



# LAW & SOCIETY TRUST

## Fortnightly Review

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In this issue we publish the presentation made by Ms Nimalka Fernando on "Women and Political Participation" at the *Consultation on Women's Rights and the Draft Constitution* organised by the Trust in December. She identifies the relevant provisions in the 1978 Constitution and the Draft Constitution on gender equality and discusses how participation by women in the political process can be increased and facilitated. This issue also carries the report on the Consultation which includes a Memorandum submitted to the Ministry of Justice and Constitutional Affairs.

In his article on "A National List for Women?" Dr Mario Gomez discusses various options that are available to increase participation of women in the political process. These include preparing a national list, a reservation in the nominations list, a reservation for those elected and quotas and reservations.

The keynote address by Mr Mangala Samaraweera, the Honourable Minister of Posts and Telecommunications and the Media presented at the Annual Law & Economy Conference organised by the Trust and a book review by Dr Neelan Tiruchelvam are also included in this issue.

## WOMEN AND THE POLITICAL PROCESS

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# WOMEN AND POLITICAL PARTICIPATION

Nimalka Fernando \*

If women's participation in politics and decision-making in their countries is a measure of democracy, then all countries have a long way to go to achieve true democracy. Although women are participating in increasing numbers in politics and public life all over the world, they still remain largely outside the realms of power and decision-making in governments.

Beginning with New Zealand in 1893, women have gained the right to vote almost everywhere often only after long and difficult struggles. The fight for women's suffrage in the United Kingdom and the USA, for example, began in the mid nineteenth century, and lasted well into the first quarter of the twentieth century. The Indian women's movement demanded the right to vote from the British in the 1920s and lobbied their political parties for support, but it was not until 1950 that women in India finally gained the right to vote. Before the second world war only 11 countries had granted women the right to vote which included Bolivia, Brazil, Cuba, Maldives, Mongolia, the Philippines, Sri Lanka, Thailand and Uruguay.<sup>1</sup> In a number of countries that had been colonised, women received the right to vote at the time of independence.

## 1. Women in Parliament and at Ministerial Level

The right to vote was a necessary step but, despite expectations, it was no guarantee that women would be able to participate in politics on an equal basis with men. In most countries, the right of women to be elected to parliament was granted at the same time as the right to vote, and in many places they were elected to parliament in the first elections following the granting of the right to be elected. In some countries, however, there were gaps ranging from 3 to 4 years. (Denmark and Australia). According to UN reports, by 1993, women had been elected to parliament of most countries of the world. Although women's participation in parliaments grew between 1975 to 1987 the pace of such increase has been uneven. Overall, women hold an average of only 10% of parliamentary seats.<sup>2</sup>

Unfortunately, we have observed that the number of female members of Parliament has dropped notably in the 90's following the political changes in the former socialist block countries. Under the one party system in socialist States, women held a relatively high percentage of parliamentary seats - almost as high as thirty percent. We are well aware that in our own country that there is a significant decline of women at all levels of political representation.

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\* Presented at the Consultation on Women's Rights and the Draft Constitution organised by the Law & Society Trust in December 1997. Edited for publication.

<sup>1</sup> *Women and Empowerment: Participation and Decision Making* (Zed Books) (1995).

<sup>2</sup> *The World's Women*, United Nations (1995).

According to statistics available this has dropped to less than one per cent.<sup>3</sup>

Worldwide women held only 4% of ministerial level positions in 1990. They were responsible for health, welfare, education, cultural affairs or women's affairs - areas traditionally considered as women's concerns. These ministries are marginalised in many countries and have limited powers and resources. Finance, foreign affairs and justice are areas that remain exclusively a male preserve, with a very few exceptions.

The twentieth century also witnessed few women heads of state or government, either elected or appointed. Many women who have reached the top came from families which are deeply involved in politics. Most of these women have been 'lone' women at the top. They have not, on the whole, been connected to women's movements or made special efforts to promote women's issues or open the way to other women to participate in politics. Notable exceptions are Ms. Bruntland of Norway whose Cabinet of Ministers was composed equally of men and women and the Irish Head of State Mary Robinson who acknowledged the importance of the women's movement in Ireland.

## 2. Constitutional Processes and the CEDAW

The Preamble to the Convention on the Elimination of All Forms of Discrimination Against Women CEDAW states:

*despite these various instruments extensive discrimination against women continues to exist .... discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth and prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity.*<sup>4</sup>

The convention contains a range of measures which state parties should adopt in relation, *inter alia*, to education, public life, nationality rights, employment and health care. They are also required to amend their constitutions and laws to eliminate discrimination against women.<sup>5</sup> International conventions play an important role in setting and defining international standards. Furthermore, the reporting process embodied in international instruments is an incentive to take positive action. Unfortunately, we are well aware that they do not alter the harsh realities of life!

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<sup>3</sup> Department of Census and Statistics, Sri Lanka.

<sup>4</sup> UN Convention Against All Forms of Discrimination Against Women (1979).

<sup>5</sup> Ibid.

Many states have, since the adoption of the Convention and some states even before that amended their Constitutions to enshrine equality between women and men. For example, the 1978 Constitution of Sri Lanka and the present Draft Constitution are very explicit in this area. The principle of non discrimination on the basis, inter alia, of sex is guaranteed by the 1978 Constitution. The right to challenge discriminatory State action in the Supreme Court is recognised under Article 126. Furthermore, new legislation brought before Parliament which is discriminatory may also be challenged. The Directive Principles of State Policy which guide policy and statutory interpretation too articulate the State's commitment to prevent gender discrimination. Provisions in the Draft Constitution of 1997 have to be evaluated to ascertain whether we have moved forward with regard to ensuring further elaboration of gender rights taking into consideration: (a) the national context where women's participation in the economic life had increased during the past decade; and (b) the advancement made at the UN level to recognise women's rights as human rights. This casts an obligation on Sri Lanka as a member of the UN system.

At a Consultation held recently on the Draft Constitution of Sri Lanka convened by the Law & Society Trust the delegates considered the following as being absolutely and fundamentally important:

- (i) the unequivocal acceptance of the supremacy of the Constitution, and the conformity both of its terms and of the interpretation of those terms with the standards laid down by international law;
- (ii) the independence of the judiciary;
- (iii) the importance of judicial review, for consistency with the Constitution, of laws whether or not they come into effect after its commencement.<sup>6</sup>

For the purposes of the present discussion I would like to briefly ponder over some relevant provisions of CEDAW and their implications. The principle of gender equality and equality before the law are guaranteed under the 1978 Constitution as well as in the present Draft. The Constitution also recognises that special laws can be formulated for the protection of women. Under Article 2 of the Convention State Parties are obliged to embody principles of equality, adopt appropriate legislative and other measures to prohibit discrimination against women; to afford legal protection; to eliminate discrimination against women by any person, organisation or enterprise; to take measures to modify and abolish existing laws, regulations, customs, and practices which constitute discrimination against women; and to repeal all national penal provisions which constitute discrimination against women.

Article 11(3)(4) of the Draft Constitution deals with the principle of non-discrimination on the basis of sex and gender. For the purpose of our discussion it is important to look at the

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<sup>6</sup> See Report on the Consultation on the Draft Constitution prepared by Patricia Hyndman, Law & Society Trust, 1997.

provisions of the CEDAW as its provisions are used to formulate charters and laws on women's rights. The Women's Charter of Sri Lanka, for example, is a replica of the CEDAW. The problems of the Draft Constitution with regard to gender rights are as follows:

- (a) Women can take action only against the State or public authorities for discrimination.
- (b) Article 28 states that "all existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the provisions of this chapter." Implications are that all customary practices and personal laws will be left untouched. This is where major reforms are required if we are to truly uphold gender equality. This validation clause negates the very spirit of human rights. However, there is no clear indication of subsequent action.

Article 2 of the CEDAW titled 'Obligations to Eliminate Discrimination' obligates States Parties to condemn discrimination against women and to eliminate it through constitutional, legal and other appropriate means. This extends to public authorities and institutions, private persons, organisations and enterprises.<sup>7</sup>

The present Draft provides that a Commission be established to report to the President as to whether any law is inconsistent with the provisions of the fundamental rights chapter, and "the President shall, as soon as practicable, cause such report to be placed before Parliament."<sup>8</sup>

The proposed appointment of a Commission to review discriminatory laws is commendable. Whether appropriate steps would be taken to revise laws based on international obligations as a state that has ratified the CEDAW is not clearly expressed. In view of the above observations neither the present Draft nor the 1978 Constitution can be seen as a legal instrument which fulfils the obligations under Article 2 of CEDAW.

Another important area that is not covered in the Draft Constitution is the issue of nationality. It is important to stress that unless we grant women equal rights with men with respect to the nationality of their children, the commitment to gender equality will never be realised.

Since the UN World Conference on Women in Nairobi, women all over have worked hard to promote legal equality. This enthusiasm is important as legal equality enables and validates women's struggle for equal rights and access to resources and makes equality a public issue. Constitutional changes alone, however, cannot end patriarchy or overturn centuries of discrimination. The speed at which the road from constitutional reform to real equality is travelled depends primarily on the political will of each government to reorient its priorities towards ending discrimination. As we have seen in many countries constitutional equality can

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<sup>7</sup> Article 2 of CEDAW.

<sup>8</sup> 1997 Draft Article 28(1)(2).

also leave the real foundations of discrimination untouched. For example, although the 1974 Constitution of Thailand contains provision on equal rights, the 1976 Family Law discriminates against women in many respects, especially in the area of property rights.<sup>9</sup> We have raised similar concerns on the present Draft Constitution of Sri Lanka. There is a vast body of law in many countries, including Sri Lanka, which regulates business, employment, social security, property, marriage, divorce and inheritance that impinges on women's rights.

### **3. Can women make a difference?**

We need to explore the specific areas of the polity in order to increase greater participation for women. One proposal is the recommendation to obtain a quota for women. There are several issues related to this. When significant numbers of women are present in politics, as in the Nordic countries where women hold a relatively high percentage of electoral positions in government, studies have shown that they do make a difference. However, women are subject, just as men, to prevailing political practices and to global economic and political forces that effect the realisation of the objectives. A study on women in public life, carried out by the United Nations Division for Advancement of Women, contends that only a critical mass of women allows female politicians to bring different values to public life: "The fewer the number of women in public life ... the less they are likely to be able to confidently assert distinctively female values, priorities and characteristics. As a minority operating in a male domain, most women public figures, to be accepted and to function on a basis of equality with men, have had to adapt to and adopt the male priorities predominating in public life." Such behaviour must be studied and analysed: i.e. in the process of absorbing this male culture, women in high political positions tend to disassociate themselves from other women and even deny the very existence of discrimination.<sup>10</sup>

Some of the obstacles women face in relation to participation in politics are:

1. the relatively short historical tradition of political participation of women and the lack of experience in campaigning, public debate and exposure to media;
2. prevailing negative attitudes towards women's participation in public life, lack of confidence and support for female candidates and politicians on the part of the electorate, including women;
3. the difficulty women experience in combining a political career with the traditional role in the family and often in society;
4. economic dependency or lack of financial means;

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<sup>9</sup> Women and Law - APDC Publication, KL Malaysia.

<sup>10</sup> Participation and Politics and Public Life, Zed Books (1995).

5. insufficient education in general and political education in particular;
6. women's reluctance or diffidence to participate in politics, particularly at a high level;
7. inability to cope with political violence.

Political parties, parliaments and trade unions are major vehicles for political careers. The low participation of women in these organisations, especially at the leadership level, blocks important avenues for advancing to decision-making positions. Whilst women comprises a substantial part of the membership of political parties and are involved in fund raising and campaigning, they are most certainly excluded from leadership. The structuring of political working time, conceived by men for men, creates a time conflict for women between political activities and the time they must and wish to devote to their family. This is true for women in all countries, and particularly true for those in the developing world where traditional division of tasks between men and women remains rigid.

While political parties which are genuinely interested in seeing women taking an active part in politics should begin by mobilising their women's fronts at all levels, this by itself is not sufficient. It is necessary that women should be consciously drawn into the decision-making levels. It is necessary to raise the question as to how many women are at the central committee level in our parties.

We have a similar responsibility as women's groups and NGOs. We need to critically assess our own behaviour and attitudes. It is not sufficient to only lobby for a particular quota for women or for reservations: we must ensure that women join political parties in large numbers and develop their own constituencies and enlarge the role played by them. This will enhance our own demands for reservations. At this point I wish to raise a pertinent issue: how have women responded to politics? There is a certain amount of fear among women to discuss politics and an even greater fear to participate in politics. At times we consider party politics as a contemptible game and, therefore, keep a deliberate distance from it, but also wish to lobby the same process for reservations or quotas. The very nature of our NGO activities has estranged us from politics. Many have worked for years on women's issues. Can we claim to have succeeded in creating a solid electoral constituency among women?

We should strive to bring about qualitative changes in various political fora with women's participation. We cannot join in this process passively or as mere puppets. Can we change the pattern that connections to powerful patriarchs is an important requirement for women in politics today?

#### **4. Women in movements for liberation and democracy**

During times of political upheaval, women from all regions of the world have come forward to defend or struggle for national independence and liberation and for greater democracy.



Resistance or liberation movements have given women the opportunity to leave their homes and participate alongside men for radical political changes. Recent Sri Lankan experiences cannot be forgotten in this respect: the Mothers' Front of Jaffna, Mothers and Daughter of Lanka, and the militant women of the JVP and the LTTE have to be mentioned. There is a necessity to look towards a qualitative change in this respect. Despite this activism we are sadly aware that the empowerment of women has not occurred to bring them into leadership positions at the national and regional levels.

If one takes a look at what happened to the gains of the Russian and Chinese revolutions, women, as usual, were expected, at the end of the struggle, to assume their traditional roles or were largely limited to supportive positions in political and public life. Although most victorious movements proclaimed equality of women and repealed blatantly oppressive practices, women's issues continued to be marginalised.

## **5. Mechanisms for increasing women's participation**

There have been several expert group meetings convened by the UN and the recommendations formulated based on these discussions are as follows:<sup>11</sup>

1. as an interim measure, substantial targets, such as quotas or similar forms of positive action to ensure women's candidacy for office and participation in political posts should be applied;
2. training programmes should be developed to increase the political and management skills of women in politics;
3. women's sections of political parties should be evaluated and strengthened to enable them to influence party policy and promote female candidacy;
4. parties should be encouraged to examine the criteria used to select persons for political functions/nominations lists;
5. Adopt appropriate measures to sensitise party membership on gender participation in political processes;
6. provide finances to women candidates.

In some countries quotas have been successfully used to increase women's participation in the leadership of political parties and in party lists for elections. For instance, the Norwegian Labour Party stipulates that at least 40% of all candidates for election must be women. There

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<sup>11</sup> United Nations Division for the Advancement of Women, Expert Group Meeting Report, Vienna (1989).

is a proposal before the Indian parliament to reserve 33% of seats for women.<sup>12</sup> Quotas for women have been the most efficient strategy used to increase their political representation. It must be noted that affirmative action programmes like legislation on equality of men and women will not be effective unless women are aware of them and unless there is strong pressure to ensure that they are implemented. Although affirmative action is a useful tool for increasing women's participation, it is only a part of a larger strategy necessary to breakdown the existing barriers.

## 6. Mobilising and organising of women

The experience of being continuously marginalised in mainstream politics leads us to believe that there is an urgent need for participating in feminist activities and politics. This movement is fuelled by the realisation that, despite the gains in the social, economic and political spheres, women are still a long way away from participating equally in society. The present day feminist movement did not spring up in a vacuum; the seeds were planted by our mothers, grandmothers or even great-great grandmothers who fought for women's rights as strong individual women, as part of the suriyamal movement, adult franchise movement and in the anti-colonial struggles and workers' movements.<sup>13</sup>

Let me conclude this presentation by sharing with you a verse from the song titled 'Women' of the Shakthi Group of India. This always inspires me when I feel depressed and hopeless particularly when discussing a topic like 'women and political participation.'

*Women,  
We have a purpose in our lives  
to be part of history, of a new dawn  
to be an overflowing river  
that waters the world  
which belongs to all equally.*

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<sup>12</sup> Economic and Political Weekly, October 26 (1996).

<sup>13</sup> Feminism and Nationalism, Kumari Jayawardhena.

## Report of the Consultation on Women's Rights and the Draft Constitution\*

A consultation was held recently at the Trust on Women's Rights and the Draft Constitution. The consultation was chaired by Radhika Coomaraswamy and the keynote address was delivered by Nimalka Fernando.

The following is the text of the Memorandum submitted to the Ministry of Justice & Constitutional Affairs.

### MEMORANDUM

#### A. Fundamental Rights and Personal Laws:

1. The discrimination provisions as prescribed in Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) should be included in the Constitution. If not, there should at least be a stipulation that the interpretation of the discrimination clause be done with reference to the CEDAW provisions.
2. Article 11(4) is to be redrafted on the basis of Article 4 of CEDAW (on affirmative action).<sup>1</sup>
3. Remedies for violations of fundamental rights are presently available only against the State. These remedies should be made available against private actors also.
4. The government, in consultation with women rights' groups, should work towards the creation of a "Women's Commission" akin to the Commission for Gender Equality under the South African Constitution with clear guidelines as to its scope and ambit.<sup>2</sup> The

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\* Organised by the Law & Society Trust on 13 December 1997. The report on the consultation was prepared by Dinusha Panditharatne & C.S. Dattathreya of the Law & Society Trust.

<sup>1</sup> "Adoption by States Parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved."

<sup>2</sup> Article 187 of the South African Constitution reads as follows:

"187(1). The Commission for Gender Equality must promote respect for gender equality and the protection, development and attainment of gender equality."

"187(2). The Commission for Gender Equality has the power, as regulated by national legislation, necessary to perform its functions, including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality."

"187(3). The Commission for Gender Equality has the additional powers and functions prescribed by national legislation."

Commission should examine issues of discrimination, violence against women and all other women's issues, for example, trafficking and prostitution.

5. The word "honour" in Article 14(1) should be deleted. It has been used in defence of acts of violence against women and in some instances it has proved to be an obstacle to rape victims getting compensation.
6. The "right to bodily integrity" should be included in the Fundamental Rights Chapter.
7. The word "appropriate" in Article 25(1)(c) is inadequate and vague. This provision should be redrafted to give an indication as to what is covered by that phrase.
8. The Commission which would be appointed to review existing laws, under Article 28, should have women representatives.
9. Provision should be made allowing public representations to be made to the Commission reviewing existing laws for their compatibility with the fundamental rights chapter.
10. A provision mandating that "appropriate and relevant action be taken on the basis of that report" that would be submitted by the Commission reviewing existing laws should be included.
11. The women's movement is concerned with secularism and pluralism. Therefore, Chapter 2 dealing with Buddhism should be re-conceived and re-formulated in terms of adopting "religions" as the subject. If this is not possible, there should at least be a clause that Chapter 2 "must not prejudice" Articles 15(1) and 11(3).
12. The citizenship laws should be brought into line with the provisions of the Constitution. The Constitution should make it clear that men and women have an equal right to transfer citizenship to their children, in conformity with Article 9 of CEDAW.<sup>3</sup> Towards this end, an Article should be introduced guaranteeing the equal right of every Sri Lankan, regardless of sex and marital status, to transmit citizenship to his/her children.
13. Specific provision should be made in Article 15(1) guaranteeing the right not to adopt a religion or belief.

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<sup>3</sup> (i) "State Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband."

(ii) "States Parties shall grant women equal rights with men with respect to the nationality of their children."

14. Article 25 needs to be reformulated in the light of the relevant provision in the South African Constitution<sup>4</sup> and Article 7 of the Women's Charter.
15. Article 22(6) needs to be reformulated with the following features:
  - (i) *Compulsory* free education till the age of 14, *and*
  - (ii) Access to free education until the completion of secondary education.
16. Article 22(1) should be expanded to include the right to a nationality, as provided for the Convention on the Rights of the law.
17. An Article should be introduced which provides that all children are entitled to equal treatment regardless of the parents' marital status.
18. The "right to dignity" needs to be included in an appropriate place in the Fundamental Rights Chapter. It could be included alongside the earlier suggested clause on the "right to bodily integrity."

**B. Electoral Provisions, the Judiciary, the Constitutional Council and other Public Institutions:**

1. The quota of 25% representation for women provided under Item 42 of the Regional List in relation to elections to local authorities should be increased to 30 per cent. There is also a need to establish national standards regarding the actual mechanisms through which this 30% figure is implemented. These standards need to be established in consultation with women's groups.
2. The figure of 30% representation for women should be extended to Regional Councils and the National Parliament as well. There is also a need to ensure that 50% of the names on the National Lists of political parties comprise women candidates.
3. Appointments to all public and judicial appointments should be in consideration of a "merit and diversity" principle. This principle should apply, *inter alia*, to those appointed to the Constitutional Council and those appointed *by* the Constitutional Council.
4. The proposed "Women's Commission"<sup>5</sup> should be added to the Schedule to Article 23 of the Draft, listing institutions whose members are to be appointed by the Constitutional Council.

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<sup>4</sup> See Article 27 of the South African Constitution and Articles 10 to 14 of CEDAW.

<sup>5</sup> See Recommendation No.4 in Part A above.

5. The present Draft provides that appointments to and by the Constitutional Council needs only to reflect different ethnic and interest groups as far as practicable [Articles 122(1)(e) and 123(3)]. It is proposed that
- (i) it be expanded to "gender equality and different ethnic and interest groups."
  - (ii) the phrase "as far as practicable" be deleted. It provides an easy excuse for not reflecting diversity.
6. Instead of including retired judges on the Constitutional Council as stipulated by Article 122(1)(f) of the Draft, there should be provision for including "eminent jurists."

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**SRI LANKA: STATE OF HUMAN RIGHTS 1997**

This report is a detailed account of the state of human rights in Sri Lanka focusing on events which occurred in the country in 1996.

The report considers civil and political rights in relation to the integrity of the person; emergency rule; freedom of expression and media freedom and judicial protection of human rights. Separate chapters are devoted to environmental rights; internally displaced persons and the freedom of movement; nationality and citizenship laws; violence against women; and children's rights. The report also discusses the human rights implications of the devolution proposals and the Office of the Ombudsman.

**Price: Rs. 375/=**

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# A National List for Women?

Mario Gomez\*

Tucked away in the government's new draft constitution is a provision that deserves a little more public debate than it is currently attracting. Whether the lack of public debate is because women's issues tend to remain in the margins anyway, or whether it is because the provision lies inconspicuously at the end of the constitutional document, is not clear.

This provision seeks to ensure that 25% of those elected to local authorities in this country would be women. According to paragraph 42 of the Regional List:

*...election laws (in each Regional Council) shall ensure that not less than twenty five per cent of the members elected ... to local authorities shall be women;...*<sup>1</sup>

This proposal was first made public at the end of May when the state owned *Daily News* in its page one lead story announced that reservations for women would be introduced in national Parliament.<sup>2</sup> This news report was subsequently found to be inaccurate and what did transpire was that the government was contemplating to include a reservation for women at the local government level only. This provision has been included in the constitution on the government's initiative. It was not the result of a concerted initiative on the part of women's groups in the country. In fact, some women's groups got into the act only in the second half of this year and after the government's proposals were made public. Given that the recent constitutional reform process has been dominated by a male select committee, male consultants and (mostly) male draftsmen, the inclusion of such a provision *in the absence* of a strong women's lobby, is significant.

Women have never held more than 5% of the seats at any level of government since independence. Currently there are 11 women members in a 225 member Parliament. Barring one, all are members of political families or connected to a former male politician. At local government level and provincial level too, the figure is under five per cent. No group, defined with such precision, can lay claim to such a monumental under-representation in government.<sup>3</sup>

The government's proposal unfortunately does not go far enough. While the proposal is to be welcomed, it needs to be broadened to ensure the representation of women not only at the local

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<sup>1</sup> *The Government's Proposals for Constitutional Reform, October 1997*, Ministry of Justice, Constitutional Affairs, Ethnic Affairs and National Integration, paragraph 42 of the Regional List in the Second Schedule.

<sup>2</sup> See Mario Gomez & Shyamala Gomez, 'Reserving Quotas for Women' in the *Sunday Times* of 15 June 1997.

<sup>3</sup> See Mario Gomez & Shyamala Gomez, 'Preferring Women,' *Draft Article* (Unpublished).

government level, but also in the proposed Regional Councils and in Parliament. It is highly unlikely that, in the short term, the country will generate significant numbers of women politicians in the absence of a broader reservation of this nature.

### 1. A National List at Parliamentary Level and Regional Level

An effective way of implementing a reservation for women in government is through the use of a national list exclusively for women.

Under the current electoral system a 50 member national list would guarantee approximately 22% of the places in the 225 member parliament to women. The 50 places would be allocated in proportion to the total vote received nationally, by the political parties that compete. The parties would be compelled to nominate women only.

Thus, where Party 'A' secures 50% of the votes it would be entitled to nominate 25 members to the national list. Similarly, if Party 'B' gets 30% of the votes nationally, it gets to nominate 15 women to the national list and so on. The figure of 22% is lower than the 33% legislative reservation that the Indian Parliament has been considering. It is also lower than the 30% figure set by the United Nations.

- \* If Party 'A' gets 50% of the total vote (nationally) - they get to nominate 50% of the candidates [25 seats].
- \* If Party 'B' gets 30% of the total vote (nationally) - they get to nominate 30% of the candidates [15 seats].
- \* If Party 'C' gets 20% of the total vote (nationally) - they get to nominate 20% of the candidates [10 seats].

	<b>% of the Vote Nationally</b>	<b>No. of Women on the National List</b>
Party A	(50%)	- 25
Party B	(30%)	- 15
Party C	(20%)	- 10
	100	- <b>50 seats</b>

*Total No. of Seats in Parliament: 225*

This system is relatively easy to understand and to administer. It would work either under the current system of proportional representation (PR) or under the proposed combined system (German System). The German System combines the PR system with the 'first-past-the-post' system. This same system could be replicated at the Provincial or Regional Council level.



This scheme will not, however, guarantee women MPs from all areas of the country. The party would decide on the women nominees. Since there are different local government bodies - Municipal Councils, Urban Councils and Pradeshiya Sabhas at local government level, a different scheme will have to be devised.

## **2. Representation of Women: Other Options**

### **2.1 A Reservation in the Nominations List**

Under this scheme when a political party files its nomination papers to contest an election it would be required to show that at least 30% are women. This is similar to the existing Youth Quota at the Local Government level. While there is no guarantee as to the number of women finally elected it would work at local government level. This is also easy to administer and understand.

### **2.2 A Reservation for those elected**

Political parties will have to ensure that of those ultimately elected 30% are women. This is similar to the government's proposed scheme at local government level. This would be more difficult to administer and understand. This scheme would work well under the proportional representation system, but not under the 'first-past-the-post' system.

### **2.3 Multi Member Constituencies**

Under this scheme, small multi member constituencies which guarantee the election of **at least** one woman member are established. This would work under the 'first-past-the-post' system only. Under the Proportional Representation system the whole district becomes the constituency and would be covered by No. 2 above.

Thus in a 'three member' constituency, the two candidates who poll the highest number of votes get elected. These candidates could be men or women and their gender is irrelevant. The third candidate has to be a woman and would be the woman candidate who polls the next highest.

If the government decides to go for a combined 'proportional representation - first-past-the-post system' (the German System), multi member constituencies may be combined with a National List for Women.

## **3. Quotas and Reservations**

Many people recoil at the idea of a quota or reservation. To them equality means 'merit' and any departure from this should only be done in exceptional cases. Others hold a more complicated position: they favour the more fashionable concept of 'affirmative action,' but oppose quotas, failing to comprehend that both may sometimes amount to the same thing.

The rationale for quotas, reservations and affirmative action is simple: there are groups that have been historically discriminated against, or are currently disadvantaged, and, therefore, they need a 'quota' or 'reservation' to compete equally with the privileged groups. Equality may require the equal treatment of 'equals' and also the unequal treatment of 'unequals.' An Indian Supreme Court judge once observed that "to bring about equality between unequals, it is necessary to adopt positive measures to abolish inequality."<sup>4</sup>

Quotas, reservations and affirmative action should not operate indefinitely, but for a well defined period. They should be removed when the disadvantaged group can compete equally with the other groups. It is this rationale that has supported the extensive reservations for the scheduled castes and scheduled tribes in India, and for the African Americans in the United States.<sup>5</sup>

In India the concept of reservations has consistently received the approval of the Supreme Court. In the United States there is now a growing body of opinion against quotas and the US Supreme Court is due in 1998 to deliver judgment in a landmark case that may well decide the future direction of affirmative action in that country.<sup>6</sup>

#### **4. Women in Government**

The rationale that supports quotas, reservations and affirmative action is also applicable to women in government in this country. Statistics may not always present a complete picture, but in this case the statistics are shocking. A group that makes up half the population has for almost fifty years never had more than 5% of its representatives in government.

In the absence of a reservation that will operate for 15 to 20 years, it is extremely unlikely that Parliament, the proposed Regional Councils, and the local authorities, will have significant numbers of women representatives in the near future.

Moreover, there is an inconsistency of thinking in the current constitutional proposal. If one accepts that women need a reservation at local government level, then what are the special factors that operate at parliamentary and provincial levels that preclude the application of a reservation at these levels of government? What is so special about a quota at local government level? In fact, women potentially face more hurdles at national and provincial levels than at local government level and there is an even greater need for a reservation at those levels.

One of the advantages of a national list, as noted above, is its relative simplicity. Another advantage is that it is likely to counter an argument advanced by politicians: "where can we find

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<sup>4</sup> Justice Sawant in *Indra Sawney v Union of India (Mandal Commission Case)* AIR 1993 SC 477.

<sup>5</sup> See Devenesan Nesiah, *Discrimination With Reason?* Oxford: 1997 and Marc Galanter, *Competing Equalities: Law and the Backward Classes in India*, Oxford: 1984.

<sup>6</sup> *Board of Education of the Township of Piscataway v Taxman*.

the women?" It would be relatively easier to 'find' (sic) women to compete under a national list, than it would under some other form of reservation system.

Women should be in government not because they are likely to improve the quality of governance or parliamentary life. May be they would do that too. But to take that argument is to cloud the issue. Women should be in government because our ideas of democracy and justice require that half the country's population be able to compete equality for 'political places' in government with men and that the electorate be able to vote for men **and** women. A national list for women would give effect to these ideas.

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# Regulation of Telecommunications

**Mangala Samaraweera, MP\***

Director, Law & Society Trust, Dr. Neelan Tiruchelvam, distinguished speakers, panelists, ladies and gentlemen,

It is indeed a privilege to have been invited to deliver the keynote address, and I would like to thank the organisers for giving me the opportunity to do so.

During the past few years, Sri Lanka has undergone an almost revolutionary change in the area of telecommunications. Not long ago, a government department was providing telephones at its own slow pace, hardly paying attention to quality of service or the demands of the rural population. Hamstrung by bureaucratic rules, devoid of any motivation, lacking in financial resources for capital investment for network expansion, the Department of Telecommunications was not the appropriate vehicle to meet the demands of a modern Sri Lankan society.

It is now a part of history that the department was transformed into a corporation in 1991 and which during its five year period of existence did deliver telecommunication services to the subscribers but not entirely to the satisfaction of the subscribers. Despite the fact that Sri Lanka Telecom enjoyed greater management flexibility, recruited professionals of quality, invested substantially on network expansion with external assistance, many had to wait for as long as 10 years for a telephone.

During this time, especially in 1990's we also saw the emergence of private companies in the telecommunications sector. Today there are four cellular telephone companies, five firms providing data services, five paging services and four types of pay phones. We also have two wireless local loop (WLL) operators in the area of basic telephone service. Therefore, since a competitive environment of several operators and service providers require effective regulation, a government department performing the functions of the regulator was replaced with a Regulatory Commission with a wide variety of functions among which is to ensure fair competition among the operators and service providers.

Today, the colossus in the telecommunication market is the newly restructured Sri Lanka Telecom Ltd. with its partner, NTT. This new alliance was forged to attract sufficient investment capital and modern technology, infuse management capability and enhance the technical and other professional skills. Sri Lanka Telecom Ltd. is showing remarkable signs of progress. Significantly, it is freed from the shackles that fettered it from speedy procurement of services and supplies. Implementation of projects for which enormous amounts of soft loans were obtained was frustratingly slow due to the labyrinthine procedures of procurement.

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\* Keynote address delivered at the National Law & Economy Conference organised by the Law & Society Trust on the theme "Financing of Telecommunication Infrastructure: Policy, Process and Regulation." Edited for publication.

Management of the Sri Lanka Telecom Ltd. is in the experienced hands of experts from NTT. As you will see, the dominant operator in the telecom market is now fully geared to the challenges ahead.

The WLL operators have, in the recent times, shown great promise. Both Lanka Bell and Suntel have extended their services beyond the Colombo Metropolitan area. In terms of the licences issued to them, they will have to establish their services in each of the secondary switching areas, thus fulfilling the universal service obligations. I am confident that the WLL operators will provide the 200,000 telephones expected of them within the next three years. Not only will they conform to the physical targets of providing phones, but will also give the subscribers value added services such as Internet.

Cellular telephones are a tremendous success in spite of the several odds faced by them. We have reached almost a 100,000 cell phones within a very short period. The growth has been phenomenal since 1994. It is my expectation that cellular companies will have a wider coverage to encompass all parts of the country, except areas of civil conflict. Moreover, I also expect everyone of the cellular companies to switch over to the digital system as early as possible. We are not compelling this legally, but I see that the dictates of the market and the development of technology will compel the mobile phone companies to switch over from the analogue system to the digital system. I am glad that one of the companies has already done so.

The companies that provide data services have been active during the past two years. The services provided include switched and non-switched data, store and forward e-mail, telex, video text services and internet. In addition, there are also internet providers licensed to offer these services to subscribers using the infrastructure of the existing licences.

We have already taken a policy decision not to issue any licences to data services till 1998, no licences will be issued for cellular and other voice services till the year 2000 and no international voice service licence will be issued until the year 2002. This decision was taken primarily to stabilise competition in the telecom market.

When the present government came to power in 1994, a set of policy objectives was defined as follows:

- (a) To provide telecommunication facilities to all, at cost-based tariffs.
- (b) To achieve universal service covering the whole country including the villages. This implies easy access to basic telecommunication facilities such as telephone, telegraph and facsimile to all at affordable and reasonable prices.
- (c) To obtain an acceptable quality of service for voice and data communications for both national and international communications.
- (d) To eliminate waiting lists for telecommunication facilities.

- (e) To provide prompt and effective attention to consumer complaints and improve public relations.
- (f) To progressively increase local value-addition in telecommunication projects, through local manufacture and construction at competitive price levels.

Defence, security and environmental interests of the country will be protected while meeting the above objectives.

The statistics in relation to the teledensity since 1993 in Sri Lanka vis-a-vis other selected countries are as follows:

	1993	1994	1995	1996	1997 (up to Sept.)
1. No. of connections given	22,270	25,322	24,556	50,170	45,541
2. No. of waiters	124,066	185,569	237,800	270,800	289,437
3. Density per 100	0.89	1.0	1.14	1.41	1.56

People per telephone according to the published figures for November 1997 is as follows:

#### People per telephone

Sri Lanka	India	Nepal	Myanmar	Bangkok	Pakistan	Nigeria	Switzerland	Canada	U.S.A	Singapore	Malaysia	U.K.
72.9	76.6	174.0	265.5	380.0	56.1	260.5	1.1	1.3	1.3	2.0	5.5	1.9

Looking at the performance of the telecom sector, I think you will not disagree that we are on course. However, there is a lot more to be done. I find it to my entire satisfaction, that the Conference focuses on some very crucial issues such as financing the sector, regulating the sector, etc.

Financing telecommunications is an interesting issue. In the past, the government was very fortunate in obtaining soft loans at concessionary terms to finance telecom infrastructure. The World Bank through its IDA window, the ADB, OECF, EDCF and several bilateral agencies, provided ample concessionary credit to the Government which was utilised by the Sri Lanka Telecom. These sources of funds are now not available to telecom as the perception is that telecom projects are viable commercial concerns and, therefore, these projects could obtain

loans on commercial terms. You are perhaps aware that S.L.T. has embarked on a 150K project from loans obtained on commercial terms. I am given to understand that of the donors only OECF of Japan is coming forward to fund telecom in the coming year on the usual concessionary terms.

The private sector has to rely on commercial credit. This necessarily means that the projects are viable and that cost effective technologies are deployed. Financing projects in rural areas where income flows may not be attractive presents a problem not merely in relation to the private sector investments but even to the S.L.T. Yet, universal service obligation is high on the government's agenda and the Ministry of Posts, Telecommunications and the Media is deeply committed to this. I would urge the private sector to pay attention to this concern. Universal service obligation can be discharged in so many ways. It could take the form of service connection to rural subscribers or connecting the Sub-Post Offices in the rural areas or provision of pay phones in rural centres or opening of communication centres in the way you find in the cities or the establishment of virtual telephones.

With a large number of players in the market, the regulator must ensure fair competition among the participants. The Government established the Telecommunications Regulatory Commission in February 1997 which is in the process of recruiting required professionals. At the moment the Commission is grappling with the problems caused by the interconnection between S.L.T. Ltd. and WLL operators. The Commission is also engaged in assessing the tariff revision proposals submitted to it by the S.L.T. It is envisaged that the tariff revision is aimed at re-balancing the tariff to ultimately achieve cost based tariffs. Tariff re-balancing will ultimately remove cross subsidies among various operations.

The Regulatory Commission will also be required to ensure quality of service and at some future point in time hold public hearings in terms of the Act.

We expect that, with the measures we have taken and the institutions we have established, the policy objectives we hope to achieve will be fully realised. The day is not far off when telephones are connected immediately on demand, without having to wait, when faults are rectified within a day and the quality of transmission equals that in any developed country. The day is not far off when our students, researchers, co-operate customers, professionals and the average person is connected to the internet. I see a very bright future for Sri Lanka in this new communication age.

Let me congratulate, the Law & Society Trust for organising this very important and relevant National Law and Economic Conference and I wish the deliberations a great success.

***We wish our readers  
a happy & peaceful 1998!***

# **The Out-Door-Proctor - James Cecil Walter Pereira 1881**

**New Edition with an Introduction  
by Vijaya Samaraweera (1997, pp.35)**

## **A Review by Neelan Tiruchelvam**

The re-publication of the little known essay by Walter Pereira in 1881 on Out-Door Proctors is an important publishing event. The term "Out-Door Proctors" is an expression which in more contemporary times refers to "touts," "hawkers," or "*goda perakodorus*" who were informal legal practitioners without training or licence and serve as intermediaries between litigants and the formal legal system. Walter Pereira's essay was written during the last quarter of the 19th century when there was considerable public agitation for legislation against outdoor proctors who were referred to as "despicable creatures" who fleece litigants. Walter Pereira had been in practice only for three years and was no more than 25 years when he penned this fascinating booklet in verse.

Vijaya Samaraweera, who had come across this pamphlet quite by chance while teaching at the University of Peradeniya, could not subsequently locate a copy. He states in his introduction -

*The copy of "The Out-Door Proctor" which I had referred to at the Peradeniya University Library could no longer be found, and an initial search in the libraries of other major repositories failed to turn up a copy of the work. Subsequent search at the National Museum Library by Bimsara Dissanayake of the Law & Society Trust, who was working as a researcher for me, produced results, and I was able to have access to another copy (probably the only surviving one) of "The Out-Door Proctor."*

Samaraweera's introduction further endeavours to place this booklet within a wider historical and socio-legal context. He refers in particular to the broad-based legal reforms introduced by the Colebrook-Cameron Commission in 1833 to the organisation of the courts and its procedures and the need for intermediaries "who had the capacity and the ability to facilitate access to and understanding of the unintelligible system." Samaraweera adds that the intermediaries "pave the way for the innovation to take root in the new soil." Earlier records seem to indicate that outdoor proctors have often had some familiarity with the formal legal system through appointment as notary publics or as clerks and used this knowledge and experience to gain a livelihood. In this endeavour they sought the co-operation of minor court officials. Samaraweera points out that "The Outdoor Proctor" was an expose of the collusion between these two groups which was perceived to be "the major source of corruption in courts in the last decade of the century." There were many cases in which these Outdoor Proctors were prosecuted for practising law without a licence and were otherwise charged under the Vagrance Ordinance No. 4 of 1841 "for not having any visible means of subsistence."

Walter Pereira was born to a wealthy family on 10 September 1856. His father was said to have come from a Sinhala family which owned almost the whole of Kollupitiya and his mother belonged to the Dutch de Haan family, many of whom served with distinction in Batavia. He



married the daughter of a prominent English planter, Edward McCarthy. The mixed parentage and the matrimonial alliances must have caused some confusion of identity amongst Walter and his two brothers J.E.R. and H.J.C., who were also eminent lawyers. It was rumoured that during the 1911 elections, one brother voted in the Sinhala constituency, the second in the Burgher constituency and the third in the European constituency!

He was admitted as a proctor in the District Court in 1878 and subsequently joined the more honoured ranks of a proctor of the Supreme Court in 1880. He was admitted to the English Bar in 1887 and was enrolled as an Advocate of the Supreme Court in 1888. He also joined the Madras Bar and was made King's Counsel in 1904, a distinction which had previously been granted only to Ramanathan, de Sampayo, Lascelles, and Donhorst. He later joined the Official Bar and served as a Supreme Court judge with distinction from 1910 to 1915.

The subsequent grant of silk to H.J.C. Pereira was not without controversy and public agitation. The stalwarts of the local Bar were embittered that the appointment of King's Counsel was often restricted to the official Bar. The leaders of the unofficial Bar were frequently ignored. The council of advocates made representations to the colonial office that the system should be changed. Tissa Fernando in his seminal essay on the Legal Profession of Ceylon pointed that R.G. Stubbs, the colonial secretary, ridiculed these efforts. He uncharitably claimed that the movement was originated by "two of the most disloyal members of the profession," H.J.C. Pereira and A. St. V. Jayewardene, "the worst member of a bad family." However, both the Chief Justice, J.C. Gollan, and the Attorney-General, Anton Bertram, responded more favourably to this request. And under the new regulations A. St. V. Jayewardene, H.J.C. Pereira, Alan Dreiberg and C.B. Elliot were made King's Counsel in 1921.

It is, however, as a legal scholar that Walter Pereira made an enduring contribution to the law. He mastered the Roman Dutch Law and published a comprehensive study on the laws of Ceylon, and thereby updated and revised Thompson's Institute. The Acting Chief Justice, G.H. Schneider, summed up "surely no Ceylon lawyer made as large a contribution to our legal literature."

Walter Pereira will also be remembered as one of the founders of the Orient Club with which his family has had a close association. This included his son Alien Pereira, the eminent criminal lawyer, R.L. Pereira, and the constitutional lawyer MaCkenzie Pereira, who lived in one of the rooms of the club until his death.

The Ourdoor Proctor is a colourful caricature in verse which provides the reader with a flavour of court life sprinkled with humour, wit and irony. It is an evocative combination of law and art equal in importance to Leonard Woolf's court scenes in the *Village in the Jungle*.

In his description of "the motley crowd that earn a living within the courts," he begins with a reference to the advocates:

Deep versed in law, but deeper still in art,  
To lure the native with his purse to part,  
They drain the rich of all they could afford,  
Nor leave untouched the pauper's scanty hoard.

Moving on to "astute" and "nimble" Proctors, he added -

But 'mong the countless proctors, 'neath the sun,  
'Midst us, behold the impecunious one:  
Ten thousand vices in his heart contend;  
And filthy lucre his eternal end;  
In tatters loose and swinging at his sides;  
Now here, now there, from court to court, he strides;

and finally with regard to Outdoor Proctors -

Ah! 'tis the vulture of the minor courts:  
Behold in him and in his vacant stare,  
The veritable out-door proctor there.  
In him there gleams with glance askance and sly.  
Beneath a ruffled brow, a bloodshot eye,  
While roasted gram or betel serves to clog  
The foul effluvia of the morning grog;

The Outdoor Proctor quickly pounces on his unsuspecting prey, the rustic litigant, and counsels him:

But, by yourself, to knotty law ne'er speed,  
The kind advice of some good proctor heed.  
About these courts, condemned from youth to roam,  
To me they've grown familiar as my home;

Of the minor officials of the court, he wrote:

The noted swindler-prince, the bailing clerk-  
And had to him, with sorrow, told his tale,  
Besought his mercy, and had tendered bail;  
But, true to all the instincts of his tribe,  
To bail poor Simang, he would have a bribe:

And finally, in a cynical tribute to graft "the grand motive power," he added:

Not such alone thy power, but marvels grand  
are wrought by thine unseen mysterious hand.

By thee induced, important papers here  
Slide off, and long-lost records re-appear;  
Thou couldst the course of many an action halt,  
Prolong a case, or cause or purge default;  
Affect of many a faultless suit the fate,  
Its notes expunge, and pleadings antedate.

These lines penned more than century ago, not only provide us with a unique insight into the culture of the court system in the late 19th century but also compels us to realise how little has changed in the administration of justice. The Outdoor-Proctor should be mandatory reading for all law students and legal practitioners. Colebrook-Cameron Commissioners promised to establish a court system which provided expeditious, inexpensive and accessible justice. Even at the end of this millennium, this goal continues to elude us. The Outdoor-Proctor enables us to understand some of the causes of the decline. None of the subsequent reforms have, however, managed to reverse this trend.

## **THE OUT-DOOR PROCTOR**

**James Cecil Walter Pereira**  
**1881**

**Re-printed with an Introduction**

by

*Vijaya Samaraweera*

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