



*Sri Lanka: Failing to Protect the Rule of Law
and the Independence of the Judiciary*

November 2001

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EXECUTIVE SUMMARY

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

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

- (1) to identify the circumstances surrounding the calling of a referendum on the Constitution, assess the constitutional position of such action and the implications for the rule of law;
- (2) in the light of recent cases seeking to disbar the Chief Justice from practising as a lawyer and attempts by over one-third of MPs to have him impeached, to examine the guarantees for the independence of the judiciary, and the practical respect these guarantees receive.

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

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

Independence of the Judiciary

The delegation was of the view that the perception of a lack of independence of the judiciary was in danger of becoming widespread and that it was extremely harmful to respect for the rule of law by ordinary citizens. It was concerned that not only is there a perception that the judiciary is not independent, there may indeed be some basis in fact for the existence of such a viewpoint in relation to a minority of the judiciary. There

were also serious concerns expressed about the discipline, retirement, appointment, transfer and promotion of judges under the auspices of the Judicial Services Commission (JSC). The delegation was not confident that the JSC is acting entirely without outside interference. The delegation recommends:

1. Appointments of judges by the President and without an independent process of assessment should be ceased. All judges should be appointed by an independent process of assessment, based on merit, with names being forwarded to the President or Minister of Justice for final appointment.
2. The appointment, transfer, discipline, dismissal or retirement of judges of whatever rank must be determined by a transparent and accountable system. Built into this system must be the opportunity for a fair hearing, at which the proceedings are recorded and a copy given to the judge in question followed by a reasoned decision, and with a right of appeal.
3. The JSC must be independent. To ensure this, consideration should be given to the following:
 - i) Membership should be expanded to include a range of other appointees such as members of the independent legal profession. There must be a greater number of members of the judiciary on the body than any other constituent group.
 - ii) Appointments to the JSC should not be made by the executive.
 - iii) The method of selecting members for the JSC must be transparent and independent.
4. The salaries, security of tenure and conditions of appointment of judges should be such as to attract the best candidates for a judicial career.
5. The judiciary, at all levels, should be the subject of an annual report, signed by the Chief Justice, and setting out for public information, full details of the functioning of courts, data on the number and type of cases and their disposal, and of the detailed functioning of the JSC.

6. Fundamental rights under the Sri Lankan Constitution should be protected as to their enforcement before the Supreme Court by a coherent statement of principle, on the basis of which leave will be granted or refused. The absence of such a statement of principle runs the risk that different panels of the Supreme Court will adopt different criteria for the granting or refusal of leave.
7. The administration of the Supreme Court should collate and publish data on the number and type of fundamental rights cases disposed of, and in regard to particular panels of the bench, so as to determine whether there has been a reduction in the number of cases granted leave. But in any event, such data serves to clarify the basis on which jurisdiction is being exercised quantitatively and qualitatively. This should be reviewed by a body separate to judicial administration.
8. The panels of three Supreme Court judges who hear fundamental rights applications should be subject to an appropriate system of rotation. Clearly the presider should be the most senior judge. Every attempt should be made for the junior judges to sit regularly with the most senior judges.
9. Any proceedings or inquiries concerning the position of the Chief Justice when Attorney-General, and in connection with his appointment as Chief Justice, should be resolved by decision or appropriate judicial action and not left in abeyance. Further, any continuation of the present, or future impeachment proceedings of the Chief Justice should be dealt with rapidly and with due process of law.
10. No politician, including the President, should engage in gratuitous or unsupported allegations against members of the judiciary.
11. While judges and the courts are not exempt from public debate, it is contrary to the interests of justice for debate to descend to politically-motivated criticism which has the effect of undermining the stature and independence of the judiciary.

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

Constitutional Reform

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

13. Constitutional reform must take place through constitutional means.
14. The doctrine of necessity can rarely, if ever, be used to justify constitutional change in a democratic society. Legal norms, established by the Constitution, must be, by and large, obeyed and if not obeyed, applied, otherwise legal order as a whole would lose its validity.
15. The Government's call for a referendum as a route for constitutional change was:
 - i) Constitutionally inappropriate.
 - ii) Framed in terms that were not readily comprehensible to lawyers and certainly not to electors.
16. The appropriate constitutional route under the present Constitution is:
 - i) By Article 82, whereby Parliament would be the vehicle for constitutional change given a two-thirds majority.

- ii) Alternatively, under Article 83, reform of certain 'core' provisions require the calling of a public referendum and agreement by a two-thirds majority of Parliament.
17. What is neither appropriate, nor constitutionally proper is to call for constitutional reform through a referendum when the Constitution provides no route for implementation of any constitutional reform other than through Parliament.
18. It appeared to the delegation that the vast majority of those consulted, including those from opposing political parties, accepted the need for substantial constitutional reform so as to establish:
- i) Much stronger parliamentary control of government as against the present constitutional system of a strong presidential executive government.
 - ii) The introduction of five commissions dealing with justice, media, police, elections and the Constitution. These are independent commissions designed to ensure fair and efficient working relationships between the executive and the institutions themselves.
19. The delegation would also like to recommend that any reform of the Constitution should be accompanied by any necessary changes to accommodate a settlement of the Tamil problem.
20. Such reforms should, in the view of the delegation, take into account:
- i) An adequate balance between central and regional government.
 - ii) Adequate autonomy, especially in the Tamil area.
 - iii) The defined role of central government in the fields of defence, foreign affairs, national security, taxation and any other appropriate area.

The Media

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

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

The delegation concluded:

21. The use of criminal defamation is contrary to the fundamental human rights set out within Sri Lanka's Constitution and is an affront to a free media. As to the exercise of the prosecution powers by the Attorney-General in relation to criminal defamation, it is unclear on what principles the Attorney-General should act so as to ensure he acts fairly and objectively and seeks to avoid unjust pressure on the media.
22. The use of licensing controls and pressure on advertisers, tactics purportedly used by the Government to close down TV stations, is unacceptable.
23. In a literate modern democracy, there is no need for government control of the press, TV or radio and certainly not by way of state ownership. The capacity of any government and executive to manipulate the media to its own ends and particularly to stifle free debate is obvious and cannot be justified.
24. The delegation rejects, in the strongest possible terms, the use of interrogation and harassment by the police or security forces of media employees as a means of controlling free speech.
25. The delegation noted that all the politicians whom it met were supportive of a free media. However, this willingness to support the right to freedom of speech

and bring about reform must be guaranteed regardless of which political party is in power.

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

The delegation recommends:

27. There must be a repeal of the law of criminal defamation. It offends the fundamental right of freedom of expression. Its survival since the 1978 Constitution is an anachronism arising from the provision preserving pre-Constitution laws. It is inimical to a free media and represents a continued use of colonial legislation in the free modern democracy of Sri Lanka. It has led to:
 - i) A system of prosecution of the media at the instigation of the Attorney-General and the Government.
 - ii) The use of criminal penalties to stifle, gag and punish the media.
 - iii) The involvement of the judiciary in a process which is entirely inappropriate as it becomes a quasi-arbiter in political disputes between the Government and media.
28. A National Press Association should be formed which is free from party interest or influence. It should include a diverse range of members from both within and outside the industry. This body must be both constitutionally and factually free from influence from the executive or legislature.
29. It is imperative that the proposals to set up a media commission are seen through to fruition and that the reforms proposed are considered seriously and in the interests of protecting a free media.
30. There should be a National Advisory Council for the media, independent of the Government and independent of any new constitutional commission, which

should issue an annual report on the state of the media and its relations with Government, Parliament and the people. It could include members from abroad who are eminent in the field.

31. It is vital that the media is supported by all political parties to include a genuine and detailed guarantee of the freedom of the press and a willingness to effect change, regardless of which party is in power.
32. Laws relating to freedom of expression should be reviewed to ensure that they are in conformity with Sri Lanka's international obligations.
33. After the elections, the new Government should take steps to divest itself of ownership of the state media.

Conclusion

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

INTRODUCTION

This is the report of a fact-finding mission by the International Bar Association to Sri Lanka between 28 August 2001 and 31 August 2001. The focus of the mission was twofold:

- (1) to identify the circumstances surrounding the calling of a referendum on the Constitution, assess the constitutional position of such action and the implications for the rule of law;
- (2) in the light of recent cases seeking to disbar the Chief Justice from practising as a lawyer and attempts by over one-third of Members of Parliament to have him impeached, to examine the guarantees for the independence of the judiciary, and the practical respect these guarantees receive.

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

The mission was organised by the Human Rights Institute (HRI) of the International Bar Association (IBA). The IBA is the world's largest lawyers' organisation with members in 183 countries. It is an independent, non-political organisation that works to protect the rule of law and the independence of the judiciary and promotes the right of lawyers to practise freely without interference. The HRI was established in 1995 under the honorary Presidency of Nelson Mandela.

The HRI has undertaken other similar missions. Its practice has been to send delegations comprising experienced lawyers and judges who are required to exercise independence and impartiality in all aspects of their participation within the mission. Delegations take account of relevant standards in international law, customary international law, regional and national laws, and any published findings are assessed against such standards.

Sri Lanka Delegation Members

The delegation members were:

- ?? **Lord Brennan QC** – former Chair of the Bar Council of England and Wales. Appointed as Queen’s Counsel in 1985. Regularly sits as a Deputy High Court Judge.
- ?? **Justice Malimath** – former Chief Justice of Karnataka and Kerala, former Member of the National Human Rights Commission of India and current Chair of the Committee on Reforms of the Criminal Justice System in India.
- ?? **Mah Weng Kwai** – barrister at law, President of the Malaysian Bar.

All delegation members come from common law jurisdictions with legal systems similar to that of Sri Lanka. They were grateful to the support and advice provided by Joanna Salsbury, HRI Programme Lawyer, who accompanied the mission and acted as Rapporteur.

Consultation

The members of the delegation read widely both prior to and during the visit, and were familiar with the 1978 Constitution, the draft Constitution of 2000, the 17th Amendment to the Constitution, academic articles and relevant media reports. They also considered the case law and jurisprudence on constitutional reform and allegations and litigation concerning the Chief Justice. During the mission, the delegation consulted widely with government ministers, the Leader of the Opposition, representatives of political parties, judges, lawyers, the professions, the media, academics and judges who have been dismissed or who have retired. These meetings were conducted in private and discussion was both full and frank. The resulting report is a thorough and wide-ranging examination of the issues which were the focus of the mission.

The delegation would like to extend its gratitude to all those whom it met during the visit. Delegation members were warmly received by both the Minister of Foreign Affairs, the Honourable Lakshman Kadirgamar and the then Minister of constitutional Affairs, the Honourable Dr G L Peiris. In addition, the delegation members would like

to thank the Chief Justice, Sarath Nanda Silva, for agreeing to meet them and giving generously of his time.

At the end of its visit, the delegation was compelled to conclude that, important though the constitutional question is, the most serious issue affecting Sri Lanka in the short term is that concerning the independence of the judiciary and the position of the Chief Justice. In any event, since the conclusion of the mission, the referendum on constitutional change has been cancelled. The delegation is, however, of the view that as constitutional reform had been proposed via a referendum route, albeit that this was never executed, close examination of the legal issues is nonetheless required.

This report is divided into four main chapters and an epilogue. At the end of each chapter, the delegation has included its conclusions and, where necessary, made a number of recommendations. An executive summary of the delegation's findings can be found above on page 3.

Since the IBA mission, Parliament has been dissolved and a general election called. The resulting debates will surely include the issues with which this report deals. The delegation hopes that it assists in a fair and democratic discussion.

On 14 November 2001 the IBA sent an electronic and hard copy of this report to the Sri Lankan Government (via the High Commission in London). It was indicated to the Government that the IBA would welcome any comments it would wish to make. The Association said that subject to their length, it would incorporate their comments into the published version of the report. The IBA indicated as well that it would prefer to publish the comment verbatim, requesting that comments be received by 21 November 2001 and be limited to 5000 words. This deadline was later extended to 26 November 2001 following a request for an extension by the Sri Lankan Government. Regrettably no comments were received by that extended deadline. The IBA remains willing to publicise the Government's comments and has undertaken to make these available on its website (www.ibanet.org) should it receive them.

CHAPTER 1: THE FACTS

Background

- 1.1 For the past 18 years, there has been significant civil conflict in Sri Lanka as a result of ethnic tension between the Tamil and Sinhalese communities. The Tamils, who comprise approximately 18 per cent of the population, live primarily in the north and north-east of Sri Lanka. They complain of discrimination by the larger Sinhalese community which is concentrated in the densely populated south-west. Militants among the Tamil population say that in order to prosper they need a separate country where they can be free from domination by the Sinhalese majority, and the Liberation Tigers of Tamil Eelam (LTTE) are fighting on their behalf for a separate state. Although there have been various attempts over the years to initiate peace talks, to date these have amounted to nothing. The first half of 2001 saw an increase in tension and violence between the Government and the LTTE culminating, on 24 July 2001, in an attack on Colombo's international airport which left around 20 people dead and 17 injured.
- 1.2 Sri Lanka is a unitary state with a unicameral Parliament of 225 seats. Parliamentary elections are held every six years under a proportional representation electoral system. In the last elections, held on 10 October 2000, the Peoples' Alliance (PA) won 107 seats, the United National Party (UNP) 89, Peoples Liberation Front (JVP) 10, the Eelam People's Democratic Party (EPDP) 4, the National Unity Alliance (NUA) 4, the Tamil United Liberation Front (TULF) 5, the Tamil Eelam Liberation Organisation (TELO) 3, the All Ceylon Tamil Congress (ACTC) 1, and the Independent Group 1. The PA has been the largest political party in Parliament since the elections of 1994.
- 1.3 The President holds office for a maximum of six years before seeking re-election. The current incumbent, President Chandrika Bandaranaike Kumaratunga, was elected in August 1994. The last Presidential election was held on 21 December 1999 and the next is due in December 2005. President Kumaratunga serves as both the Chief of State and Head of Government. She is also the leader of the PA.

- 1.4 Sri Lanka has a written Constitution (see Appendix A for extracts of the Constitution). The Constitution, adopted in 1978, has been subject to 16 amendments, the last being in 1988. A new Constitution was drafted and a Bill placed before Parliament in August 2000. It did not have sufficient support from MPs and was subsequently withdrawn.
- 1.5 The Constitution grants extensive executive powers to the President. These include, *inter alia*, the authority to appoint the Prime Minister, to appoint the Cabinet of Ministers and to make judicial appointments. In addition, the President has the power to prorogue Parliament for a period of no longer than two months, although Article 70 of the Constitution provides that Parliament should not be prorogued within 12 months of the last election. The Constitution provides that the President is immune from legal proceedings in respect of both public and private acts during the period of office.¹
- 1.6 Sri Lanka is a signatory to a number of international human rights treaties including: the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic Social and Cultural Rights; the Convention on the Elimination of All Forms of Racial Discrimination; the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of the Child; and the Convention on the Elimination of all Forms of Discrimination Against Women.

The Legal System

- 1.7 The legal system in Sri Lanka comprises various systems introduced during periods of colonisation. Roman Dutch law was later supplemented in the 19th century by English law. With the introduction of English law came methods of judicial administration and organisation which the 1978 Constitution preserves even today.

The Judicial Structure

- 1.8 The judiciary comprises a Supreme Court with three courts in session, one Court of Appeal with six or seven courts in session, 25 High Courts, 77 District Courts,

¹ Article 35(1).

92 Magistrates' Courts and 18 Primary Courts which have approximately 220 judges and 3,000 court employees. Sri Lanka's highest court, the Supreme Court, comprises no more than ten and no less than six judges.² It has jurisdiction in respect of the following: constitutional matters; protection of fundamental rights; final appellate jurisdiction; consultative jurisdiction; election petitions; breach of parliamentary privileges; and in other matters which Parliament may decide. The Supreme Court and Court of Appeal are courts of superior record.

- 1.9 Under the Constitution, the President appoints the Chief Justice, the President of the Court of Appeal and all judges in both the Supreme Court and the Court of Appeal.³ These judges may only be removed by Parliament on grounds of proved misbehaviour or incapacity. The process requires a motion to be taken by the Speaker of Parliament, signed by no less than two-thirds of MPs, which is then supported by a majority of MPs. Following parliamentary approval, the President must issue an order to remove the judge from office.⁴ High Court judges are also appointed by the President but are subject to disciplinary control by the President on the recommendation of the JSC.⁵
- 1.10 The JSC has responsibility for the appointment, promotion, discipline, transfer and dismissal of all judges, excluding those in the Court of Appeal and Supreme Court.⁶ The Commission comprises the Chief Justice, who sits as *ex officio* chair, and two other Supreme Court judges appointed by the President. The delegation was given to understand that it has long been the practice in Sri Lanka for appointments to the JSC from the Supreme Court to be in order of seniority. The JSC has the authority to make any provision for such matters as are necessary or expedient for the discharging of its duties.⁷ This includes the power to adopt rules of procedure on the recruitment and appointment of judges. In addition, the JSC can convene a committee of no less than three Supreme Court or Court of Appeal judges to hold an inquiry on its behalf into any matter concerning the judiciary.⁸

² Article 119(1).

³ Article 107(1).

⁴ Article 107(2).

⁵ Article 111(1).

⁶ Article 114(1).

⁷ Article 112(8)(a) and (b).

⁸ Article 114(5).

Constitutional Position of the Chief Justice

1.11 The Chief Justice is appointed by the President and can only be removed from office by the same method used to remove Supreme Court judges. The Chief Justice is head of the Supreme Court and Chair of the JSC. He has no constitutional role to advise or provide legal assistance outside his role within the Supreme Court.

Recent Events

1.12 The following is a chronology of recent events:

16 September 1999 Attorney-General Sarath Nanda Silva is appointed as Chief Justice.

October to November 1999 Three petitions are lodged at the Supreme Court challenging the appointment of Sarath Silva as Chief Justice.

3 August 2000 A Bill to repeal and replace the 1978 Constitution is presented to Parliament and subsequently withdrawn.

10 October 2000 General election. The PA wins the largest number of seats but does not have a majority in Parliament.

13 October 2000 The PA forms a coalition with the NUA and the EPDP and is sworn in to Government. This coalition had a small majority in the 225-seat Parliament.

6 June 2001 A motion for impeachment of the Chief Justice, signed by 77 MPs, is handed to the Speaker of Parliament. On the same day, the Supreme Court issues an order restraining the Speaker of Parliament from appointing a select committee pending the final outcome of an outstanding fundamental rights petition.

- 20 June 2001 The Speaker rules that the Order of the Supreme Court (referred to above) is not binding on Parliament. The Speaker proceeds to place a Motion on the parliamentary order paper with a view to setting up a select committee to look into the impeachment motion.
- The Sri Lankan Muslim Congress (MC), which forms part of the NUA coalition, announces its withdrawal from Government. Seven MPs join the opposition, leaving the PA Government without a majority.
- 3 July 2001 MC member expelled from Parliament by the Government.
- 8 July 2001 A no confidence motion against the PA Government, signed by 115 MPs, is presented to the Speaker stating, *inter alia*, the House declares it has no confidence in the Government, since it is demonstrably clear that it cannot solve the pressing problems of the country and its people'. MPs are expected to take up the Motion for debate on 18 July 2001 following submission of a written request to the Speaker.
- 10 July 2001 The President exercises her powers under Article 70 of the Constitution and prorogues Parliament until 7 September 2001. The President declares a referendum under the powers vested in her by Article 86. The question to be posed to the Sri Lankan people reads as follows: 'is a new Constitution, as a matter of national importance and necessity, needed for the country?'
- 30 July 2001 Petition lodged at the Supreme Court alleging that the expulsion of the MC MP was unlawful.
- 7 August 2001 Referendum date delayed until 18 October 2001.
- 7 September 2001 MPs return to Parliament. The President announces the cancellation of the referendum. A new coalition government is

formed between the PA and the JVP who sign a formal Memorandum of Understanding.

20 September 2001 Decision on the expulsion of the MC MP.

10 October 2001 Defection of 13 members of the PA/JVP coalition. Parliament is dissolved and an election called (subsequently confirmed as 5 December 2001).

1.13 This summary shows the country to be in a state of constitutional turmoil and the position of the Chief Justice to be of central concern. The delegation is acutely aware that the primacy of the rule of law and the protection of the independence of the judiciary within the context of democratic constitutional reform are of fundamental importance. Where there is a lack of judicial independence, whether real or perceived, the repercussions for the maintenance of the rule of law are grave.

CHAPTER 2: THE INDEPENDENCE OF THE JUDICIARY

The Principles

- 2.1 It is widely recognised that the separation of powers in government is at the core of a democratic state. Pursuant to this power, the judiciary dispenses justice not only between citizens but also between citizens and other government organs and agencies. Thus the need to develop and preserve an independent judiciary free from political influence and with adequate guarantees to maintain its impartiality and independence is of prime importance in the protection of the rule of law and constitutional democracy. Historically, of the three arms of government, it is the judiciary that is most vulnerable and needs the greatest protection and security.
- 2.2 The importance of safeguarding an independent judiciary and legal profession is recognised by various international and regional instruments as playing a fundamental role in protecting human rights and basic liberties. Article 10 of the Universal Declaration on Human Rights and Article 14 of the International Covenant on Civil and Political Rights provide for the right to a fair and public hearing by an independent and impartial tribunal.
- 2.3 These concepts have been further developed in both an international and Asian context. In 1980, the UN Secretary General requested Dr L M Singhvi to prepare a report on the independence and impartiality of the judiciary and lawyers. The final report was submitted to the UN Sub-Commission with a draft declaration which thereafter became known as the 'Singhvi Declaration on the Independence of Justice'. In his report to the Sub-Commission, Dr Singhvi summarised the essential aspects of an independent judiciary:

‘Judges must be impartial and independent and free from any restrictions, inducements, pressures, threats or interference, direct or indirect The concept of impartiality is in a sense distinct from the concept of independence. Impartiality implies freedom from bias, prejudice and partisanship; it means not favouring one more than another; it connotes objectivity and an absence of

affection or ill-will. To be impartial as a judge is to hold the scales even and to adjudicate without fear or favour in order to do so.'

2.4 In 1985, the United Nations adopted the Basic Principles on the Independence of the Judiciary (see Appendix B) which provide that states should organise and administer justice in accordance with the Universal Declaration on Human Rights and the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights. The main features of the Basic Principles are set out below:

- ?? States shall guarantee the independence of the judiciary through their constitutions or laws.
- ?? The judiciary shall decide matters before it impartially and without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any person or entity for any reason.
- ?? The judiciary shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.
- ?? Independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of parties are respected.
- ?? Each member state must ensure and provide the judiciary with adequate resources for it to properly perform its functions.

To ensure the independence of the judiciary, the Basic Principles oblige member states to respect rigid conditions of service and tenure for judges, including specifically:

- ?? National laws shall adequately secure the term to be served by judges, their security, adequate remuneration, conditions of service, pensions and the age of retirement.
- ?? Judges shall have guaranteed tenure, subject to removal for retirement or other factors which render a judge unfit to discharge his or her duties.
- ?? Any complaints filed against a judge shall be processed expeditiously and fairly under an appropriate procedure.

2.5 Within the Asian region, the sixth Conference of Chief Justices of Asia and the Pacific in Beijing in August 1995 adopted the Statement of Principles on the Independence of the Judiciary (see Appendix C). Sri Lanka was represented by Justice Perera who voluntarily agreed to the Principles on behalf of the then Chief Justice G P S De Silva. Although not signed by heads of states, the Declaration is nonetheless an important document signed by the most eminent jurists of the region. In light of this, governments may find it difficult to ignore the Principles. The 43 Principles include the following:

~~///~~ Where a Judicial Services Commission is adopted, it should include representatives of the higher judiciary and the independent legal profession as a means of ensuring that judicial competence, integrity and independence are maintained.

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

~~///~~ A judge who is sought to be removed must have the right to a fair hearing.

~~///~~ Judgments in disciplinary proceedings, whether held in camera or in public, should be published.

2.6 The IBA has itself adopted minimum standards on judicial independence (see Appendix D) which provide specific guidelines on protecting the independence of the judicial function, including:

?? The executive shall refrain from any act or omission which pre-empts the judicial resolution of a dispute or frustrates the proper execution of a court judgment.

?? The executive shall not have the power to close down or suspend the operation of the court system at any level.

?? Individual judges should enjoy personal independence and substantive independence.

?? Personal independence means that the terms and conditions of judicial service are adequately secured as to ensure that individual judges are not subject to executive control.

- ?? Judicial appointments and promotion should be vested in a body in which members of the judiciary and the legal profession form a majority.
- ?? The executive shall not have any control over judicial functions.
- ?? Ministers of government should not exercise any form of pressure on judges, whether overt or covert, and shall not make statements which adversely affect the independence of the judiciary.
- ?? The power to transfer a judge from one court to another should be vested in a judicial authority and preferably should be made with the judge's consent.
- ?? The proceedings for discipline and removal of judges should ensure fairness to the judge and adequate opportunity for hearing.
- ?? A judge shall not sit in a case where there is a reasonable suspicion of bias or potential bias.

Main Principles of Judicial Independence

2.7 The Supreme Court of Canada has referred to the main or core principles of the independence of the judiciary.⁹ These are said to be security of tenure, financial security and institutional security. The Court has also set out a standard for the test of reasonable perception of independence which is as follows:

‘The question that now has to be determined is whether a reasonable person, who was informed of the relevant statutory provisions, their historical background and the traditions surrounding them, after viewing the matter realistically and practically would conclude that the Tribunal or Court was independent.’

The Judicial Services Commission (JSC)

2.8 During the visit to Sri Lanka, all members of the delegation met with a range of sitting and retired judges. Throughout many of these meetings there was consistent complaint relating to improper judicial supervision under the auspices of the JSC and the present Chief Justice.

⁹ *Valente v The Queen* (1985) 2 SCR 673.

2.9 The JSC is headed by the Chief Justice. He is joined by two Supreme Court judges who are appointed by the President¹⁰ and a Secretary who is also a presidential appointment.¹¹ Historically, appointments to the JSC have been made on the basis of seniority within the Supreme Court. However, this convention was departed from after the PA Government came to power, when the two most senior Supreme Court judges, Justices Fernando and Amarasinghe, were not reappointed in 1994. The delegation noted that many both inside and outside the judiciary cited this departure as evidence that the JSC had been subject to political influence. When the delegation raised this issue with the Chief Justice on 31 August 2001 it was stated that there had been no departure from usual convention. However, the delegation noted that the two current members of the JSC, Justices Ismail and Edissuriya, were not the most senior Supreme Court judges at the time of their appointment.

2.10 Under the Constitution, the JSC is given authority over the appointment, transfer, dismissal and discipline of the judiciary.¹² The Chief Justice informed the delegation that complaints against members of the judiciary were compiled by the JSC and, following receipt of a serious complaint or where complaints against a particular judge are too numerous, the JSC undertakes one of three courses of action:

- (1) The JSC holds an inquiry or asks a panel of three Supreme Court or High Court judges to undertake the inquiry on its behalf.
- (2) Where the complaints are widespread and of a general nature, the judge may be asked if he or she wants to retire rather than continue with an investigation.
- (3) If the judge is on probation, the JSC may decide not to make the appointment permanent.

The Chief Justice went on to explain that when an inquiry takes place, a typed record of the proceedings is made and, on request, a copy is given to the judge being investigated. The JSC does not issue a written judgment except when a

¹⁰ Article 112(1).

¹¹ Article 113(1).

¹² Article 114(1).

judge is investigated by a panel of Supreme Court or High Court judges. The outcome of any such disciplinary hearing is not published, which, according to the Chief Justice, is in deference to the judges holding the proceedings. There are no rights to appeal against a decision of the JSC except on a matter of administrative law which falls within the jurisdiction of the Court of Appeal.

2.11 Over the course of its visit, the delegation was concerned to hear claims that judges had been removed from the bench by the JSC or the Chief Justice without proper recourse to an inquiry or disciplinary hearing. The delegation found these allegations to be credible. Indeed, delegation members were saddened to note that a number of people were fearful of the consequences of having spoken to the IBA delegation. Commonly, those interviewed cited their involvement in a case concerning members of opposition political parties as the reasons for dismissal, transfer or disciplinary action. It is not for the delegation to decide the merits of the disciplinary action. It was concerned, however, with fair procedures. Although the delegation took a careful note of the reasons given by the judges and former judges for the disciplinary action, it was especially concerned with the apparent lack of accountability, the breach of natural justice, the potential for undue influence and disregard of appropriate and equitable procedures shown by these disciplinary measures. Detailed below is a sample of the variety of cases raised with the delegation.¹³

Case 1

A district judge ordered the detention of a PA member for contempt of court after he interrupted judicial proceedings to berate his wife. The judge was subsequently asked by the JSC to tender his resignation without an inquiry, investigation or hearing.

Case 2

A magistrate in Colombo discharged an MP from an opposition political party from criminal proceedings. State counsel filed a motion and requested the judge to reopen the case. The magistrate refused. He was later asked to resign by the

¹³ For reasons of confidentiality names have been withheld.

present Chief Justice on grounds that he had jailed a woman in possession of illegal alcohol. He was not subject to an inquiry or hearing.

Case 3

A magistrate in Colombo, accused of being a member of the UNP, was said to have made decisions in favour of other UNP supporters. He was ordered to retire and there was no hearing or inquiry into the matter.

Case 4

A district judge reported that having bailed two members of an opposition political party who appeared before him on charges of murder, he was subject to an inquiry by the JSC. There were no findings against him and yet he was asked to retire.

Case 5

A senior district judge who did not take part in the ceremonial reception organised for the present Chief Justice was subsequently transferred to another more lowly court some distance away. When she reached the retirement age of 55, her service was not extended.

Case 6

Before the appointment of the present Chief Justice, a magistrate acquitted a political opponent of the Government who was standing trial on an election offence. After the Chief Justice's appointment, the magistrate was transferred from Kandy to a more remote location. It is reported that the Chief Justice claimed he would 'teach him a lesson'.¹⁴ The magistrate's salary increments were stopped and he later resigned through fear of other reprisals.

Judicial Salaries

2.12 The Constitution provides that salaries of Supreme Court and Court of Appeal judges shall be determined by Parliament.¹⁵ Other judicial salaries are controlled through the JSC. The delegation learned that the salaries paid to judges were

¹⁴ Words used by the magistrate.

reportedly not sufficient to provide them with financial security. It is understood, for example, that Supreme Court judges are paid in the region of the equivalent of US\$500 per month. There are suggestions that, without a second or private income, some judges in the subordinate judiciary are not able to cope with their financial responsibilities.

Fundamental Rights Petitions

2.13 Fundamental rights petitions¹⁶ fall within the jurisdiction of the Supreme Court. All applications to the Supreme Court are subject to a filtering process whereby a single Supreme Court judge will grant leave to proceed to a full hearing in applications where it is determined there is a *prima facie* case. The delegation was advised by the Chief Justice that this system takes account of the severity of the violation and the urgency of the matter and may prioritise petitions in certain circumstances. He also advised that although there are no written principles on which to determine the merits of a leave application, each petition is dealt with on a case-by-case basis. It is understood that the Chief Justice personally considers many fundamental rights petitions both at the leave stage and in full hearings where he sits as chair of the bench. It is also reported that when he constitutes a bench he generally does so with the same two judges.¹⁷

2.14 It is understood that around 75 per cent of all fundamental rights petitions are from Tamil complainants. The delegation was concerned to hear claims from a highly credible and eminent source that the numbers of cases in which leave is granted have significantly reduced since 1999. The delegation noted that the inferences which can be drawn from such a reduction are complex. However, it is aware that some international NGOs are reporting an increase in the reported incidents of human rights violations.¹⁸ It might have expected, therefore, to see a rise in the number of petitions submitted to the Supreme Court and subsequently granted leave to proceed to a full hearing.

¹⁵ Article 108(1).

¹⁶ Alleging violations of fundamental rights of the Sri Lankan Constitution.

¹⁷ Justices Bandaranayake and Ismail.

¹⁸ See, eg Amnesty International (AI), Sri Lanka: Disappearance on the Rise, 31 August 2000, AI Index 37/027/200. Also AI annual report available at <http://www.web.amnesty.org/web/ar2001.nsf/webasacountries/SRI+LANKA?OpenDocument>.

Petitions Against the Chief Justice

- 2.15 The delegation noted that two complaints have been submitted to the Supreme Court under section 42 of the Judicature Act to strike off the name of Sarath Silva from the roll of Attorneys at Law on the ground that he was guilty of several acts of serious professional misconduct while he was Attorney-General. In the complaint to the Supreme Court by Victor Ivan, editor of the newspaper *Ravaya*, the allegation is that Sarath Silva had taken steps to cover up the investigation of an alleged incident of rape by Magistrate Ratnayake, a close friend of his. The further allegation is that prior to his appointment as magistrate, when efforts were made to inquire into these matters, Sarath Silva, as Attorney-General, misled the then Minister of Justice Dr G S Peiris to prevent further investigation into the matter. The then Chief Justice referred the complaint against Sarath Silva to Justice Ameer Ismail, who in turn called on the Attorney-General to provide his explanation before 15 October 1999.
- 2.16 In another complaint to the Supreme Court the petitioner, Jayasekhara, sought to strike Sarath Silva's name from the roll of Attorneys at Law on the grounds of his immoral character and serious professional misconduct. The allegations were that following Sarath Silva's co-habitation with the complainant's wife, he had filed a petition for divorce, with Sarath Silva named as the adulterer and co-respondent. District Judge Upali Abeyaratne, who was dealing with the case, was influenced by Sarath Silva to delete his name from the list. Sarath Silva threatened Jayasekhara's counsel not to appear for him. It is believed that on receipt of this complaint, the then Chief Justice circulated it within the Supreme Court and referred it to Justice Shirin Bandaranayake. It would appear that these two complaints have yet to be concluded as neither of the complainants has been informed about the outcome of their complaints.
- 2.17 Soon after the President appointed Sarath Silva as Chief Justice on 16 September 1999, three fundamental rights petitions were presented to the Supreme Court challenging his appointment. The principal contention in all these cases was that the President acted arbitrarily in appointing Sarath Silva during the pendency of

the two complaints against him for inquiry by judges of the Supreme Court into serious allegations about his integrity, and the commission of serious acts of professional misconduct. Chief Justice Sarath Silva, who is impleaded as party respondent in all these cases, himself chose the three judges to constitute the bench to hear the cases against him. The complainants then requested the Chief Justice to constitute the larger bench, strictly in the order of seniority, to eliminate the vice of his picking and choosing judges to hear the cases against himself. The Chief Justice, however, constituted a bench of the seven most junior judges in ascending order of seniority. He further ordered that if the bench failed to conclude the hearing of the cases for any reason whatsoever, he would not constitute the larger bench.

2.18 When these cases were placed before the bench of seven judges for consideration of the grant of leave to proceed, the petitioners raised several objections to the constitution of the bench by the Chief Justice. It was contended that the action of the Chief Justice in constituting the bench was in violation of the principles of natural justice. It was further alleged that the Chief Justice had acted arbitrarily and with bias in excluding the most senior judges from the bench (choosing instead the most junior) and by ordering in advance that if for any reason whatsoever, the bench of seven judges failed to conclude the hearing then he would not reconstitute a bench of seven judges. By an order dated 28 February 2001, the bench overruled all preliminary objections to the constitution of the bench, and adjourned the cases for hearing on the question of grant of leave to proceed. However, one of the judges having retired, the Chief Justice constituted a smaller bench consisting of five judges, again excluding the most senior.

2.19 Before the same bench, the Attorney-General raised several preliminary objections to the maintainability of the three fundamental rights petitions. By an order dated 20 June 2001, the bench upheld the preliminary objections, refused leave to proceed and dismissed all three petitions. The bench, *inter alia*, held that the Chief Justice can be removed by the President only in accordance with Article 107 of the Constitution and not through a fundamental rights petition, that no issues of violations of fundamental rights arise for consideration in these

cases, that in view of the immunity granted to the President under Article 35, the appointment made by the President cannot be challenged and that there were two glaring deficiencies in the pleadings, disentitling the petitioners from invoking the fundamental rights jurisdiction of the Supreme Court.

2.20 It is noteworthy that the appointment of Sarath Silva as Chief Justice at a time when two petitions seeking to remove him as an Attorney at Law were outstanding was the subject of a communication from the Special Rapporteur on the Independence of the Judiciary to the Government of Sri Lanka.¹⁹

Attempt to Remove the Chief Justice by Parliament

2.21 A notice seeking the impeachment of the Chief Justice, supported by 77 MPs, was submitted to the Speaker of Parliament on 6 June 2001. The notice accused the Chief Justice of misbehaviour citing a number of cases in which he reportedly abused his position as chair of the JSC. The decision of the Supreme Court, on the same day, restraining the Speaker from accepting the motion was much criticised by lawyers and MPs. The order, which was later overturned, was never finally debated on account of the prorogation of Parliament. The delegation heard allegations that the timing of the prorogation was politically expedient in a number of ways, for example by guaranteeing that the motion on the impeachment of the Chief Justice was never debated.

The World Bank Programme

2.22 Sri Lanka has embarked on a programme of judicial reform with the aid of funds of US\$18.2 million from the World Bank. The project objectives are to:

- ?? Modernise the legislative framework that impacts private sector activity.
- ?? Improve the administration, monitoring and regulatory functions of the Company Registry.

¹⁹ E/CN.4/2000/61, 21 February 2000, para 247/259.

?? Build on the capacity of the judiciary and other institutions providing dispute resolution services.²⁰

This third project objective includes four sub-components which are:

?? Judicial training.

?? Judicial administrative reforms (JSC).

?? Model courts.

?? Mediation.

The cost of the above components is US\$10.49 million. The implementation of the whole project is being overseen by a Steering Committee which is chaired by the Chief Justice.

2.23 It is recognised that in addition to the above objectives, the programme will offer further support for the judicial sector which, in turn, will help improve governance and reduce corruption. Notably, the project appraisal recognises the existing systematic weaknesses in the legal and judicial systems and the need to improve efficiency, predictability, access and transparency.

2.24 The Sri Lankan Government is credited with a stated commitment to strengthen the judiciary as an institution and is understood to have recognised that the need for comprehensive reform has been required for some time. As a first stage in the project, it is anticipated that improved efficiency and quality within judicial services will help judicial reform to commence. Currently, it finds that the judicial system faces major difficulties in terms of quality and the speed of decision-making which is reflected in its high backlog of cases.

2.25 The World Bank project report notes the problems experienced by the JSC in carrying out its administrative functions and attributes this to a lack of qualified staff. It is recognised that complaints against the judiciary are not always investigated and that there is no systematic planning. Statistical reporting is carried out on an ad hoc basis leading to inaccurate information.

²⁰ World Bank Report no 20135 – CE.

- 2.26 Crucial to the improvement of the legal system in Sri Lanka is access to the law and professional development materials. It is recognised that lawyers, students and judicial officials have inadequate access to legal materials and information which leads to ignorance about changes in the law or regulatory systems.
- 2.27 The component of the project on judicial administration includes a fundamental reorganisation of its administrative structure, including court and case management. One of the stated objectives is to improve transparency and accountability and to establish a defined ethics code and investigative process.
- 2.28 The component on model courts will introduce administrative reforms developed through the JSC at 25 selected court-clusters on a trial basis. Two additional courts in Jaffna and Trincomalee will be constructed. At his meeting with the delegation, the Chief Justice did not touch on any planned administrative reforms of the JSC. He did, however, advise that two additional High Courts have been opened in Jaffna and Vaunia and that there were firm proposals for a further five new magistrates' courts.

Law Commission

- 2.29 Sri Lanka's Law Commission, created in 1969, was formed to supervise existing and draft laws and to help in revising those laws deemed inapplicable or outdated. It is understood that the Commission is severely under-funded with the effect of reducing its capacity to work effectively. The Commission comprises a Supreme Court judge as Chair and 11 other lawyers. It is serviced by two secretaries.
- 2.30 The delegation was interested to learn that the Law Commission had made a number of proposed amendments to the draft Constitution of 2000 which included reforms of judicial appointments and a widening of the interpretation of fundamental rights petitions.²¹ In relation to changes to judicial appointments,

²¹ The Law Commission of Sri Lanka, proposed Amendments to the Constitution, Draft Constitution Amendments proposed by the Law Commission on Matters Concerning the Administration of Justice, November 2000.

it was proposed that the President should act on the advice of a representative body of persons who would be able to assess fairly the merits of the proposed appointee. It was envisaged that the representative body should comprise the following: the Chief Justice; two of the most senior judges of the Supreme Court; the President of the Court of Appeal; the Attorney-General; the Minister of Justice or an alternate designated by the Minister of Justice; an MP nominated by the Prime Minister; an MP nominated by the Leader of the Opposition; the President of the Bar Association of Sri Lanka; a senior President's counsel nominated by the Executive Committee of the Bar Association. Unless the advice body unanimously agrees on the name of a candidate for appointment, three names should be submitted to the President. If the President chooses not to appoint any of the three, reasons should be given in writing to the advisory body.

- 2.31 A further recommendation pertaining to the section of the draft Constitution proposing that the President should appoint judges in consultation with the Chief Justice was rejected. The Commission proposed that appointment should be made on merit and that consultation with the Chief Justice served little or no purpose.
- 2.32 To the best of the delegation's knowledge, the Law Commission's proposals have not been included into the Government's constitutional reforms.

President's Criticism of the Judiciary

- 2.33 It has been reported that the President has publicly criticised one of the Supreme Court judges at a public meeting, stating that he is an obstruction to the Government's progress. Further, the President has accused an unnamed Supreme Court judge of taking a large financial bribe. This accusation has been widely published in Sri Lanka's press. The judges of the Supreme Court have understandably been alarmed at so public an accusation and have written to the President asking her to investigate the matter in the hope of removing the cloud of suspicion over them all.

The Bar Association of Sri Lanka

2.34 Before drawing conclusions on the independence of the judiciary in Sri Lanka, the delegation has included a brief commentary on the Bar Association of Sri Lanka which it considers to be an important player in ensuring that judicial independence and the rule of law are upheld.

2.35 The Bar Association of Sri Lanka was formed on 9 November 1994. Sri Lanka's population of about 18 million people has approximately 7,000 legal practitioners who are paid-up members of the Bar Association and who therefore have voting rights.

On being called to the bar, all practitioners are eligible to practise and become members of the Bar Association. However, some 2,000 to 3,000 practitioners have not paid their annual subscriptions and thus do not enjoy the right to vote. Such members must pay all subscription arrears to be voting members.

2.36 As there is no compulsion on practitioners to be fully paid-up members, many have chosen to stay out of the activities of the bar, therefore rendering it, in the opinion of the delegation, less effective and united.

2.37 The Bar Association seems to be highly politicised, and split between members supporting the PA Government and others supporting the Opposition Party. It also appears that the Bar Association is divided along party lines on any major issue of public importance and rule of law where the bar would be expected to take a position. For example, on the appointment of the present Chief Justice, which undoubtedly met with considerable disapproval among practitioners, the Bar Association did not make any statement regarding the appointment but instead took part in the welcoming ceremony for the Chief Justice.

2.38 For the Government to recognise and accede to the representation of the Bar Association, it must be united and remain independent and apolitical at all times. For the good administration of justice and to be a major player in leading public

opinion in matters of law and order and the rule of law and justice, the Bar Association must ensure that:

?? all practitioners must be fully paid up;

?? it must not be party political; and

?? it must be committed to protecting the independence of the judiciary and legal profession at all times.

Conclusions

2.39 The delegation was firmly of the view that the perception of a lack of independence of the judiciary was in danger of becoming widespread and that this was extremely harmful to respect for the rule of law by ordinary citizens. It was concerned that not only is there a perception that the judiciary is not independent, there may indeed be some basis in fact for the existence of such a viewpoint in relation to a minority of the judiciary. Most of the judiciary still enjoy public confidence, however, the situation is bleak given the frequent eruptions of ethnic violence in Sri Lanka and the overwhelming need for an independent, credible judicial system. These concerns, expressed by the delegation to Ministers and the Chief Justice during the mission, do not appear to be the subject of any inquiry by the Government. Given the regard in which the Sri Lankan judiciary was once held, this is a worrying development.

2.40 Serious concerns have been voiced by the delegation over the method of appointing judges. The delegation noted that judicial appointments have traditionally been based on seniority, the benefit of which has been to ensure a lack of executive influence. Where there has been a deviation from this longstanding practice, fears have been expressed that appointments have been subject to political interference. The delegation cannot help but conclude that appointing judges on the basis of merit rather than time served is a preferable practice. The current system, an apparent mix of the two, has created the impression that judicial appointments are subject to executive preferences. Therefore, appointments of judges by the President, without the prescribed

requirement of an independent process of assessment by an independent body or representative, was seen by the delegation as lacking objectivity and transparency.

2.41 In order to maintain an independent judiciary free from corruption, it is crucial that the monitoring body, in this case the JSC, is seen to be and is in fact an entirely independent body. The delegation was very troubled to hear complaints regarding the conduct of the JSC and was disturbed to learn that judges are being threatened with removal from the bench, transfer to distant courts and demotion, and that these threats have been carried out in some instances. It was appalled to hear that judges were fearful of meeting the delegation for fear of repercussions. From all the above, it concluded that the administrative procedures within the JSC are manifestly weak and unaccountable such that abuse is possible. The delegation was also vexed by the apparent lack of procedures to ensure a fair hearing for judges under investigation. In particular, it noted the following:

?? No provision for a right of appeal.

?? Not all proceedings are recorded.

?? Inconsistency as to when an investigation should be conducted, when a judge should be disciplined and when a panel of Supreme Court judges should investigate.

?? Judges are offered retirement rather than face an inquiry, which renders the system open to abuse by failing properly to investigate serious matters. Equally, judges can be driven from the bench through fear of being connected to an investigation regardless of their innocence.

2.42 The delegation concluded that Sri Lanka is now in great danger of failing to fulfil its obligations under international law and is not following the Principles it voluntarily signed up to at the sixth Conference of Chief Justices in Beijing. In particular, it is noted that the Statement of Principles requires the removal of judges only after proved misconduct,²² the right to a fair hearing²³ and the publication of disciplinary proceedings.²⁴

²² Principle 22.

- 2.43 The delegation was of the view that existing disciplinary measures for all judges must be subject to improvement and that to generate trust in the judiciary there has to be a willingness to root out corrupt or incompetent judges. Concurrently, a greater sense of security must be imbibed among the majority of Sri Lanka's judges who are widely recognised as both professional and highly competent. Further, disciplinary procedures must be accountable, fair and free from interference by the executive or legislature. For this reason, the delegation is concerned that senior judges are subject to discipline by Parliament which it views as not the appropriate forum in which to have an independent debate about judicial misconduct or incapacity. The delegation, therefore, makes a number of practical recommendations (see below) to help ensure that judicial discipline in Sri Lanka is transparent and accountable.
- 2.44 The salaries, security of tenure and conditions of appointment should be such as to attract the best candidates for a judicial career, based on merit as well as seniority.
- 2.45 The delegation notes that there is no published annual report of judicial functions or activities. Neither is there any means by which judicial independence is monitored or reported.²⁵ The delegation concluded that the judiciary at all levels should be the subject of an annual report signed by the Chief Justice setting out, for public information, full details of the functioning of courts, data on the numbers and types of cases and their disposal, and of the detailed functioning of the JSC. Any criteria on which the judiciary is monitored should be transparent and published among all judges.
- 2.46 Fundamental rights under the Sri Lankan Constitution should be protected as to their enforcement before the Supreme Court by a coherent statement of principle, on the basis of which an application for leave will be granted or refused. The lack of stated legal principles in considering fundamental rights cases is of concern to the delegation, especially in light of the fact that there is

²³ Principle 26.

²⁴ Principle 28.

no regular review of the number of cases refused or granted leave. The delegation concluded that this situation could lead to a scenario in which the approach to fundamental rights cases varies as between different Supreme Court benches. In cases involving human rights abuses, the delegation notes that there must be trust by the victims that the state will bring the perpetrators of violations to justice and act even-handedly between applicants of different ethnic origins. Furthermore, Sri Lanka is bound by its human rights obligations to ensure that it provides reparation for victims of human rights abuses and is also bound under the ICCPR to ensure that the law is applied equally between its citizens.²⁶ Having heard anecdotally that the number of fundamental rights petitions being refused leave has increased, and having noted a lack of clearly-stated principles under which petitions are considered, the delegation concluded that the potential risk for human rights abuses to go unpunished is high.

- 2.47 The delegation has concluded that the Supreme Court should collate and publish data on the number and type of fundamental cases disposed off within the judiciary, including information on the refusal or granting of leave in fundamental rights cases and the particular constitution of the bench. This data will help clarify the basis on which jurisdiction is being exercised quantitatively and qualitatively.
- 2.48 By way of a safeguard, it was the view of the delegation that the panel of judges hearing applications for leave should be subject to a system of regular rotation with the most senior judges acting as chair.
- 2.49 With regard to the Chief Justice, the delegation was concerned to note that he chose the bench considering the petitions against him. Under common law principles of natural justice, the delegation took the view that it would have been preferable for the Chief Justice to refrain from appointing the bench himself. Further, under the UN Basic Principles on the Independence of the Judiciary it is incumbent on judges to decide matters before them impartially.²⁷

²⁵ There is a Judicial Services Association which is a constituent body (similar to a union with elected representative) which issues an annual report.

²⁶ Article 14(1).

- 2.50 Having chosen the bench which then refused leave to proceed in the three fundamental rights petitions against him, it cannot be said that allegations concerning the Chief Justice have been satisfactorily dealt with by judicial scrutiny. The confidence of the ordinary citizens in the independence of the judiciary appears to have been damaged by this unfortunate episode.
- 2.51 The delegation took the view that any outstanding proceedings against the Chief Justice when Attorney-General should be resolved by appropriate action and must not be left in abeyance.
- 2.52 The delegation was equally disturbed by the MPs' submission to Parliament of the impeachment notice and the damage this was doing to the credibility of both the judiciary and the Chief Justice. There have been suggestions that the Chief Justice should withdraw himself from the judiciary while the impeachment process is pending. The delegation believes this to be a matter for the Chief Justice and his conscience. Any continuation of, or new, impeachment proceedings must, however, be dealt with speedily and in accordance with due process of law.
- 2.53 While judges and the courts are not exempt from public debate, politically-motivated criticism of the judiciary and, in particular, the Supreme Court by politicians is regarded by the delegation as contrary to the interests of justice and to the independence of the judiciary.
- 2.54 In return, the public needs to be assured that the judiciary shall ensure at all times that it avoids either bias or the impression of bias, whether in the course of proceedings, or in the manner in which particular panels of judges are selected or proceedings listed or conducted.
- 2.55 The delegation welcomes the positive developments proposed in the World Bank strategic project and is pleased to note that the first stage of the programme is now under way. It has not, however, been appraised of any proposed reforms to judicial administration or the JSC and hopes that these are

²⁷ Principle 2.

firmly in hand by the review committee. If necessary, it suggests some of the funds from the World Bank programme should be redirected specifically to achieve this goal. It welcomes recognition by the Government that judicial administration and structure needs urgent reform and hopes that this report can go some way to assisting with this work. The delegation notes the introduction of Sri Lanka 'Law Net' which will facilitate the dissemination of the latest law reports, legislative changes and other important legal documents throughout the whole of Sri Lanka, something which had hitherto been impossible. This project is clearly a positive start in the process of legal education.

- 2.56 The delegation is firmly of the view that an active Bar Association must play an important role in preserving the rule of law and independence of the judiciary. The delegation was sad to note that the Sri Lanka Bar Association is not functioning to its full effectiveness at present and that it is divided along party political lines. However, the delegation feels sure that this can and will be remedied in the coming months.

Recommendations

1. Appointments of judges by the President and without an independent process of assessment should cease. All judges should be appointed by an independent process of assessment, based on merit, with names being forwarded to the President or Minister of Justice for final appointment.
2. The appointment, transfer, discipline, dismissal or retirement of judges of whatever rank must be determined by a transparent and accountable system. Built into this system must be the opportunity for a fair hearing, at which the proceedings are recorded and a copy given to the judge in question followed by a reasoned decision, with a right of appeal.
3. The JSC must be independent. To ensure this, consideration should be given to the following:
 - i) Membership should be expanded to include a range of other appointees such as the independent legal profession. There must be a greater

number of members of the judiciary on the body than any other constituent group.

- ii) Appointments to the JSC should not be made by the executive.
 - iii) The method of selecting members for the JSC must be transparent and independent.
4. The salaries, security of tenure and conditions of appointment of judges should be such as to attract the best candidates for a judicial career.
 5. The judiciary at all levels should be the subject of an annual report signed by the Chief Justice setting out, for public information, full details of the functioning of courts, data on the number and type of cases and their disposal, and of the detailed functioning of the JSC.
 6. Fundamental rights under the Sri Lankan Constitution should be protected as to their enforcement before the Supreme Court by a coherent statement of principle, on the basis of which leave will be granted or refused. The absence of such a statement of principle runs the risk that different panels of the Supreme Court will adopt different criteria for the granting or refusal of leave.
 7. The administration of the Supreme Court should collate and publish data on the number and type of fundamental rights cases disposed of, and in regard to particular panels of the bench, so as to determine whether there has been a reduction in the number of cases granted leave. But in any event, such data serves to clarify the basis on which jurisdiction is being exercised quantitatively and qualitatively. This should be reviewed by a body separate to judicial administration.
 8. The panels of three Supreme Court judges who hear fundamental rights applications should be subject to an appropriate system of rotation of the different judges. Clearly the presider should be the most senior judge. Every attempt should be made for the junior judges to sit regularly with the most senior judges.

9. Any proceedings or inquiries concerning the position of the Chief Justice when Attorney-General, and in connection with his appointment as Chief Justice, should be resolved by decision or appropriate judicial action and not left in abeyance. Further, any continuation of the present, or future impeachment proceedings of the Chief Justice should be dealt with rapidly and with due process of law.
10. No politician, including the President, should engage in gratuitous or unsupported allegations against members of the judiciary.
11. While judges and the courts are not exempt from public debate, it is contrary to the interests of justice for debate to descend to politically-motivated criticism which has the effect of undermining the stature and independence of the judiciary.
12. Such support from the executive and the legislature must be matched by the judiciary ensuring that, at all times, it avoids either bias or the impression of bias, whether in the course of proceedings, or in the manner in which particular panels of judges are selected or proceedings listed or conducted.
13. The IBA is extremely keen to see the Sri Lankan Bar Association take a more active role in the protection of the rule of law and independence of the judiciary. The delegation hopes that the Bar Association will work with the IBA to build on its membership base and undertake a more active role in promoting these objectives.

CHAPTER 3: CONSTITUTIONAL ISSUES

Relevant Constitutional Provisions

- 3.1 The Constitution provides just two routes for constitutional reform. The first requires the placing of a Bill setting out the amendments before Parliament and no less than two-thirds of all MPs voting in support of it.²⁸ The second applies to the reform of 'core' provisions within the Constitution and requires the support of the Sri Lankan people through a referendum, in addition to a two-thirds majority in Parliament.²⁹ The President, at his/her discretion, can hold a referendum of the people under Article 85. However, constitutional reform via an Article 85 referendum is specifically prohibited. Under Article 86, the President may submit to the people by referendum any matter which, in her opinion, is of national importance. However, as there are no prescribed consequences flowing from an Article 86 referendum, any result is almost certainly not legally binding as to any constitutional effect. The delegation understands that the Supreme Court has never been asked to consider the legality of a referendum under Article 86. Indeed a referendum has never been held under this clause before.
- 3.2 Although the referendum planned for 18 October 2001 has now been officially cancelled by the President, it is possible that future governments may seek to instigate constitutional reform by similar means. The delegation, therefore, considers it appropriate to reflect on the events surrounding this very important issue and draw conclusions on the legal implications.

Facts

- 3.3 The delegation was convinced that the need for constitutional reform was widely accepted among the range of people it consulted during the mission, particularly in an effort to help solve the ongoing ethnic conflict. There was not, however, the same consensus as to the degree of constitutional reform required. The draft Constitution of 2000, presented to Parliament after a long process of cross-party

²⁸ Article 82.

²⁹ Article 83(b).

consultation, did not receive sufficient support from MPs to be passed, and was subsequently withdrawn.

- 3.4 The preamble to the draft Constitution of 2000 stated that the new Constitution would strengthen the institutions of governance; ensure a wider sharing of power; enshrine democratic values such as social justice and human rights; facilitate economic, social and cultural advancement; and promote peace, ethnic harmony and good governance. Perhaps the most important feature of the document was the inclusion of devolution to the regions of Sri Lanka, including the North and East. It is understood that had the referendum resulted in a 'yes' vote, the Government was proposing to bring in a new Constitution, similar to the 2000 draft, by way of a second referendum.
- 3.5 The alternative to an entirely new Constitution is changing the Constitution by a piecemeal process. There have been suggestions from a number of groups, including the UNP and the Organisation of Professional Associations (OPA) that a number of new commissions should be created to look at the Constitution, the media, the electoral system, the police and the judiciary. In addition, there appears to be some consensus on the need to improve the system of judicial supervision, with the OPA, among others, recommending an enlarged JSC.³⁰
- 3.6 It was clearly a matter of frustration to the Government that the constitutional change it felt was so vital in helping solve Sri Lanka's ethnic problems was unattainable. After the Government lost its majority in Parliament and the motion of no confidence in the Government was placed before the Speaker of the House, the issue of constitutional reform again became of primary importance to the President. On the day the President prorogued Parliament, she announced a referendum asking the Sri Lankan people whether they wanted constitutional change. The delegation is aware that Article 70 of the Constitution forbids the prorogation of Parliament within 12 months of the last election and notes that the Government's action contravened this.

³⁰ 17th Amendment to the Constitution, A Publication of the Organisation of the Professional Associations of Sri Lanka, p 10.

- 3.7 Many people whom the delegation met were cynical about the timing of the referendum, believing that Parliament was prorogued under the auspices of constitutional reform only because the Government had lost its majority and was facing a no confidence motion that it might lose. Further, by proroguing Parliament it is unclear whether, under the Constitution, all outstanding bills and motions lapse. The delegation recalls the view of the Minister of Foreign Affairs during its meeting with him on 29 August 2001 in which a new Constitution was said to 'be a matter of necessity'. However, the delegation has since noted that after securing a new coalition with the JVP on 5 September 2001 the referendum on the Constitution was cancelled.
- 3.8 The legality of cancelling the referendum is also a matter of controversy. The Referendum Act does not make any specific provision for cancellation, and some argue that the overriding objective of the Act is that a referendum will take place under any circumstance.
- 3.9 The referendum, originally to be held on 21 August 2001, was later deferred until 18 October 2001. The question to be posed to the people was 'is a new Constitution, as a matter of national importance and necessity, needed for the country?' Under the Referendum Act of 1981, the referendum question must be capable of being answered 'yes' or 'no'.³¹ It was suggested to the delegation by two well-regarded academics, that the phrasing of the question was illogical and unclear. Moreover, an affirmative vote could not lead to a specific course of action capable of being the subject of a yes or no answer.
- 3.10 Notwithstanding the validity of the question, it was the view of some that the use of the word 'necessity' was included with the specific purpose of relying on the doctrine of necessity to justify constitutional reform without going through the due processes. The delegation was advised that as constitutional reform requires the agreement of a two-thirds majority of Parliament, under the current electoral system (proportional representation) it has been impossible to introduce constitutional change. Thus it was a matter of necessity that the people be polled for their views on constitutional reform that was otherwise

³¹ Section 2(2)(a).

unattainable through the normal route. The delegation notes that there have been examples of states adopting new constitutions without reference to the existing Constitution under the common law doctrine of necessity. This doctrine has traditionally permitted the executor of an unlawful act to furnish a legal excuse for a departure from the normal rule of law. It is applied sparingly and has never implied total abdication from judicial review or acquiescence in the suppression of the legal order. An examination of the doctrine and its applicability to the situation facing Sri Lanka is found in the conclusion below.

Conclusions

- 3.11 The delegation noted that the need for constitutional reform was a matter for the Sri Lankan Parliament and people. However, the fact that there was an attempt to pursue constitutional reform by referendum and without Parliamentary approval merits comment from the delegation.
- 3.12 It is clear to the delegation that the drafters of the Constitution did not intend any constitutional reform to follow a referendum held under Article 86. Moreover, in the view of the delegation there are no legally binding consequences flowing from a referendum under this provision. An attempt to by-pass Parliament and bring in constitutional reform via a referendum to the people would, in the opinion of the delegation, be unconstitutional and of dubious legality. Further, it was gravely concerned by the prospect of any reliance upon the doctrine of necessity to justify constitutional reform. It notes that the doctrine has only been successfully applied in most exceptional of circumstances. In reaching this conclusion the delegation relies upon an assessment of the relevant case law pertaining to the doctrine and its judicial review.
- 3.13 In an early English case it was already clear that the doctrine was successfully applied only in the direst of circumstances. Lord Mansfield stated:
- ‘... the only question for you to consider is this: whether there was that necessity for the preservation of the society and the inhabitants of the place as authorised private men ... to take possession of the

government; and to take possession of the government to be sure it was necessary to do it immediately.³²

Pakistan's courts have considered the doctrine of necessity on a number of occasions. In *Federation of Pakistan v Moulvi Tamizuddin Khan*³³ and *Dosso's Case v State*,³⁴ the courts have been willing to accept that the Constitution can be usurped in a military coup. In the latter case, the judge relied heavily on Kelsen's theory quoting him as follows:

'It is never the constitution merely but always the entire legal order that is changed by a revolution. This shows that all the norms of the old order have been deprived of their validity by revolution and not according to the principle of legitimacy.'

However, In *Asma Jilani v Pakistan*³⁵ the Supreme Court was asked, *inter alia*, to consider whether the doctrine enunciated in the *Dosso* case was correct. The facts are that in 1969 General Khan issued a proclamation declaring martial law and assumed the position of President, claiming he would relinquish the post once a new constitution had been framed. Mamoodur Rahman CJ held that the Chief Justice in the *Dosso* case had misapplied the doctrine of necessity. He concluded that the judge had erred in both interpreting Kelsen's theory and applying the facts and circumstances of the case.³⁶ He went on to find that the principle as stated in *Dosso* was unsustainable and held:

'Recourse has to be taken to the doctrine of necessity where the ignoring of it would result in disastrous consequences to the body politic and upset the social order itself but I respectfully beg to disagree with the view that it is a doctrine for validating the illegal acts

³² *R v George Stratton and Others* (1779) 21 *Howell's State Trials* 1045.

³³ PLD 1955 FC 240.

³⁴ PLD 1958 SC 139.

³⁵ PLD 1972 SC 155.

³⁶ In the mid-1960s, Kelsen restated his own position to clarify the matter. He asserted: 'not even in the earliest formulation of the Pure Theory of Law did I express the foolish opinion that the propositions of the Pure Theory of Law "bind" the judge in the way in which legal norms bind him'. He went on to say that 'the relationship between validity and efficacy of legal norms is the efficacy of the legal order is only the condition of validity, not the validity itself ... [E]stablished legal norms must be by and large obeyed

of usurpers I would call this a principle of condonation and not legitimisation.'

In *Nusrat Bhutto v Chief of the Army Staff and Federation of Pakistan*,³⁷ the Court chose not to follow either the *Dosso* or *Jilani* judgments. In 1977, the Chief of the Army Staff, General Zia, imposed Martial Law, removed the Prime Minister and dismissed the National and Provincial Assemblies. The Chief Justice found that the extra-constitutional steps taken by General Zia were justified by the requirements of State necessity and welfare of the people. However, crucially he made clear that the new legal order merely represented a phase of constitutional deviation dictated by necessity and that:

'The Court has found it possible to validate the extra-constitutional action of the chief martial not only for the reason that he stepped in to save the country at a time of grave national crisis and constitutional breakdown, but also because of the solemn pledge given by him that the period of constitutional deviation shall be of as short a duration as possible.'

It would seem, therefore, that acts of unconstitutional behaviour are unlawful, while those which are deemed extra-constitutional, in that they do not directly contradict any provision within the constitution, can be condoned in certain limited and exceptional circumstances.

3.14 Most recently, the Pakistani Supreme Court upheld General Pervez Musharraf's military takeover in the *Military Action Case*³⁸ the Court reasoned:

'There was no remedy provided in the constitution to meet the situation like the present one with which the country was confronted, therefore, constitutional deviation made by the Chief of the Army staff, General Pervez Musharraf for the welfare of the people rather than abrogation the Constitution or imposing Martial Law by means of an extra-constitutional

and if not obeyed, applied; otherwise the legal order as a whole just as a single norm, would lose its validity.' (1965) 17 *Stanford Law Review* 1139.

³⁷ PSC 1977 (Pakistan) 657.

measure is validated for a transition period on recognition to the present regime with a view to achieving his declared objectives and that it is in the interest of the community that order be preserved.’

- 3.15 It can be seen from these cases that the Pakistani Supreme Court has interpreted the doctrine of necessity more strictly over the years and now recognises its legitimacy only as a constitutional deviation, for a temporary period, in the interests of the welfare of the people and only where there is no constitutional remedy in existence. It would be highly unlikely that the Pakistan Supreme Court, or indeed any other national court, would condone action which was entirely unconstitutional.
- 3.16 This view accords with the earlier judgment of *Attorney-General of the Republic v Mustapha Ibrahim and Others*³⁹ which concerned the constitutionality of the merging of the Supreme constitutional Court and the High Court by the House of Representatives. One of the questions facing the Court was whether the doctrine of necessity should or should not be read into the provisions of the Constitution. The Court drew on the experience of other countries and outlined the prerequisites for the application of the doctrine of necessity:
- a) an imperative and inevitable necessity or exceptional circumstances;
 - b) no other remedy to apply;
 - c) the measure taken must be proportionate to the necessity; and
 - d) it must be of a temporary character limited to the duration of the exceptional circumstances.
- 3.17 From this case and the preceding paragraphs, it can be concluded that the criteria under which the doctrine of necessity may be applied are strict. The delegation concluded that the doctrine of necessity can only operate in the gravest of circumstances where the very functioning of society is under severe threat, even then the measures must be temporary and proportionate to the necessity. In Sri Lanka, any use of the doctrine would, in the view of the delegation, be entirely improper, even after taking account of the seriousness of

³⁸ 1999.

³⁹ [1964] *Cyprus Law Reports* 195.

the ongoing conflict. The need to amend the Constitution, important though this may be, is not of the direst necessity threatening the life of the nation. constitutional reform in Sri Lanka is possible only under the provisions outlined in Article 82 and only with the support of two thirds of Parliament. The delegation believes, therefore, that political parties must be prepared to work in cooperation to bring about much needed constitutional reform and with it generate opportunities for political stability, economic prosperity and peace.

3.18 The delegation concluded that the Government's call for a referendum as a route for constitutional change was:

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

3.19 The appropriate constitutional route for reform under the present Constitution is:

- i) By Article 82, where by Parliament would be the vehicle for constitutional change given a two-thirds majority.
- ii) Alternatively, under Article 83, reform of certain 'core' provisions require the calling of a public referendum and agreement by a two-thirds majority of parliament.

3.20 What is neither appropriate, nor constitutionally proper, is to call for constitutional reform through a referendum when the Constitution does not provide a route for implementation of any constitutional reform other than with the agreement of two-thirds of Parliament.

Recommendations

1. It appeared to the delegation that the vast majority of those consulted, including political parties even when in opposition, accepted the need for substantial constitutional reform so as to establish:

- i) Much stronger parliamentary control of government as against the present constitutional system of a strong presidential executive government.
- ii) The introduction of five commissions dealing with justice, media, police, elections and constitution. These are independent commissions designed to ensure fair and efficient working between the executive and these institutions themselves.

The delegation recommends that any reform of the Constitution should be accompanied by necessary changes to accommodate a settlement of the Tamil problem.

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

- i) An adequate balance between central and regional government.
- ii) Adequate autonomy, especially in the Tamil area.
- iii) The defined role of central government in the fields of defence, foreign affairs, national security, taxation and any other appropriate area.

CHAPTER 4: FREEDOM OF THE MEDIA

- 4.1 At the heart of a democracy is the concept of the accountability of elected representatives and civil servants. Ideally, a range of mechanisms should guarantee this, but even the best systems may be abused. History shows that when wrongdoing occurs, the media is the best placed to expose it and ensure that justice and the rule of law are upheld. To ensure the true accountability of legislators and the executive, a democracy should be confident that it has an independent judiciary and a free press. Without either component there is a greater likelihood of an abuse of power by the state.
- 4.2 The issue of freedom of the media is a crucial one in Sri Lanka. Although the Constitution provides for freedom of speech and expression,⁴⁰ successive governments have imposed restrictions on free speech largely as a result of the ongoing conflict in the north and east. In addition, the delegation was saddened to note that expressing dissent on any side of the conflict could constitute a life-threatening activity. The delegation met with a range of people from the Sri Lanka media and was concerned to hear claims that not only was there overt censorship but some of its members also suffered intimidation by agents of the Government. Given the importance of a free media in the context of an independent judiciary, the delegation felt compelled to comment on the serious issues raised by those it consulted during its visit.
- 4.3 The right to freedom of speech is understood to be a general norm of customary international law. It is recognised in all major international human rights treaties and is viewed as an essential element of democracy.⁴¹ In a now famous passage, the European Court of Human Rights claimed 'freedom of expression constitutes one of the essential foundations of a [democratic] society'.⁴²
- 4.4 Nowhere is freedom of speech perceived as more vital than in the press, where overbearing regulation, still present in some autocratic states, has led to the

⁴⁰ Article 14(1)(a).

⁴¹ E Barendt, 'Freedom of Speech in an Era of Mass Communication' in P Birks (ed), *Criminal Justice and Human Rights – Pressing Problems in the Law*, Vol 1 (OUP, 1995), p 110.

⁴² 'Handyside v UK' in D J Harris, M O'Boyle and C Warbrick, *Law of the European Union* (Butterworths, 1995), p 373.

prosecution of writers and free thinkers. The idea of freedom of the press is closely aligned to the concept of free speech as a democratic necessity. The existence of a free press as an essential ingredient of a democratic society is widely recognised. The European Court, stressing the importance of the press as ‘public watch dog’,⁴³ has declared:

‘incumbent upon [the press] to impart information and ideas on political issues just as on these other areas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them.’⁴⁴

- 4.5 The Sri Lankan Government controls the country’s largest newspaper chain, two major television stations, and the Sri Lanka Broadcasting Corporation. Despite election promises in 1994, the Government has not yet privatised government-owned media. There is a variety of independent privately-owned newspapers, journals and radio and television stations. It is reported that some journalists practise self-censorship due to fear of intimidation.
- 4.6 In the PA’s election manifesto of October 1994, it pledged to implement wide-ranging media reforms as part of a policy of improving democracy in Sri Lanka. Following election victory, the PA set up a committee to advise on media reforms with the specific requirement advising on proposed legislative changes. Unfortunately, it is reported that few of the reforms proposed by the committee have been put into place.⁴⁵

Restrictions to Free Speech

- 4.7 The right to free speech is not an absolute one. Both the Universal Declaration on Human Rights and the ICCPR permit restrictions on free speech where such restrictions are:

?? necessary given the exigencies of the situation;

⁴³ *Observer and Guardian v UK*, Series A no 216 (1991), para 59(b).

⁴⁴ *Lingens v Austria*, Series A no 103 (1986), para 41.

⁴⁵ Global Trends on the Right to Information, Article 19, September 2001, available at www.article19.org/docimages/1116.htm.

- ?? set out in law; and
- ?? for a listed reason such as public order or morality.

Both international and regional tribunals interpret these limitations restrictively. The Sri Lankan Constitution permits restrictions on free speech as may be prescribed by law in the interests of racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence.⁴⁶ The Constitution goes beyond the permissible restrictions in international law thereby placing Sri Lankan law in conflict with its international obligations under the ICCPR.

- 4.8 One of the most serious impediments to the protection of human rights in Sri Lanka is Article 16 of the Constitution which maintains the validity of existing laws notwithstanding any inconsistency with the 1978 Constitution. Thus, old laws which were in place before 1978 conflict with the human rights provisions contained within the Constitution. Although there is a provision to challenge new Bills in the Supreme Court on reasons of incompatibility, this can only be done within one week of the Bill being placed on the order paper of Parliament. Where the Supreme Court finds the Bill incompatible, it may refer the draft back to Parliament where it can still be passed by a two-thirds majority.
- 4.9 Sri Lanka retains a law of criminal defamation. In 1997, the editor of the *Sunday Times* newspaper was given a seven-year suspended prison sentence for defamation of the President. His appeal, heard in 2000, was upheld by the Court of Appeal. He has now made a complaint to the Human Rights Committee which was declared admissible and is awaiting final adjudication. The delegation discovered that the editor of *Ravaya* currently has six charges pending against him. Retaining a criminal penalty for defamation gives the irrefutable impression that Sri Lanka's politicians have an interest in restricting certain speech. It is widely recognised, however, that the danger posed by criminal defamation laws is that they will be abused by the state to limit criticism and to stifle public debate. The threat of harsh criminal sanctions, especially imprisonment, exerts a chilling effect on free speech. Ideally, an individual's reputation is treated

⁴⁶ Article 15(3).

primarily or exclusively as a private interest. The role of the Attorney-General, appointed by the Government, in determining when to initiate legal proceedings could be seen to be a further infringement on the right to free speech and a means by which the Government can control the press.

- 4.10 Sri Lanka's Press Council has various powers to regulate publications. Section 16 of the Press Council Law No 5 of 1973 makes it an offence to publish any material which is said to be a decision or a part of a decision of the Cabinet, unless publication has been approved by the Secretary of the Cabinet. In addition, the fact that the President has power to nominate members to the Council has led to allegations that, by its constitutional make-up, the Council is not independent.
- 4.11 On a number of occasions, the Sri Lankan authorities have imposed prior censorship particularly in relation to reporting on the Tamil conflict. There are suggestions that these restrictions have been applied crudely to restrict media criticism.

Intimidation of the Media

- 4.12 The delegation was concerned to learn of the harassment and intimidation suffered by newspaper editors and journalists. Typically, members of the media are questioned by police detectives in what appears to be an attempt to breed a climate of fear. Where journalists challenge politicians they are frequently accused of being members of opposition political parties and running media campaigns for political parties. Detailed below are a number of additional examples:

- ?? In April 2000, the local BBC correspondent was assaulted while covering a rally that protested Norway's involvement in the country's peace process. Other journalists reported threats for expressing opinions critical of the Government. Several fled the country.
- ?? Rohana Kumara, editor of a Sinhala-language newspaper, which had been critical of leading figures in the ruling coalition, was murdered in 1999. To date, no one has been brought to trial.

- ?? In January 2000, the President reportedly attacked the press and singled out individuals and media organisations for criticism by name. Following this broadcast, nine members of the MTV station were interrogated by the police.
- ?? Journalists have been prevented from attending, and reporting on, certain public places or functions.

4.13 The delegation heard about one television station and a number of extremely serious allegations about the tactics used by the Government to restrict its activities. The station runs a mixture of news features, talk shows, current affairs programmes and political satires. Detailed below are some of the main accusations:

- ?? Interrogation of staff by the police Criminal Investigations Division (CID) at their headquarters.
- ?? Harassment of staff including obscene phone calls, nuisance calls to home telephones and surveillance by intelligence officers.
- ?? Arrest in 1996 of the news director by the CID under the Prevention of Terrorism Act. He was later acquitted by a magistrate.
- ?? Financial pressure:
 - ?? To persuade companies not to advertise on the TV station.
 - ?? Government officers have imposed heavy sanctions on the late payment of bills on the basis of 'orders from the top'. Other similar organisations have been given more time to submit payment.
- ?? The withholding of government licences to construct transmission towers.

Conclusions

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

- 4.15 In return, the media itself should investigate and report fairly and reasonably and always in the national interest.
- 4.16 The delegation finds it unacceptable that criminal defamation remains on the statute book and notes that, in many states, civil law replaces criminal sanctions for protecting reputations. The use of criminal defamation ranges from serious interference of press freedom by politicians to the most trivial examples of senior politicians concerned about their *amour propre*.
- 4.17 The continued use of criminal defamation in Sri Lanka is contrary to the fundamental human rights set out in the Constitution and is an affront to a free media. It can be used to stifle, gag and punish the media and it involves the judiciary in a process whereby it becomes an arbiter in a political dispute between the Government and the media. The delegation sees this as wholly inappropriate. So too is the pursuit of prosecution at the instigation of the Attorney-General where it is entirely unclear on what principles he should act to ensure protection from political prosecution.
- 4.18 Were criminal defamation to be repealed, care must be taken to ensure that civil law defamation is applied within its proper limits and is not used to seek punitively high damages as a means of political control, the like of which has been recently seen in Malaysia.
- 4.19 In a literate modern democracy, there is no need for government control of the press, TV or radio and certainly not by way of state ownership. The capacity of any government to stifle free debate is obvious and cannot be justified.
- 4.20 The use of licensing controls and pressure on advertisers, tactics purportedly used by the Government to close down TV stations, is unacceptable. Measures must be taken to ensure that decisions taken by civil servants on these matters are not subject to any considerations other than those required by law. Companies should be free to advertise on the television stations of their choice.

- 4.21 The delegation rejects, in the strongest possible terms, the use of interrogation and harassment by the police or security forces as a means of restricting free speech. Any attacks or intimidation reported by the media should be investigated and those responsible brought to justice.
- 4.22 The delegation noted that the politicians whom it met were all supportive of a free media. However, this willingness to support the right to freedom of speech and bring about reform must be guaranteed regardless of which political party is in power. The delegation concluded that, in the past, political parties have lamented the persecution of the media while in opposition and then continued the previous system when they were in government. The delegation firmly hopes this pattern will not be followed in the future.
- 4.23 The media itself should investigate and report fairly and reasonably and always in the national interest. With a free media comes responsibility and the delegation feels that the relationship between the government and the media would be improved if there was greater trust and recognition of this.
- 4.24 Following the recent coalition of the PA and JVP, the delegation has learned that there was agreement to set up four new commissions and legislation is to be passed within six months to establish a media commission. The delegation sees this initial step as a positive development, although it has now been overtaken by the dissolution of Parliament.

Recommendations

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

- ii) The use of criminal penalties to stifle, gag and punish the media.
 - iii) The involvement of the judiciary in a process which is entirely inappropriate as it becomes a quasi-arbiter in the political disputes between the Government and media.
2. A National Press Association should be formed which is free of party interest or influence. It should include a diverse range of members from both within and outside the industry. This body must be both constitutionally and factually free from influence from the executive or legislature.
 3. It is imperative that the proposals to set up a media commission are seen through to fruition and that the reforms proposed are considered seriously and in the interests of protecting a free media.
 4. There should be a National Advisory Council for the media, independent of Government and independent of any new constitutional Commission. It should issue an annual report on the state of the media and its relationships with the Government, Parliament and the people. It could include members from abroad who are eminent in the field.
 5. It is vital that the media is supported by all political parties to include a genuine and detailed guarantee of the freedom of the press and a willingness to effect change, regardless of which party is in power.
 6. Laws relating to freedom of expression should be reviewed to ensure that they are in conformity with Sri Lanka's international obligations
 7. After the elections, the new Government should take steps to divest itself of ownership of the state media.

EPILOGUE

Sri Lanka is a working democracy with a highly-literate population. It has a well-educated and hard-working society. In the past, the country has functioned as a stable democracy. Like many developing countries, it has explored different constitutional and political alternatives. Central to its progress has been an independent judiciary and a national respect for the rule of law. The judiciary has previously enjoyed a good reputation and indeed some of the senior judges, notably in the Supreme Court, are highly regarded internationally. The delegation recognised that the majority of Sri Lankans respect a constitutional government that serves the people, look to the judiciary to uphold the law and ensure that justice is done, and expect there to be freedom of the press and media so contributing to a healthy democracy.

Sri Lanka is, however, confronted with major problems including: (i) faltering economic development; (ii) the need for urgent constitutional reform; and (iii) ethnic conflict between the Tamil and Sinhalese communities. Sri Lanka's ability to cope with these difficulties is very much dependent on the Government bringing about:

- ?? Constitutional change that commands the confidence of the people.
- ?? The promotion of an independent judiciary and an effective division of powers between the Government, the legislature and the judiciary.
- ?? A free media.

It is essential that all political parties not only declare their support for these principles, but then put them into practice. The people of Sri Lanka are entitled to nothing less. Furthermore, the three overriding issues which are highlighted in this report and which the Government of the day must recognise are:

- (1) The judiciary and the Chief Justice serve the people and must be independent and dedicated to the supremacy of the rule of law.
- (2) Constitutional reform must be achieved through constitutional means.
- (3) A strong democracy depends on a free media and everyone, including the politicians and upholders of the rule of law, should respect this.

The delegation was greatly impressed by the determination of so many that it met who were working for a better Sri Lanka. It is hoped that this report will assist their objectives.

APPENDIX A

EXTRACTS OF THE 1978 SRI LANKA CONSTITUTION

CHAPTER III

FUNDAMENTAL RIGHTS

Article 14

(1) Every citizen is entitled to –

- ? (a) The freedom of speech and expression including publication;
- (b) The freedom of peaceful assembly;
- ? (c) The freedom of association;
- (d) The freedom to form and join a trade union;
- (e) The freedom, either by himself or in association with others, and either in public or in private, to manifest his religion or belief in worship, observance, practice and teaching;
- ? (f) The freedom by himself or in association with others to enjoy and promote his own culture and to use his own language;
- ? (g) The freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise;
- ? (h) The freedom of movement and of choosing his residence within Sri Lanka; and
- ? (i) The freedom to return to Sri Lanka

Article 15

(3) The exercise and operation of the fundamental right declared and recognized by Article 14 (1) (b) shall be subject to such restrictions as may be prescribed by law in the interests of racial and religious harmony.

CHAPTER VII

THE EXECUTIVE

Article 35

(1) While any person holds office as President, no proceedings shall be instituted or continued against him in any court or tribunal in respect of anything done or omitted to be done by him either in his official or private capacity.

CHAPTER XII

THE LEGISLATURE – AMENDMENT OF THE CONSTITUTION

Article 82

(1) No Bill for the amendment of any provision of the Constitution shall be placed on the Order Paper of Parliament, unless the provision to be repealed, altered or added, and consequential amendments, if any, are expressly specified in the Bill and is described in the long title thereof as being an Act for the amendment of the Constitution.

- (2) No Bill for the repeal of the Constitution shall be placed on the Order Paper of Parliament unless the Bill contains provisions replacing the Constitution and is described in the long title thereof as being an Act for the repeal and replacement of the Constitution.
- (3) If in the opinion of the Speaker, a Bill does not comply with the requirements of paragraph (1) or paragraph (2) of this Article, he shall direct that such a Bill be not proceeded with unless it is amended so as to comply with those requirements.
- (4) Notwithstanding anything in the preceding provisions of this Article, it shall be lawful for a Bill which complies with the requirements of paragraph (1) or paragraph (2) of this Article to be amended by Parliament provided that the Bill as so amended shall comply with those requirements.
- (5) A Bill for the amendment of any provision of the Constitution or for the repeal and replacement of the Constitution, shall become law if the number of votes cast in favour thereof amounts to not less than two-thirds of the whole number of Members (including those not present) and upon a certificate by the President or the Speaker, as the case may be, being endorsed thereon in accordance with the provisions of Article 80 or 79.
- (6) No provision in any law shall, or shall be deemed to, amend, repeal or replace the Constitution or any provision thereof, or be so interpreted or construed, unless enacted in accordance with requirements of the preceding provisions of this Article.
- (7) In this Chapter, "amendment" includes repeal, alteration and addition.

Article 83 Notwithstanding anything to the contrary in the, provisions of Article 82-

(b) a Bill for the amendment or for the repeal and replacement of or which is inconsistent with the provisions of paragraph (2) of Article 30 or of, paragraph (2) of Article 62 which would extend the term of office of the President or the duration of Parliament, as the case may be, to over six years,

shall become law if the number of votes cast in favour thereof amounts to not less than two-thirds of the whole number of Members (including those not present), is approved by the People at a Referendum and a certificate is endorsed thereon by the President in accordance with Article 80.

CHAPTER XV

THE JUDICIARY

Article 107.

- (1) The Chief Justice, the President of the Court of Appeal and every other Judge of the Supreme Court and Court of Appeal shall be appointed by the President of the Republic by warrant under his hand.

- ? Every such Judge shall hold office during good behaviour and shall not be removed except by an order of the President made after an address of Parliament supported by a majority of the total number of Members of Parliament (including those not present) has been presented to the President for such removal on the ground of proved misbehaviour or incapacity:

provided that no resolution for the presentation of such an address shall be entertained by the Speaker or placed on the Order Paper of Parliament, unless notice of such resolution is signed by not less than one-third of the total number Members of Parliament and sets out full particulars of the alleged misbehaviour or incapacity.

Article 108.

- (1) The salaries of the Judges of the Supreme Court and of the Court of Appeal shall be determined by Parliament and shall be charged on the Consolidated Fund.

Article 111 *. [(1) There shall be a High Court of Sri Lanka which shall exercise such jurisdiction and powers as Parliament may by law vest or ordain.]

Article 112.

- (1) There shall be a Judicial Service Commission (in this chapter referred to as the "Commission") which shall consist of the Chief Justice who shall be the chairman, and two Judges of the Supreme Court appointed by the President of the Republic.

(8) The Judicial Service Commission may make-

- (a) Rules regarding schemes for recruitment and procedure for ** [the appointment of judicial officers, and scheduled public officers,] and,
- (b) Provision for such matters as are necessary or expedient for the exercise, performance and discharge of the powers, duties and functions of such Commission.

Article 113.

- (1) There shall be a Secretary to the Commission who shall be appointed by the President in consultation with the Cabinet of Ministers.

Article 114.

- (1) The appointment, transfer, dismissal and disciplinary control of judicial officers, and (notwithstanding, anything to the contrary in Chapter IX) of scheduled public officers, is vested in the Commission.
- (5) The Chairman of the Judicial Service Commission or any Judge of the Supreme Court authorized by the Chairman of the Commission shall have full power and authority to inspect any Court of First Instance or the records, registers or other

documents maintained in such court and to hold such inquiry as may be necessary.

CHAPTER XVI

THE SUPERIOR COURTS

Article 119.

- (1) The Supreme Court shall consist of the Chief Justice and of not less than six and not more than ten other Judges who shall be appointed as provided in Article 107.

* Original para (1) repeals and substituted by the Eleventh Amendment to the Constitution sec. 2.

** Substituted by the Eleventh Amendment to the Constitution Sec. 3, for “the appointment of judicial officers.”

APPENDIX B.

Basic Principles on the Independence of the Judiciary

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

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

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

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

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

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

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

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

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

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

The following basic principles, formulated to assist Member States in their task of securing and promoting the independence of the judiciary should be taken into account and respected by Governments within the framework of their national legislation and practice and be brought to the attention of judges, lawyers, members of the executive and the legislature and the public in general. The principles have been formulated principally with professional judges in mind, but they apply equally, as appropriate, to lay judges, where they exist.

Independence of the judiciary

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

Freedom of expression and association

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

Qualifications, selection and training

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

Conditions of service and tenure

11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.
12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.
13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.

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

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

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

Discipline, suspension and removal

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

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

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

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

APPENDIX C

UN BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY.

Preamble and Beijing Statement

PREAMBLE TO STATEMENT OF PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY

Beijing, 19 August, 1995

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ANNEX

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

Judicial Independence

1. The Judiciary is an institution of the highest value in every society.
2. The Universal Declaration of Human Rights (Art. 10) and the International Covenant on Civil and Political Rights (Art. 14(l)) proclaim that everyone should be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. An independent Judiciary is indispensable to the implementation of this right.
3. Independence of the Judiciary requires that;
 - (a) the Judiciary shall decide matters before it in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source; and
 - (b) the Judiciary has jurisdiction, directly or by way of review, over all issues of a justiciable nature.
4. The maintenance of the independence of the Judiciary is essential to the attainment of its objectives and the proper performance of its functions in a free society observing the Rule of Law. It is essential that such independence be guaranteed by the State and enshrined in the Constitution or the law.
5. It is the duty of the Judiciary to respect and observe the proper objectives and functions of the other institutions of government. It is the duty of those institutions to respect and observe the proper objectives and functions of the Judiciary.
6. In the decision-making process, any hierarchical organisation of the Judiciary and any difference in grade or rank shall in no way interfere with the duty of the judge exercising jurisdiction individually or judges acting collectively to pronounce judgment in accordance with article 3 (a). The Judiciary, on its part, individually and collectively, shall exercise its functions in accordance with the Constitution and the law.
7. Judges shall uphold the integrity and independence of the Judiciary by avoiding impropriety and the appearance of impropriety in all their activities.
8. To the extent consistent with their duties as members of the Judiciary, judges, like other citizens, are entitled to freedom of expression, belief, association and assembly.
9. Judges shall be free subject to any applicable law to form and join an association of judges to represent their interests and promote their professional training and to take such other action to protect their independence as may be appropriate.

Objectives of the Judiciary

10. The objectives and functions of the Judiciary include the following:
 - (a) to ensure that all persons are able to live securely under the Rule of Law;
 - (b) to promote, within the proper limits of the judicial function, the observance and the

attainment of human rights; and

(c) to administer the law impartially among persons and between persons and the State.

Appointment of Judges

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

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

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

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

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

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

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

Tenure

18. Judges must have security of tenure.

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

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

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

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

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

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

25. Where parliamentary procedures or procedures for the removal of a judge by vote of the people do not apply and it is proposed to take steps to secure the removal of a judge, there should, in the first instance, be an examination of the reasons suggested for the removal, for the purpose of determining whether formal proceedings should be commenced. Formal

proceedings should be commenced only if the preliminary examination indicates that there are adequate reasons for taking them.

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

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

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

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

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

Judicial Conditions

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

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

Jurisdiction

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

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

Judicial Administration

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

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

37. The budget of the courts should be prepared by the courts or a competent authority in collaboration with the Judiciary having regard to the needs of judicial independence and administration. The amount allotted should be sufficient to enable each court to function without an excessive workload.

Relationship with the Executive

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

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

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

Resources

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

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

Emergency

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

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

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

The Hon Sir Gerard Brennan AC KBE Chief Justice of Australia

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

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

The Hon Sir Ti Liang Yang Chief Justice of Hong Kong

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

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

The Hon Yun Kwan Chief Justice of the Republic of Korea

The Hon D. Dembereltseren Chief Justice of Mongolia

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

The Rt Hon Mr Justice Biswanath Upadhyaya Chief Justice of Nepal

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

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

The Hon Mr Justice Sajjad Ali Shah Chief Justice of Pakistan

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

The Hon Andres R. Narvasa Chief Justice of the Philippines

The Hon Justice Yong Pung How Chief Justice of Singapore

**The Hon Mr Justice P. R. P. Perera Justice of the Supreme Court of Sri Lanka
(Representing The Hon Mr Justice G. P. S. De Silva, Chief Justice of Sri Lanka)
The Hon Charles Vaudin D'Imecourt Chief Justice of Vanuatu
The Hon Mr Justice Pham Hung Chief Justice of Vietnam
Tiavaasue Falefatu Maka Sapolu Chief Justice of Western Samoa**

APPENDIX D

IBA MINIMUM STANDARDS OF JUDICIAL INDEPENDENCE

(Adopted 1982)

A. JUDGES AND THE EXECUTIVE

1.
 - a) Individual judges should enjoy personal independence and substantive independence.
 - b) Personal independence means that the terms and conditions of judicial service are adequately secured so as to ensure that individual judges are not subject to executive control.
 - c) Substantive independence means that in the discharge of his judicial function a judge is subject to nothing but the law and the commands of his conscience.
2. The Judiciary as a whole should enjoy autonomy and collective independence vis-à-vis the Executive.
3.
 - a) Participation in judicial appointments and promotions by the executive or legislature is not inconsistent with judicial independence provided that appointments and promotions of judges are vested in a judicial body in which members of judiciary and the legal profession form a majority.
 - b) Appointments and promotions by a non-judicial body will not be considered inconsistent with judicial independence in countries where, by long historic and democratic tradition, judicial appointments and promotion operate

satisfactorily.

4.
 - a) The Executive may participate in the discipline of judges only in referring complaints against judges, or in the initiation of disciplinary proceedings, but not the adjudication of such matters. The power to discipline or remove a judge must be vested in an institution, which is independent of the Executive.
 - b) The power of removal of a judge should preferably be vested in a judicial tribunal.
 - c) The Legislature may be vested with the powers of removal of judges, preferably upon a recommendation of a judicial commission.
5. The Executive shall not have control over judicial functions.
6. Rules of procedure and practice shall be made by legislation or by the Judiciary in co-operation with the legal profession subject to parliamentary approval.
7. The State shall have a duty to provide for the executive of judgements of the Court. The Judiciary shall exercise supervision over the execution process.
8. Judicial matters are exclusively within the responsibility of the Judiciary, both in central judicial administration and in court level judicial administration.
9. The central responsibility for judicial administration shall preferably be vested in the Judiciary or jointly in the Judiciary and the Executive.
10. It is the duty of the State to provide adequate financial resources to allow for the due administration of justice.
- 11.

- a) Division of work among judges should ordinarily be done under a predetermined plan, which can be changed in certain clearly defined circumstances.
 - b) In countries where the power of division of judicial work is vested in the Chief Justice, it is not considered inconsistent with judicial independence to accord to the Chief Justice the power to change the predetermined plan for sound reasons, preferably in consultation with the senior judges when practicable.
 - c) Subject to (a) the exclusive responsibility for case assignment should be vested in a responsible judge, preferably the President of the Court.
12. The power to transfer a judge from one court to another shall be vested in a judicial authority and preferably shall be subject to the judge's consent, such consent not to be unreasonably withheld.
13. Court services should be adequately financed by the relevant government.
14. Judicial salaries and pensions shall be adequate and should be regularly adjusted to account for price increases independent of executive control.
- 15
- a) The position of the judges, their independence, their security, and their adequate remuneration shall be secured by law.
 - b) Judicial salaries cannot be decreased during the judges' services except as a coherent part of an overall public economic measure.
16. The ministers of the government shall not exercise any form of pressure on judges, whether overt or covert, and shall not make statements which adversely affect the independence of individual judges or of the Judiciary as a whole.
17. The power of pardon shall be exercised cautiously so as to avoid its use as interference.

18.

- a) The Executive shall refrain from any act or omission which pre-empts the judicial resolution of a dispute or frustrates the proper execution of a court judgement.
- b) The Executive shall not have the power to close down or suspend the operation of the court system at any level.

B. JUDGES AND THE LEGISLATURE

19. The Legislature shall not pass legislation which retroactively reverses specific court decisions.

20.

- a) Legislation introducing changes in the terms and conditions of judicial services shall not be applied to judges holding office at the time of passing the legislation unless the changes improve the terms of service.
- (b) In case of legislation reorganising courts, judges serving in these courts shall not be affected, except for their transfer to another court of the same status.

21. A citizen shall have the right to be tried by the ordinary courts of law, and shall not be tried before *ad hoc* tribunals.

C. TERMS AND NATURE OF JUDICIAL APPOINTMENTS

22. Judicial appointments should generally be for life, subject to removal for cause and compulsory retirement at an age fixed by law at the date of appointment.

23.

- a) Judges should not be appointed for probationary periods except for legal systems in which appointments of judges do not depend on having practical experience in the profession as a condition of the appointment.
- b) The institution of temporary judges should be avoided as far as possible except where there exists a long historic democratic tradition.

24. The number of the members of the highest court should be rigid and should not be subject to change except by legislation.
25. Part-time judges should be appointed only with proper safeguards.
26. Selection of judges shall be based on merit.
27. The proceedings for discipline and removal of judges should ensure fairness to the judge and adequate opportunity for hearing.
28. The procedure for discipline should be held in camera. The judge may however request that the hearing be held in public, subject to final and reasoned disposition of this request by the disciplinary tribunal. Judgements in disciplinary proceedings, whether held in camera or in public, may be published.
29.
 - a) The grounds for removal of judges shall be fixed by law and shall be clearly defined.
 - b) All disciplinary actions shall be based upon standards of judicial conduct promulgated by law or in established rules of court.
30. A judge shall not be subject to removal unless by reason of a criminal act or through gross or repeated neglect or physical or mental incapacity he has shown himself manifestly unfit to hold the position of judge.
31. In systems where the power to discipline and remove judges is vested in an institution other than the Legislature the tribunal for discipline and removal of judges shall be permanent and be composed predominantly of members of the Judiciary.
32. The head of the court may legitimately have supervisory powers to control judges on administrative matters.

E. THE PRESS, THE JUDICIARY AND THE COURTS

33. It should be recognised that judicial independence does not render the judges free from public accountability, however, the press and other institutions should be aware of the potential conflict between judicial independence and excessive pressure on judges.
34. The press should show restraint in publications on pending cases where such publication may influence the outcome of the case.

F. STANDARDS OF CONDUCT

35. Judges may not, during their term of office, serve in executive functions, such as ministers of the government, nor may they serve as members of the Legislature or of municipal councils, unless by long historical traditions these functions are combined.
36. Judges may serve as chairmen of committees of inquiry in cases where the process requires skill of fact-finding and evidence-taking.
37. Judges shall not hold positions in political parties.
38. A judge, other than a temporary judge, may not practice law during his term of office.
39. A judge should refrain from business activities, except his personal investments, or ownership of property.
40. A judge should always behave in such a manner as to preserve the dignity of his office and the impartiality and independence of the Judiciary.
41. Judges may be organised in associations designed for judges, for furthering their rights and interests as judges.

42. Judges may take collective action to protect their judicial independence and to uphold their position.

G. SECURING IMPARTIALITY AND INDEPENDENCE

43. A judge shall enjoy immunity from legal actions and the obligation to testify concerning matters arising in the exercise of his official functions.
44. A judge shall not sit in a case where there is a reasonable suspicion of bias or potential bias.
45. A judge shall avoid any course of conduct which might give rise to an appearance of partiality.

H. THE INTERNAL INDEPENDENCE OF THE JUDICIARY

46. In the decision-making process, a judge must be independent vis-à-vis his judicial colleagues and supporters.