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OBJECTIVES

The Law and Society Trust Fortnightly Review keeps the wider Law and Society community informed about the activities of the Trust, and about important events of legal interest and personalities associated with the Trust.

FUNDAMENTAL RIGHTS: THE NEW AMENDMENT

By Neelan Tiruchelvam

The new amendments to the chapter on Fundamental Rights are to be presented in Parliament shortly. The amendments have three broad objectives. Firstly, to strengthen the existing chapter on fundamental rights and to add to the said chapter new rights having regard to the Sri Lankan constitutional experience over the past decade and its international obligations under the International Civil and Political Covenant, and the International Socio-Economic Covenant. Secondly, to re-examine the restrictions on the existing fundamental rights enabling the state to derogate from such rights. This was achieved by deleting Article 15(7) of the Constitution which provided for wide and general restrictions and to further limit restrictions on a case-by-case basis. The exercise was directed towards rationalizing the restrictions and wherever practicable to limiting the restrictions. Thirdly, to broad-base and democratize remedies relating to the enforcement of fundamental rights, and to provide for public interest litigation. With these broad objectives in view, the following specific changes have been introduced.

Firstly, the Constitution now provides that 'access to justice' shall be a fundamental right, and further that the 'inherent right to life' and the 'right to liberty and to security of persons' shall be recognised as fundamental rights. Secondly, the existing fundamental rights relating to the freedom of speech, have been expanded to include 'publication and information'. Other changes provide that at the time of arrest, an accused shall be informed (a) of the reasons for his arrest; b) his right to remain silent; c) his right to retain a lawyer; and d) that any statement made by him in the presence of a lawyer will be admissible. Further, all persons arrested shall be charged within 'a reasonable period' and shall be brought to trial 'without unreasonable delay'. Fourthly, the new amendments are intended to rationalise the existing restrictions on fundamental rights and to limit those restrictions to those instances where the derogation from fundamental rights would be necessary. Fifthly, with regard to remedies, they enable a 'body', other than the in-

dividual affected, to engage in public interest litigation. The remedy in relation to fundamental rights can be invoked within four months in lieu of the one month period envisaged now. Further, such a remedy may be now invoked in respect of 'state action', instead of 'executive and administrative action', as provided for in the present Constitution.

THE FULL PROVISIONS OF THE ACT

AN ACT TO AMEND THE CONSTITUTION OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

BE it enacted by the Parliament of the Democratic Socialist Republic of Sri Lanka as follows:-

Short Title

Replacement of Articles 12 to 17 of the Constitution

1. This Act may be cited as the Seventeenth Amendment to the Constitution.

2. Articles 12 to 17 (both inclusive) of the Constitution of the Democratic Socialist Republic of Sri Lanka (hereinafter referred to as "the Constitution") are hereby repealed and the following Articles substituted therefor:-

This is a special issue on the 17th Amendment to the Constitution.

Right to equality

"12.(1)(a) All persons are equal before the law and are entitled to the equal protection of the law.

(b) Subject to the provisions of the Constitution, no person shall be denied access to the institutions for the administration of justice created and established or recognized by the Constitution or by law, for the protection, vindication and enforcement of his rights.

(2) No citizen shall be discriminated against on the grounds of ethnic group, religion, language, caste, sex, political opinion, place of birth or any one of such grounds:

Provided that it shall be lawful to require a person to acquire within a reasonable time sufficient knowledge of any language as a qualification for any employment or office in the Public, Judicial or Local Government Service or in the service of any public corporation, where such knowledge is reasonably necessary for the discharge of the duties of such employment or office:...

Provided further that it shall be lawful to require a person to have a sufficient knowledge of any language as a qualification for any such employment or office where no function of that employment or office can be discharged otherwise than with a knowledge of that language.

(3) No person shall, on the grounds of ethnic group, religion, language, caste, sex or any one of such grounds, be subject to any disability, liability, restriction, or condition with regard to access to shops, public restaurants, hotels, places of public entertainment and places of public worship of his own religion.

(4) Nothing in this Article shall prevent special provision being made by law, subordinate legislation or executive action, for the advancement of women, children, youth or disabled persons.

Freedom from arbitrary arrest, detention and punishment, and prohibition of retroactive penal legislation.

13. (1) No person shall be arrested except according to procedure established by law. Any person arrested shall at the time of his arrest be informed in a language which he appears to understand -

(a) of the reasons for his arrest,
(b) of his right to remain silent,
(c) of his right to retain an attorney-at-law, and
(d) that any statement made by him in the presence of such attorney-at-law will be admissible in court.

(2) Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law.

(3) Any person charged with an offence shall be so charged within a reasonable period of time and shall be entitled to be heard, in person or by an attorney-at-law, at a fair trial by a competent court, without unreasonable delay.

(4) Every person has the inherent right to life. No person shall be arbitrarily deprived of his life.

(a) Every person has the right to liberty and security of person. No person shall be deprived of such right except on such grounds and in accordance with procedures established by law.

(b) No person shall be punished with imprisonment except by order of a competent court, made in accordance with procedure established by law. The arrest, holding in custody, detention or other deprivation of personal liberty of a person, pending investigation or trial, shall not constitute punishment.

(5) Every person shall be presumed innocent until he is proved guilty:

Provided that the burden of proving particular facts may, by law, be placed on an accused person.

(6) No person shall be held guilty of an offence on account of any act or omission which did not, at the time of such act or omission, constitute such an offence, and no penalty shall be imposed for any offence more severe than the penalty in force at the time such offence was committed.

Nothing in this Article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

It shall not be a contravention of this Article to require the imposition of a minimum penalty for an offence provided that such penalty does not exceed the maximum penalty prescribed for such offence at the time such offence was committed.

(7) The arrest, holding in custody, detention or other deprivation of personal liberty of a person, by reason of a removal order or a deportation order made under the provisions of the Immigrants and Emigrants Act or such other law as may be enacted in substitution therefor, shall not be a contravention of this Article.

Freedom of speech, assembly, association, movement, & c.

14. (1) Every citizen is entitled to -

(a) the freedom of speech and expression including publication and information;
(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 leave and to return to Sri Lanka.

(2) A person not being a citizen of Sri Lanka, to whom the Indo-Ceylon Agreement, signed on 30 October, 1964 and amendments to the said Agreement applies, and who has been ordinarily resident in Sri Lanka prior to the enactment of the Grant of Citizenship to Stateless Persons (Special Provisions) Act, No.39 of 1988, and continues to be so resident shall be entitled to the rights declared and recognised by Articles 12(2) and 14. The issue of every such person shall also be entitled to such rights, provided that such issue is ordinarily resident in Sri Lanka.

Restrictions on fundamental rights

15 (1) The exercise and operation of the fundamental rights declared and recognized by Articles 12(1) (a), 12(2), (13)(1), 13(2), 13(5), 13(6) and 14(1)(d) shall be subject only to such restrictions as may be prescribed by law in the interests of national security or of public order.

(2) The exercise and operation of the fundamental right declared and recognized by Article 12(3) shall be subject only to such restrictions as may be prescribed by law for the protection of women and children or in the interests of national security or public order.

(3) The exercise and operation of the fundamental right declared and recognized by Article 14(1) (a) shall be subject to such restrictions as may be prescribed by law in the interests of ethnic and religious harmony or in relation to parliamentary privilege, contempt of court, defamation, incitement to an offence or national security or public order or for the prevention of obscenity. The exercise and operation of the fundamental right to information shall be subject to such further restrictions as may be prescribed by law in the interests of privacy, state privilege, or official secrecy.

(4) 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 ethnic and religious harmony, national security or public order.

(5) The exercise and operation of the fundamental right declared and recognized by Article 14(1) (c) shall be subject to such restrictions as may be prescribed by law in the interests of ethnic and religious harmony or national economy, or national security or public order.

(6) The exercise and operation of the fundamental right declared and recognized by Article 14(1) (e) shall be subject to such restrictions as may be prescribed by law for the purposes of securing due recognition and respect for the rights and freedom of others or in the interests of ethnic and religious harmony or national security or public order.

Existing written law and unwritten law to continue in force

(7) The exercise and operation of the fundamental right declared and recognised of 14(1) (f) shall be subject to such restrictions as may be prescribed by law for the purposes of securing due recognition and respect for the rights and freedoms of others or in the interests of ethnic and religious harmony.

(8) The exercise and operation of the fundamental right declared and recognized by Article 14(1) (g) shall be subject to such restrictions as may be prescribed by law in the interests of national economy or in relation to -

(a) the professional technical, academic, financial and other qualifications necessary for practising any profession or carrying on any occupation, trade, business or enterprise and the licensing and disciplinary control of the person entitled to such fundamental right, and

(b) the carrying on by the State, State agency or a public corporation of any trade, business, industry, service or enterprise, whether to the exclusion, complete or partial, of citizens or otherwise.

(9) The exercise and operation of the fundamental right declared and recognized by Article 14(1) (h) shall be subject to such restrictions as may be prescribed by law in the interests of national economy, public health, national security or public order.

(10) The exercise and operation of the fundamental right declared and recognized by Articles 14(1) (i) shall be subject to such restrictions as may be prescribed by law in the interests of national security, public order, the detection and punishment of offences, or by procedure established by law applicable to the entry and exit of persons to and from Sri Lanka.

(11) The exercise and operation of the fundamental rights declared and recognized by Articles 12(1), 13 and 14 shall, in their application to the members of the Armed Forces, Police Force and other Forces charged with the maintenance of public order, be subject to such restrictions as may be prescribed by law in the interests of the proper discharge of their duties and the maintenance of discipline among them.

(12) For the purposes of this Article "law" includes regulations made under the law for the time being relating to public security.

(16) (1) All existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of this Chapter.

(2) The subjection of any person on the order of a competent court to any form of punishment recognized by any existing written law shall not be a contravention of the provisions of this Chapter.

Remedy for the infringement of fundamental Rights by state action

(17)(1) Every person shall be entitled to apply to the Supreme Court as provided by Article 126 in respect of the infringement or imminent infringement by State action of a fundamental right to which such person is entitled under the provisions of this Chapter.

(2) Where the person aggrieved is unable or incapable of making an application under Article 126 by reason of physical or social or economic disability, or similar cause, a body of persons shall be entitled to make an application under Article 126 on behalf of such person, if the application is in the public interest and the person aggrieved raises no objection to such application.

In this paragraph "body of persons" means a body of persons, Sri Lankan in character, whether incorporated or unincorporated".

Amendment of Article 121 of the Constitution

3. Article 121 of the Constitution is hereby amended as follows:-

(1) in paragraph (1) of that Article, by the substitution, for the words "within one week", of the words "within two weeks";

(2) in paragraph (2) of that Article, by the substitution of the words "period of three weeks", of the words "period of one month"; and

(3) in paragraph (3) of that Article, by the substitution, for the words "within three weeks", of the words "within one month"

4. Article 122 of the Constitution is hereby amended in paragraph (1) of that Article as follows:-

(1) by the substitution, for the words "a Bill, which is in the view of the Cabinet of Ministers". of the words "a Bill, not being a Bill which is described in its long title as being for the amendment of any provision of the Constitution, or for the repeal and replacement of the Constitution, which is in the view of the Cabinet of Ministers"; and

(2) by the substitution, for the words "within twenty four hours (or such longer period not exceeding three days as the President may specify), of the words "within seventy-two hours (or such longer period not exceeding eight days as the President may specify)".

5. Article 126 of the Constitution is hereby amended as follows:-

(1) in paragraph (1) of that Article, by the substitution, for the words "by executive or administrative action", of the words "state action"; and

(2) in paragraph (2) of that Article -

i) by the substitution for the words "by executive or administrative action"; of the words "by state action" and

ii) by the substitution for the words "within one month thereof", of the words "within four months thereof".

Sinhala text to prevail in the event of inconsistency

6. In the event of any inconsistency between the Sinhala and Tamil texts of this Act, the Sinhala text shall prevail.

SOCIETIES IN TRANSITION

Constitutional Change in South Asia: Sri Lanka and Nepal

By Mario Gomez

The Seventeenth Amendment to the Constitution is now ready for debate before Parliament. The Seventeenth Amendment has come into being as a result of a unique process of constitutional change - the All Party Conference - and is the result of about six months of discussion at this forum.

The All Party Conference (APC) - a gathering of representatives from the major political parties and functioning in the nature of a second chamber - has been engaged in a process of constitutional and other review for the past six months. The objective of the exercise was to reach a political consensus on fundamental issues affecting our polity, that could not be achieved through the mechanism of elected representatives in Parliament. The seventeenth amendment is its first major product. If the amendment passes through Parliament it would represent a significant development in terms of political change in Sri Lanka.

In another part of South Asia - Nepal - a more significant process of political change is taking place. More significant because the changes being sought through the introduction of a new constitutional order, are tantamount to a complete reversal of the order that existed before. This short note will examine some of the more salient features of these processes of change.

CONSTITUTIONAL REFORM IN THE AUSTRIAN TRADITION

April 1990 marked a new phase in the constitutional history of Nepal. The proclamation of the King brought to a halt the movement for democracy in that country. By acceding to the demands of the Pro Democracy Movement, King Birendra took the steam out of the popular struggle.

History may also mark April 1990 as a turning point in the political history of Sri Lanka. For around that

Amendment of Article 126 of the Constitution

time a Representative Committee of the APC - representing all major political parties in the country, barring the Sri Lanka Freedom Party and the Mahajana Eksath Peramuna - began an inquiry into several fundamental issues relating to Sri Lankan society. One of those issues was a scrutiny of the fundamental rights chapter in the 1978 constitution. The Seventeenth Amendment is the result of this exercise. Other issues like the Media and Devolution are still being debated.

The Proclamation of the King in Nepal set in motion a process of events that has led to the adoption of a new constitution in the country. The invitation to political parties to participate in an All Parties Conference - and the formation of the Representative Committee - also set in motion a train of events, which now seems likely to alter in some degree, the constitutional structure of Sri Lanka.

The sincerity of the political elites in both countries to a process of constitutional reform is not beyond question. One can only hope that the optimism entertained at this stage is not misplaced.

Both these processes of reform were ignited by a popular struggle of sorts. In Nepal - a struggle of much larger magnitude than in Sri Lanka. The social forces which unleashed this process of constitutional reform in Nepal drew their strength from a larger section of society compared to Sri Lanka. In Sri Lanka the struggle came from a much smaller section of society, though the issues they articulated had widespread empathy.

In Sri Lanka the APC began meeting in 1989, in an effort to get the Janatha Vimukthi Peramuna - which was then waging a war against the state - into the political mainstream. The effort failed, but the APC continued to meet and to address several issues which surfaced during the period of the JVP militancy.

Both struggles took place outside the pale of conventional politics. But both processes of change - if they do occur completely - are taking place within the framework of the Austinian model.

In Nepal the space for dissent and change was almost non-existent prior to the events of February, March and April this year. Hence any movement for political change would have to come from outside the legally recognized political canvas.

In Sri Lanka too, despite a semblance and a facade of constitutional democracy, significant extra-political pressures existed (and probably still do exist) that were not conducive to an environment of dissent or change. The space for initiating change was small. Here too, at least part of the stimulus for change, came from outside the pale of traditional politics.

The instrument of the All Party Conference has also highlighted the deficiencies in conventional instruments for change. The mechanism being used to initiate this process of change in Sri Lanka is one that lies outside the conventional political fabric. It is not the elected representatives sitting as members of Par-

liament, but a gathering of representatives from the different political parties in the country, that have now produced Sri Lanka's seventeenth amendment.

The All Party Conference was convened at one time, in an attempt to solve the ethnic problem. APCs were convened to seek participation, through a process of dialogue and negotiation, from groups that had rejected traditional party politics and opted to seek change from outside the mainstream of politics.

The APC was reconvened again last year, to seek the participation of another group - the JVP - that was articulating a set of grievances and demands from outside the mainstream of politics. The effort failed, but the APC has continued to sit - despite the absence of the second largest political party in the country, the SLFP - and explore some fundamental issues affecting our polity.

In Nepal too, the new constitution that has now come into force, was the product of a committee representing several political strands in that country and was constituted solely for the purpose of drafting a new constitution.

The Seventeenth Amendment

The Seventeenth Amendment introduces a new chapter on fundamental rights - replacing the current articles 12 to 17 with new articles. Many of them are replications of the earlier provisions, some others represent significant changes to the constitution.

What the Seventeenth Amendment seeks is a comprehensive rewriting of the fundamental rights chapter contained in the 1978 constitution. The re-writing flows from over a decade of experience with the provisions of the present chapter.

The amendments reflect an article of faith in the notion of rights as a mechanism for change and as a bulwark against arbitrary government. They also reflect influences from within the region, especially from India.

Among its more significant amendments are the inclusion of clauses permitting third parties to file fundamental rights cases on behalf of aggrieved parties; the expansion of 'executive and administrative action' to the wider notion of 'state action'; the inclusion of a right to life clause; the inclusion of a clause on the right to equal access to justice; and the extension of the time frame within which fundamental rights applications may be filed, from one month to four months.

The Movement for Democracy in Nepal

The movement for democracy took off on February 18 this year. On that day the Nepali Congress and the United Left Front published a joint appeal for a 'People's Movement'. The appeal called upon the

people of Nepal to band together to overthrow the existing political system.

Prior to this there had been several protests against the existing order. However the appeal of 18 February began a dramatic 50 day period which culminated in the King's proclamations in April, capitulating to the demands of the people for a multi party system and constitutional democracy.

The King revoked an order banning political parties and set up a constitution drafting committee to prepare a new constitution for the country. He also established an interim cabinet, which will run the nation's affairs, till elections are held in April or May next year.

The draft constitution was submitted by the drafting committee in September and has now been proclaimed by the King, subject to a few minor alterations. The new constitution replaces the Panchayat constitution, which was in force for almost thirty years. The Nepalis lost out in the 1950s when after the overthrow of the Rana dynasty, a promised constituent assembly failed to materialise, and with it, a new constitution embedding the principles of constitutionalism and pluralism.

The new draft constitution submitted by the drafting committee in September is probably the most progressive of the constitutions in the region. In a matter of about six months Nepal has moved from a heavily centralised and dictatorial state, to being one of most liberal democratic states - in terms of constitutional theory - in any part of the third world.

Third Party Actions

One of the most significant regional developments in human rights jurisprudence over the past 10 years, has been the concept of public interest litigation (or Social action Litigation), pioneered by Justices Krishna Iyer and Bhagwati of the Indian Supreme Court.

The Seventeenth Amendment seeks to give constitutional sanctity to one component of this development. PIL as it developed in India was primarily and essentially a judge made concept. The concept has been fashioned by the Indian Supreme Court, with the participation and assistance of academics, journalists, and activists.

In Sri Lanka - third party actions in cases of fundamental rights violations will now be institutionalized, through a stroke of the legislative pen.

In terms of the amendment, Article 17(2) permits a body of persons to make an application under Article 126 of the constitution, where the person aggrieved is unable or incapable of making the application himself/herself, and where the application is in the public interest.

A significant restriction, is the requirement that the aggrieved party be 'incapable' of making the applica-

tion, due to a 'physical or social or economic disability', thus raising the possibility of endless debates on when a person is capable and when a person is not.

The section also stipulates that the aggrieved person should raise no objection to such applications. In Bangladesh, state and quasi state agencies have begun to 'buy up' petitioners, in PIL cases and this raises the outrageous possibility that groups of people might transact their rights, given suitable incentives, in this country too.

A more appropriate approach in our case would have been to permit only bona fide applications, as the Indian Supreme Court has done, and eliminate both the use of the word incapable and the requirement that no objections be filed by the aggrieved party. It would be upto the courts to decide when applications are bona fide.



The Nepali provisions are wide enough to permit third party interventions. The draft provisions would also seem to permit the Supreme Court of Nepal - when constituted - to frame procedures and innovate according to the exigencies of the situation.

Drafting Language

A significant omission in the drafting language is the continued use of 'sexist' language and the refusal to adopt gender neutral terminology. The new chapter on fundamental rights may have been a good place to start adopting gender neutral terminology, in our constitutional and legislative provisions. The draft Human Rights Commission law, now before the APC, has made an effort in this direction.

State Action

One of the early controversies in the Supreme Court, soon after the promulgation of the 1978 constitution, was with regard to the phrase 'executive and administrative action'. In terms of Article 126, an action can only instituted where the violation is a result of 'executive or administrative action'. Early judicial attitudes tended to adopt a restrictive interpretation of this phrase.

The Seventeenth Amendment now broadens the ambit of Article 126 to permit applications where the violation has been as a result of state action.

However recent cases from the Supreme Court indicate a more liberal attitude. In a recent case the Supreme Court indicated that an individual who instigates and actively participates in an action by state officers which amounts to a violation of fundamental rights, may be liable under the phrase 'executive and administrative action'. [See **Alwis v Quintus Raymond** commented on in the August 16 issue of the LST Review]

The amendments do not permit applications under Article 126 to be made against non-state parties. Human rights is viewed in the Seventeenth Amendment in its classical sense - as a body of obligations owed by the **state** to the citizenry.

However in a South Asian context, in which human rights violations by non-state parties have begun to assume horrendous proportions, some mechanism and process to deal with these violations is necessary. From a citizen's point of view, it is immaterial from where the violation emanates - state, militant organisation or business establishment.

The Nepali approach to rights is much wider. The Nepali provisions do not restrict human rights to violations by the state. The language of Article 93 of the draft Nepali constitution is wide and sweeping and permits the Supreme Court of Nepal to issue 'necessary and appropriate orders' for the enforcement of fundamental rights contained in the constitution. There is no indication to say whether the violation should flow from the state or not

Judicial Review

Judicial review of legislative action was an issue which featured prominently in the APC discussions on constitutional reform. The Liberal Party and the Tamil United Liberation Front argued strongly for judicial review and the submission of legislative action to the test of constitutionality. Unfortunately, the idea was too repugnant to our Austinian legal traditions and to zealously guarded concepts like legislative supremacy. Legislative supremacy, yes; constitutional supremacy, no.

The Nepali draft constitution on the other hand permits judicial review of legislative action and affords any Nepali citizen the right to file a petition in the Supreme Court on the ground that a law violates the constitution [Article 93 (1)].

Procedural Limitations

The Nepali provisions also offer a stark comparison with regard to procedural limitations which have hampered significantly the work of the Supreme Court in enforcing fundamental rights. Absent are provisions

seeking to stipulate time limits with regard to the filing of applications, or the giving of judgements.

In Sri Lanka on the other hand, stringent approaches to issues such as the time requirement for the filing of applications, the delivery of the court orders and the questions of standing, predominated in the early years of the court. Technicalities of procedure hampered significantly the work of the Supreme Court in its early years.

The Seventeenth Amendment eases somewhat the rigidity of the earlier provisions. Applications under Article 126 can now be initiated within four months of the alleged infringement. The earlier time limit was one month.

The Nepali provisions are characterized by a stark simplicity. The constitution lays down a chapter of rights and provides in Article 93 that the Supreme Court shall have the power to issue the necessary orders for the enforcement of these rights.

Right to Life

The Seventeenth Amendment in one of its most significant amendments, introduces a right to life clause into the constitution. In terms of Article 13(4), 'every person has the inherent right to life'. The Nepali provision is narrower - 'no person shall be deprived of his life or personal liberty save in accordance with law' [Article 12(1)].

The right to life clause in the Indian Constitution was used creatively by the Bhagwati Court to carve new frontiers for human rights protection in that country. The right to life as interpreted by the Indian Supreme Court came to include the right not to be deprived of one's livelihood, the right to a speedy trial and to speedy justice and the right to a clean and healthy environment.

In **Hussainara Khaton v State of Bihar** (*Four decisions of the Supreme Court, AIR 1979 1360, 1369, 1377 and 1819*) the Supreme Court reasoned that although the right to a speedy trial was not explicitly laid down in the constitution, it was 'implicit in the broad sweep and content of Article 21' (the right to life clause). In the same case Justice Bhagwati also noted that 'free legal services to the poor and needy is an essential element' of the right to life clause.

In **M C Mehta v Union of India** (*AIR 1988 SC 1115*) the right to life clause was held to include the right to a clean and healthy environment; and in **Olga Tellis v Bombay Municipal Corporation** (*AIR 1986 SC 180*) it was held to include the right to livelihood.

In relation to a speedy trial, the new amendment introduces a specific provision. Article 13(3) states that a person charged with an offence be charged 'within a reasonable period of time' and be brought to trial 'without unreasonable delay'.

Equal Access to Justice

The new amendment introduces a diluted equal access to justice clause stating that no person shall be denied access to institutions for the administration of justice.

In India, Justice Bhagwati used the right to life clause in the Indian Constitution to hold that a citizen had a fundamental right to legal aid (See **Hussainara Khatoon** cited above).

The clause may provide a handle on which to forge a right to free legal aid. It may also provide constitutional protection for a Supreme Court willing to innovate with regard to court procedures, as the current Supreme Court seems to be doing, in the *Boosa* Case.

The Rights on Arrest

The right to remain silent on arrest and the right to retain an attorney at law are also part of the changes brought in by the new Amendment.

The draft Nepali constitution similarly contains a provision safeguarding the privilege against self incrimination.

Restrictions

The Seventeenth Amendment makes several significant changes with regard to the restrictions that can be imposed on the exercise of fundamental rights. The most significant of them is the deletion of the 'omnibus' restriction contained in the current article 15(7).

The Human Resource Factor

A legal system can be broadly divided into concepts, structures, processes and personnel. The South Asian experience with human rights highlights the importance of personnel. In Sri Lanka despite the existence of a fairly elaborate Bill of Rights, human rights protection fell far short of what was desirable. In India on the other hand, a creative and innovative judiciary was able to expand considerably the frontiers of human rights protection. This is reflected especially in India's experience with PIL.

Structures, procedures and concepts are of no effect in the absence of a process of value formation and education that produces a culture and an ethos where the basic tenets of constitutionalism and pluralism are universally endorsed. This now is one of the major challenges facing these societies.

The draft Nepali constitution makes an attempt to see that the personnel appointed to the institutions created under the constitution, go through a vetting process. The draft constitution establishes a Constitutional Council consisting of the Prime Minister, the

Chief Justice, the Chairman of the State Council (the Upper House), the Speaker of the House of Representatives and the Leader of the Opposition Group in the House of Representatives. Vested in the Constitutional Council is the power to recommend officials for appointment to Constitutional positions.

The Constitution also establishes a Judicial Council and appointments to the judiciary are to be made by the King based on the recommendation of the Judicial Council.

The Judicial Council consists of the Chief Justice, the Minister of Justice, the two senior most judges of the Supreme Court and a distinguished jurist nominated by the King. In cases where the recommendation relates to the appointment of the Chief Justice, the Prime Minister shall sit in place of the Chief Justice.

Basic Structure

The Basic Structure doctrine has featured prominently on the South Asian constitutional agenda. The basic structure doctrine limits the power of Parliament to amend the constitution to those amendments that do not affect its basic features. (See *Kesavananda v State of Kerala AIR 1973 SC 146*).

The draft Nepali constitution now entrenches this doctrine (*Article 123*). This doctrine was recently endorsed by the Appellate Division of the Bangladesh Supreme Court [See *LST Review of August 16*]. The doctrine was also resorted to by Justice Wanasundera in his dissenting judgement in the 13th Amendment Case, in support of his argument that the Amendment required the approval of the people at a Referendum. (*In re the 13th Amendment to the Constitution [1987] to Sri Lanka Law Report 312 from 333*).

The new Nepali constitution now gives this doctrine constitutional protection. What the basic features of the constitution are, is not laid down and is probably a question for the Supreme Court to decide. However it appears that one of the basic features protected by the constitution is the concept of constitutional monarchy (See *the preamble to the Constitution*).

Treaties

The draft Nepali constitution contained a provision that all treaties that the country ratifies shall be done only pursuant to a two thirds majority of those present in a joint session of Parliament. It is not known whether any amendment was made to this provision before the constitution was adopted on November 9.

CONCLUSION

The processes of change now taking place in Nepal and Sri Lanka, represent an effort at installing more effective institutions, processes and concepts as part

of the constitutional framework. The move to multi party democracy in different parts of the globe has been one of the most remarkable phenomena of recent times, if not this century. The political fabric of most of Eastern Europe has been radically re-woven with the installation of the recently elected regimes. In Chile there has been a resounding vote for democracy in a remarkable defeat for dictator Pinochet. And several African countries are now on the boil, demonstrating against their one party systems and clamouring for pluralism.

There has never probably been such heavy demands sought of constitutional democracy. Can it meet the challenge? Can pluralism and constitutionalism extricate the third world from the abyss that several years of colonialism and post-independent corruption and mismanagement put it into?

Several countries in Africa and Asia, gifted western style democracies, soon shed them for dictatorships and military rule. The constitutions these countries inherited failed to cope with the tensions the newly independent countries threw up and there emerged dictatorships and one party rule. The cycle seems to be shifting slightly and there is now a search for new political structures and institutions to help bail the third world.

However new institutions, processes and concepts will not work, in the absence of the vital human resource. The South Asian experience has taught us that institutions, processes and concepts can remain dead letters, in the absence of committed and innovative personnel to run and apply them. The challenge for these societies then, is to produce these personnel, capable of giving substance to the new political structures that are now taking shape.

