

We set out below the current situation regarding constitutional safeguards for fundamental and human rights. There is now a proposal submitted by the government before the Parliamentary Select Committee for a complete rewriting of the chapter on fundamental rights.

We shall carry in our next issue an examination of these proposals and how they improve on the present Constitution.

CONSTITUTIONAL SAFEGUARDS AND HUMAN RIGHTS

(i). Constitutional protection of human rights

The Bill of Rights contained in the 1978 Constitution speaks of the State's commitment to the protection of its citizen's dignity and well-being. Such commitment is attested to by Article 4(d) which states "the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government, and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided".

The Bill of Rights in chapter III of the Constitution encompasses Articles 10 through 14. The fundamental rights guaranteed by Articles 10 through 13 apply equally to citizens and non-citizens. Thus every person within the borders of Sri Lanka is assured the following rights: (a) freedom of thought, conscience and religion; (b) freedom from torture or cruel, inhuman or degrading treatment or punishment; (c) equality of person before the law and equal protection of the law (this section prohibits discrimination based on race, religion, language, caste, sex, political opinion, or place of birth); (d) freedom from arbitrary arrest, detention and punishment; (e) prohibition of retroactive penal legislation; (f) fair trial; and not to be deprived of one's life without procedures established by law. The Constitution guarantees the freedom to exercise certain rights only to citizens in Article 14. Thus, the freedom of speech and expression, freedom of assembly and association, the right to join a trade union, freedom to practice one's religion and culture, freedom to work, and freedom of movement, are accorded to every Sri Lankan citizen and denied to non-citizens.

The Sri Lankan Constitution does not specifically protect the right to life in absolute terms, however, Article 13(4) of the Sri Lankan Constitution states that "No one shall be punished with death or imprisonment except by order of a competent court, made in accordance with procedure established by law, and this affords some protection from arbitrary deprivation of life. The term "procedure established by law" is not the same as the right to "due process of law". Due process of law requires the establishment of adequate procedures and the implementation of such procedures to avoid arbitrary infringement upon a citizen's right. The Indian Supreme Court has developed a "due process of law" standard. In *E.P. Royappa v. State of Tamil Nadu* (1974) S.C. 555 at 583,584

Justice Bhagwati adopted a due process standard, which principle was followed by *Maneka Gandhi v. Union of India* A.I.R. (1978) S.C. 597 and others. The Sri Lankan Supreme Court, however, refused to adopt the Indian interpretation stating "Natural justice is not a fundamental right in our country where the architects of the Constitution eschewed the 'due process' found in the American Constitution", *Elmore Perera v. Major Montague Jayawickrema* (1985) 1 S.L.R.287. Article 13(4) does not come within the reach of Article 15 which authorises certain restrictions of fundamental rights under certain conditions. Nevertheless, since life and liberty can be deprived subsequent to any procedure established by law, the wide latitude in action authorized by the emergency regulations whittles away the minimum protection granted by Article 13.

The International Covenant on Civil and Political Rights guarantees not only the freedom of expression but also the right to information. The Sri Lankan Constitution on the other hand does not accord the right to information. In *Visuvalingam v. Liyanage* 2 Sri L.R. 123 (1984) Justice Wimalaratne read in the right to information. In that case, Justice Wimalaratne's statement "I am of the view that the fundamental right to the freedom of speech and expression includes the freedom of the recipient", as such includes the freedom of the press as well. To quote Justice Wimalaratne again "It is only a free press which can... propagate a diversity of views and ideas and advance the right to a free and general discussion on all matters of public importance...". The All Party Conference recommended that explicit recognition be awarded to the right to information.

The Constitution entitles the guarantees of fundamental rights to every "person" and "citizen". As discussed above, fundamental rights enumerated in Articles 10 through 13 can be enjoyed by all persons, including "legal persons", and Article 14 enumerates rights enjoyed only by citizens. The Supreme Court has interpreted "citizen" to exclude legal persons such as companies and corporations, who are, therefore, not entitled to Article 14 protection (Supreme Court dismissed the application by *Janatha Finance and Investment Limited* (application No. 116/82 Dec.14, 1982), on this basis). However, directors and shareholders of a Company may instigate action if they can show that they have suffered distinct and separate injury as individuals (*Dr. Neville Fernando et. al. v. Liyanage et. al.* (1983) 2 Sri L.R. 214).

(a) Restrictions on Fundamental Rights

Article 15 lists the conditions under which the above rights and freedoms can be restricted. Article 10 and 11 freedoms cannot be restricted under any circumstances. According to the Sri Lankan Constitution freedom of thought, conscience and religion and freedom from torture may be considered absolute rights. However, according to Article 16, if any written or unwritten law which restricted these rights predated the Constitution, such laws would continue in force regardless of the inconsistency with constitutional provisions.

Rights guaranteed by Articles 12, 13 and 14 can be restricted for various reasons. Article 15(7) lists the conditions under which these rights can generally be restricted: on the basis of national security, public order, the protection of public health and morality, etc. Some of the enumerated freedoms can be restricted for reasons other than those listed in Article 15(7).

Article 2(1) of the Covenant on Civil and Political Rights obliges a state to respect and to ensure the rights declared to "all individuals within its territory and subject to its jurisdiction". No derogation is permitted from those provisions which guarantee the right to life, or which forbid torture or inhuman treatment, slavery, servitude, conviction or punishment under retroactive laws. The right to recognition as a person before the law and the right to freedom of conscience, thought and religion are also declared in absolute terms. Four non-derogable rights are common to the Covenant on Civil and Political Rights, the American Convention on Human Rights, and the European Convention for the Protection of Human Rights and Fundamental Freedoms: (a) the right to life, (b) the prohibition of torture, (c) the prohibition of slavery, and (d) the prohibition of retroactive penal measures.

Even those rights and freedoms which are derogable are only so at times of "public emergency which threaten the life of the nation", and only to the "extent strictly required by the exigencies of the situation". However, under the Sri Lankan Constitution restrictions can be imposed at any time, and for reasons such as in the interest of racial and religious harmony or national economy. Moreover, Article 15 does not condition the restriction to be reasonable. Courts have, however, evolved a reasonableness standard through case law (*Wickramabandu v. AG Appl. 27/88*; SCM 6.90; *Joseph Perera v. AG SC Appl. 107-109/86*). Some of the Supreme Court justices have evolved a reasonable and rational nexus standard to measure infringements of fundamental rights by emergency regulations. Whether, this standard would be applied across the board is unclear.

The Public Security Ordinance was made part of the 1978 Constitution in Article 155(1). Article 155(2) declares that Emergency Regulations cannot override, amend, or suspend the provisions of the Constitution, although they may do so to any other law in the country. However, Articles 12, 13(1), (2) and 14 are subjected to restrictions under Art. 15(7) in the interest of national security or public order. Such restrictions

may be in the form of regulations enacted for the purpose of public order. In other words, contrary to Art. 155(2), the constitutional protection afforded by the above articles can be amended by emergency regulations. Earlier Supreme Courts have expressed the view that in periods of national turmoil protection of fundamental freedoms must necessarily be awarded a subordinate status. (See *Visuvalingam v. Liyanage (1984) 1 Sri L.R. 305, 318*; in *Kumaranatunga v. Samarasinghe F.R.D(2) 347* Justice Soza stated "It is well recognized that individual freedom has in times of public danger to be restricted when the community itself is in jeopardy,.... These [Emergency] Regulations overshadow the fundamental rights guaranteed by Articles 13(1) and (2) of the Constitution").

Later cases indicated a welcome trend as evidenced in *Wickramabandu v. AG* where the Court stated "The State may not have the burden of establishing the reasonableness of the restrictions placed by law or Emergency Regulations, but if this Court is satisfied that the restrictions are clearly unreasonable, they cannot be regarded as being within the intended scope of the power under Art. 15(7)". In a landmark decision in *Joseph Perera v. AG SC Appl. 107-109/86*; SCM 25.5.87: the Supreme Court struck down an emergency regulation dealing with the infringement on the freedom of speech on the basis it lacked clarity and permitted arbitrary and capricious action by the police.

(b) Judicial Protection of Human Rights

Article 118 expressly confers on the Supreme Court jurisdiction over constitutional matters and the protection of fundamental rights. Article 125 grants the Supreme Court sole jurisdiction over constitutional interpretation and to inquire into complaints of fundamental rights violations and determine the appropriate remedy and compensation.

The Constitution does not permit judicial review of Bills passed by Parliament. The Supreme Court, however, may review Bills before they become law. The jurisdiction of the Supreme Court to review such a Bill for constitutionality can be invoked by either the President or by a citizen. The Supreme Court cannot act on its own initiative (*R.K.W. Goonesekere, "Fundamental Rights and Judicial Approaches, 111 Fortnightly Review #49 [Law and Society Trust, 1 & 16 Dec. 1992]*). When the President invokes the jurisdiction of the Supreme Court, the Attorney General sets the agenda as to which provisions are presented for judicial scrutiny. Once the Court rules on the validity of the Bill and identifies inconsistencies with the Constitution it has no further role in the enactment of the said Bill. It neither has the authority to scrutinise the amendments to the Bill nor any procedure undertaken to pass the Bill. A Bill may still be passed even after judicial invalidation if it receives an endorsement by a 2/3 majority in Parliament.

Urgent Bills go automatically to the Supreme Court for review. The Supreme Court must give its determination in 72 hours. Due to the short time period, concerned citizens and

NGOs do not have sufficient time to raise issues and assist the Supreme Court in its scrutiny. Often, government suspends standing orders and pushes legislation through.

Order papers of proposed Bills are published in the Gazette. These Gazettes are not easily accessible. Subordinate legislation, such as Provincial Council statutes and regulations and laws issued by bodies instituted by legislation under Article 76(2) and (3) and emergency legislation under the Public Security Ordinance is subject to judicial review even after the enactment of the law.

Article 17 grants every person the right to apply to the Supreme Court when any right guaranteed by Chapter 111 is violated by executive or administrative action. According to Article 126(2) only the individual or his/her attorney may petition the Supreme Court charging infringement of fundamental rights. New Rules of the Supreme Court which came into operation at the end of April 1992, seek to expand the scope of the locus standi to file fundamental rights applications. Rule 44 of the new Rules of Court allow those other than the injured to file applications if a judge sitting in chambers determines that a prima facie case of "an infringement, imminent infringement, of fundamental right or language right", has been established. In this case the judge may exercise his discretion to treat it as a "petition in writing under and in terms of Article 126(2)..." if two conditions exist. Firstly, the person injured must not have the means to pursue complaint according to Article 126, and secondly, the victim of infringement or imminent infringement would be substantially prejudiced.

An individual cause of action under the Constitution would arise when an executive or administrative action infringes on the rights guaranteed by the Constitution. This is much narrower than justiciable infringement by state action provided by the Indian and U.S. Constitutions. In the past infringement of fundamental rights by a state owned insurance company was held to be non justiciable as according to the court it did not fall within "executive and administrative action". However, in *Rajaratne v. Air Lanka Ltd* (1987) 2 Sri L.R. 128. Justice Atukorale held that Air Lanka was an agent of the government and as such its actions would amount to "executive and administrative action", invoking Article 126 jurisdiction.

When a private party violates an individual's rights under the Constitution, no constitutional cause of action arises, unless it falls within Article 12(3) which prohibits preventing individual access to public places such as shops, restaurants, hotels, places of worship, etc. on the basis of race, religion, language, caste, or sex. Hence, a cause of action under the Constitution need not be triggered only by executive or administrative action.

In a landmark decision in 1993 the court held that in certain instances actions by private individuals can be considered state action if there is a sufficient nexus between the private actor or actors and the Executive. In *Mohamed Faiz v. The AG Supreme Court Application No 89/91* (decided 19/11/93), the petitioner, while in police custody, was assaulted by two

Ministers of Parliament and a Provincial Council member. The police officers stood by and allowed the MPs and Councillor to assault the petitioner. The Court also found that the petitioner had been arrested and detained at the prompting of the MPs and Councillor. Under such circumstances the executive officer and the private individual would be held responsible for the action which infringed upon the fundamental rights of a citizen (see also section on Habeas Corpus and Fundamental Rights Cases in the chapter on Civil and Political Rights).

(ii) Sri Lanka's international obligations

Sri Lanka is a party to several of the international human rights covenants including the two major covenants (on Civil and Political Rights and on Economic Social and Cultural Rights) and to the conventions protecting women's rights, children's rights, and worker's rights. A list of international instruments to which Sri Lanka is a party is provided in Appendix 1. Despite committing itself to these obligations Sri Lanka has in some instances failed to bring national laws into conformity with its international obligations and in many instances has also failed to implement the requirements of the international legal instruments.

Sri Lanka is yet to ratify several key international instruments. For example, it is not a party to the Optional Protocols to the ICCPR. The Optional Protocol accepts the competence of the Human Rights Committee to consider complaints by individuals. The Second Optional Protocol aims at abolishing the death penalty. For a complete list of international instruments Sri Lanka has either not signed or not ratified, see Appendix 2.

In 1991 The Sri Lankan government announced to the UN Human Rights Commission that a 17th Amendment to the Constitution had been drafted in order to strengthen the protection afforded to fundamental rights. The All Party Conference (APC) in 1990, comprising representatives of all the major political parties in Sri Lanka, drafted a 17th Amendment to the present Constitution after a six month deliberation, and debate. The Amendment sought to: firstly, strengthen the existing chapter on fundamental rights by bringing the chapter into conformity with Sri Lanka's obligations under the International Civil and Political Covenant and the International Socio-Economic Covenant; secondly, to curtail the wide and general restrictions and powers of derogations currently allowed by Article 15(7) by deleting that provision and introducing a case by case analysis and rationalization of restrictions; and thirdly, to broad-base and democratize rights by providing for public interest litigation.

The proposed 17th amendment although published by the government in December 1990, is yet to be put before Parliament for debate. At the 49th session of the Human Rights Commission in 1991, the Sri Lankan government also undertook to establish a human Rights Commission. The

legal draftsman is said to be engaged in drafting legislation at present to set up a Human Rights Commission. It is hoped that the legislation will be presented to Parliament during the course of the year and a Commission established by the end of 1994.

In 1993 Sri Lanka submitted reports to the UN Sub-commission on Prevention of Discrimination and Protection of Minorities (45th session on 11 Aug. 1993). Sri Lanka informed the Sub-commission that steps were underway to introduce constitutional reforms which would strengthen existing constitutional guarantees of fundamental rights. The statement by the government professed that a Parliamentary

select committee comprised of all parties represented in Parliament would be mandated to make recommendation for constitutional reform.

Sri Lanka has been remiss in its reporting obligations under some of the instruments which it has signed and ratified. The International Covenant of Economic Social and Cultural Rights requires biannual reports. Sri Lanka is yet to submit one. Sri Lanka has neither presented reports under the Convention on the Elimination of All Forms of Discrimination against Women nor the Convention on the Elimination of All Forms of racial Discrimination. ■

The contemporary State is the easiest seen and best-known product of civilization. And it is an interesting revelation when one takes note of the attitude that mass-man adopts before it. He sees it, admires it, knows that there it is, safeguarding his existence; but he is not conscious of the fact that it is a human creation invented by certain men and upheld by certain virtues and fundamental qualities which the men of yesterday had and which may vanish into air tomorrow. Furthermore, the mass-man sees in the State an anonymous power, and feeling himself, like it, anonymous, he believes that the State is something of his own. Suppose that in the public life of a country some difficulty, conflict, or problem presents itself, the mass-man will tend to demand that the State intervene immediately and undertake a solution directly with its immense and unassailable resources.

This is the gravest danger that threatens civilization: State intervention; the absorption of all spontaneous social effort by the State, that is to say, of spontaneous historical action, which in the long run sustains, nourishes, and impels human destinies. When the mass suffers any ill-fortune or simply feels some strong appetite, its great temptation is that permanent, sure possibility of obtaining everything-without effort, struggle, doubt, or risk-merely by touching a button and setting the mighty machine in motion. The mass says to itself, "L'Etat, c'est moi", which is a complete mistake. The state is the mass only in the sense in which it can be said of two men that they are identical because neither of them is named John. The contemporary State and the mass coincide only in being anonymous. But the mass-man does in fact believe that he is the State, and he will tend more and more to set its machinery working on whatsoever pretext, to crush beneath it any creative minority which disturbs it-disturbs it in any order of things: in politics, in ideas, in industry.

Extracted from *The Greatest Danger, the State*
by Jose Ortega y Gasset