case of *Singarasa v. Attorney General* (S.C. Spl. (LA) No. 182/99; SCM 15th September 2006) holding that while the accession of Sri Lanka to the ICCPR was legal, valid, and bound the State at international law, it created no additional rights as recognised in the ICCPR for individuals within the jurisdiction of Sri Lanka in the absence of domestic legislation, proved to be hugely controversial. The Supreme Court in that case also went on to hold that the accession to the First Optional Protocol to the ICCPR, which allows individuals to address complaints of violations of ICCPR rights to the Human Rights Committee, was invalid and unconstitutional.

The Supreme Court's opinion that the ICCPR itself created no justiciable rights under Sri Lankan domestic law raised questions as to whether, in the light of this decision, Sri Lanka could be considered as having not only ratified, but also fully implemented the ICCPR, so as to re-qualify for GSP Plus in 2008. It should be noted at the outset that under international law, the ICCPR and its First Optional Protocol are two separate treaties, and the GSP Plus framework only obliges a beneficiary country to ratify and fully implement the ICCPR.

In response, the then government adopted several measures. In addition to an intensified campaign of diplomatic lobbying, the specific legal measures the Government adopted in order to meet the criticisms of the *Singarasa* judgment were two-fold. Firstly, it enacted a piece of legislation called the International Covenant on Civil and Political Rights (ICCPR) Act, No. 56 of 2007, to purportedly give effect to the rights recognised by the ICCPR at domestic law that were not already recognised by the Constitution or by existing law.

Secondly, the Government engaged the consultative jurisdiction of the Supreme Court under Article 129 (1) of the Constitution and sought an Advisory Opinion from the Court as to the extent of compliance of the Sri Lankan Constitution and law with the rights contained in the ICCPR. Article 129 provides, *inter alia*, that 'If at any time it appears to the President of the Republic that a question of law or fact has arisen or is likely to arise which is of such nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer that question to that Court for consideration and the Court may, after such hearing as it thinks fit, within the period specified in such reference or within such time as may be extended by the President, report its opinion to the President thereon.' The Supreme Court communicated its Advisory Opinion to the Government in March 2008, following a hearing in which the Attorney General as

well as several intervenient petitioners were allowed by the Court to make oral and written submissions.

It was clear, however, that the Rajapaksa government would not initiate any constitutional amendment to give effect either to the ICCPR within Sri Lanka, or to facilitate access to the UN Human Rights Committee in the light of the Supreme Court's declaration that the accession to the First Optional Protocol was unconstitutional.

What follows in this Working Paper is a critical discussion of the constitutional provisions include the Chapter on Fundamental Rights, the ICCPR Act, the Advisory Opinion of the Supreme Court, and most importantly, the Annexure to the Advisory Opinion (entitled 'Reference under Article 129 – SC 01/2008: Legislatives [*sic*] Compliance with the ICCPR') that lists the provisions of the Sri Lankan Constitution and law on the basis of which the Supreme Court arrived at the main conclusion that the Sri Lankan Constitution and law are in compliance with and give recognition to the rights established by the ICCPR.

The paper is structured in five parts, including this introduction. In Part B, we outline our general observations on the overarching issues and considerations that apply to an attempt to enact the ICCPR into domestic law and to ensure that rights recognised by the ICCPR are meaningfully and effectively made available to individuals within the territory and subject to the jurisdiction of Sri Lanka. It also includes a discussion about rights and limitations that we urge inclusion in the new constitution. Part C is a critical review of the Supreme Court's Advisory Opinion. In Part D, we comment on the specific provisions of the Sri Lankan Constitution and law that were suggested by the Government, with the concurrence of the Supreme Court in the Annexure to its Advisory Opinion, as being in compliance with and giving effect to certain of the rights recognised by the ICCPR. Finally, Part E contains a set of brief conclusions.

For convenience of reference, unless otherwise indicated or the context so requires, the ICCPR Act, No. 56 of 2007 will be referred to in this paper as the 'ICCPR Act'; the Supreme Court's Advisory Opinion under Article 129 in SC Ref. 01/2008 will be referred to as the 'ICCPR Advisory Opinion'; and the Annexure to the ICCPR Advisory Opinion as the 'Annexure to the ICCPR Advisory Opinion.'

B. GENERAL OBSERVATIONS

General Obligations undertaken by Sri Lanka upon accession to the ICCPR

The ICCPR was adopted and opened for signature, ratification, and accession by General Assembly Resolution 2200A (XXI) on 16th December 1966, but only entered into force, in accordance with Article 49, on 23rd March 1976. Sri Lanka ratified and acceded to the ICCPR on 11th June 1980. Thus the ICCPR was not in force at the time that the first republican constitution was adopted in 1972, and in 1978 when the second republic constitution was enacted, it was in force but not yet ratified by Sri Lanka.

Part II of the ICCPR comprising Articles 2, 3, 4 and 5 set out the general nature of the obligations undertaken by State Parties in respect of the substantive rights contained in Part III and certain other provisions. These important provisions, establishing the foundation upon which substantive civil and political rights are to be protected, secured, promoted and enjoyed, relate to matters such as equality of treatment and the prohibition of negative discrimination on any basis; to undertake legislative and other measures to give effect to ICCPR rights; to ensure access to competent courts for the vindication of such rights; and for effective administrative implementation of remedies.

Moreover, there are procedural and substantive controls established for the invocation of derogations from treaty obligations during a state of national emergency, including official proclamation and communication to the Secretary General of the United Nations; for requirements such as necessity and proportionality of derogating measures; and an enumeration of rights from which there can be no derogation under any circumstances.

Finally, there is provision to ensure that there is no activity that is aimed at the destruction of rights recognised by the ICCPR, and to allow the constitutional orders of individual States to provide for fundamental human rights the scope and nature of which may exceed the rights recognised by the ICCPR, or be subject to restrictions less stringent than the limitations recognised by the ICCPR.

In our view, there is no comparably coherent legal basis for the recognition and protection of fundamental human rights under the present Constitution, the recent ICCPR Act, or the ordinary laws of Sri Lanka. In fact, the constitutional framework for the protection of fundamental rights is weak for a number of reasons more fully set out below, and some of the legal provisions advanced by the Government of Sri Lanka, and endorsed by the Supreme Court as being in fulfilment of ICCPR rights are considerably inadequate for meaningful fulfilment, and in some cases have no relation to the apposite right. Consequently, we are of the view that Sri Lanka's fulfilment of undertakings upon accession to the ICCPR is incomplete and inconsistent with the letter and spirit of what is contemplated by the ICCPR.

Article 16 of the Constitution: Validation of laws inconsistent with Fundamental Rights and the Constitution

One of the key criticisms about the constitutional provision for the protection of fundamental rights in Sri Lanka relates to Article 16 of the Constitution. This provision, which is incongruously part of the chapter on fundamental rights (Chapter III), states that all existing written and unwritten law shall be valid and operative notwithstanding any inconsistency with the fundamental rights declared and recognised by the Constitution (Article 16 (1)). By ensuring the continuation in force of existing laws inconsistent with constitutionally declared fundamental rights, this provision undermines not merely the protection of the limited number of fundamental rights that are in fact recognised by the Constitution, but also the principle of constitutional supremacy.

In practical terms this means, for example, that provisions of the criminal law (the Penal Code of 1889), or provisions in laws on land and succession to land that are discriminatory against women, remain legally valid even though these provisions may be inconsistent with the bill of rights in the Constitution (For a strong argument in favour of reform of Muslim personal laws inconsistent with human rights, see A.M. Faaiz (2016) [*'Muslim Personal Laws Reforms: On or Not?'*](#)). It also makes it impossible to challenge the constitutionality of these outdated legal provisions in the courts on the ground that they are inconsistent with the present Constitution. Therefore, such laws or legal provisions remain legally valid and operative even though they may be inconsistent with the bill of rights in the Constitution.

We note that Part II of the ICCPR outlined above is intended to deal with precisely this kind of anomaly within the constitutional systems and political processes of ICCPR State Parties and to ensure uniform and consistent protection of civil and political rights. In the absence therefore of a comparably coherent legal basis, and the continuation in force of Article 16, it is difficult to conclude that Sri Lanka has fulfilled the undertaking to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the ICCPR.

The need for constitutional amendments for giving full effect to the ICCPR regime

The new constitution must follow the ICCPR not only in the enumeration of ICCPR rights at domestic law, but also to enhance the scope of those ICCPR rights which are in principle recognised by the Sri Lankan Constitution and law through the more progressive textual formulations found in the ICCPR (including in the framework for restrictions where permissible), as well as to extinguish anomalies such as Article 16.

A further point in this regard pertains to the First Optional Protocol to the ICCPR, which allows individual complaints to be communicated to the treaty body, the Human Rights Committee at Geneva. This was a salutary right of access to an international forum through which internationally recognised rights could be

protected and upheld, and it will be recalled that several important communications were submitted by authors from Sri Lanka since 1998 in which the Committee had occasion to uphold such complaints in cases where the Sri Lankan judicial and administrative protection of ICCPR rights were found to be inadequate. We have already noted how the Supreme Court has in the case of *Singarasa v. Attorney General* (2006) held that the accession to the First Optional Protocol by Sri Lanka was invalid and unconstitutional. If the Government is bound by the reasoning of the Supreme Court in this case, but is nonetheless committed to ensuring access to the international enforcement machinery of the ICCPR in the form of the Human Rights Committee, then it is necessary to ensure that the future constitution ensures access to the Human Rights Committee.

Use of Directive Principles of State Policy

In 2008, the Annexure to the ICCPR Advisory Opinion made reference to the Directive Principles of State Policy set out in Article 27 of the Constitution in claiming implementation of ICCPR provisions. The device of directive principles may be an appropriate method with which to recognise socioeconomic rights and their progressive realisation, but it is difficult to regard Article 27 as implementing any aspect of the ICCPR, as the principles set out therein are directory, and not mandatory, guidelines for the making of policy and law by Parliament and the President and Cabinet of Ministers.

Article 29 of the Constitution provides emphatically that these principles are merely aspirational and not justiciable, and do not confer or impose legal rights or obligations, are not enforceable in any court or tribunal, and no question of inconsistency with such principles shall be raised in any court or tribunal. Consequently, there has been extremely sparse judicial use of these principles in Sri Lanka, and it is doubtful in the extreme the extent to which successive governments have regarded themselves as being guided, let alone bound by these principles in law and policy making. Such peremptory principles of international human rights law as are contained in the ICCPR must be reflected in operative and justiciable parts of the constitution, i.e., the bill of rights.

Textual Formulation and Scope of Rights including Framework for Enforcement and Restrictions

Subject to the specific comments set out in relation to discrete ICCPR rights and purportedly corresponding provisions of the Sri Lankan Constitution and law below, we would make some preliminary observations of a general nature with regard to the textual formulation and contemplated scope of rights as between the ICCPR and domestic law. In general, the number of civil and political rights recognised by the ICCPR and the nature and extent of their reach are formulated in terms that are far more progressive and facilitative of full realisation and enjoyment than the chapter on fundamental rights of the Sri Lankan Constitution, or indeed the wholly inadequate ICCPR Act of 2007.

Viewed against international best practice in the design and structure of constitutional bills of rights aimed at guaranteeing, protecting and promoting human rights, the Sri Lankan bill of rights is incomplete and structurally incoherent. The lack of a coherently conceptualised theory underpinning the Constitution that seeks to maximise the enjoyment of human rights by Sri Lankans makes hermeneutical interpretation of the bill of rights as a whole difficult. This is reflected in the fundamental rights jurisprudence of the Supreme Court over the last three decades.

This lack of theoretical coherence in the Supreme Court's fundamental rights case law is also partly due to its role as a court of first instance in respect of fundamental rights, rather than as a constitutional court that enunciates general principles in the interpretation of the bill of rights. A major drawback of having the Supreme Court as the court of first instance is that there can be no further appeals from its determinations. In terms of Article 126 of the Constitution, the Supreme Court has exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental rights set out in Chapter III of the Constitution or any language rights set out in Chapter IV. In addition to the observation above, other limitations of Article 126 relate to the coverage only of violations by executive or administrative action. This excludes legislative and judicial action. While the requirement of *locus standi* has in general been liberalised over the years to facilitate greater access, this also suffers from a lack of conceptual coherence in the Supreme Court's jurisprudence.

It is not clear from the text of Chapter III the basis on which the fundamental rights selected for inclusion were chosen, the order in which they appear was determined, or why certain textual formulations were adopted when more liberal options were available. The three instruments of the International Bill of Rights, *viz.*, the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966) had been well-established in international law by the time the Constitution was drafted in 1977 – 78, as had other regional instruments such as the European Convention on the Protection of Human Rights and Fundamental Freedoms (1950). These could have provided useful guidance in designing the bill of rights, but apart from some textual evidence that the drafters drew from the UDHR and ICCPR, it is clear the design and drafting was informed by political considerations other than a principled pursuit of human rights protection and promotion. The right to life for example is not recognised in the bill of rights.

The result is that the bill of rights resembles a randomly cherry-picked cluster of inchoate rights that cannot at the conceptual level amount to a proper bill of rights compatible with modern expectations. Thus, for example, temporary policy considerations that were relevant at the time of drafting find incongruous expression in the fundamental rights chapter such as where Articles 13 (7) and 14 (2) deal with citizenship policy concerning the categories of persons falling under the Indo-Ceylon Agreement (Implementation) Act No. 14 of 1967.

The absence of a proper rationalisation of constitutional values is evident elsewhere in the fundamental rights chapter as well, as we have already noted in relation to Article 16, which is wholly inconsistent with constitutionalism and the central object of a constitutional bill of rights when it validates all existing law notwithstanding inconsistency with fundamental rights.

Perhaps the most serious structural weakness of the bill of rights is in relation to the way it deals with restrictions, especially in states of emergency when fundamental rights are most vulnerable and therefore require strong constitutional protection and regulation of governmental action. The provision on permissible restrictions is Article 15, which is not only an example of the incoherence of the chapter of which it is a part, but from the perspective of human rights protection, it is also the weakest provision in the chapter.

An elementary safeguard in human rights instruments including the ICCPR is the distinction made between 'limitations' and 'derogations.' This is in recognition that some human rights may legitimately be limited in their enjoyment and exercise, and that in exceptional circumstances such as states of emergency, some rights may require to be temporarily suspended. From the recognition of these necessities and the consequent distinction between limitations and derogations flow a set of detailed rules that govern the substantive and procedural dimensions of limitations and derogations, including the constitutional enumeration of absolutely non-derogable rights.

Similar to the ICCPR, the Sri Lankan chapter on fundamental rights adopts an older approach in the design of bills of rights, which involves attaching restrictions based on different justifications to specific rights. Article 15 employs the term 'restrictions' and in its enumeration of permissible restrictions encompasses both limitations (e.g. restrictions for the protection of the rights of others) and derogations (i.e., restrictions based on national security).

However, the Sri Lankan bill of rights does not follow the ICCPR in expressly setting out a list of non-derogable rights. These are identified by implication: Article 10 (freedom of thought and conscience), Article 11 (prohibition of torture), Article 13 (3) (right to be heard at a fair trial by a competent court, with or without legal representation) and Article 13 (4) (right to due process and fair trial prior to imposition of punishment, but excluding pre-trial detention) are not subject to any restriction by Article 15, and are thereby to be considered absolute rights.

It is to be further noted that the rights which are not susceptible to restriction under the Constitution are not as extensive as those provided for by the ICCPR Article 4 (2), and more significantly, are also inconsistent with ICCPR standards in terms of the content of protection. For example, whereas Article 4 (2) recognises the Article 15 prohibition of retroactive criminal liability as a non-derogable right under the ICCPR, Article 15 (1) of the Constitution permits restrictions on the apposite prohibition in Article 13 in the interests of national security. Likewise, the substantive controls of necessity and proportionality in relation to any attempted restriction strongly established by Article 4 (1) of the ICCPR are nowhere to be found in the Sri Lankan Constitution.

The effectiveness of a bill of rights is assessed not only in terms of the list of the rights enumerated therein but also, very importantly, in the light of the restriction or limitation clause which sets out how such rights may be curtailed. Most restriction clauses including that contained in the ICCPR have a requirement that the restrictions be reasonable or necessary thereby introducing an objective proportionality requirement. The Sri Lankan Constitution does not include a reasonableness requirement in its restriction clause thereby providing the political branches of government with considerable latitude with respect to the imposition of restrictions on rights. Though the Supreme Court has in some cases by interpretation imposed a reasonableness requirement, this has proved *ad hoc* and has not introduced change that is general and universally applicable.

The only procedural safeguard provided by Article 15 of the Constitution for the imposition of restrictions on fundamental rights is that they are required to be prescribed by law, which includes emergency regulations having an overriding effect over ordinary legislation. It is to be noted that even in older instruments such as the ICCPR, restrictions have to meet requirements other than prescription by law and includes higher thresholds of substantive justification such a necessity in a democratic society or proportionality. While reference is made in Article 15 (7) to 'the just requirements of the general welfare of a democratic society', this is set out as a separate ground of restriction rather than as an inherent justificatory requirement of restrictions that are aimed at securing national security and other aims.

Furthermore, the omnibus nature of Article 15 (7) has the effect of undermining many of the limits on permitted restrictions enumerated in its other sub-sections. Thus it permits restrictions as may be prescribed by law (which includes emergency regulations) in the interests of national security, public order and the protection of public health and morality, for recognition of the rights of others, and for meeting the just requirements of the general welfare of a democratic society, on the following fundamental rights: the right to equality (Article 12), key rights of personal liberty (Article 13 (1) and (2)), and the entirety of Article 14, which includes *inter alia* the freedoms of expression, assembly, association, occupation and movement.

A final point to note in respect of restrictions on fundamental rights permitted under the Sri Lankan Constitution is with regard to emergency regulations having the quality of law, and overriding the provisions of any ordinary law. Emergency regulations are executive-made law under the provisions of the Public Security Ordinance and Chapter XVIII of the Constitution (both as amended from time to time). States of emergency during which these presidential powers of law-making come into operation have been more the norm than the exception in Sri Lanka in the past, especially during the period of war. Abuse and excess of authority through the use of emergency regulations under successive governments have been extensive and well documented. Successive Presidents have promulgated emergency regulations that have had little bearing on national security or the maintenance of essential supplies, or that are overbroad in terms of their scope. In a time of crisis when fundamental human rights are most vulnerable, there can

be very little confidence that emergency regulations will not be made which are in effect not in derogation of international human rights standards as protected by the ICCPR.

In addition to the observations above, we strongly urge the adoption in the new constitution of four crucial devices, all found in the South African constitution, that would serve to immeasurably strengthen the constitutional protection of rights in the future, and hopefully to guard against judicial misadventures like the Singarasa case discussed below.

The first is a general context clause that precedes the enumeration of substantive rights in the chapter on fundamental rights. Section 7 of the South African constitution states that, 'This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality, and freedom. The state must respect, protect, promote and fulfil the rights in the Bill of Rights.' Such a provision provides a useful and necessary guiding basis for adjudication of the bill of rights. This is reinforced, secondly, by the very robust application clause represented in Section 8 of the South African constitution. This is an essential element to the design of the future Sri Lankan bill of rights.

The third is the general limitation clause in Section 36 that gives all organs of government and especially the courts strong constitutional guidance on how to approach limitations and derogations. It states, 'The rights in the Bill of Rights may only be limited in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking in all relevant factors including: the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.' Importantly, the provision also establishes that except as provided by it or any other provision of the constitution, no law may limit any right entrenched in the bill of rights.

Finally, we would urge a more robust constitutional recognition of the role of international law in domestic litigation than has been the tradition in Sri Lanka. Sections 232 and 233 of the South African constitution again provide some useful comparative guidance in this regard, but at the least, we would recommend that the new constitution requires Sri Lankan courts to take account of relevant international law in the interpretation of the future bill of rights, and to interpret rights therein consistently with Sri Lanka's international obligations, especially the ICCPR.

Omissions in the Chapter on Fundamental Rights

These are dealt with comprehensively in the discussion to follow, but we would at this point emphasise three key fundamental rights, which we strongly recommend should be included in the new constitution. These are the rights to life and human dignity, privacy, and property. Their importance – and the consequences of their

absence from constitutional protection – have been highlighted time and again in the past few decades, especially during the time of war. Their significance is no less in the post-war future. No Sri Lankan constitution has recognised the right to life (although there is some case law suggesting an implied right), the most basic of rights, which guards against not merely the arbitrary deprivation of life, but the inviolable value of human dignity (see Section 10 of the South African constitution).

Likewise, the values underpinning the right to privacy is one of the most disrespected aspects of Sri Lankan legal and political culture, often in unintended ways. Subject to reasonable and established limitations, the new constitution must protect the privacy of individuals, of family, of the home, of correspondence, and other personal records. The latter aspect might become especially important in the context of the recent enactment of freedom of information legislation, which while recognising privacy claims as exemptions, is not accompanied by data protection legislation as yet.

The right to property is an indispensable element of a liberal democracy. Current Sri Lankan land acquisition legislation and case law are inconsistent with even a basic notion of a protection of private property against intrusions by the state. The concept of the public interest that provides the rationale for incursions into private property has been exonerated by executive action with the collusion of the judiciary. In view of the huge expropriations of land under emergency powers during the war in the north, which are yet to be returned to lawful owners, we are reminded that in the Sri Lankan case, a right to property would be of benefit not to the wealthy, but to large sections of ordinary Sri Lankans. We find the elaborate provisions of Section 25 of the South African constitution a valuable and persuasive model to follow in designing a right to property in the new constitution.

Omissions and Problematic Features of the ICCPR Act, No. 56 of 2007

The premise of the ICCPR Act is that the Sri Lankan constitutional and legal system is substantially in conformity with the rights recognised by the ICCPR, which was unfortunately endorsed by the Supreme Court in its ICCPR Advisory Opinion. Its long title and preamble make clear that the Act is to give effect to certain articles of the ICCPR only, and that a substantial part of the civil and political rights referred to in the ICCPR have been already given legislative recognition in the Constitution of Sri Lanka, as well as in other legislation enacted by Parliament. This is in fact not the case, as demonstrated by our general comments above, and specific observations to follow.

The ICCPR Act contains only four main substantive rights-conferring provisions in sections 2, 4, 5 and 6: *viz.*, the right to be recognised as a person before the law; entitlements of alleged offenders to legal assistance, interpreter and safeguard against self-incrimination; certain rights of the child; and right of access to State benefits, respectively. These provisions are formulated in terms substantially and significantly different from the corresponding provisions of the ICCPR.

Section 4 corresponds to the ICCPR provisions of Article 14 (2), (3), (5), and (7) but without Article 14 (3) (c), which establishes a minimum guarantee to be tried without undue delay in criminal trials; or Article 14 (1), (4), and (6), which includes the presumption of innocence in criminal trials and investigations. These omissions are presumably for the reason that the issues they concern are addressed by other Sri Lankan constitutional and statutory provisions.

Reiterating the concern we have raised before, this approach results in a considerable divergence of standards of human rights protection as between domestic Sri Lankan law and the ICCPR. For example, the presumption of innocence until proved guilty according to law is expressed as an absolute right in Article 14 (2) ICCPR, whereas in the apposite Article 13 (5) of the Sri Lankan Constitution, the presumption is subject to a proviso that the burden of proving particular facts may by law be placed on an accused, and moreover, Article 15 (1) permits the presumption to be overturned by law including emergency regulations in the interests of national security.

Section 6 corresponds with Article 25 ICCPR but does not mention the prohibition on racial discrimination or unreasonable restrictions that must govern the right to participate in public affairs either directly or through freely elected representatives, and to access services provided by the State to the public. Section 6 (2) states that the expression 'conduct of public affairs' shall not include the conduct of any affairs which are entrusted exclusively to any particular authority by or under any law, which is not a curtailment contemplated by Article 25 of the ICCPR. Crucially and inexplicably, section 6 does not incorporate Article 25 (b).

We would further point out that the constitutional framework as a whole does not facilitate public participation in law or policy-making. Despite constitutional provisions that declare that sovereignty is in the people, constitutional provisions with respect to law and policy-making and the Establishments Code consisting of the rules and regulations of the public service in the country, deny public engagement in the process. Draft legislation is not made available to the public for public comment, legislation has often been labelled as urgent in the national interest and enacted within a few days, there is no requirement that emergency regulations are accessible to the public and generally, the public does not know in advance what Bills will be presented in Parliament (some of these anomalies have been now addressed by the Nineteenth Amendment to the Constitution (2015)).

The Act also contains an elaborate provision, section 3, prohibiting the propagation of war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, and which is now made a cognizable and non-bailable offence. The purpose of section 3 appears to be to give effect to Article 20 of the ICCPR. There can arise a tension between this provision of the ICCPR and its Article 19, relating to the freedom of expression. The latter right is formulated in the ICCPR in wider terms than the corresponding right to speech in Article 14 (1) (a) of the Sri Lankan Constitution, to include the right to hold opinions without interference, to receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the

form of art, or through any other media of a person's choice. Therefore, the restriction on freedom of expression contained in Article 20 ICCPR must be read in the textual context of Article 19 ICCPR, whereas section 3 of the Sri Lankan ICCPR Act has no corresponding constitutional framework governing the freedom of expression in Article 14 (1) (a) of the Constitution, that can deliver the appropriate balance between the freedom of expression and the need to prohibit speech promoting war and communal hatred.

In any event, Article 20 of the ICCPR is hardly the most important provision therein, and it is even questionable to what extent it enjoys the legal quality of a fundamental human right. In this context, it is noteworthy that the then government in enacting the ICCPR Act should have been so concerned as to enact this provision in the broadest possible terms, including through the establishment of an offence, punishment, and trial procedure, when indeed there were and are far more important provisions from the perspective of fundamental human rights that ought to have engaged the government's more pertinent attention.

These divergences in the respective formulations and standards of human rights protection reflected as between the ICCPR and the Sri Lankan ICCPR Act, and indeed other constitutional and statutory provisions, are in over and above significant omissions, such as the right to self-determination which constitutes Article 1 and Part I, common to the ICCPR and the ICESCR. The then government's position as endorsed by the ICCPR Advisory Opinion was that the right to self-determination requires no specific legislative or constitutional recognition, on the basis of a highly outdated political position on the right to self-determination (reflected in UN Resolution 2625) which holds that the right is exhausted once colonies achieve independence, and which does not take into account much of the policy and scholarly debates on this issue over the past several decades.

Likewise, the right to privacy is established in forceful terms by Article 17 of the ICCPR. In 2008, the Government did not claim that this important fundamental right is constitutionally recognised in Sri Lanka, and instead alluded to various common law and statutory provisions. This was a matter of serious concern then, given that intelligence and covert operations in the context of escalating conflict were often conducted extra-legally in Sri Lanka, and without any judicial protection being afforded against the abuse or arbitrary use of powers in the absence of a constitutional right to privacy. Moreover, cordon and search operations and *en masse* detentions that were then common, purportedly in the exercise of emergency powers and / or anti-terrorism legislation, and having the effect of discriminatory treatment and violation of the fundamental rights of ethnic minorities, would have been more difficult to execute, had a right to privacy in terms recognised by the ICCPR been established by the Constitution.

In sum, the position of the Government and of the Supreme Court in 2008 was that the fundamental rights chapter of the Constitution, the ICCPR Act and various other provisions of domestic law, including judicial decisions, substantially give effect to the provisions of the ICCPR. At the time, we are unable to agree that this constituted a systematic and coherent approach to giving effect to the ICCPR within Sri Lanka, and that individuals would have meaningful access to these

critical rights. To the extent the existing provisions of Sri Lankan law give effect to provisions of the ICCPR as claimed by the then government, their location in a multiplicity of laws as well as widely different procedures of enforcement (i.e., in some cases by the Supreme Court, in others through the High Court in the exercise of criminal and civil jurisdiction, and still others presumably through the District Courts) serve to defeat the purposes of human rights protection through confusion and unnecessary complication. In any event, the unprincipled selectivity which characterises this attitude was certainly inappropriate to the task of implementing an international instrument as fundamental as the ICCPR. These issues must be addressed in a coherent and comprehensive way in the new constitution.

C. THE SUPREME COURT'S ICCPR ADVISORY OPINION

General Observations on the Article 129 Reference on the ICCPR

As observed at the outset, in March 2008, the President submitted a reference under Article 129 (1) of the Constitution to obtain the opinion of the Supreme Court on two questions of law. As reproduced in the Court's Advisory Opinion these were as follows (at p.2; see Appendix I in A. Welikala (Ed.) (2008) *GSP+ and Sri Lanka: Economic, Labour, and Human Rights Issues* (Colombo: Centre for Policy Alternatives and Friedrich Ebert Stiftung) for a reproduction of the opinion):

1. Whether the legislative provisions cited in the reference that have been taken to give statutory recognition to civil and political rights in the International Covenant on Civil and Political Rights (ICCPR) of the United Nations adhere to the general premise of the Covenant and whether individuals within the territory of Sri Lanka would derive the benefit and the guarantee of rights as contained in the Covenant through the medium of the legal and constitutional processes prevailing in Sri Lanka?
2. Whether the said rights recognised in the Covenant are justiciable through the medium of legal and constitutional process prevailing in Sri Lanka?

Four intervenient petitioners, viz., the Centre for Policy Alternatives (CPA), Rohan Edrisinha, Lal Wijenayake, and the Legal Aid Commission, were permitted by Court to make submissions. Since under the terms of Article 129 intervenient petitions will not be heard as of right, it was positive that the Supreme Court allowed intervenient petitioners to make submissions in this matter of major public importance. The single day hearing was held on 17th March 2008, although with respect to the Court, a strong argument can be made that the array of issues raised by the two questions in the presidential reference, as the present discussion amply demonstrates, justified a longer and more deliberative hearing.

Moreover, Article 129 (1) only requires that opinions on a reference made under it be reported to the President, and it has generally been the practice that unless made informally available, such opinions are not made public. We find this to be

wholly unsatisfactory, in that this provision, together with Article 129 (4) which provides that every proceeding under Article 129 (1) shall be held in private unless the Court for special reasons directs otherwise, are grounded in a culture of governmental secrecy and convenience at odds with such requirements of modern notions of participatory democracy as transparency and accountability of the governmental decision-making process. This is especially so with regard to judicial determinations and consequent executive policy and decision-making so clearly requiring public participation and open debate as the implementation of the ICCPR within domestic jurisdiction.

The Unpublished Annexure to the ICCPR Advisory Opinion

By some mysterious process, the ICCPR Advisory Opinion was published in the press (*The Nation*, 30th March 2008; *Daily Mirror*, 31st March 2008), but significantly, without the schedule of legal provisions which was alluded to in the opinion in the following terms: “On the basis of the submissions of the Additional Solicitor General, the observations of Court and submissions of other counsel, for purposes of clarity a comprehensive schedule annexed hereto was prepared with two columns. The column on the left gives the particular Article of the Covenant and the column on the right gives the legislative compliance within Sri Lanka and the relevant pronouncements made by the Supreme Court and the other Courts to further strengthen the guarantee of rights recognised in the Covenant” (at p.5).

The fact that this schedule (i.e., the Annexure to the ICCPR Advisory Opinion), which is critical to any informed debate about the Court’s reasoning was not disclosed, although the Advisory Opinion itself seemed to have been the subject of a convenient institutional seepage, adds particular credence to the point made above with regard to transparency and open government. What is the competing policy consideration that requires the Annexure, which constitutes the actual pith and substance of the Supreme Court’s opinion – to the effect that the Sri Lankan legal system is in compliance with the human rights standards protected by the ICCPR – be shielded from public scrutiny other than to protect both the Government and the Court from critique and open debate? We would keenly reject the notion that foreclosing such critique and debate is legitimate in a democracy.

Since the Annexure was not made publicly available, it was difficult for some time to assess the Supreme Court’s claims in respect of the compliance of Sri Lankan law with the ICCPR, until we were opportunely able to secure a copy confidentially. Unfortunately, however, the treatment of ICCPR Articles 13 and 14 (1) and (2) are missing in the copy of the document we were able to obtain, and consequently, we are unable to offer any comment in these respects (This document is reproduced as Appendix II in A. Welikala (Ed.) (2008) *GSP+ and Sri Lanka: Economic, Labour, and Human Rights Issues* (Colombo: Centre for Policy Alternatives and Friedrich Ebert Stiftung). While it bears some resemblance to earlier documents produced by the Attorney General’s Department for the purposes of negotiations with the European institutions on GSP Plus (which were also not made public), and especially those parts dealing with the ICCPR in Annex ‘A’ to the *National Report of the Government of Sri Lanka to the Human Rights*

Council for the Universal Periodic Review (2008) (which is a public document available electronically from the Office of the High Commissioner for Human Rights [here](#)), the Annexure to the ICCPR Advisory Opinion reflects a more elaborate exposition of the Sri Lankan constitutional and legal provisions and case law than its predecessors.

The part of the Advisory Opinion that was published in the press only dealt with the Court's inadequate and disappointing reasoning in rejecting the arguments of three of the intervenient petitioners: CPA, Wijenayake, and Edrisinha. The Supreme Court dismissed all of the submissions on several specific matters made by counsel for the intervenient petitioners, mainly on the ground that many of these submissions were based on hypotheses. The Court came to the conclusion that "...the legislative measures referred to in the communication of...the President dated 4.3.2008 and 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 International Covenant on Civil and Political Rights 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" and "that the aforesaid rights recognised in the Covenant are justiciable through the medium of the legal and constitutional process prevailing in Sri Lanka." (at p.13)

It is difficult to agree with the Supreme Court given that the opinion did not contain a full and reasoned basis on which its conclusions can be defended. For example, in relation to the ICCPR Act No. 56 of 2007, the Court confined itself to reiterating the claims made in the preamble – which together with its short title, as noted earlier, is a total misnomer given the substance of the Act – and did not consider the fact that the ICCPR Act contains only four main substantive rights-conferring provisions in Sections 2, 4, 5 and 6 (*viz.*, the right to be recognised as a person before the law; entitlements of alleged offenders to legal assistance, interpreter and safeguard against self-incrimination; certain rights of the child; and right of access to State benefits, respectively), and that these provisions are formulated in terms substantially and significantly different from the corresponding provisions of the ICCPR.

Given that none of the fundamental issues relating to the recognition of ICCPR rights at domestic law were given any serious judicial consideration and settlement, it is to be expected that the current process of constitutional reform would address the compliance issues that remain. For our part, we would wish to draw attention to the following matters.

The Arguments of Intervenient Petitioners and the Reasoning of the Supreme Court in the ICCPR Advisory Opinion

As required by Article 129 (3), the matter was heard by a five-judge panel of the Supreme Court including the Chief Justice. The bench comprised Silva CJ, and Amaratunga, Marsoof, Somawansa, and Balapatabendi, JJ.

In its introductory remarks, the Court observed that at the time of Sri Lanka's accession to the ICCPR on 11th June 1980, "...the currently operative Constitution was in force as the Supreme law of the Republic" and further that, "As stated in the Preamble to the Covenant the rights recognised and enshrined therein stem from the Universal Declaration of Human Rights. We have to state as a basic premise that the fundamental rights declared and recognised in Chap. III of the Constitution are based on the Universal Declaration of Human Rights" (at p.3).

The assertions that the preamble to the ICCPR makes reference to the UDHR, and that at least some of the fundamental rights recognised by Chapter III of the Sri Lankan Constitution relate to apposite provisions of the UDHR are, of course, undeniable. However, by itself, this observation has very little value to the judicial exercise the Court was asked to perform by the presidential reference, which was to determine the extent of compliance of the Sri Lankan legal system with the ICCPR. Both the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR) were drafted as necessary legal elaborations, in the form of rights, of the broad declaratory principles of the UDHR, and the task before the Court was not to discover the provenance of the rights recognised by either the ICCPR or the Sri Lankan Constitution, but to establish the number, form, nature, and scope of civil and political rights presently recognised by the Sri Lankan Constitution and law, and further to determine, through a process of adjudicatory reasoning, whether those formulations complied with the standard of protection afforded by the specific formulations of those rights in the ICCPR.

The Court also observed that Article 3 of the Constitution states that in the Republic of Sri Lanka sovereignty is in the people, that sovereignty includes fundamental rights, and that Article 4 (d) stipulates that all organs of government have a duty of respecting, securing and advancing constitutionally recognised fundamental rights, which cannot be restricted save in the manner set out in the Constitution. In the Court's view, this is "...a unique feature of the Constitution which entrenches fundamental rights as part of the inalienable Sovereignty of the People. Thus the fundamental rights acquire a higher status as forming part of the Supreme Law of the land..." (at p.4).

Once again, this is not a concern that has direct relevance to the question at hand, which is essentially one of evaluation between what is provided by the ICCPR and what is recognised by the Sri Lankan Constitution and law. While of course the constitutional injunctions in Articles 3 and 4 (d) are salutary, the real question arising out of the reference in this regard is whether the Sri Lankan constitutional foundation for the protection of fundamental rights set out therein conforms with the requirements set out in Part II of the ICCPR. As discussed above, we do not believe this to be the case.

The Court described the constitutional framework for the enforcement of fundamental rights set out in Articles 118 (b) and 126 of the Constitution, and observed how the Supreme Court had expanded the scope of protection: "The Court has permitted public interest litigation covering matters that transcend the infringement of fundamental rights. Directions have been issued in connection with matters of general importance as to liberty, personal security and

administrative action connected with a wide array of matters that impact on the natural environment, particularly with regard to water, air and noise pollution” (at p.4).

While we do agree, and in most cases, welcome the fact that the Supreme Court has displayed a progressive attitude on the question of *locus standi*, and further that in some cases judicial development of fundamental rights has indeed taken place, we do not regard this as the same thing as the full textual elaboration of fundamental human rights in the constitutional instrument itself. Our specific concerns with regard to the scope of civil and political rights that are in fact available and justiciable under the Sri Lankan Constitution and the law are more fully set out in Part D of this paper.

The Court also opined that, “It has to be emphasised in this connection that Parliament enacted special legislation titled ‘International Covenant on Civil and Political Rights (ICCPR) Act No. 56/2007 to give legislative recognition in respect of certain residual rights and matters in the Covenant that have not been appropriately contained in the Constitution and other operative laws. The preamble to the said Act states as follows:

AND WHEREAS a substantial part of the civil and political rights referred to in that Covenant have been given legislative recognition in the Constitution of Sri Lanka, as well as in other legislation enacted by Parliament.

AND WHEREAS it has become necessary for the Government of Sri Lanka to enact appropriate legislation to give effect to those civil and political rights referred to in the aforesaid Covenant, for which no adequate legislative recognition has yet been granted” (at pp.5-6).

The Court concluded that, “This enactment has been made by the Parliament of Sri Lanka in compliance with the obligation as contained in Article 2.2 of the Covenant, which requires a State Party to ‘adopt such law or other measures as may be necessary to give effect to the rights recognised in the Covenant’” (at p.6).

This was the sum total of the Supreme Court’s examination of the ICCPR Act and of the fundamental issues of international and constitutional law engaged by Article 2 (2) of the ICCPR. In the light of the concerns we have raised earlier in this discussion, it is not only deeply disappointing, but also astonishing that this was the Court’s casual attitude with respect to a matter of such fundamental importance.

The Court concluded its preliminary remarks with the observation that it has, “...in several decided cases relied on the provisions of the Covenant to give a purposive meaning to the provisions of the Constitution and other applicable law so as to ensure to the People that they have an effective remedy in respect of any alleged infringement of rights recognised by the Constitution” (p.6).

While it is no doubt true that in some occasions the Supreme Court has indeed made reference to the ICCPR in especially fundamental rights decisions, we would

reiterate here our general observation above about the nature of the body of fundamental rights case law over the past few decades. Because the Supreme Court sits as a court of first instance, and because the attitudes of particular benches vary widely, it is often difficult to determine broad precedent-based trends in the Supreme Court's fundamental rights jurisprudence as in apex courts that function as constitutional arbiters in such matters elsewhere. Consequently, the fact that some judges have utilised the ICCPR in their reasoning does not necessarily mean that a future court would always follow suit. In any event, we would strenuously argue that while judicial incorporation of international human rights norms is entirely to be welcomed, it is certainly not the same thing as constitutional incorporation and the spirit of solemn commitment envisaged by Article 2 (2) of the ICCPR.

The Court remarked that 'Counsel for the Interventient Respondents did not detract from the general premise' (at p.6) as discussed above. Presumably, this was for the reason that they approached the questions in the reference from an angle very different to that of the Court, and the Court's adoption of the Government's 'general premise' was not necessarily a matter that required contestation in view of the more salient submissions they wished to focus on, within the course of the hearing of a few hours.

The Court then went on to 'briefly deal' (at p.6) with the submissions of the intervenient petitioners, the major portion of which was devoted to dealing with the submissions on 'seven specific matters' by the third intervenient petitioner, Wijenayake, represented by Dr Jayampathy Wickramaratne, PC. The Court dealt with the submissions of the first and second intervenient petitioners, CPA and Edrisinha represented by Mr. M.A. Sumanthiran within this framework, and his submissions on the right to self-determination separately at the end. It should be noted here that there is a mismatch between the 'seven specific matters' set out in the written submissions of Dr Wickramaratne, and the seven submissions as discussed by the Court. The mismatch occurs when the Court deals separately (as submissions 4 and 5 respectively) with the submission on pre-enactment review being inconsistent with ICCPR Article 2 (3) on the one hand, and on the other, an argument that committee-stage amendments to parliamentary bills are not susceptible to judicial review. In fact, in Dr Wickramaratne's written submissions, the argument about judicial review of committee-stage amendments is part of the broader submission that pre-enactment review in law and practice does not afford an 'effective remedy' within the contemplation of ICCPR Article 2 (3). The resulting position is that the Court in its opinion does not deal with Dr Wickramaratne's actual seventh submission relating to the death penalty on minors at all.

In this part of the discussion we shall only comment on the Court's responses to the submissions of counsel for the intervenient petitioners, and will further comment on the specific provisions of the ICCPR, the Sri Lankan Constitution and law, as part of our discussion on the Annexure to the ICCPR Advisory Opinion in Part D of this paper, below.

Prohibition of Retroactive Criminal Liability

Article 15 (1) read with Article 13 (5) and (6) of the Constitution are inconsistent with ICCPR Article 15 (1), which is a guarantee that is non-derogable in terms of ICCPR Article 4 (2). It should also be noted that there is a mistake in the text of the opinion with respect to ICCPR Article 4 (2), which sets out the non-derogable provisions, when the text refers to 'Article 42', which concerns the Inter-State reporting procedure. This is clearly inadvertent and contrary to context, and we should proceed on the basis that the Supreme Court meant ICCPR Article 4 (2).

The essence of the submission was that the prohibition against retroactive criminal liability, which is established in absolute and non-derogable terms by the ICCPR, is subject to restriction by law (which includes emergency regulations made by the executive) under the Sri Lankan Constitution in the interests of national security whereas the ICCPR admits no restriction on this guarantee. This made the Sri Lankan constitutional provision inconsistent with the ICCPR.

The Court's response was as follows: "When questioned by Court Dr. Wickremaratne was unable to point to any specific instance where a law has been enacted by the Parliament of Sri Lanka or any Regulation has been promulgated in the interests of national security to created [*sic*] an ex post facto offence. In the circumstances we are of the opinion that the submission of Dr. Wickremaratne is based on a hypothetical premise" (at p.7).

The Court regarded it as sufficient for the purposes of consistency with the ICCPR standard that "If and when a law is sought to be made to create an ex post facto offence, the constitutionality of that law would be considered by this Court on the basis of the firm guarantee as contained in the Article 13 (6) [of the Constitution]...In the case of *Weerawansa v. Attorney General* (2000) 1 SLR 387, this Court has specifically held that Sri Lanka is a party to the Covenant and a person deprived of liberty has a right of access to the judiciary" (at p.7).

Thus the Court's position was that if any future law or emergency regulation made under Article 15 (1) of the Constitution sought to introduce retroactive criminal liability, the Supreme Court would interpret the guarantee against such liability to be found in Article 13 (6) of the Constitution to prevail over such law. This finding is problematic for three reasons. Firstly, the Court does not seem to be aware that constitutional interpretation and adjudication are very often undertaken on the basis of hypotheses and the prospective consequences of measures. Indeed, the very framework for pre-enactment judicial review of legislation in the Sri Lankan Constitution itself envisages that constitutional argumentation necessarily anticipates future events. In this context, the Court's dismissive allusion to 'hypotheses' is misplaced.

Secondly, given the structure and text of the fundamental rights chapter, it would strain any notion of judicial construction for a future Supreme Court to come to a finding in the way the present Court asserts it will. Article 13 (6) sets out in the form of a fundamental right the prohibition against retroactive criminal liability (subject to certain provisos). Article 15 is the restrictions clause of the Sri Lankan

bill of rights, which enumerates the type of restriction which may be imposed upon fundamental rights identified therein. The essential purpose of Article 15 therefore is to establish the permissible grounds on which incursions into fundamental rights may be made, and moreover, it must be presumed on a plain reading of the provisions that the Constitution envisages the prohibition in Article 13 (6) to be removed in the interests of national security. While an activist Court may very well act in the manner described in the present Advisory Opinion, it is not the same thing as the cast iron guarantee to be found in the ICCPR which entertains no limitations or derogations from the prohibition even in a state of emergency.

The third concern arises directly out of the second, in that the approach of the Court relies too much on the goodwill of a future Court, and is inconsistent with the first principles of constitutional supremacy whereby fundamental rights guarantees are to be enshrined in the text of legal instruments and not on the predilections of officials even if they are judges. For these reasons, we do not agree with the opinion of the Court that Article 15 (1) of the Constitution is consistent with ICCPR Article 15 read with Article 4 (2).

Article 16 of the Constitution

The submission was that Article 16 (1) of the Constitution which allows the continuation in force of pre-existing law notwithstanding inconsistency with fundamental rights, ensured the continuing validity of certain personal laws. Mr M.A. Sumanthiran representing the first and second intervenient petitioners, CPA and Edrisinha, submitted that certain provisions of these laws discriminate against women. The Court observed that, “The matters on which submissions were made do not relate to any state action affecting rights of person [*sic*]. The instance of alleged discrimination is in personal Family law” (at p.8).

Noting that Article 27 of the ICCPR provided for the cultural, religious and linguistic rights in States with ethnic, religious or linguistic minorities, the Court observed that, “These are customary and special laws that are deeply seated in the social milieu of the country...In our view it could not be contended that the provisions of Article 16 (1) of the Constitution that only provides for the continuance in force of the already operative law could be considered to be inconsistent with the Covenant only on the ground that there are certain aspects of Personal Law which may discriminate women [*sic*]. The matter of Personal Law is one of great sensitivity. The Covenant should not be considered as an instrument which warrants the amendment of such Personal Laws. If at all there should be any amendment such request should emerge from the particular sector governed by the particular Personal Law” (at p.8).

This of course is an old, familiar and yet disingenuous argument about Article 16, that it is essential for protecting the integrity of Sri Lanka’s customary and personal laws (i.e., Kandyan law, *Thesawalamai* and Muslim law). But we would point out that if this was the need, then Article 16 could easily be reformulated more narrowly to capture only these laws within its scope rather than all existing law, even if inconsistent with the Constitution. Article 16 protects all law from

constitutional scrutiny, not merely the personal laws of the country. The Supreme Court offered no justification or response to the intervenients' submissions that such a sweeping protection of existing law that may be inconsistent with the bill of rights was unacceptable.

The Court in its consideration of ICCPR Article 27 also did not give adequate weight to the principle of non-discrimination which is established in Part II of the ICCPR and which applies to both rights and limitations provided in Part III. This ensures that Article 27 of the ICCPR does not operate so as to facilitate sexual or other form of discrimination on the basis of any ethnic, cultural, religious, or linguistic particularity. Moreover, the Court's assertion that 'The Covenant should not be considered as an instrument which warrants the amendment of such Personal Laws' is untenable in the face of the fact that by its accession, Sri Lanka is bound by the human rights standards established by the ICCPR.

Presidential Immunity

The submission was that the immunity from suit granted to the President of the Republic *qua* Head of State under Article 35 (1) was inconsistent with ICCPR Article 2 (3) which requires that an effective remedy is available to persons whose rights have been violated. While this immunity does not apply to acts of the President in a ministerial capacity under Article 44 (2), to impeachment proceedings under Article 129 (2), or to proceedings under Article 130 relating to a Presidential election petition, the Supreme Court has also held in *Karunathilaka v Dayananda Dissanayake* (No. 1) (1999) 1 SLR 157 that Article 35 is a shield only for the doer but not for the act. Where a person relies on an act done by the President in order to justify his own conduct, Article 35 does not shield that conduct.

However, Dr Wickramaratne argued, an order made by the President cannot be impugned when no such other person is involved. For example, an order made by the President under emergency regulations cannot be the subject of a fundamental rights application (*Satyapala v. Attorney General*, SC Application No.40/84, SCM 11th May 1984; *Mallikarachchi v. Shiva Pasupati* (1985) 1 SLR 74). The resulting position is that where an act or omission of the President results in the infringement of a person's right, such person cannot take proceedings against the President in view of Article 35.

However, ICCPR Article 2 (3) requires the State Party to ensure that there is an effective remedy for persons whose rights or freedoms under the ICCPR are violated. Dr Wickramaratne therefore 'submitted that Article 35 of the Constitution is inconsistent with ICCPR Article 2 (3) to the extent that the former shuts out judicial review of official acts of the President that are violative of a person's rights' (*vide* written submissions on behalf of the third intervenient petitioner).

The Court observed that in *Mallikarachchi v. Shiva Pasupati* (1985) the Supreme Court had stated that immunity for Heads of State was not unique to Sri Lanka,

and that immunity ceases when the incumbent leaves office. The Additional Solicitor General, the Court noted, furnished Court with several instances where the former President was impleaded in pending actions, whereas Dr Wickramaratne, the Court said, "...was unable to point to any instance where a person aggrieved of an infringement of any of his rights has been denied a remedy in view of the immunity granted to the Head of State by Article 35 (1) of the Constitution" (at p.9).

Presidential immunity was marginally restricted by the Nineteenth Amendment in 2015, whereby now fundamental rights applications can be maintained against the Attorney-General for official acts of the President, except the power to declare war and peace, that may threaten fundamental rights (new Article 35).

Judicial Review of Legislation

Dr Wickramaratne made lengthy submissions both written and oral on this issue. Article 80 (3) of the Constitution precludes any challenge to the constitutionality of legislation post-enactment, even if the impugned law is manifestly unconstitutional or inconsistent with fundamental rights, which results in the denial of an effective remedy to those affected as required by ICCPR Article 2 (3). Although Article 121 (1) of the Constitution read with Article 123 enables pre-enactment review, for various reasons including the short time period of one week within which challenges are allowed by the Constitution, and the lack of effective access to information relating to the legislative process which enables citizens' exercise of the right to challenge a proposed law in practice, including the fact that committee-stage amendments to parliamentary bills are not susceptible to judicial scrutiny at all, the "Submission of Dr. Wickremaratne was that this provision is not an effective window to review constitutionality of legislation" (at p.10).

The Court's response was as follows: "It is to be noted that there is no provision in the Covenant which mandates judicial review of legislation. Article 2 (3) of the Covenant...provides that the State should ensure that any person whose rights or freedom are violated have an effective remedy through a competent judicial authority. The submission is hypothetical since it is based on the premise that there will be a Law enacted by Parliament in derogation of the rights recognised in the Covenant and it would not be challenged by any citizen before this Court prior to enactment" (at p.10). Apart from the Court's peculiar aversion to 'hypotheses' already mentioned, this response refuses to acknowledge that pre-enactment review is in practice severely hindered by closed and secretive law and policy-making processes in Sri Lanka

The Court's dismissal of the 'hypothesis' that Parliament will enact law that could be unconstitutional and inconsistent with ICCPR rights (and without pre-enactment review being engaged) is plainly untenable, given that there is in fact legislation and even constitutional amendments that would, at the least, require justification as to consistency with the Constitution both substantively and procedurally. Dr Wickramaratne's example was the Land Grants (Special

Provisions) Act. Another example is the provisions of the Seventeenth Amendment to the Constitution which altered the powers of the National Police Commission, established at law previously by the Thirteenth Amendment as an intrinsic element of a scheme of devolution, that should have only been enacted through a special amendment procedure involving consultation and consent of Provincial Councils. That procedure was not followed, and there was no pre-enactment review which settled the balance between the fundamental constitutional principles of devolution and ensuring the independence of public institutions.

In the best traditions of the Bar, Dr Wickramaratne's written submissions placed before the Court the main argument made in some quarters against allowing post-enactment review, the generation of uncertainty, but suggested the manner in which this could be mitigated through the examples of constitutional provisions and judicial doctrines developed elsewhere. Mr. Edrisinha's submissions highlighted the conceptual anomaly of the legislature, a creature of the Constitution, being able to enact laws inconsistent with the Supreme Law, the Constitution. His submissions also demonstrated the inadequacy of pre-enactment review especially in the context of the lack of transparency in the law making process in the country and a political culture dominated by considerations of executive convenience, the politicisation of the Attorney General's Department, and a weak tradition of legislative scrutiny of Bills. The Court did not engage with these submissions at all.

Judicial Review of Committee-stage Amendments to Bills

As noted earlier, the submission in this respect was that committee-stage amendments to parliamentary bills are not subject to judicial review, and the only requirement under Article 77 (2) of the Constitution is that the Attorney General, in practice an officer of the Attorney General's Department present in Parliament, certifies constitutionality to the Speaker. The Court's view was that, "...amendments are generally made at Committee Stage in Parliament with regard to matters of incidental or procedural nature" (at p.10) and then merely went on to reiterate the provisions of Article 77 (2).

As mentioned before, this particular submission was made as a part of the broader argument about the need for comprehensive judicial review for compliance with ICCPR Article 2 (3), and not as a separate submission as reflected in the Advisory Opinion. For reasons best known to itself the Court chose to regard it as a separate submission, and then merely rejected it by simply reiterating the constitutional provision upon which the submission was made. The court chose not to deal with the intervenient petitioners' main submission on the issue of the constitutional prohibition of judicial review of legislation: that it failed to effectively protect the supremacy of the constitution, ensure that all legislation was compatible with the bill of rights, and therefore undermined the full and effective implementation of rights recognised in the ICCPR.

Prohibition on Imprisonment for Failure to fulfil Contractual Obligations

Both Dr Wickramaratne and Mr Sumanthiran submitted that certain provisions of the Agrarian Services Act No. 58 of 1979 (as amended), the Co-operative Society Law No. 05 of 1972, and the Civil Procedure Code provide for imprisonment for failing to fulfil a contractual obligation, in contravention of ICCPR Article 11 which prohibits the imposition of the punishment of a term of imprisonment solely for failure to fulfil a contractual obligation.

In respect of the Agrarian Services Act and the Co-operative Society Law, the Court agreed with the highly technical distinction between statutory and common law obligations made by the Additional Solicitor General, observing that under these two statutes, “...penal sanction would not attach to pure contractual obligations but to statutory obligations” (at p.11). However, the intervenient petitioners’ submission was to the effect that a non-derogable guarantee similar to ICCPR Article 11 was nowhere to be found in the Sri Lankan Constitution and law, and in these circumstances, Parliament was free to enact legislation in a manner inconsistent with ICCPR Article 11 in future, i.e., to punish by way of imprisonment the failure to perform a contract. Once again, therefore, the Court did not directly address the submission.

Moreover, in the opinion of the Court, “Arrest and imprisonment is provided for in Section 298 of the Civil Procedure Code only in respect of a judgment debt, where there are circumstances that establish an intent to defraud and so on. Hence the instances cited by Counsel do not amount to an inconsistency with Article 11 of the Covenant” (at p.11). Our specific observations on this issue are made in the commentary on the Annexure to the ICCPR Advisory Opinion, below.

Procedure for the Removal of Superior Court Judges

The submission was that Article 107 (3) of the Constitution requires Parliament to provide, *inter alia*, for the investigation and proof of the alleged misbehaviour or incapacity and the right of the judge concerned to appear and to be heard, by law or by Standing Orders, and further that under Standing Order 78A of Parliament, the investigation of the alleged misbehaviour or incapacity would be conducted by a Select Committee of Parliament. In this context, it was argued that a framework that allows the investigation of allegations against judges by Members of Parliament affects the independence of the judiciary and is thus inconsistent with ICCPR Article 14 (1), which entitles a person to a fair and public hearing by a competent, independent and impartial tribunal established by law. This was a pungent argument in retrospect, given how this procedure was blatantly abused in the unconstitutional impeachment of Shirani Bandaranayake, CJ in 2013.

Dr Wickramaratne further submitted that, “The Treaty Body of the ICCPR, namely, the Human Rights Committee in its concluding observations on Sri Lanka made on

01.12.2003 (CCPR/CO/79/LKA) expressed concern that the procedure for the removal of Judges of the Supreme Court and the Court of Appeal set out in Article 107 of the Constitution, read with Standing Orders of Parliament, is incompatible with Article 14 of the ICCPR, in that it allows Parliament to exercise considerable control over the procedure for removal of Judges. The Committee recommended that the independence of the Judiciary be strengthened by providing for Judicial, rather than Parliamentary, supervision and discipline of judicial conduct. A copy of the said observations is annexed (Annex II). Paragraph 16 is the relevant paragraph.” (*vide* written submissions on behalf of the third intervenient petitioner).

While the Court found that this submission had ‘merit’ and that “...the process of impeachment of Superior Court Judges can be held like a sword of democles [*sic*] over incumbent Judges who would be placed in peril of an inquiry to be held within Parliament by a Panel consisting of Members of Parliament”, it felt nonetheless that “...this by itself does not amount to an inconsistency with Article 14 of the Covenant which mandates equality before the courts of law and fair and public hearing by [a] competent, independent and impartial tribunal” (at p.11).

We note that both Article 107 and Standing Order 78A, in addition to the concluding observations of the Human Rights Committee reproduced above, have long been the focus of critical attention because together they fall far short of international standards and best practice with regard to ensuring the independence of the judiciary. It is also unsurprising given the present Court’s hostility to the recognition of the competence of the Human Rights Committee in the *Singarasa Case*, to note that the Supreme Court made no reference at all to the views of the ICCPR treaty body in coming to its conclusion on this specific submission. Nonetheless, it is noteworthy that the views of the Human Rights Committee adduced by the Government in support of the claim that no legislative enactment was necessary in respect of the right to self-determination recognised by ICCPR Article 1, were uncritically adopted by the Court in its Annexure to the ICCPR Advisory Opinion (see below).

Prohibition on the Death Penalty for Minors

As mentioned at the outset, Dr Wickramaratne’s seventh specific submission, for whatever reason, escaped the attention of the Court and consequently finds no consideration in the Advisory Opinion. For the sake of completeness, we reproduce the relevant submission here.

“VII. Article 6(5) of the ICCPR – Death penalty not to be imposed for crimes committed by persons below 18 years of age – Section 281 of the Code of Criminal Procedure

1. Section 281 of the Code of Criminal Procedure Act No. 15 of 1979 as amended by Act No. 52 of 1980 states as follows:

“Where any person convicted of an offence punishable with death, appears to the court to be under the age of eighteen years, the court shall pronounce on that person in lieu of the sentence of death the sentence provided by section 53 of the Penal Code.”

2. Thus, it is the age of the offender at the time of the pronouncement of sentence and not the age at the time of the commission of the offence that is material.
3. The provision is also discriminatory and arbitrary. Where a person commits an offence punishable with death at a time when the person is less than 18 years of age but is convicted before the person attains the age of 18 years, death penalty cannot be imposed. But, if the trial had been delayed for reasons beyond the person’s control and the person is convicted at a time when he/she is over 18 years of age, death penalty can be imposed.
4. Article 6(5) of the ICCPR is in the following terms:

“Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.”

There are no permissible restrictions and the above provision is non-derogable.

5. In the matter of *Johnson v Jamaica*, Application No. 592/1994, the Human Rights Committee held that the imposition of death sentence on a person who was under 18 years of age at the time of the commission of the offence but over 18 year at the time of the imposition of death sentence, was a violation of Article 6(5) of the ICCPR. Since the imposition of death sentence was void *ab initio*, it was further held that his detention on death row constituted a violation of Article 7 of the ICCPR (Freedom from torture or cruel, inhuman or degrading treatment or punishment). Pages 144 and 145 of M. Novak’s *U.N. Covenant on Civil and Political Rights, CCPR Commentary* which refers to the case are annexed (Annex III).
6. It is respectfully submitted that the Sri Lankan law on the matter is inconsistent with Article 6(5) of the ICCPR.”

Right to Self-Determination

The submission of Mr Sumanthiran in this regard was that there is no specific constitutional or statutory recognition in Sri Lanka to give effect to the right to self-determination recognised by Article 1 of the ICCPR.

The Court dealt with this in the following manner: “The Additional Solicitor general quite correctly submitted that the right to self determination does not require enforcement through legislative means, as established by the Human Rights Committee. This position is fortified by the Declaration of Principles of

International Law contained in United Nations General Assembly Resolution 2625 (XV). Referring to the phrase 'All people' in Article 1 of the Covenant Mr. Sumanthiran submitted that there should be statutory recognition of what he described as 'internal self determination'...We have to note that in terms of Article 3 of the Constitution 'in the Republic of Sri Lanka sovereignty is in the People and is inalienable'. This sovereignty is reposed in the People as a whole and it cannot be contended that any group or part of the totality of People should have a separate right of self determination" (at p.12).

It is disappointing that this complex question was disposed of with such brevity by the Court (relying on an unspecified opinion of the Human Rights Committee), given that the submission availed it of the opportunity to make a far-reaching pronouncement. Moreover, despite the wealth of scholarship and comparative constitutional experiences to draw from, the Court ostensibly regards the concepts of sovereignty and self-determination as one and the same thing. Therefore, an opportunity to engage in a comprehensive judicial discussion that could have contributed to the ongoing debate on these fundamental questions within Sri Lanka was, we strongly believe, dissipated. The best example of what the Court could have done is the celebrated Advisory Opinion of the Supreme Court of Canada on the question of the secession of Quebec, on a reference by the Governor General.

D. SPECIFIC COMMENTS ON CONSTITUTIONAL AND LEGAL PROVISIONS ADDUCED IN SUPPORT OF COMPLIANCE WITH THE ICCPR

In this part, we offer a commentary on the relationship between the Sri Lankan constitutional and statutory provisions which were submitted by Government, and endorsed by the Supreme Court, as being in conformity and effective of discrete ICCPR provisions. These comments, which are confined to the issues which in our opinion require comment, should be construed and understood in the light of the broader general observations and commentary on the Supreme Court's ICCPR Advisory Opinion set out above. We also make reference to those ICCPR provisions which are either not dealt with or dealt with inadequately by the Sri Lankan Constitution and law. For convenience of reference, we reproduce a breakdown of the provisions of the Sri Lankan Constitution and law mentioned in the Annexure to the ICCPR Advisory Opinion before specific comments on each provision of the ICCPR (The Annexure itself is reproduced as Appendix II in A. Welikala (Ed.) (2008) *GSP+ and Sri Lanka: Economic, Labour, and Human Rights Issues* (Colombo: Centre for Policy Alternatives and Friedrich Ebert Stiftung).

ICCPR Article 1

| ICCPR | Annexure to the ICCPR Advisory Opinion |
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| Article 1 | Unspecified view of the Human Rights Committee that Article 1 does not require specific domestic legislative incorporation |
| | UNGA Resolution 2625 |
| | Constitution of Sri Lanka, 1978: Articles 3; 4 |

Commentary: We are unable to offer a concrete response with regard to the assertion in the Annexure that 'As established by the Human Rights Committee under the ICCPR, the right to self determination does not require enforcement through legislative means' due to the fact that there is no specific reference(s) for this claim.

The Annexure also claims that, 'However Sri Lanka's consistent position has been that the concept applies only in a decolonization context and cannot be applied or be interpreted in a manner prejudicial to the sovereignty and territorial integrity of an Independent State. This position is fortified by the Declaration of Principles of International Law contained in UNGA Resolution 2625 (XXV)'.

The position that the right to self-determination is exhausted once former colonies have achieved independence, and drawing upon a Cold War-era UNGA resolution (better known as the 'Friendly Relations Resolution') to buttress this position is, in our view, an unduly restrictive and regressive policy. This is especially so given

the fact that Sri Lanka has faced fundamental constitutional problems leading to armed conflict on ethnicity-based claims to self-determination, which would require a more open attitude to the developments in international law, policy, and practice, as well as the massive scholarly literature and debates in the post-Cold War world order in relation to the concept of self-determination, where the sanctity of the principles contained in the Friendly Relations Declaration encounters increasing scepticism in the light of more recent international political developments.

It is further claimed that Articles 3 and 4 of the Constitution vest sovereignty in the people, which while textually unassailable does not answer the question, in the context of violent conflict, as to how the collective right to self-determination has been successfully implemented by Sri Lanka. We would also note that while the concepts of sovereignty and self-determination are closely related, they are not the same.

ICCPR Articles 2, 3

| ICCPR | Annexure to the ICCPR Advisory Opinion |
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| Articles 2, 3 | Constitution of Sri Lanka, 1978: Articles 12 (1), (2), (3); 27; 126 |
| | Parliamentary Commissioner for Administration Act, No.17 of 1981 as amended by Act No. 26 of 1994: Section 10 |
| | Human Rights Commission of Sri Lanka Act, No. 22 of 1996: Sections 2, 10, 11, 14, 26 |
| | Grant of Citizenship to Persons of Indian Origin Act, No. 35 of 2003: Section 2 |

Commentary: As discussed in detail in Part B of this paper, ICCPR Articles 2 and 3 are pivotal provisions of the deeper legal foundation of the entire treaty regime comprising Part II of the ICCPR. They include the positive obligations undertaken by State Parties to the ICCPR, where not already provided for by existing legislative or other measures, to undertake the necessary steps, in accordance with the State's constitutional processes, to give effect to the ICCPR. For reasons already discussed, we are not of the opinion that the law of Sri Lanka is in accordance or conformity with these provisions.

The provisions of the Constitution of Sri Lanka cited by the Annexure to the ICCPR Advisory Opinion relate to the right to equality, to the Supreme Court's fundamental rights jurisdiction, and to the Directive Principles of State Policy. We have already set out the weaknesses of these constitutional provisions, especially in comparison to the scope and objectives of the framework of obligations set out in Part II of the ICCPR.

There is then reference to the functions of the Ombudsman. To the extent this has relevance for ICCPR Article 2 (3), it should be noted that there is no perceptible

effect the office of the Ombudsman has had on good government and administration in Sri Lanka, despite efforts in 1994 to strengthen the legislative framework. We would in particular point to section 11 of the cited Act (as amended), which concerns matters not subject to investigations by the Ombudsman. These include *inter alia* the exercise, performance or discharge of any power, duty or function under the Public Security Ordinance (i.e., emergency powers), and functions of legal advisors to the State and its instrumentalities. The effectiveness of this office has been hampered by case overload and inefficiency, and in 2008 following the non-implementation of the Seventeenth Amendment, appointments to this office were also potentially unconstitutional.

In 2008, the latter concern with regard to appointments applied with even greater force to the Human Rights Commission of Sri Lanka. Until the passage of the Nineteenth Amendment in 2015 and the reconstitution of this institution, it was undermined in the through the concomitant enervation of the Seventeenth Amendment and was almost entirely unable to perform its functions with the requisite independence, impartiality and despatch.

ICCPR Article 4

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| ICCPR | Annexure to ICCPR Advisory Opinion |
| Article 4 | Constitution of Sri Lanka, 1978: Article 15 (7) |

Commentary: We have already dealt extensively with the ‘omnibus’ nature of Article 15 (7) of the Constitution and how it serves to further undermine even the weak regime governing restrictions on fundamental rights. Therefore, the reference to Article 15 (7) of the Constitution in the Annexure to the ICCPR Advisory Opinion cannot be regarded as an adequate response to the comprehensive regulatory framework for derogations during states of emergency set out in Article 4 of the ICCPR. For reasons already discussed above, the Sri Lankan constitutional and statutory framework for the restrictions of fundamental rights during states of emergency falls short of the substantive legal standards established by Article 4.

We also observe that compounding the inadequacy of the conceptual distinction between ‘limitations’ (to be understood as an attenuation, or a partial and temporary disability imposed on the exercise of a fundamental right) and ‘derogations’ (i.e., a temporary but complete suspension of some fundamental rights that may be allowed under states of emergency) in the constitutional text, has been the practice with regard to promulgation and execution of emergency regulations, and the exercise of emergency powers in Sri Lanka. Officials at all levels, more often than not, have not had the training or capacity to exercise emergency powers in a manner that respects fundamental rights and, certainly, to appreciate the difference between rights that are merely restricted as opposed to suspended. In a state of emergency and escalating violence as we have seen in the past, the adverse consequences for human rights protection are immediate and considerable.

There is also no practice in Sri Lanka of formal communication to the Secretary General upon the operationalisation of derogations under a state of emergency. This is a critical omission.

ICCPR Article 5

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| ICCPR | Annexure to the ICCPR Advisory Opinion |
| Article 5 | 'Imposes a Negative obligation' |

Commentary: It was to be presumed that the comment 'imposes a negative obligation' reflected the position of the then government that it was under no obligation to give legislative recognition to ICCPR Article 5, and with which we disagreed. There is no mention in any domestic instrument of the provisions especially in Article 5 (2) whereby if the legal and constitutional order of a State Party allows greater scope for fundamental rights than the ICCPR, or more stringent control over their restriction than the ICCPR, nothing in the ICCPR shall be construed as a pretext for limiting such recognition or for broadening the scope of such restrictions. This was perhaps of limited relevance for Sri Lanka previously, but now that a new constitution is being contemplated, attention should be given to how we can go beyond the ICCPR in providing for civil and political rights.

ICCPR Article 6

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| ICCPR | Annexure to the ICCPR Advisory Opinion |
| Article 6 (1) | Constitution of Sri Lanka, 1978: Articles 11; 13 (4) |
| | <i>Sriani Silva v. Iddamalgoda</i> (2003) 2 SLR 63, 75-77 |
| | SC (FR) 38/2007 (sound pollution) SC (FR) 89/2007 (air pollution) SC (FR) 81/2006 (salinity of water) |
| | Penal Code, 1889, as amended: Chapter XIV |
| Article 6 (2) | Penal Code, 1889, as amended: Murder |
| Article 6 (4) | Constitution of Sri Lanka, 1978: Article 34 (1) |
| | Code of Criminal Procedure Act, No. 15 of 1979: Section 312 |
| Article 6 (5) | Penal Code, 1889, as amended: Sections 53, 54 |

Commentary: Article 6 of the ICCPR provides for the pivotal right to life in elaborate terms. It is specified as an absolutely non-derogable right in Article 4 (2) of the ICCPR. The right to life is not recognised by the Constitution of Sri Lanka.

The death penalty remains on the statute book, and Sri Lanka is not a signatory to the Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty.

The Annexure rightly draws attention to the important case of *Sriani Silva v. Iddamalgoda* (2003), in which the Supreme Court held that an implied right to life, unless the deprivation of life is consequent to a court order, may be inferred from Articles 13 (4) and 11 of the Constitution. As acknowledged above, such judicial development of the text of the Constitution in respect of fundamental rights must be welcomed, especially where they promote human rights. However, the point nevertheless remains that international best practice requires that a positive right to life be recognised expressly in the Constitution, in like manner as ICCPR Article 6 (1). In its absence, there is nothing to prevent the decision in *Sriani Silva* being overturned by a future Court.

We find the various references to pending cases and the public health provisions of the Penal Code in support of the proposition that the 'quality of life has been improved by the Supreme Court' to be neither directly relevant nor particularly persuasive. The 'quality of life' on such matters as sound and air pollution or salinity of water is not the issue addressed by the right established by ICCPR Article 6 (1); it is the non-derogable (under ICCPR Article 4 (2)) recognition of the basic condition of human dignity that every human being has the inherent right to life. Furthermore, this right must be protected by law, and in international best practice, this means a constitutionally expressed and protected, non-derogable right.

We note that there is no reference in the Annexure to ICCPR Article 6 (3), which provides that when deprivation of life constitutes the crime of genocide, it is understood that nothing in ICCPR Article 6 authorises any State Party to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide (to which Sri Lanka acceded on 12th October 1950). Similarly, there is no reference to the encouragement to the abolition of the death penalty in ICCPR Article 6 (6).

Article 34 (1) of the Constitution and Section 312 of the Code of Criminal Procedure are adduced in fulfilment of ICCPR Article 6 (4), which establishes that a person sentenced to death shall have the right to seek a pardon or commutation of the sentence. Article 34 (1) of the Constitution provides for the presidential discretion of a grant of pardon for any offender convicted of any offence or for commutation of sentence. Section 312 of the Code of Criminal Procedure provides that the President, may, without the consent of the person sentenced, commute any sentence of death, rigorous imprisonment or simple imprisonment. These provisions of the Sri Lankan Constitution and law, respectively, therefore concern an administrative discretion conferred on the President of the Republic, and is not addressed from the perspective of the person sentenced to death. *Per contra*, the material difference in ICCPR Article 6 (4) is that it establishes a non-derogable right for such a person to seek a pardon or commutation of such sentence.

ICCPR Article 7

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| ICCPR | Annexure to the ICCPR Advisory Opinion |
| Article 7 | Constitution of Sri Lanka, 1978: Article 11 |
| | Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act, No. 22 of 1994: Sections 2, 3 |

Commentary: Sri Lanka has both acceded and enacted into domestic law the UN Convention on Torture as mentioned in the Annexure to the ICCPR Advisory Opinion. In addition, Article 11 of the Constitution of Sri Lanka guarantees the freedom from torture, or cruel, inhuman or degrading punishment treatment or punishment as a justiciable fundamental right, which furthermore is not subject to any restriction on any basis under Article 15. This is consonant with this right being established as a non-derogable right under Article 4 (2) ICCPR.

However, a significant omission in the Sri Lankan Constitution and law is the particular prohibition in Article 7 of the ICCPR that no one shall be subjected without his free consent to medical or scientific experimentation. Moreover, the divergence between the letter of the law and the practice is significant, with credible reports of torture and physical abuse frequently documented by human rights groups (see *inter alia* detailed [reports](#) of the Asian Human Rights Commissions) and UN bodies, including the UN Special Rapporteur on Torture (see [Report](#) of the Mission to Sri Lanka). As Kishali Pinto Jayawardene has pointed out, “It is now very clear that the Convention Against Torture and other Inhuman and Degrading Punishment Act No. 22 of 1994 (the CAT Act) has signally failed in its intent to bring about an improved deterrent regime in regard to practices of torture in Sri Lanka...As repeatedly pointed out in this column previously, Sri Lanka's High Courts have handed down only three convictions during the fourteen years of the CAT Act's existence.” (see [‘The Abject Failure of the CAT Act’](#), *The Sunday Times*, 19th October 2008)

ICCPR Article 8

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| ICCPR | Annexure to the ICCPR Advisory Opinion |
| Article 8 | Abolition of Slavery Ordinance, No. 20 of 1844: Section 2 |

Commentary: While the aforementioned Ordinance has abolished the specific practice of slavery in Sri Lanka, Article 8 (2) of the ICCPR also mentions the prohibition of servitude, and Article 8 (3) establishes detailed requirements with regard to forced or compulsory labour in countries such as Sri Lanka, where imprisonment with hard labour is a criminal punishment. The prohibitions on slavery and servitude in Articles 8 (1) and (2) are non-derogable rights under

Article 4 (2) of the ICCPR. Apart from the reference to servitude, therefore, it can be concluded that in principle, Sri Lankan law meets the ICCPR requirements.

ICCPR Article 9

| ICCPR | Annexure to the ICCPR Advisory Opinion |
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| Article 9 | Constitution of Sri Lanka, 1978: Articles 13 (1), (2), (3), (4) |
| | Code of Criminal Procedure Act, No. 15 of 1979, as amended: Sections 17, 23, 32-33, 37, 53, 54, Chapter XXXIV |
| | Civil Procedure Code: Section 298 |
| | Bail Act, No. 30 of 1997: Sections 2, 4-5, 21 |

Commentary: The constitutional and procedural law provisions cited in the Annexure to the ICCPR Advisory Opinion *ex facie* correspond with Article 9 of the ICCPR (although we cannot see the relevance of Section 298 of the Civil Procedure Code in this regard). We would emphasise the general point made above, however, that while the ICCPR does not contemplate specific limitations on the provisions of its Article 9, Article 15 of the Sri Lankan Constitution, in particular Article 15 (1) and (7) permits restrictions to be placed on critical rights to security and liberty of the person (Article 13 (1), (2), (5) and (6) of the Constitution) in favour of a wide array of competing interests including national security (see our general observations on the restrictions clause (Article 15 of the Constitution) in Part B, above), without the requisite substantive controls contemplated by the ICCPR.

In the case of restrictions imposed in the interests of national security, emergency regulations (i.e., executive law-making with what is in practice minimal parliamentary supervision) would have the quality of law overriding the procedural protections established by the Code of Criminal Procedure as well as any other law. This is an illustration of how ICCPR rights that seem superficially to be recognised by the Sri Lankan Constitution and law, prove on closer examination to contain a lesser standard of human rights protection than what is contemplated by the ICCPR.

ICCPR Article 10

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| ICCPR | Annexure to the ICCPR Advisory Opinion |
| Article 10 | Constitution of Sri Lanka, 1978: Article 11 |
| | Human Rights Commission of Sri Lanka Act, No. 22 of 1996: Section 11(d) |
| Article 10 (2) | Code of Criminal Procedure Act, No 15 of 1979 as amended: Sections 24-30 |
| | Subsidiary Legislation of General Application, Vol.1 (Cap.54): General Rules Relating to Prisons: pp.766-860 Rules 177-181: Rules as to separation and classification of prisoners Rules 190-216: Rules relating to unconvicted prisoners and civil prisoners |

Commentary: We would reiterate the comments made above with regard to ICCPR Articles 7 and 9. The Annexure has cited Article 11 of the Constitution, which more properly corresponds with ICCPR Article 7, as compliance of ICCPR Article 10. The reason why the ICCPR has two discrete rights in its Articles 7 and 10 is that Article 7 is a general and non-derogable guarantee of the freedom from torture, whereas Article 10 relates more specifically to the humane treatment of persons deprived of their liberty.

Furthermore, we note that the reference in the Annexure to Section 11 (d) of the Human Rights Commission Act pertains to one of the powers of the Commission to monitor the welfare of persons detained either by a judicial order or otherwise, by regular inspection of their places of detention, and to make such recommendations as may be necessary for improving their conditions of detention. This is most definitely not the same thing as what is contemplated by Article 10 of the ICCPR, which establishes a positive right of persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person. Such a positive right is not expressly recognised in the Sri Lankan legal provisions cited in the Annexure to the ICCPR Advisory Opinion.

There seems to be no connection bar the most tenuous between the cited provisions of the Code of Criminal Procedure and ICCPR Article 10 (2), which provides for such matters as segregation of accused persons from convicted persons in recognition of their unconvicted status, the segregation of juvenile accused from adults, and bringing juveniles as speedily as possible to adjudication. Chapter IV, Part A, of the Code of Criminal Procedure, within which Sections 24 – 30 are located, provides the rules for arrest generally, and more specifically in the cited sections, provisions concerning search of a place entered by a person sought to be arrested; procedure where ingress is not available; general powers of search of a person or place; search of an arrested person; power to break open doors and windows for purposes of liberation; prohibition against unnecessary restraint; and the mode of searching women. In these circumstances, we find it absurd that

these legal provisions are advanced as complying with the requirements of ICCPR Article 10 (2).

Certain rules of secondary legislation relating to the treatment of prisoners are also cited in the Annexure. While these relate to the matters contemplated by ICCPR Article 10 (2), we would strongly argue as a legal proposition that subordinate legislation cannot be advanced as implementing rights guaranteed by the ICCPR. These are administrative rules that are susceptible to change and amendment at executive discretion, which are moreover, subject to practically non-existent legislative oversight in Sri Lanka.

Finally, there is an injunction in ICCPR Article 10 (3) that in States Parties to the ICCPR, the fundamental policy objective and essential aim of the penitentiary system should be the reformation and social rehabilitation of prisoners. Such a normative principle does not find expression in the Sri Lankan Constitution and relevant laws.

ICCPR Article 11

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| ICCPR | Annexure to the ICCPR Advisory Opinion |
| Article 11 | 'Imposes a negative obligation' |
| | Civil Procedure Code: Section 298 |

Commentary: We do not understand what is meant by the observation 'imposes a negative obligation' in the Annexure. To the extent it is contended that ICCPR Article 11 does not articulate a right, we would straightaway dispute the observation.

Section 298 of the Civil Procedure Code (implausibly cited by the Annexure to the ICCPR Advisory Opinion in relation to Article 9 ICCPR, see above) provides that, once a writ is issued for the execution of a decree for the payment of money, subject to certain conditions, a warrant for the arrest of a judgment-debtor may be issued by a competent court on the application of the judgment-creditor. But as we saw in the discussion on the ICCPR Advisory Opinion in Part B, above, the Supreme Court held with the Additional Solicitor General's submission that a distinction could be made between purely common law and statutory contractual obligations, and further, that Section 298 of the Civil Procedure Code was engaged only if, *inter alia*, intention to defraud was shown.

We would observe that ICCPR Article 11 does not make the Additional Solicitor General's distinction between 'purely common law' and 'statutory' contractual obligations, and also does not provide for an exception to the application of the right where intention to defraud is demonstrated. This seems therefore to be a domestic legal provision in contravention of Article 11 of the ICCPR, which is furthermore an absolutely non-derogable right under Article 4 (2) ICCPR.

ICCPR Article 12

| ICCPR | Annexure to the ICCPR Advisory Opinion |
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| Article 12 | Constitution of Sri Lanka, 1978: Articles 14 (1) (h), (i) |
| | <i>Rodrigo v. SI Kirulapone and Others</i> (2007) SC (FR) 297/07, SCM 3 rd December 2007 |
| | <i>Somawansa and 205 Others v. Attorney General</i> (2006) SC Spl. 1-205/2006 |

Commentary: The constitutional provisions cited by the Annexure to the ICCPR Advisory Opinion correspond with Article 12 of the ICCPR. However, Article 14 (1) (i) of the Constitution only guarantees the right to return to Sri Lanka, whereas Article 12 (2) of the ICCPR also includes the freedom of a person to leave any country, including his own.

The limitations permitted by Article 12 (3) of the ICCPR on the rights of freedom of movement and choice of residence, and freedom of entry and return, are somewhat similar to the restrictions contemplated by the Sri Lankan Constitution in Article 15 (6) and (7) in respect of these rights, albeit with the following key differences. Firstly, the freedom of movement and choice of residence may be restricted under Article 15 (6) of the Constitution in the interests of the national economy, for which there is no corresponding provision in the ICCPR.

Secondly, the limitations clause of the ICCPR (Article 12 (3)) in respect of these rights mentions the concept of necessity, and consistency with other rights recognised by the ICCPR, as substantive requirements for the imposition of restrictions, whereas the Constitution of Sri Lanka does not explicitly mention the term necessity, or any requirement of consistency with other rights. Elsewhere in this paper we have pointed out that the concept of necessity as a mechanism of substantive control over restrictions on fundamental rights is absent in the text of the Sri Lankan Constitution.

Thirdly, Article 15 (7) of the Constitution introduces the ‘just requirements of the general welfare of a democratic society’ as a separate and distinct ground of restriction. There is no corresponding ground of restriction in Article 12 or in any other provision of the ICCPR. Indeed, where the concept of ‘necessity in a democratic society’ is employed by the ICCPR (for e.g. in Article 21), it is intended to serve as a restraint or control on the imposition of restrictions on fundamental rights through substantive official justification, rather than as a separate ground of restriction *per se*. We would stress the importance of the last observation as illustrating a critical difference in the scope of corresponding rights as formulated in the ICCPR and under the Sri Lankan Constitution. In this instance, as in many others, the ICCPR formulation of a right is broader, and restrictions more difficult to justify and impose, than in the case of the Sri Lankan Constitution.

In view of the fact that *Rodrigo v. SI Kirulapone and Others* (2007) has been referred to in the Annexure, we would like to reiterate an observation we make

throughout this paper with regard to the gap between the law and the practice in Sri Lanka. In this case, the Supreme Court held that permanent security roadblocks in the city of Colombo violated the fundamental right to freedom of movement, and issued an order that they must be removed. While this order was obeyed at first instance by the concerned authorities, within a short time the permanent security roadblocks were back in place. Thus an administrative measure continued in operation despite the Supreme Court having declared it to be in violation of fundamental rights. This naturally raises questions regarding the extent to which ICCPR human rights standards, even where they are reflected in the Sri Lankan Constitution and enforced by the Supreme Court, are in practice fully implemented.

ICCPR Article 13

Explanatory Note: As stated above, in the copy of the Annexure to the ICCPR Advisory Opinion that we have been able to obtain, the Government's response to Article 13 of the ICCPR, which relates to rights of aliens lawfully within the territory of States Parties is missing. We would therefore not comment on this aspect.

ICCPR Article 14

Explanatory Note: In the copy of the Annexure to the ICCPR Advisory Opinion in our possession, the Government's response to ICCPR Articles 14 (1), 14 (2), 14 (3) (a), 14 (3) (b), 14 (3) (c), and 14 (3) (d) are missing. We do not propose therefore to extensively comment on these aspects, apart from draw attention to our discussion above with regard to the ICCPR Act in which we have dwelt on some of the issues included in ICCPR Article 14, and further to point to some of the provisions of the Sri Lankan Constitution that have a bearing on these rights.

| ICCPR | Annexure to the ICCPR Advisory Opinion |
|--------------------|--|
| Article 14 (3) (e) | ICCPR Act, No. 56 of 2007: Section 4 (1) (d) |
| Article 14 (3) (f) | ICCPR Act, No. 56 of 2007: Section 4 (1) (e) |
| Article 14 (3) (g) | ICCPR Act, No. 56 of 2007: Section 4 (1) (f) |
| Article 14 (4) | ICCPR Act, No. 56 of 2007: Section 5 (1), (2) |
| Article 14 (5) | Constitution of Sri Lanka, 1978: Articles 127, 139 |
| | Code of Criminal Procedure Act, No. 15 of 1979, as amended: Chapter XXVIII |
| | Judicature Act, No. 2 of 1979: Sections 14, 16 |
| Article 14 (6) | Delictual liability for malicious prosecution |

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| Article 14 (7) | Code of Criminal Procedure Act, No 15 of 1979: Chapter XXVII, Sections 314, 315 |
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Commentary: Article 14 (3) (a) is part of the set of minimum guarantees ensured in full equality by the ICCPR for accused persons in criminal trials, and relates to the right to be informed promptly and in detail in a *language understood by the accused* of the nature and cause of the charge. Article 24 (2) of the Constitution provides that any party or applicant or legal representative may initiate proceedings and submit to court pleadings and other documents, and participate in the proceedings in court, in *either of the National Languages*, which in Sri Lanka are Sinhala and Tamil (Article 19). This is narrower than the ICCPR formulation.

Nevertheless, section 4 (1) (e) of the ICCPR Act states that a person charged of a criminal offence shall be entitled to have the assistance of an interpreter where such person cannot understand or speak the language in which the trial is being conducted. This seems to be less unequivocal than the commitment to status given to the two National Languages in respect of judicial proceedings established by Article 24 (2) of the Constitution. However, it is possible to construe the right contained in section 4 (1) (e) of the ICCPR Act as additional and supplementary to Article 24 (2) of the Constitution.

Subject to the observations made before with regard to Section 4 of the ICCPR Act in its relation to Article 14 of the ICCPR (see Part B of this paper, above), the statutory provisions cited by the Annexure to the ICCPR Advisory Opinion, read together with Section 4 of the ICCPR Act, in respect of Article 14 (3) (d) of the ICCPR are unobjectionable. As mentioned in the Annexure, ICCPR Articles 14 (3) (e), (f), and (g) correspond almost wholly to Sections (4) (1) (d), (e) and (f) of the ICCPR Act.

Article 14 (4) of the ICCPR, which deals with considerations relating to criminal proceedings against juveniles, are within the contemplation of Section 5 (2) of the ICCPR Act.

Articles 127 and 139 of the Constitution and the relevant provisions of the Code of Criminal Procedure are consonant with the requirements of ICCPR Article 14 (5), (6) and (7), dealing with the general right of appeal according to procedure established by law against both conviction and sentence in criminal cases, delictual remedies and principles of double jeopardy.

We would like to add, despite our incomplete information in respect of some aspects of ICCPR Article 14, and subject to the caveats about the gap between law and practice, that this is an area in which the Sri Lankan Constitution and law conform very closely with what is contemplated by the ICCPR. The Constitution provides the broad substance of the rights and the enabling institutional framework, which are then statutorily elaborated in great detail. This is the model approach to implementing international standards.

ICCPR Article 15

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| ICCPR | Annexure to the ICCPR Advisory Opinion |
| Article 15 | Constitution of Sri Lanka, 1978: Article 13 (6) |

Commentary: Article 13 (6) of the Constitution as a matter of textual formulation of the positive right is in accordance with Article 15 of the ICCPR. Significantly, however, this right as articulated in the ICCPR contains no limitation clause, and is also mentioned as an absolutely non-derogable right under ICCPR Article 4 (2), whereas Article 13 (6) of the Constitution is subject to restriction in the interests of national security under Article 15 (1) of the Constitution. The non-derogable quality of this right, taken together with the absence of a right-specific limitation clause in the ICCPR, would seem to suggest that the Sri Lankan constitutional provisions contravene an absolute general obligation of Sri Lanka under Part II of the ICCPR.

ICCPR Article 16

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| ICCPR | Annexure to the ICCPR Advisory Opinion |
| Article 16 | ICCPR Act, No. 56 of 2007: Section 2 |

Commentary: Article 16 of the ICCPR concerns the right to recognition as a person before the law, and is a non-derogable right under ICCPR Article 4 (2). This right is now established in identical terms by Section 2 of the ICCPR Act No. 56 of 2007, although ideally and in accordance with international best practice, this should be included in the constitutional bill of rights rather than in a provision of ordinary law. Why it is important that the right should be constitutionally recognised is that ordinary law such as the ICCPR Act may be overridden by emergency regulations during a state of emergency. Consequently, Section 2 of the ICCPR Act may be restricted or suspended and thereby does not conform to the ICCPR requirement of non-derogability. Thus, the suggestion that Section 2 of the ICCPR complies with ICCPR Article 16 cannot be accepted.

ICCPR Article 17

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| ICCPR | Annexure to the ICCPR Advisory Opinion |
| Article 17 | Common law delictual right to sue for damages loss of reputation |
| | Post Office Ordinance, No. 11 of 1908: Sections 71, 75 |
| | Computer Crimes Act, No 24 of 2007: Sections 3, 8, 10 |

Commentary: Article 17 of the ICCPR deals with the right not to be subject to arbitrary or unlawful interference with a person's privacy, family, home or correspondence, and to the protection of the law against such interferences. Further to our comments on this matter before (see discussion on the ICCPR Act as part of our general observations in Part B, above), we note that the Annexure only refers to the private law rights and other statutory provisions aimed at specific offences. The right to privacy is not guaranteed as a fundamental right by the Sri Lankan Constitution, which we view this as a serious omission.

The ICCPR recognises (as in other domestic jurisdictions) the right to privacy as a human right, but neither forecloses private law remedies for breaches of privacy, nor does it assume that privacy as a human right should only apply where other private law and statutory regulation of privacy is unavailable. What is expected is that a right to privacy is established as a fundamental public law right over and above and in addition to any existing private law and statutory regulation. For these reasons we would strenuously argue that the existing provisions of law are insufficient for the purposes of compliance with ICCPR Article 17, and would need to find articulation in a new constitution.

ICCPR Article 18

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| ICCPR | Annexure to the ICCPR Advisory Opinion |
| Article 18 (1) | Constitution of Sri Lanka, 1978: Article 10, 14 (1) (e) |
| Article 18 (2) | <i>Christian Sahanaye Doratuwa Prayer Centre (Incorporation) Case</i> (2001) SC Det. 2/2001 <i>New Wine Harvest (Incorporation) Case</i> (2003) SC Det. 19/2003 |
| Article 18 (3) | Constitution of Sri Lanka, 1978: Article 15 (7) |
| Article 18 (4) | Age of Majority Ordinance, No. 7 of 1865 as amended Common Law Law of Persons |

Commentary: Article 18 (1) of the ICCPR relates to the freedom of thought, conscience and religion, for which the corresponding provisions in the Sri Lankan Constitution are Articles 10 and 14 (1) (e). It should also be noted that ICCPR Article 18 in its entirety is a non-derogable right under ICCPR Article 4 (2). Article 10 of the Constitution (the freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of a person's choice) is not subject to any restrictions, whereas Article 14 (1) (e) (the right to manifest religion or belief in worship, practice and teaching, etc.) may be restricted on any of the grounds listed in Article 15 (7) of the Constitution. This follows the distinction between the two aspects of this right (i.e., reflected in Article 10 and 14 (1) (e) of the Constitution), and distinction therefore of treatment in respect of restrictions, to be found in ICCPR Article 18 (3).

The formulation of this set of rights in the Sri Lankan Constitution is thus broadly consonant with the ICCPR, subject to the following differences. Firstly, the ICCPR imposes an obligation on States Parties to the ICCPR that the rights enumerated therein apply to all *persons* in the territory and subject to the State's jurisdiction and no distinction is made as between citizens and other persons. Such a distinction is made in the Sri Lankan bill of rights. Accordingly, while the right under Article 10 of the Constitution is available to all persons, those under Article 14 (1) (e) are only exercisable by Sri Lankan citizens. In view of the peremptory provisions of Article 2 (1) of the ICCPR, it is doubtful whether the Sri Lankan Constitution can continue this distinction in conformity with the ICCPR.

Secondly, Article 18 (2) of the ICCPR states that no one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. There is no correspondingly explicit provision in the Sri Lankan Constitution, although case law of the Supreme Court (for e.g. those cited in the Annexure to the ICCPR Advisory Opinion) indicates this is an implicit condition for the exercise of this right. It should also be noted that the Supreme Court in a series of decisions has given a narrow interpretation to 'religion' and religious practices in a way that impairs fuller recognition of religious freedom and activity in line with international standards.

Thirdly, Article 18 (4) states that the States Parties to the ICCPR undertake to respect the liberty of parents or legal guardians to ensure the religious and moral education of their children in conformity with their own convictions. Again there is no similar provision in the Sri Lankan Constitution. The vague allusions to broad branches of private law in the Annexure are inadequate, and in any case, does not answer the question of how such a fundamental right has been given recognition in Sri Lanka consonant with the ICCPR standard.

Fourthly, the secular character of the Sri Lankan State is, at least arguably, impaired by Article 9 of the Constitution (an entrenched provision requiring a special procedure for amendment in terms of Article 83), which provides that the Republic of Sri Lanka shall give to Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster the Buddha *Sasana*, while assuring to all religions the rights granted by Articles 10 and 14 (1) (e). The

Supreme Court has not always struck a balance that gives appropriate weight to Articles 10 and 14 (1) (e) in respect of minority religions (see *Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzinger of Sri Lanka (Incorporation) Case* (2003) SC Spl. Det. 19/2003). Obviously, there is no such privileging of a religion envisaged by the ICCPR.

Fifthly, the limitations clause relating to this right in the ICCPR, Article 18 (3), introduces the substantive control through the concept of necessity, which as discussed before, is not a requirement of the Sri Lankan restrictions framework under Article 15 of the Constitution. While the Sri Lankan Constitution follows the ICCPR in permitting restrictions only on the right to manifest religion, Article 15 (7) allows restrictions based *inter alia* on national security and the just requirements of the general welfare of a democratic society, which are not grounds for restriction on the non-derogable right in Article 18 (1) allowed by Article 18 (3) of the ICCPR.

ICCPR Article 19

| ICCPR | Annexure to the ICCPR Advisory Opinion |
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| Article 19 (1) | Constitution of Sri Lanka, 1978: Articles 10, 14 (1) (a), 14 (1) (b), 27 |
| | Penal Code 1889, as amended: Sections 290 – 292 |
| | Profane Publications Act, No. 41 of 1981 |
| Article 19 (2) | <i>Environmental Foundation Ltd. v. Urban Development Authority</i> (2005) SCM 23 rd November 2005 |
| Article 19 (3) | Constitution of Sri Lanka, 1978: Articles 15 (2), (7) |

Commentary: Article 19 of the ICCPR relates to the freedom of expression and opinion, and is formulated in wider terms than the corresponding right to speech in Article 14 (1) (a) of the Sri Lankan Constitution, to include the right to hold opinions without interference, to receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of a person's choice. Article 14 (1) (a) only establishes the freedom of speech and expression including publication, although the case law of the Supreme Court has taken a liberal approach to what constitutes 'expression'. Accordingly, the right to vote (*Karunathilaka v. Dayananda Dissanayake (No.1)* (1999) 1 SLR 157) and non-speech forms of political protest (*Amaratunga v. Sirimal* (1993) 1 SLR 264) have been held to be within the ambit of freedom of expression. The Court has also held on occasion that freedom of expression includes the freedom to receive and disseminate some forms of information (for e.g. in the case cited in the Annexure). This has now been addressed by the Nineteenth Amendment, whereby a specific right to information has been introduced as a fundamental right in the Sri Lankan Constitution (new Article 14A).

These pronouncements of the Supreme Court, however, do not ameliorate the absence or vitiate the need for a more robust textual formulation of the freedom of expression. It must also be stated (to reiterate our general observations on the interpretation of the bill of rights) that the Supreme Court has no uniformly liberal record in this respect. In many instances, its judgments have been regressive and out of step with international standards, including in a recent case in which it imposed its own views on culture and morality in a challenge involving the banning of a film meant for adult audiences. Similarly, the wholly arbitrary and retrograde use of the powers under the law of contempt of court has had a directly adverse impact on the freedom of expression and the media. Parliament has also used its power to punish for contempt oppressively against newspapers and journalists in the past, although not recently.

As observed in relation to other rights, the requirement of necessity in Article 19 (3) for the restriction of this right is absent in the Sri Lankan framework for restrictions. Likewise, the provision in Article 15 (7) of the Constitution of meeting the just requirements of the general welfare of a democratic society is not allowed as a distinct ground of restriction in the ICCPR, although other grounds of restriction enumerated in this provision are allowed by the ICCPR. Article 15 (1) imposes specific grounds of restriction on the freedom of expression such as the interests of racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation, or incitement to an offence. Excepting defamation and incitement to an offence, covered by ICCPR Articles 19 (3) (a) and 20 respectively, none of these other grounds for restriction are recognised by the ICCPR. This also underscores a tangential issue not directly the subject of this paper: the statutorily unregulated nature of the law relating to parliamentary privilege and contempt of court in Sri Lanka, which has occasioned the use of these powers in a manner inimical to the freedom of expression as envisaged by the ICCPR. The new constitution must establish the standards in this regard, and statute must be brought into line with this.

It is also to be noted that the rights under Article 14 (1) (a) are only available to Sri Lankan citizens and not all persons within the territory and subject to the jurisdiction of the Sri Lankan State as required by Article 2 (1) of the ICCPR.

The freedom of expression has been particularly vulnerable under circumstances of emergency, with prior censorship imposed during times of acute crisis through emergency regulations. The Supreme Court has generally displayed a tendency to favour the State in fundamental rights challenges in this respect (for e.g. *Sunila Abeysekera v. Ariya Rubesinghe and Others* (2000) 1 SLR 314). In this context, we would like to restate the concerns we have repeatedly raised in this paper about the use and misuse of emergency powers.

Finally, we find it perplexing as to why the Annexure, purporting to demonstrate the compliance of Sri Lankan law with the standard of protection for the freedom of expression guaranteed by ICCPR Article 19, should adduce Sections 290 – 292 of Penal Code and the Profane Publication Act in this respect. Of the cited provisions of the Penal Code, all of which concern offences relating to religion (and, we might add, of a rather archaic nature), only Sections 291A and 291B

concern speech acts, and which seek to restrict speech wounding the religious feelings of others, provided that malicious and deliberate intention is proved. It is only through an ignorance of contemporary international standards governing the freedom of expression, including the standard established by Article 19 of the ICCPR that these provisions can be regarded as corresponding to ICCPR Article 19 (3) (a) or (b). The Profane Publications Act is an unsatisfactory piece of legislation, not least for the fact that it is susceptible to abuse by not providing a definition of what constitutes ‘profanity’ or a ‘profane publication’ and in the way it allows police interference.

Article 14 (1) (b), which guarantees the freedom of peaceful assembly is also mentioned in the Annexure as promoting freedom of expression, presumably because it allows public protest. In our view, this matter is better dealt with in relation to ICCPR Article 21 (see below). For reasons already discussed at length in Part B above, we do not regard Article 27 (enumerating ‘Directive Principles of State Policy’) as in any way a satisfactory means of implementing ICCPR rights within Sri Lanka.

ICCPR Article 20

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| ICCPR | Annexure to the ICCPR Advisory Opinion |
| Article 20 (1) | ICCPR Act, No. 56 of 2007: Section 3 |
| Article 20 (2) | ICCPR Act, No. 56 of 2007: Section 3 |

Commentary: We would merely reiterate our observations made in relation to Section 3 of the ICCPR Act, No. 56 of 2007 in Part B of this paper, above.

ICCPR Article 21

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| ICCPR | Annexure to the ICCPR Advisory Opinion |
| Article 21 | Constitution of Sri Lanka, 1978: Article 14 (1) (b) |

Commentary: Article 21 of the ICCPR concerns the right of peaceful assembly, as does the corresponding Article 14 (1) (b) of the Constitution. The contemplated restrictions on this right are negatively formulated in Article 21 of the ICCPR, and require conformity with law and, specifically, the justification of necessity in a democratic society. These requirements do not feature in the framework for restrictions under the Sri Lankan Constitution. Grounds for restriction set out in Articles 15 (3) and (7) of the Sri Lankan Constitution, over and above those recognised by the ICCPR, are the interests of racial and religious harmony and the just requirements of the general welfare of a democratic society.

The rights under Article 14 (1) (b) are only available to Sri Lankan citizens and not all persons within the territory and subject to the jurisdiction of the Sri Lankan State as required by Article 2 (1) of the ICCPR.

ICCPR Article 22

| ICCPR | Annexure to the ICCPR Advisory Opinion |
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| Article 22 (1) | Constitution of Sri Lanka, 1978: Articles 14 (1) (c), (d) |
| Article 22 (2) | Article 15 (4) |

Commentary: Article 22 of the ICCPR relates to the freedom of association, including the right to form and join a trade union. The corresponding provisions of the Sri Lankan Constitution are Articles 14 (1) (c) and (d). The contemplated restrictions on this right are negatively formulated in Article 22 of the ICCPR, and require the prescription of law and, specifically, the justification of necessity in a democratic society. These requirements do not feature in the framework for restrictions under the Sri Lankan Constitution. Grounds for restriction set out in Articles 15 (4) and (7) of the Sri Lankan Constitution, over and above those recognised by the ICCPR, are the interests of racial and religious harmony or national economy, and the just requirements of the general welfare of a democratic society.

The rights under Article 14 (1) (c) and (d) are only available to Sri Lankan citizens and not all persons within the territory and subject to the jurisdiction of the Sri Lankan State as required by Article 2 (1) of the ICCPR.

ICCPR Article 23

| ICCPR | Annexure to the ICCPR Advisory Opinion |
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| Article 23 (1) | Constitution of Sri Lanka, 1978: Article 27 |
| | Prevention of Domestic Violence Act, No. 34 of 2005 |
| | Evidence Ordinance: Sections 120 (2), (3), (4) |
| Article 23 (2) and (3) | General Marriages Ordinance Penal Code |
| Article 12 (4) | Constitution of Sri Lanka, 1978: Article 12 (1) Maintenance Ordinance, as amended |

Commentary: For reasons already mentioned, we are of the opinion that Article 27 of the Constitution (Directive Principles of State Policy) cannot constitute implementation of obligations undertaken under the ICCPR. Moreover, the suggestion that Article 12 (1) of the Constitution fulfils the requirements of ICCPR

Article 23 (4) is misleading, because the ICCPR provision is a specific one aimed at ensuring the equality of rights and responsibilities between spouses as to marriage, whereas Article 12 (1) of the Constitution is the general equality clause of the Sri Lankan bill of rights, and which is furthermore, in terms of Article 17 (1) enforceable only against executive and administrative actions of the State.

While it may be the case that the various other laws cited in the Annexure seek to address the issues addressed by ICCPR Article 23, we would once again reiterate the point that constitutional recognition is the most appropriate method of giving effect to the rights contained in it.

ICCPR Article 24

| ICCPR | Annexure to the ICCPR Advisory Opinion |
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| Article 24 | Constitution of Sri Lanka, 1978: Articles 12 (4), 27 |
| | ICCPR Act, No. 56 of 2007: Section 5 |
| | Children and Young Persons Ordinance |
| | National Child Protection Authority Act, No. 50 of 1998 |

Commentary: For reasons already mentioned, we are of the opinion that Article 27 of the Constitution (Directive Principles of State Policy) cannot constitute implementation of obligations undertaken under the ICCPR. Moreover, Article 12 (4) of the Constitution is a power-conferring provision, in the nature of a proviso to the general equality clause set out in Article 12 (1), which allows for positive discrimination or affirmative action measures through law, subordinate legislation or executive action for the advancement of women, children or disabled persons. It is thus emphatically not a rights-conferring provision.

As rightly mentioned in the Annexure, the provisions of Article 24 (2) and (3) have now been given effect to by Section 5 of the ICCPR Act, No. 56 of 2007, which includes several other rights of the child. We note also that Sri Lanka has enacted into domestic law the UN Convention on the Rights of the Child. However, Article 24 (1) of the ICCPR is not reproduced in the ICCPR Act. This provision states that every child shall have, without discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State. Nonetheless, it is conceivable that Section 5 (2) of the ICCPR Act is intended to cover these concerns in what is a more modern formulation of the best interests and rights of the child.

We must, however, point out that although the scope of rights contemplated by ICCPR Article 24 may now be available statutorily, the more appropriate form in which they should be given recognition is through the Constitution itself.

ICCPR Article 25

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| ICCPR | Annexure to the ICCPR Advisory Opinion |
| Article 25 | Constitution of Sri Lanka, 1978: Article 4 (e), 88, 89 |
| | ICCPR Act No. 56 of 2007: Section 6 (a) |
| | Supreme Court Determination 12/2003 |

Commentary: Article 25 of the ICCPR is an important provision concerning rights of political participation, for which there is no comparable provision in the Sri Lankan Constitution and law. Article 4 of the Constitution, which sets out the manner of exercise and enjoyment of sovereignty, states in sub-section (e) that the franchise shall be exercised at the election of the President, Members of Parliament and at referenda by every citizen over the age of eighteen years who is a qualified elector. This has been extended by way of judicial interpretation to elections to Provincial Councils and local authorities in the Supreme Court determination mentioned in the Annexure.

However, it must be borne in mind that Provincial Councils are devolved institutions established by the Constitution (Thirteenth Amendment to the Constitution (1987)), and it is deeply unsatisfactory that Article 4 (e) does not mention elections to these bodies. Local authorities are governed by ordinary statute in Sri Lanka. While these observations may seem strictly speaking tangential to a discussion about ICCPR Article 25, we would nonetheless argue that the spirit of the provision is to ensure both public participation in government through periodic elections as well as the democratic legitimacy of institutions, and in that context, the fact that Article 4 (e) of the Constitution does not mention elections to the second tier of devolved government in Sri Lanka is a major lacuna.

More to the point, the chapter on fundamental rights of the Sri Lankan Constitution (Chapter III) does not provide for the right to vote as a fundamental right. *Per contra*, Article 25 (b) of the ICCPR provides that every citizen (incidentally the only occasion where the ICCPR speaks of ‘citizens’ as opposed to the more general ‘every person within the territory and subject to the jurisdiction of a State’) shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions, to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors. This is a powerful restatement of the key procedural rights of democracy in a pivotal international human rights instrument.

In Section 6 of the ICCPR Act, Article 25 (a) has been incorporated (as Section 6 (1) (a)), as well as Article 25 (c) (as Section 6 (1) (b)); the latter in slightly different and perhaps broader terms than in the ICCPR. That is, where Article 25 (c) provides for access, on general terms of equality to public service, section 6 (1) (b) provides for access to services provided to the public by the State.

It is inexplicable therefore, why in Section 6 of the ICCPR Act, when incorporation of ICCPR Article 25 was attempted, and in the absence of a comparable provision

in the Constitution, the critical sub-section (b) to Article 25 reproduced above has been left out.

The ICCPR Act also omits the references in Article 25 to the prohibition of unreasonable restrictions, the general principle of equality, and crucially given its importance to the entire regime of rights in the ICCPR, the reference to Article 2 of the ICCPR (discussed above). There is also the limitation on Section 6 (1) (a) imposed by Section 6 (2), which is alien to the ICCPR (discussed above).

For these reasons and due to the omission of Article 25 (b), it is possible to deduce that there has been an attempt, for whatever reason, to downplay the significance of ICCPR Article 25 in the ICCPR Act. Further evidence of this is the marginal note to Section 6, which describes the section as concerning 'Right of access to benefits provided [*sic*]', which of course is not the purpose of Article 25. In the absence of a constitutional provision in Sri Lanka corresponding to Article 25, we are at a loss to understand these omissions in domestic legislation advanced as an implementation measure of the ICCPR.

Articles 88 and 89, which concern the right and disqualification are unobjectionable.

ICCPR Article 26

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| ICCPR | Annexure to the ICCPR Advisory Opinion |
| Article 26 | Constitution of Sri Lanka, 1978: Articles 12 (1), (2), (3) |

Commentary: Article 26 of the ICCPR is the general right to equality before the law without discrimination of any kind, the corresponding provision for which in the Sri Lankan Constitution is Article 12. The standard and concept of equality, and the formulations used, as between the ICCPR and the Sri Lankan Constitution are broadly equivalent. While the two provisos to Article 12 (2) in the Sri Lankan Constitution are not found in the ICCPR, it does not seem that they are repugnant to the provisions of Article 26 of the ICCPR. The provision for limited affirmative action (positive discrimination) in Article 12 (4) of the Sri Lankan Constitution with regard to women, children and disabled persons is also not generally understood to be contrary to the right to equality.

ICCPR Article 27

| ICCPR | Annexure to the ICCPR Advisory Opinion |
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| Article 27 | Constitution of Sri Lanka, 1978: Articles 10, 14 (1) (e), 14 (1) (f), 18-25, 27 |
| | Official Languages Commission Act, No. 18 of 1991: Sections 2, 6-7 |
| | Penal Code of 1889, as amended: Sections 290-292 |

Commentary: Article 27 of the ICCPR is a provision in the form of a group right, of special importance to pluralistic societies such as Sri Lanka, which provides that in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

There is no comparable single provision in the Constitution of Sri Lanka that acknowledges the group or community rights of minorities in terms similar to Article 27 of the ICCPR, although of course, discrete provisions of the Constitution and law speak to some of the issues encapsulated in Article 27.

We would reiterate our observations above in relation to the constitutional provisions highlighted by the Annexure to the ICCPR Advisory Opinion, and add that in respect of Articles 18 to 25 of the Constitution (which encompasses the entirety of Chapter IV: Language, as amended by the Thirteenth Amendment), the provisions of the Constitution are more impressive on paper than in practice. Furthermore, it is significant to note in the light of Sri Lanka's ethnic conflict and its evolution, that even today, Sri Lanka's Constitution does not provide for parity of status of the Sinhala and Tamil languages. Article 18 (as amended by the Thirteenth Amendment) of the Constitution declares that Sinhala is '*the*' official language of Sri Lanka while Tamil is '*an*' official language. The Official Languages Commission also has not had a demonstrable impact in implementing the language provisions of the Constitution. We would reiterate our previous comments in respect of the cited provisions of the Penal Code.

E. CONCLUSION

It is clear therefore that the bill of rights in the Constitution of 1978, the ICCPR Act of 2007, and the other statutory provisions cited in the Annexure to the ICCPR Advisory Opinion, taken as a whole, fail to comply with the requirement of ratification and full implementation of the ICCPR. The Sri Lankan legal regime falls short of the international standard in terms of the constitution and law on their face or in terms of their substance and content.

The Supreme Court's reasoning in its ICCPR Advisory Opinion, for the reasons canvassed above, was fundamentally flawed because it failed to realise that mere recognition of a right in a bill of rights or a law is inadequate. The textual formulation of the right, the limitations that may be imposed on such right, and the mechanisms to ensure that the scope and extent of the right cannot be limited unreasonably or disproportionately, are key to assessing whether the rights are effectively protected and implemented. The Supreme Court's Advisory Opinion represented a cursory and superficial review of the bill of rights and other law, and failed to subject the texts to the critical scrutiny that was required for a comprehensive evaluation of whether the Sri Lankan legal regime was compatible with the ICCPR.

This unsatisfactory situation, however, has the silver lining of reminding us about what needs to be done, as Sri Lanka undertakes the drafting of its third republican constitution.