



# LAW & SOCIETY TRUST

## Fortnightly Review

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In this issue we publish the text of the second draft of the fundamental rights chapter of the new constitution released by the government in March. We also publish a document prepared at the initiation of the Trust which embodies recommendations to improve the draft fundamental rights chapter.

We also publish an article by Dr Mario Gomez on the new fundamental rights chapter, which according to him lacks vision and foresight. He argues that the government has failed to include socio-economic rights, including environmental rights in the new chapter.

We also publish two short articles on topical issues in Sri Lanka. We would like to encourage our readers to send us short articles on topical issues from their countries for publication in our Review.

## DRAFT FUNDAMENTAL RIGHTS CHAPTER OF THE CONSTITUTION

### IN THIS ISSUE

DRAFT FUNDAMENTAL RIGHTS  
CHAPTER

FUNDAMENTAL RIGHTS & FREEDOMS  
RECOMMENDATIONS

SRI LANKA'S PROPOSED  
BILL OF RIGHTS  
*Mario Gomez*

RESERVATION OF A QUOTA OF  
SEATS FOR  
WOMEN IN PARLIAMENT  
*Sunila Galappatti*

CURRENT DEVELOPMENTS  
*Sumudu Atapattu*



**The Government made public 18 Chapters of the draft Constitution on 27th of March. We publish here the draft fundamental rights Chapter, the Chapter on Directive Principles of State Policy and Fundamental Duties and draft Article 168 on the jurisdiction of the Supreme Court in relation to fundamental rights.**

### **CHAPTER III**

#### **FUNDAMENTAL RIGHTS AND FREEDOMS**

8. Every person has an inherent right to life and no person shall be intentionally or arbitrarily deprived of his life.
9. (1) No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.  
(2) No restriction shall be placed on the right declared and recognised by this article.
10. (1) No person shall be imprisoned or otherwise physically restrained except in accordance with procedure prescribed by law.  
(2) No person shall be arrested except by an authorised officer acting in accordance with procedure prescribed by law under a warrant issued by a judicial officer causing such person to be apprehended and brought before a competent court.

Provided that any person authorised so to by any law may, in the manner, and in the circumstances, prescribed by law, arrest any person without such a warrant.

- (3) Any person arrested shall at the time of arrest be informed, in a language which he appears to understand, of the reason for his arrest and of his rights under paragraphs (4) and (5) of this article:

Provided that such person, if he so requests, shall be informed in writing of the reasons of his arrest within a reasonable time.

- (4) Any person arrested shall have the right to communicate with any relative or friend of his choice, and, if he so requests, such person shall be afforded means of communicating with such relative or friend.

- (5) Any person arrested shall have the right to consult and retain an Attorney-at-law of his choice. Such Attorney-at-law shall be afforded all reasonable facilities by the state.
- (6) Any person arrested shall not be detained in custody or confined for a longer period than under all the circumstances of the case is reasonable, and shall, in every case be brought before the judge of a competent court within twenty-four hours of the arrest, exclusive of the time necessary for the journey from the place of arrest to such judge, and no person shall be detained in custody beyond such period except upon, and in terms of the order of such judge.
- (7)
  - (a) Any person detained in custody or confined who is entitled under the provisions of any law, to be released on bail or on his executing a bond, shall be so released.
  - (b) The amount of bail and the amount of every such bond shall be fixed with due regard to the circumstances of the case and shall not be excessive.
- (8) Any person suspected of committing an offence shall be charged or indicted or released, without unreasonable delay.
- (9) Any person charged with an offence shall be entitled to be heard in person or by an Attorney-at-law of his own choosing and shall be so informed by the judge.
- (10) Any person charged with an offence shall be entitled to be tried -
  - (a) without undue delay;
  - (b) at a fair trial;
  - (c) by a competent court;
  - (d) at a public hearing:

Provided that a judge may, in his discretion, whenever he considers it necessary, in proceedings relating to sexual matters, or where the interests of juveniles so require, or in the interests of national security or public order necessary in a democratic society or in the interests of order and security within the precincts of such court, exclude therefrom such persons as are not directly interested in the proceedings.

- (11) Every person shall be presumed innocent until he is proved guilty;

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

- (12) No person shall be compelled to testify against himself or to confess guilt.
- (13) 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 when such offence was committed;

Provided that 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 recognised by the community of nations.

- (14) Any person who has once been tried by a competent court for an offence and convicted or acquitted of such offence shall not be liable to be tried for the same offence.
- (15) No person shall be punished with death or imprisonment except by order of a competent court in accordance with law. The arrest, holding in custody, detention or other deprivation of personal liberty of a person, pending investigations or trial shall, if not unreasonable having regard to the circumstances, not constitute punishment:

Provided that 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 the Indo-Ceylon Agreement Implementation Act No. 14 of 1967 or other such law as may be enacted in substitution therefor, shall not be a contravention of this Article.

- (16) All persons deprived of their liberty shall be treated with humanity and respect for the inherent dignity of the human person.
- (17) No restriction shall be placed on the rights declared and recognised by this Article other than such restrictions prescribed by law as are necessary in a democratic society in the interests of national security, public order or for the purpose of securing due recognition and respect for the rights and freedoms of others.

- 11. (1) All persons are equal before the law and are entitled to the equal protection of the law.

- (2) No citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political or other 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 national language as a qualification for employment or office in the Public Service, Judicial Service, Regional Public Service or Local Government Service or in the service of any public corporation, where such knowledge is reasonably necessary for the discharge 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 race, religion, language, caste, sex, political or other opinion, place of birth 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 measures being taken by law, subordinate legislation or executive action where necessary for the sole purpose of the protection or advancement of disadvantaged or underprivileged individuals or groups including those that are disadvantaged or underprivileged because of race, sex, age or mental or physical disability.
- (5) No restriction shall be placed on the exercise of the rights declared and recognised by this Article other than such restrictions prescribed by law as are necessary in a democratic society in the interests of national security, public order or the protection of public health or for the purpose of securing due recognition and respect for the rights and freedoms of others.

12 (1) Every person lawfully resident within Sri Lanka is entitled to the freedom of movement within Sri Lanka and of choosing his residence within Sri Lanka.

(2) Every person shall be free to leave Sri Lanka.

(3) No restrictions shall be placed on the exercise of the rights declared and recognised by this Article other than such restrictions prescribed by law as are necessary in a democratic society in the interests of national security or public order or national economy or the protection of public health or morality or for securing due recognition and respect for the rights and freedom of others.

13. Every citizen shall be entitled to return to Sri Lanka.
14. (1) Every person has the right to respect for his private and family life, his home and his correspondence and communications and shall not be subjected to unlawful attacks on his honour and reputation.
- (2) No restrictions shall be placed on the exercise of the right declared and recognised by this Article other than such restrictions prescribed by law as are necessary in a democratic society in the interests of national security, public order or national economy or the protection of public health or morality or for securing due recognition and respect for the rights and freedoms of others.
15. (1) Every person is entitled to freedom of thought, conscience and religion including the freedom to have or to adopt a religion or belief of his choice.
- (2) No restrictions shall be placed on the rights declared and recognised by paragraph (1) of this article.
- (3) Every person is entitled to 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.
- (4) No restrictions shall be placed on the rights declared and recognised by paragraph (3) of this Article other than such restrictions prescribed by law as are necessary in a democratic society in the interests of national security, public order, or for securing due recognition and respect for the rights and freedoms of others.
16. (1) Every person is entitled to the freedom of speech and expression including publication. This right shall include the freedom to hold opinions and to receive and impart information and ideas either orally, in writing, in print, in the form of art, or through any other medium.
- (2) No restrictions shall be placed on the right declared and recognised by this Article other than such restrictions prescribed by law as are necessary in a democratic society in the interests of national security, public order, the protection of public health or morality, racial and religious harmony or in relation to parliamentary privilege, contempt of Court, defamation or incitement of an offence or for securing due recognition and respect for the rights and freedoms of others.
17. (1) Every person is entitled to the freedom of peaceful assembly.

- (2) No restrictions shall be placed on the exercise of the right declared and recognised by this Article other than such restrictions prescribed by or under any law as are necessary in a democratic society in the interests of national security, public order, racial or religious harmony, the protection of public health or for the purpose of securing the due recognition and respect for the rights and freedoms of others.
18. (1) Every person is entitled to the freedom of association.
- (2) Every citizen is entitled to the freedom to form and join a trade union.
- (3) No restriction shall be placed on the exercise of the rights declared and recognised by this Article other than such restrictions prescribed by law as are necessary in a democratic society in the interests of national security, public order, racial or religious harmony, national economy or for securing due recognition and respect for the rights and freedoms of others.
19. (1) Every citizen is entitled by himself or in association with others to enjoy and promote his own culture and to use his own language.
- (2) No restriction shall be placed on the exercise of the right declared and recognised by this Article other than such restrictions prescribed by law as are necessary in a democratic society in the interests of national security, public order, racial or religious harmony or the protection of public health or morality or for securing due recognition and respect for the rights and freedoms of others.
20. (1) Every citizen is entitled to the freedom to engage by himself or in association with others in any lawful occupation, profession, trade business or enterprise.
- (2) No restriction shall be placed on the exercise of the rights declared and recognised by this Article other than such restrictions prescribed by law as are necessary in a democratic society in the interests of the national economy, national security, public order, protection of public health or morality, the environment or for securing due recognition and respect for the rights and freedoms of others 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, a 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.



21. (1) Every citizen is entitled to own property alone or in association with others.
- (2) No person shall be deprived of his property except according to procedure established by law. No property shall be compulsorily acquired or requisitioned save for a public purpose or for reasons of public utility or public order and save by authority of a law which provides for the payment of fair compensation.
22. The exercise and operation of the fundamental rights declared and recognised by Articles 10, 11, 12, 14, 15(3), 16, 17 and 18 shall in their application to the armed forces, the police force and other forces charged with the maintenance of public order be subject to such restrictions as may be prescribed by or under any law in the interests of the proper discharge of their duties and the maintenance of discipline among them.
23. (1) In time of public emergency the existence of which is duly proclaimed, subject to paragraphs (2) and (3), measures may be prescribed by law derogating from the exercise and operation of the fundamental rights declared and recognised in this chapter to the extent strictly required by the exigencies of the situation and necessary in a democratic society, provided that such measures do not involve discrimination solely on the grounds of race, class, religion, gender, language, caste, national or social origin. For the purpose of this Article "law" includes regulations made under the law for the time being in force relating to public security.
- (2) There shall be no derogation from any of the rights declared and recognised by Articles 8, 9, 10(1), 10(2), 10(10), 12, 13 and 15.
- (3) There shall be no derogation from the right declared and recognised by Article 10(6) unless at the same time legal provision is made requiring -
- (i) a Magistrate having jurisdiction to be promptly informed of the arrest, and
- (2) the person arrested to be produced before such Magistrate within such time as is reasonable in all the circumstances of the case.
24. (1) All existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the provisions of this Chapter.
25. The subjection of any person on the order of a court to any form of punishment recognised by any written law shall not be a contravention of the provisions of this Chapter.
26. Every person shall be entitled to apply to the Supreme Court as provided by Article 168 in respect the infringement or imminent infringement, by State action, including

executive or administrative action, a fundamental right to which such person is entitled under the provisions of this Chapter, or by judicial action by courts exercising original criminal jurisdiction, of a fundamental right to which such person is entitled under Article 10:

Provided that where the person aggrieved unable or incapable of making an application under Article 168 by reason of physical, social or economic disability or other reasonable cause, an application be made on behalf of such a person, by any relative friend of such person if the person aggrieved, raises objection to such application:

Provided further that an application under the Article may be made, in the public interest, on behalf any person or persons aggrieved, by any other person by any incorporated or unincorporated body of person.

## **CHAPTER VI**

### **DIRECTIVE PRINCIPLES OF STATE POLICY AND FUNDAMENTAL DUTIES**

50. The following principles shall guide the State in making laws and the governance of Sri Lanka:
- (a) The State shall strengthen national unity recognising the plural and multi-ethnic character of Sri Lankan society and by promoting co-operation and mutual trust, confidence and understanding among all sections of the people of Sri Lanka.
  - (b) The State shall assist the development of the cultures and languages of the people.
  - (c) The State shall safeguard and strengthen the democratic structure of government and the democratic rights of the people.
  - (d) The State shall establish a just, equitable and moral social order the objectives of which include -
    - (i) the full realisation of the fundamental rights and freedoms of all persons;
    - (ii) securing and protecting effectively a social order in which social, economic and political justice shall inform all institutions of national life;

- (iii) the elimination of economic and social privilege, disparity and exploitation;
  - (iv) the equitable distribution of the material resources of the community and the social product;
  - (v) the realisation of an adequate standard of living for all citizens and their families including adequate food, clothing, housing and medical care;
  - (vi) ensuring social security and welfare;
  - (vii) raising the moral, cultural and educational standards of the people and facilitating the full development of the human personality;
  - (viii) the creation of the necessary economic and social environment to enable people of all religious faiths to make a living reality of their religious principles.
- (e) The State shall develop the whole country by means of appropriate public and private economic activity.
  - (f) The State shall protect and preserve and improve the environment and safeguard the reefs, shores, forests, lakes, watercourses and wildlife of Sri Lanka.
  - (g) The State shall protect and preserve every monument or place or object of artistic or historic interest declared by or under law to be of national importance.
  - (h) The State shall promote international peace, security and co-operation, and the establishment of a just and equitable international economic and social order, and shall respect, and foster respect for international law and treaty obligations in dealings with and among nations.
  - (i) The State shall strengthen, respect and foster respect for, international instruments relating to human rights and humanitarian law to which Sri Lanka is a signatory.

51. It shall be the duty of every citizen to-

- (a) uphold and protect the sovereignty, unity and integrity of Sri Lanka;
- (b) uphold and defend the Constitution and its ideals and institutions;

- (c) foster national unity and promote harmony amongst all the people of Sri Lanka;
- (d) respect the rights and freedoms of others;
- (e) value and preserve the rich heritage of our composite culture;
- (f) protect and improve the environment and conserve its riches;
- (g) safeguard and preserve artistic or historical objects and places of national importance;
- (h) safeguard and protect public property and combat its waste or misuse;
- (i) refrain from directly or indirectly participating in bribery or corruption;
- (j) uphold the rule of law and abjure violence;
- (k) work conscientiously in a persons's chosen occupation.

52. (1) The provisions of this Chapter do not confer or impose legal rights or obligations, and are not enforceable in any court or tribunal. No question of inconsistency with such provisions shall be raised in any court or tribunal.

(2) In this Chapter, the expression "State" includes a regional administration and a Regional Council.

168. (1) The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by State action including executive or administrative action, of any fundamental right or language right declared and recognised by Chapter III or Chapter IV or by judicial action by courts exercising original criminal jurisdiction, of a fundamental right declared and recognised under Article 10.

(2) Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed by State action including executive or administrative action, or by judicial action he may himself or by an Attorney-at-law or a person or a body of persons in terms of Article 26, on his behalf, within three months thereof, in accordance with such rules of Court as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief or redress in respect of such infringement. Such application may be proceeded with only with leave to proceed first had been obtained from the Supreme Court, which leave may be granted or refused as the case may be by not less than two Judges of such Court.

- (3) Where in the course of hearing in any Court, of an application for orders in the nature of a writ of habeas corpus, certiorari, prohibition, mandamus or quo warranto, it appears to such Court that there is prima facie evidence of an infringement or imminent infringement of the provisions of Chapter III or Chapter IV by a party to such application, such Court shall forthwith refer such matter for determination by the Supreme Court.
- (4) The Supreme Court shall have power to grant such relief or make such directions as it may deem just and equitable in the circumstances in respect of any petition or reference referred to in paragraphs (2) or (3) of this Article or refer the matter back to the Court if, in its opinion, there is no infringement of a fundamental right or language right.

Provided that in the case of an infringement of a fundamental right by judicial action no order for compensation or costs shall be made against a judicial officer who had acted *bona fide* and the Supreme court may order the State to pay any compensation or costs.

- (5) Where at the hearing of a petition or reference referred to in paragraph (2) or (3) there are any disputed questions of fact, the Supreme Court may refer such questions to the Human Rights Commission or other appropriate body or person for inquiry and report.
- (6) The Supreme Court shall hear and finally dispose of any petition or reference under this Article as expeditiously as possible and in any event, not later than three months of the filing of the petition or the making of the reference, as the case may be. In computing the period of three months, any period taken for inquiry and report by the Human Rights commission or any other body or person referred to in paragraph (5) shall be excluded.

## FUNDAMENTAL RIGHTS AND FREEDOMS\*

The Law and Society Trust organised a series of meetings to discuss the Fundamental Rights Chapter of the proposed Constitution, which was made public on the 27th of March. The objective of these meetings was to suggest amendments to the draft to further improve the draft and to ensure that the proposed provisions would be in line with Sri Lanka's international obligations embodied in the 1966 International Covenant on Civil and Political Rights (ICCPR).

The working group would like to commend the Select Committee for including several positive elements in the draft. It is also heartening to note that some of the recommendations made by human rights NGOs on an earlier version of the draft are embodied in the present draft. The group felt, however, that there is further room for improvement of the Chapter.

The suggestions and recommendations of the group are highlighted in the text.

**Chapter 1 of the Constitution should refer to the following:**

- (1) *Sri Lanka is one, united, sovereign, democratic republic founded on the following values:*
  - (a) *human dignity, equality and the advancement of human rights and freedoms;*
  - (b) *supremacy of the Constitution and the Rule of Law.*
  - (c) *universal adult suffrage, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.*
- (2) *The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it shall be fulfilled.*

***Explanation:*** *This section will ensure that the Constitution is, in reality, the supreme law of the land.*

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\* Prepared for publication by Sumudu Atapattu, Editor, Fortnightly Review. The Law & Society Trust would like to thank all those who participated at the meetings and made useful suggestions. The Trust is particularly grateful to Dr Deepika Udagama, Dr. Mario Gomez, Mr. Rohan Edrisinha and Ms. Suriya Wickremasinghe. Ms. Sunila Galappatti and Mr. Wickram Raghavan (Intern, LST) provided resource support.

Recommendations

8. *Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life.*

**Explanation:** It was generally felt that the wording in Article 6(1) of the ICCPR should be adopted. The group was concerned that provisions allowing for the deprivation of this right opened the system to extensive abuse and entrenched the death penalty in the Constitution. The word "intentionally" was therefore deleted. It was felt that the wording of this clause in the ICCPR strengthened the right to life.

9. (1) No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
- (2) No restriction shall be placed on the right declared and recognised by this Article.
10. (1) No person shall be imprisoned or otherwise restrained except in accordance with procedure established by law.

**Interpretation clause:** "Procedure established by law" shall be interpreted as principles of due process or fundamentally fair procedure established by law.

**Explanation:** It was felt that an interpretation clause would ensure clarity in relating "procedure established by law" only to established legal process and procedure so as to prevent abuse of this provision to legitimise unreasonably repressive laws.

- (2) No person shall be arrested except by an authorised officer acting in accordance with procedure prescribed by law under a warrant issued by a judicial officer causing such person to be apprehended and brought before a competent court:

Provided that any person authorised so to do by any law may, in the manner, and in the circumstances, prescribed by law, arrest any person without such a warrant.

- (3) Any person arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be *promptly* informed of any charges against him.

Provided that such person shall be informed in writing of the reasons of his arrest within a reasonable time.

**Explanation:** Subparagraph (3) is in line with Article 9(2) of the ICCPR. The word promptly was inserted to remove room for unreasonable delay in informing a person of the reasons for his arrest.

- (4) Any person arrested shall at the time of arrest be informed that he may communicate with any relative or friend of his choice and such person shall be afforded reasonable means of communicating with such relative or friend.

**Explanation:** The phrase "if he so requests" should be deleted wherever it occurs. The right and means to communicate with a friend, relative or lawyer should be ensured regardless of any specific request on the part of the arrested.

- (5) Any person arrested shall have the right to consult and retain an Attorney-at-Law of his choice. Such Attorneys-at-Law shall be afforded all reasonable facilities by the State.

- (6) Any person arrested shall not be detained in custody or confined for a longer period than under all the circumstances of the case is reasonable, and shall, in every case be brought before the judge of the *nearest* competent court within twenty-four hours of arrest, exclusive of the time necessary for the journey from the place of arrest to such judge, and no person shall be detained in custody beyond such period except upon, and in terms of, the order of such judge.

**Explanation:** As the time limit stipulated above excludes the time taken to travel to the court, it must be ensured that there is no loophole for abuse with regard to this aspect of the clause.

- (7) (a) Any person detained in custody or confined who is entitled, under the provisions of any law, to be released on bail or on his executing a bond, shall be released *forthwith*.

**Explanation:** This provision, too, removes room for delay that is unreasonable or unaccounted for.

- (b) The amount of bail and the amount of every such bond shall be fixed with due regard to the circumstances of the case and shall not be excessive.
- (8) Any person suspected of committing an offence shall be charged or released without unreasonable delay.
- (9) Any person charged with an offence shall be entitled to be heard in person or by an Attorney-at-Law of his own choosing and shall be so informed by the judge.



- (10) Any person charged with an offence shall be entitled to be tried -
- (a) without undue delay;
  - (b) at a fair trial;
  - (c) by a competent court;
  - (d) at a public hearing.

Provided that a judge may, in his discretion, whenever he considers it necessary, in proceedings relating to sexual matters, or where the interests of juveniles so require, or in the interests of national security or public order necessary in a democratic society or in the interests of order and security within the precincts of such court, exclude therefrom such persons as are not directly interested in the proceedings.

- (11) *Every person shall be presumed innocent until he is proved guilty.*

**Explanation:** The proviso here should be deleted so as to undo the subjection of this right to other circumstances and thereby to strengthen the clause.

- (12) No person shall be compelled to testify against himself or to confess guilt.
- (13) 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 when such offence was committed.

Provided that 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 recognised by the community of nations.

- (14) Any person who has been tried by a competent court for an offence and convicted or acquitted of such offence shall not be liable to be tried for the same offence.
- (15) *No person shall be punished except by order of a competent court in accordance with law.* The arrest, holding in custody, detention or other deprivation of personal liberty of a person, pending investigation or trial shall, if not unreasonable having regard to the circumstances, not constitute punishment:

Provided that 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 shall not be a contravention of this Article.

**Explanation:** The words "with death or imprisonment" should be deleted as they are unnecessary and serve to reinforce the introduction of the death penalty. The addition of "if not unreasonable" and of a provision to 10(15) are intended to ensure that those procedures protected so as not to constitute punishment are not in contravention of this Article. In amalgamating clauses 15 and 17 of the draft Fundamental Rights Chapter, the reference to Immigrants and Emigrants Act should be also deleted so as not to limit this right by such an involvement.

- (16) All persons deprived of their liberty shall be treated with humanity and respect for the inherent dignity of the human person.
- (17) *Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.*

**Explanation:** This addition will bring the provisions in line with Article 9(5) of the ICCPR, securing a measure of redress should an infringement of such a right take place.

- (18) No restriction shall be placed on the rights declared and recognised by the Article other than such restrictions prescribed by law as are necessary in a democratic society in the interests of national security, public order or for the purpose of securing due recognition and respect for the rights and freedoms of others.

11. (1) All persons are equal before the law and are entitled to the equal protection of the law.
- (2) *No person shall be discriminated against on grounds such as race, ethnicity, religion, language, caste, gender, age, political or other opinion, disability, place of birth or any other like ground.*

**Explanation:** The group suggested that this provision be made open-ended<sup>1</sup> and that the non-discrimination clause be afforded to all persons, rather than only to citizens to make it a more complete non-discrimination clause. It was agreed that a proviso should be drafted separately, with regard to employment, which places reasonable restrictions on this clause in relation to non-citizens. However, it was felt that this clause should stand alone in keeping with its open-ended nature.

- (3) No person shall on grounds such as caste, gender, political opinion, place of birth or any such grounds, be subject to any disability, liability, restriction or condition with regards to access to shops, public restaurants, hotels, places of public entertainment and places of public worship of his own religion.

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<sup>1</sup> This recommendation was made on an earlier version of the draft. See "Constitutional Reform and Fundamental Rights: Some Comments," *Fortnightly Review*, Vol. VI, Issue No 94 (August 1995) p 12.

**Explanation:** The same open-ended form to be followed here.

- (4) Nothing in this Article shall prevent special measures being taken by law, subordinate legislation or executive action where necessary for the sole purpose of the protection or advancement of disadvantaged or underprivileged individuals or groups including those that are disadvantaged or underprivileged because of *ethnicity, gender*, age or mental or physical disability.

**Explanation:** It was felt that *ethnicity* and *gender* should be the terms used here, and elsewhere, to replace *race* and *sex*, respectively, as they relate to wider groupings.

- (5) No restriction shall be placed on the exercise of the rights declared and recognised by this Article other than such restrictions prescribed by law as are necessary in a democratic society in the interests of national security, public order or the protection of public health or for the purpose of securing due recognition and respect for the rights and freedoms of others.

12. (1) Every person lawfully resident within Sri Lanka is entitled to the freedom of movement within Sri Lanka and of choosing his residence within Sri Lanka.

- (2) Every person shall be free to leave Sri Lanka.

- (3) *An alien lawfully in the territory of Sri Lanka may be expelled only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before the competent authority or a person or persons especially designated by the competent authority.*

**Explanation:** This clause has been inserted, with regard to aliens in Sri Lanka, to protect the unlawful deportation of aliens, to maintain proper proceedings of law in such a case and to give the individual concerned the opportunity for judicial review of his case. This incorporates the provisions in Article 13 of the ICCPR.

- (4) No restriction shall be placed on the exercise of the rights declared and recognised by this Article other than such restrictions prescribed by law as are necessary in a democratic society in the interests of national security, public order or national economy or the protection of public health or morality or for the purpose of securing due recognition and respect for the rights and freedoms of others.

13. Every citizen shall be entitled to return to Sri Lanka.
14. *No-one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation*

No restrictions shall be placed on the exercise of the right declared and recognised by this Article other than such restrictions prescribed by law and are necessary in a democratic society in the interests of national security, public order or the protection of public health or for securing due recognition and respect for the rights and freedoms of others.

**Explanation:** This is in line with Article 17 of the ICCPR. The group felt that this right should not be restricted on grounds of national economy or morality, as being subjective and often used to justify a government's invasion of privacy - thus, the reference to these should be deleted.

15. (1) Every person is entitled to freedom of thought, conscience and religion including the freedom to have or to adopt a religion or belief of his choice.
- (2) No restrictions shall be placed on the rights declared and recognised by paragraph (1) of this Article.
- (3) Every person is entitled to 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.
- (4) No restrictions shall be placed on the rights declared and recognised by paragraph (3) of this Article other than such restrictions prescribed by law as are necessary in a democratic society in the interests of *public safety* or for securing due recognition and respect for the rights and freedoms of others.

**Explanation:** The group recommended that the reference to national security be deleted and the reference to public order be replaced by public safety, as a less subjective ground for derogation, in removing room for political abuse.

16. (1) Everyone shall have the right to hold opinions without interference.
- (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
- (3) No restrictions shall be placed on the right in paragraph (2) other than such restrictions prescribed by law as are necessary in a democratic society in the

interests of ethnic and religious harmony, for the respect of the rights or reputations of others and for the protection of national security or of public order.

**Explanation:** The group felt that the rights referred to here should be separated so that it would then be in line with Article 19 of the ICCPR and so that Article 16(1) which refers to freedom of thought will be a non-derogable right. It was felt that it is imperative that the freedom of thought should be a non-derogable right, all the more because there are no limitations attached to it in the 1978 Constitution. The reference to "parliamentary privilege" as a grounds for restriction in 16(3) was deleted to prevent the use of this restriction to stifle free expression and the right to receive information on parliamentary proceedings.

17. (1) Every person is entitled to the freedom of peaceful assembly.
  - (2) No restrictions shall be placed on the exercise of the right declared and recognised by this Article other than such restrictions prescribed by law and are necessary in a democratic society in the interests of national security, public order, racial or religious harmony, the protection of public health or for securing due recognition and respect for the rights and freedoms of others.
18. (1) Every person is entitled to the freedom of association.
  - (2) Every person is entitled to the freedom to form and join a trade union.
  - (3) No restrictions shall be placed on the exercise of the right declared and recognised by this Article other than such restrictions prescribed by law and are necessary in a democratic society in the interests of national security, public order, racial or religious harmony, national economy or for securing due recognition and respect for the rights and freedoms of others.

**Explanation:** The freedom to form and join a trade union should be afforded to *every person*. The deletion of morality as a grounds for restriction has been made here, for the same as was made earlier.

19. (1) Every citizen is entitled by himself or in association with others to enjoy and promote his own culture and to use his own language *subject to the rights recognised in this Chapter*.

**Explanation:** It was felt that 19(1) should be subject to the rights recognised in this Chapter so as to prevent its imposition on the fundamental rights of other persons, under the guise of promoting one's culture.

- (2) No restrictions shall be placed on the exercise of the right declared and recognised by this Article other than such restrictions prescribed by law and are necessary in a democratic society in the interests of national security, public order, racial or religious harmony or the protection of public health or morality or for securing due recognition and respect for the rights and freedoms of others.
20. (1) Every citizen is entitled to the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise.
- (2) No restrictions shall be placed on the exercise of the right declared and recognised by this Article other than such restrictions prescribed by law and are necessary in a democratic society in the interests of national economy, national security, public order, for the protection of public health or morality, the environment or for securing due recognition and respect for the rights and freedoms of others 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, a 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.
21. (1) Every citizen is entitled to own property alone or in association with others.
- (2) No person shall be deprived of his property except according to procedure established by law. No property shall be compulsorily acquired or requisitioned save for a public purpose or for reasons of public utility or public order and save by authority of a law which provides for the payment of *just and fair (or just and equitable)* compensation.

**Explanation:** This standard should be added because it is the internationally accepted standard, which strengthens the payment of adequate compensation for the acquisition of property.

22. *Every person has the right to a clean and healthy environment.*

**Explanation:** The group strongly felt that a provision should be included regarding a clean environment as a basic right of every person. Many constitutions now include this right, the most notable being the new South African Constitution.

23. The exercise and operation of the fundamental right declared and recognised by **Article 18(2)** shall in its application to the armed forces, the police force and other forces charged with the maintenance of public order be subjected to such restrictions as may be prescribed by or under any law in the interests of the proper discharge of their duties and the maintenance of discipline among them.

**Explanation:** The group strongly felt that the present restrictions placed upon the rights and freedoms of those responsible for the maintenance of public security are too wide in their scope. It was felt that there is inadequate justification to deny these persons their basic rights to the equal protection of the law, freedom of thought, freedom of movement and the freedom from arbitrary arrest or punishment and the measures pertaining thereto. The provisions made to these rights in the interests of society were considered to be adequate in their application to the armed forces as well. It was felt that a provision restricting trade union activity was justified, and in line with the ICCPR which only restricts such persons the right to join and form a trade union [Article 22(2) of the ICCPR].

24. (1) In time of public emergency *which threatens the life of the nation* the existence of which is duly proclaimed, subject to paragraphs (2) and (3), measures may be prescribed by law derogating from the exercise and operation of the fundamental rights declared and recognised in this Chapter to the extent strictly required by the exigencies of the situation and necessary in a democratic society, provided that such measures do not involve discrimination solely on the grounds of *ethnicity*, class religion, gender, language, caste, national or social origin. For the purpose of this Article "law" includes regulations made under the law for the time being in force *and which are made public* relating to public security.

**Explanation:** It was felt that the open interpretation of 'public emergency' left room for the abuse of this provisional restriction of rights. The insertion of *which threatens the life of the nation* reduces this risk and brings this Article in line with the provisions of international law. The Emergency Regulations must be made known to the public, by the government, so as to maintain mutual awareness, thereby reduce abuse on all sides.

- (2) There shall be no derogation from any of the rights declared and recognised by Articles 8, 9, 10(1), 10(2), 10(10), **10(13)**, 12, 13, 15, **16(1) and 22**.

**Explanation:** It was felt that Article 10(13) should be included as a non-derogable right to ensure that retrospective penal legislation is not adopted. In addition, freedom of thought should be a non-derogable right, and the right to a clean environment (22) must, similar to the right to life be a non-derogable right.

- (3) There shall be no derogation from the right declared and recognised by Article 10(6) unless at the same time legal provision is made requiring -

- (i) a Magistrate having jurisdiction to be promptly informed of the arrest, and
- (ii) the person arrested to be produced before such Magistrate within such time as is reasonable in all the circumstances of the case.

**Explanation:** The group felt that a reasonable and specified time limit should be imposed on preventive detention in order to avoid any abuse.

*The group strongly recommends that the present draft Articles 24 and 25 should be deleted.*

These Articles, which subject the Fundamental Rights Chapter to any existing written law, effectively annul this Chapter wherever it comes into conflict with existing law. The nature of Fundamental Rights is such that they are fundamental and the most basic of rights. Thus to subordinate these rights to any other legislation is to undermine their very nature.

The group expressed particular concern at Article 25 being used to legitimise “any form of punishment”, an abuse that would be especially problematic when there is limited judicial review.

25. Every person shall be entitled to apply to the *Regional High Court* as provided by Article 168 in respect of the infringement or imminent infringement, by State action, including executive or administrative action, of a fundamental right to which such person is entitled under the provisions of this Chapter, or by judicial action by courts exercising original criminal jurisdiction, of a fundamental right to which such person is entitled under Article 10. *An appeal from such a decision shall lie to the Supreme Court.*

Provided that where the person aggrieved is unable or incapable of making an application under Article 168 by reason of physical, social or economic disability or other reasonable cause, an application may be made on behalf of such a person, by any relative or friend of such person if the person aggrieved raises no objection to such application.

*Provided further that an application under this Article may be made, in the public interest, by any person or by any incorporated or un-incorporated body of persons.*

**Explanation:** It was felt that there should be accommodation for a two tiered system for appeal on fundamental rights litigation against the state. It was felt that an application to the Regional High Court would, first afford practical convenience to the litigant. It was therefore considered best that fundamental rights applications be referred first to the Regional High Court and that an appeal would lie to the Supreme Court. The group also felt that the second proviso should be amended to provide for litigation in the



public interest. Thus, the words "on behalf of any person or persons aggrieved" and the word "other" should be deleted.

*Article 168 of the Constitution should be amended accordingly.*

26. (1) *When interpreting the chapter on fundamental rights, a court or other tribunal:*
- (a) *shall promote the values that underlie an open and democratic society based on human dignity, equality and freedom;*
  - (b) *shall consider international jurisprudence on human rights;*
  - (c) *may consider foreign law and human rights jurisprudence.*
- (2) *When interpreting any legislation, or when developing the common law or customary law, a court or tribunal shall promote the spirit, purport and objects of the chapter on fundamental rights.*
- (3) *The chapter on fundamental rights shall not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the chapter on fundamental rights.*

**Explanation:** It was felt that the inclusion of an interpretation clause would reinforce the spirit of the Fundamental Rights Chapter and would lead to consistency in the interpretation of the rights and freedoms laid out herein.

It was felt that Article 26 (1) reinforced the basis of the Fundamental Rights Chapter and the need to uphold international human rights standards in interpreting this chapter. Article 26 (2) asks that in dealing with other legislation, the essential spirit of the Fundamental Rights Chapter be promoted and Article 26(3) makes it clear that the Chapter should not stand in the way of other legal rights conferred by common law, provided they are not inconsistent with it.

This section achieves several objectives:

- (i) It highlights the *sui generis* character of constitutional interpretation;
- (ii) It ensures that constitutional values permeate statutory interpretation in general;
- (iii) It ensures that the existence of rights other than those recognised in the chapter, are not denied or abridged.

# SRI LANKA'S PROPOSED BILL OF RIGHTS

## Lacking in imagination and vision

*Mario Gomez*

Constitutions are supposed to restrain governments. However, huge parliamentary majorities have made a mockery of this idea. Constitutions and constitution-making, are irrelevant to most Sri Lankans because they have proved irrelevant to governance and political practice over the past 25 years. They have failed to restrain governments or to provide a political or social vision for the country.

The government recently released another draft of the fundamental rights chapter of the proposed Constitution. While in another place, at another time this would have created a flurry of activity and discussion, in Sri Lanka, there was almost none. Except for ministerial rhetoric, carried most strongly in the government press (which, three years ago, we were promised would be removed from government control) there is little public discussion or debate.

The last ten years have witnessed a massive spurt in constitution making in various spheres of the globe. Many countries of the developing world, in shedding one party systems for multi party politics, have adopted new constitutions to embody the 'new social compact'. And many of these constitutions have moved beyond the confines of traditional bills of rights, entrenching new rights in an effort to achieve social and political justice for their societies.

For example, the bills of rights in the recent constitutions of South Africa and Ghana embody specific rights relating to women, children, the environment, education, working conditions and administrative justice. The South African bill of rights has specific sections on housing, health care, food, water and the right to receive reasons for administrative decisions. Closer to home, in Nepal, the constitution contains a right to information and a right against preventive detention.

The Sri Lankan draft unfortunately ignores many of these recent constitutional innovations. It is traditional and lacking in imagination or vision. Where other countries have drawn from their recent experiences and have tried to prevent a recurrence of abuses which have taken place, the Sri Lankan draft chooses to ignore some of the recent horrendous abuses of power. Specific provisions trying to curtail an abuse of emergency powers, and provisions guaranteeing minority rights are inexplicably absent, despite Sri Lanka's recent experiences.

### **Economic and Social Rights.**

Although many in the world are talking of civil/political AND economic/social rights, the new draft talks only of civil and political rights. There is only one direct mention of an economic right.

Sri Lanka ratified the International Covenant on Economic, Social and Cultural Rights and undertook to take steps to the maximum of its available resources to achieve, progressively, the full realisation of these rights. The country's first report under this covenant is to be considered by the Committee on Economic, Social and Cultural Rights in May this year. Despite these processes, the new draft shows little consideration for economic and social rights.

For many, economic and social rights were not rights, but only goals. Many constitutions (including the Indian and the current Sri Lankan) discriminated against these rights by putting them in a section titled 'Directive Principles of State Policy' which were not legally enforceable.

Many also argued that economic and social rights were vague and therefore could not be enforced. These critics forgot that many of the civil and political rights were also vague. The Supreme Court of Sri Lanka in the late seventies and early eighties, had difficulties in defining what constituted torture. Many feminists now argue that rape is a form of torture. Similar problems cloud the right to free expression. Do you violate the right of a 'participatory listener' if a radio station suddenly stops its non-formal education service? Does the banning of pornography violate the right to free expression? Or does it promote the rights of women?

Many of the civil and political rights have acquired a degree of clarity because of the many years that courts and scholars have spent trying to define them. Social and economic rights, on the other hand, are considered to be 'new' rights. And Sri Lankan policy-makers are reluctant to allow Sri Lankan courts and lawyers the opportunity to try and define these rights by incorporating them in the new bill of rights.

Some of these rights have been the subject of judicial interpretation in other countries. The Indian Supreme Court has shown how, through a process of constitutional interpretation, it has begun to try and realise economic and social rights. The Indian constitution recognises economic and social rights only in a few cases. However, the court has, through a process of interpretation, sought to 'read in' these rights into other rights like the 'right of life'. Similar processes of thinking are evident if one looks at the decisions of the Inter-American Court of Human Rights and the Supreme Court of the Philippines.

A recent decision of the Sri Lankan Supreme Court shows that this court too has stepped on the same trail. Using the non-discrimination clause, the court has recently argued that 'equal protection of the law' extends to equal protection of livelihood (*Jayasinghe v AG*)<sup>1</sup>.

Unfortunately none of these experiences are reflected in the new draft. Where other countries (like South Africa, Namibia, Ghana and Nepal) have sought to provide their courts with constitutional tools to facilitate judicial interpretation, this country has chosen to remain silent.

A bill of rights is supposed to restrain executive and legislative power. It is supposed to act as a bulwark against tyrannical parliamentary majorities and 'one person shows'. The new draft

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<sup>1</sup> (1994) 2 Sri LR p 74.

unfortunately shows little respect for a cardinal principle that is found even in traditional bills of rights by giving sanctity to all existing law even if they violate fundamental rights. The draft discriminates between existing law and future law. Existing law is sacrosanct and cannot be challenged even if such a law violates a fundamental right. Future laws, on the other hand, may be challenged.

A bill of rights should also promote change. South Africa's policy-makers have shown how this attitude to change inspired that country's constitution. Sri Lanka's policy makers unfortunately seem considerably less inspired or, just tired.

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## **Reservation of a Quota of Seats for Women in Parliament**

*Sunila Galappatti*

The Trust organised a discussion in March, on the appropriateness and the effectiveness of a Reservation of seats for Women in Parliament. Ms Radhika Coomaraswamy made a presentation on the Indian experience before it was debated by all those present.

In discussing the advantages and potential problems arising out of the reservation for women, Ms Coomaraswamy referred to the experience in India, where such legislation has been debated. In India, 181 women are to sit in Parliament, comprising one third of the Lok Sabha and one third of the seats reserved for scheduled castes and tribes. The Bill proposes the rotation of the constituencies in which this reservation is to be implemented through the drawing of lots. The decision to set the reservation at one third is a result of the UN recommendation of this figure as the participation threshold necessary to play a crucial role in political decision making at the national level. Thirty percent is therefore the percentage being adopted by India and also by the South African Constitution. Indeed, at the party level, 30% of the members of the African National Congress are women, the highest percentage in the world. It was suggested that an alteration of the party system could indeed be one way of bringing women into the political forefront. It was pointed out that in fact, under a system of Proportional Representation, it is only through political parties that seats could be reserved for women.

Ms Coomaraswamy said that the basis of the dilemma over the reservation for women in public and political spheres is in our concept of equality. She highlighted that while a concept of formal equality would not admit such a provision, being based on the sexes being treated alike, a concept of substantive equality made an attempt to redress past imbalances, in taking active steps to alter the presentation arising out of a particular historical context.

Ms Coomaraswamy said that in India, a survey had been carried out which demonstrated a public acceptance of the approach and understanding of equality as substantive equality. Seventy five percent of men and 75% of women questioned in the survey approved of the reservation for women in parliament. Ms Coomaraswamy expressed concern as to the validity of this survey, but said that it was, nevertheless the only one that had been carried out. All parties committed themselves to 33% in Parliament. However, Ms Coomaraswamy commented that the highest percentage recorded of women in Parliament is 7.9%, in the tenth Lok Sabha. In fact, there were larger percentage of women in Parliaments in the 1940s and 1950s than today.

Ms Coomaraswamy laid out the usual arguments against substantive equality. For example, there is a concern that the reserved 33% could be constricting, preventing women from breaking through these margins into the non-reserved seats. There is also a concern as to the negative effects of women contesting women where a rotation method is used as opposed to the first-past-the-post system. Another argument that is often highlighted against reservation is that it makes for a proliferation of unmerited MPs into parliament, casually dismissed as the "wives and daughters" of the men. However, there cannot but be a gradual political development, in filling the reserved seats which can, perhaps, only be commenced by a reservation. Another concern is as to the reservation being paternalistic in nature, and addressing the causes of inequality at their roots. Ms Coomaraswamy mentioned that in India, for example, women have been extremely successful in politics at the village level, although there is never a career for women at the village level.

Ms Coomaraswamy said that she, personally, is a believer in substantive equality. She said that reservation in Parliament, for example, forces political parties to re-organise and to see women differently. She said this helped, for example, in the resolution to make women economically independent. She also commented in a disparity in the political priorities of men and women, which highlights the need to involve women's contributions to politics as they are different to those of their male counterparts. Ms Coomaraswamy suggested that seats be reserved for women at least at the local government levels as this could function as a first step to the involvement of women in national politics.

The presentation was followed by a lively discussion on the subject.

## CURRENT DEVELOPMENTS

*Sumudu Atapattu*

### Developments in the Ahungalle episode<sup>1</sup>

In the last issue of our Review, we published a short article on the tragic events that took place at a privately owned zoo in Ahunagalle. We would like to report on the developments that took place on this issue.

Although in 1993 a permit was issued to the owner of the zoo to establish a private zoo, the 1993 amendments to the Fauna and Flora Protection Ordinance made private zoos illegal. The above permit, however, was purportedly granted before the said amendments came into force (there is, however, a controversy about the exact date of the permit). When officials of the Department of Wildlife Conservation visited the zoo in February 1995 and found an excess of animals there, the Department informed the owner that he had violated the terms of the permit and asked him to show cause. Since this was ignored by the owner, the Department in July 1995 cancelled the permit granted to run the zoo. In August 1995, however, the Minister of Plantation Industries, Public Administration and Parliamentary Affairs restored the permit.

It is against this background that the tragic event took place.

This is not the end of the story, however. When the zoo was closed following the incident, people in the area took to the streets protesting against the closure stating that their jobs were at stake. They did not care about a poor innocent boy who had to pay for the misdeeds of others. Did they care only about a few rupees that they were prepared to risk a repeat performance of the events? Following the incident, when the Department officials went to inspect the premises, they were prevented from doing so by those who were protesting. One would have thought that they were protesting the incident; on the contrary, they were protesting the closure of the zoo!!

Even more interesting is the enjoining order issued by the Colombo District Judge barring the Wildlife Conservation officials from removing the animals from the zoo, pending the decision of the Minister.

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<sup>1</sup> See *Island*, 27/2/1996  
*Island*, 4/3/1997  
*Sunday Island*, 2/3/1997  
*Sunday Times*, 2/3/1997  
*Ceylon Daily News* 5/3/97  
*Sunday Times*, 9/3/1997  
*Sunday Island*, 16/3/1997.  
*Island*, 27/3/1997.

On a unanimous decision of the Fauna and Flora Advisory Committee, the Director of Wildlife Conservation cancelled the permit in March 1997. The owner then appealed to the Minister against the cancellation of the permit. The Minister decided this time to uphold the decision of the Director. The tragic events that took place may have opened his eyes. Despite the appeal being rejected, the animals remained in the zoo even at the end of the month.

While we are happy about the Minister's decision (although it came rather belatedly and at the cost of an innocent life), the question that lingers in our minds is: why could not the officials have acted within the law?

### **Emergency regulations to suspend the operation of environmental law**

The President promulgated regulations recently to suspend the operation of the National Environmental Act of 1980, the Urban Development Authority Law of 1978, the Nuisance Ordinance (Chapter 230) and Chapter IX of the Code of Criminal Procedure Act of 1979 in relation to power and energy projects. The regulations stipulate that the above statutes "shall be of no force or effect in so far as they relate to the generation of power and energy."

It is granted that the country needs additional sources of energy (we knew that at least seven years ago) and last year's drought showed us how inadvisable it is to rely solely on hydro power. Yet, is this the way to ensure that the country would have sufficient power to meet the requirements of the country? Since the laws that provide for environmental impact assessment, public participation, zoning, and judicial remedies in the event of a nuisance are suspended, it is now legally possible to put up a power plant anywhere in the country, even in the close proximity of Temple Trees, without any of the existing safeguards, without having the views of the people, and without even having to prepare an environmental impact assessment. The power plant in question will not need clearance from the CEA, the UDA or any other authority and will not be required to obtain an environmental protection licence in order to commence operation. What will happen if the CEB decides to construct a nuclear power plant in the country? Under the present state of affairs, the CEB will be entitled to do so anywhere in the country. This is indeed a very worrying situation. We wonder whether enough thought was given to the possible repercussions of this decision.

Not only was the National Environmental Act (NEA) suspended, the common law remedy available to aggrieved parties in relation to a public nuisance (procedure laid down in the Code of Criminal Procedure Act) was also suspended. Since the NEA does not provide for citizen's suits, the remedy that was commonly used by people and NGOs was the procedure applicable for the abatement of a public nuisance. Now that remedy is also denied to the people. It is no secret that these regulations were promulgated in relation to two power plants: one in Etul Kotte - a diesel power plant in operation now - for which the UDA had refused approval and no CEA clearance has been obtained and the other, the twice rejected Upper Kotmale Hydro power project.

Litigation is pending in relation to the former: the Environmental Foundation Ltd., on behalf of the residents in the area, filed action under Chapter IX of the Criminal Procedure Code for the abatement of the public nuisance caused by the power plant. The Central Environmental Authority reported in court that the noise emanating from the power plant was well beyond the stipulated level for noise (110 decibels whereas the permitted level is about 60). Due to the emergency regulations, however, the case has been postponed indefinitely.

Environmental as well as human rights experts have criticised the use of the Public Security Ordinance, under which these regulations have been promulgated, for power and energy projects, as the Public Security Ordinance was enacted for a specific reason. They also point out that a government claimed to be based on democracy and transparency should not have used the emergency regulations to nullify the rights of people.

Forthcoming

### **SRI LANKA: STATE OF HUMAN RIGHTS 1996**

For the first time, the report will cover

- \* environmental rights;
- \* devolution proposals;
- \* nationality & citizenship laws;
- \* the office of the Ombudsman,

in addition to the topics generally covered (freedom of expression, emergency regulations, children's rights, women's rights, internally displaced and integrity of the person).

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## **NEWS OF THE TRUST**

### **Discussions**

The Trust organised several discussions in March on topical issues. The first meeting was on the reservation of a quota of seats in parliament for women and a presentation was made by Ms Radhika Coomaraswamy on the Indian experience. A summary of the presentation, prepared by Sunila Galappatti, is published in this issue.

A series of meetings was held at the Trust on the newly released fundamental rights chapter of the constitution. Several prominent NGOs, academics and individuals took part in these meetings. The recommendations of the group are published in this issue.

The Trust also co-sponsored a Tribunal to mark the International Women's Day which fell on the 8th of March.

### **Visitors to the Trust**

Several distinguished individuals visited the Trust in March. His Excellency the High Commissioner for New Zealand, Geoff Ward visited the Trust. Various issues of interest were discussed including the human rights situation in Sri Lanka, the newly constituted National Human Rights Commission and the contribution of the Trust to improve the human rights situation in Sri Lanka.

A delegation from Denmark comprising representatives from the Danish Refugee Council and the Danish Immigration visited the Trust. They were particularly interested in the situation of Tamil people in Colombo. Among the issues discussed were the plight of repatriated asylum seekers, the general human rights situation in Sri Lanka and the possible collaboration between the Trust and the Danish Refugee Council on issues of mutual interest.

### **Interns**

Vikram Raghavan, a final year law student from the National Law School India, spent five weeks at the Trust. During his stay, he organised two discussions, wrote several articles and contributed to the activities of the Trust.

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