



WRITTEN SUBMISSIONS BY THE CENTRE FOR POLICY ALTERNATIVES (CPA) TO THE SUBCOMMITTEE OF THE CONSTITUTIONAL ASSEMBLY ON FUNDAMENTAL RIGHTS

18th July 2016

Prefatory Note

CPA thanks the chairperson and members of the subcommittee on fundamental rights for the opportunity to give oral submissions on 29th June 2016. In relation to the form and content of fundamental rights, their enforcement, and the concept of constitutionalism that should underpin the future constitution's bill of rights, a number of ideas were put forward by us in a constructive spirit to encourage debate and reflection before final constitutional choices are made. However, the written recommendations made below represent CPA's organisational viewpoint, which overrides any contrary suggestion made during the course of the lengthy and vigorous exchange of views during the oral hearing.

Content of the Bill of Rights

The new bill of rights must constitute the foundational basis for the civic conception of common Sri Lankan citizenship that must underpin the new constitution, and it would be desirable to establish this explicitly as a general principle, so that constitutional interpretation is always guided by the link between fundamental rights and citizenship.

The current chapter on fundamental rights falls short on a number of counts in meeting general international standards and as well as Sri Lanka's international obligations. Its enumeration of rights is incomplete, the scope and nature of the rights are expressed in terms that are narrower and more restrictive than those provided by international standards, and above all, the restrictions framework

allows incursions into rights that are both procedurally and substantively unacceptable.

CPA urges the formulation of a new constitutional bill of fundamental rights that is abreast with the standards set under the nine core human rights instruments of the United Nations: (a) International Covenant on Civil and Political Rights; (b) International Covenant on Economic, Social, and Cultural Rights; (c) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; (d) Convention on the Elimination of all Forms of Discrimination Against Women; (e) Convention on the Rights of the Child; (f) International Convention on the Elimination of all Forms of Racial Discrimination; (g) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; (h) International Convention for the Protection of All Persons from Enforced Disappearance; (i) Convention on the Rights of All Persons with Disabilities. It will be noted that we make no distinction between types or generations of rights.

In addition, we urge unimpeded access to the relevant treaty bodies and the accession to any Optional Protocols to these treaties that would serve to enhance human rights protection, and in this regard, the two Optional Protocols to the ICCPR are essential.

Limits and Restrictions on Rights

The restrictions framework in the current constitution is one of the weakest elements of the chapter on fundamental rights from the perspective of rights protection. Accordingly, serious attention must be given to how the future framework is designed. An important distinction here is that between the scope of rights and restrictions upon them. The former refers to the conceptual breadth of certain rights (e.g., free speech does not include incitement to violence or child pornography). The latter concerns the grounds, extent, and method by which the enjoyment of rights can sometimes be restricted by law where appropriate and necessary (e.g., where the freedom of speech can be restricted on grounds of defamation).

On balance, we think it would be better to include a general restrictions clause rather than provide for different means of restriction attached to discrete rights. Such an approach is reflective of more recent practice in the design of bills of rights (e.g., South Africa) rather than the older approach reflected in the Covenants, and helps to establish a consistent, coherent, and common basis on which rights can be restricted and the legitimacy of restrictions to be judicially assessed. Such an approach would also promote an analytical/conceptual approach to justifying restrictions instead of the formalistic/positivistic approach that individual restrictions clauses would engender. These distinctions are crucial in light of the evolving nature of social issues that ought to be anticipated by a bill of rights.

A general restrictions clause would expressly provide a list of non-derogable rights that cannot be restricted under any circumstances (e.g., torture) and then

provide a general test through which courts can determine the validity of any restriction placed on any right. This test must require (a) that all restrictions are prescribed by law; (b) that they pursue a legitimate public purpose; and (c) that the burden imposed on the enjoyment of a given right is proportionate to that public purpose pursued by the restriction. The provision must articulate the recognised forms of law through which limitations on rights may be imposed as well as enumerate the legitimate public purposes of restriction exhaustively (e.g., national security, public order, etc.).

The constitution should provide structured guidance to the courts in assessing proportionality. We recommend a tiered structure, which, stated briefly, distinguishes between heightened scrutiny and minimal scrutiny, applying the former in cases where certain core fundamental interests are being restricted, while applying the latter in all other cases of restriction. The judicial language developed for these tests clearly distinguishes between the *means* and *ends* of any given restriction, requiring stricter justification on both limbs if heightened scrutiny is being applied, while allowing a more relaxed approach if minimal scrutiny is applied. The question of which standard of scrutiny ought to apply in a given case is contingent on the weight given to the particular aspect of a fundamental right being restricted at that given time, and may be addressed in a constitutional text by invoking the concept of the 'minimum core' of each fundamental right, leaving its piecemeal evolution to courts, on a case-by-case basis.

In so doing, the constitution will implicitly welcome the consideration of comparative jurisprudence in the evolution of its bill of rights. Alternatively, the constitution could expressly provide that our courts take account of international law, and where appropriate, comparative case law.

For a more detailed exposition of the structure of tiered review outlined above, please see (forthcoming) Michael Mendis' CPA Working Paper on Constitutional Reform No. 3, July 2016.

Enforcement

All law, policy, practice, and conduct inconsistent with the bill of rights specifically and with the constitution more broadly must be comprehensively subject to judicial review and effective public law remedies. This means that the future Constitutional Court or the Constitutional Bench of the Supreme Court must be able to strike down even primary legislation (i.e., Acts of Parliament) if such legislation is contrary or inconsistent with the constitution.

We urge the devolution of judicial power so that Provincial High Courts become the courts of first instance for fundamental rights applications.

The expansive relaxation of *locus standi* requirements over the course of the development of its fundamental rights jurisdiction by the Sri Lankan Supreme

Court has been one of the more positive features of its case law. This should find some form of constitutional expression in the new constitution.

States of Emergency

The following matters require consideration in the design of the constitutional framework for states of emergency: (a) the *definition* of the state of emergency; (b) the procedure for the *declaration, extension, and termination* of a state of emergency; (c) the *legal effects* of emergency powers during the operation of a state of emergency; and (d) the institutional (legislative and judicial) *checks and balances* that provides for the accountability of the executive for the exercise of emergency powers during and after a state of emergency. As regards legislative scrutiny, CPA recommends a mechanism, similar to that available under the 1978 Constitution prior to its Tenth Amendment, where the executive was required to secure parliamentary assent at specified intervals to maintain and/or extend the state of emergency. Moreover, the legislature should be empowered to exercise rigorous scrutiny of the executive during states of emergency. In addition to such a safeguard, CPA also recommends a mechanism of judicial review that allows individuals aggrieved by emergency measures to seek redress in court, provided that such a mechanism is formulated in a manner that does not transgress the principles of comity that balance the separation of powers, particularly in times of emergency.

The constitution should provide a definition of a state of emergency as a public emergency that threatens the life of the nation. There are four elements to what is meant by 'public emergency threatening the life of the nation': (a) the public emergency must be actual and imminent; (b) its effects must involve the whole country or a substantial part of its territory and population; (c) continuance of the organised life of the community must be threatened; and (d) the crisis or danger must be exceptional, in that the normal measures for the maintenance of public safety are plainly inadequate.

The constitution must also make the distinction between *derogations* and *restrictions* on rights, and while derogations are only possible under a validly declared state of emergency, the constitution must also provide for an express list of rights that absolutely non-derogable under any circumstances.

The distinction between derogations and restrictions are based on two factors:

1. *Circumstances of operation*: Restrictions of rights are those that are allowed in normal times by ordinary legal measures. Derogations are only possible during a state of emergency that constitutes an exceptional threat to the life of the nation.
2. *Legal effects on rights*: Restrictions clauses attach to specific rights or are governed by a general restrictions clause, and serve as permissible restrictions on the exercise of these rights. Derogation involves possible suspension of all the rights recognised by the constitution, except obviously the non-derogable rights, during a state of emergency subject

to the restraints set out in the derogation clause and/or the provision for the declaration of a state of emergency.

A possible third safeguard that may be introduced in the new constitution is by way of procedures for *international accountability*: Restrictions on rights are undertaken by ordinary processes of law and are generally the domestic concern of states. As a state-party to the ICCPR, engaging the right of derogation requires notification of the proclamation of a state of emergency to the UN and other states parties, including the specific rights being derogated from, reasons for derogation, and other circumstantial information.

For further discussion about the principles governing the declaration, operation, extension, and termination of states of emergency, see Asanga Welikala (2008) *A State Permanent Crisis: Constitutional Government, Fundamental Rights and States of Emergency in Sri Lanka* (Colombo: Centre for Policy Alternatives): Chapters 3 & 4

Dealing with the Past

Sri Lanka's post-independence history has seen several cycles of large-scale violence including armed insurrections and pogroms. Despite the scale and reach of the violence, very little has been done to ensure the rights of victims to truth, justice and reparations. Official recognition of these instances of violence and commitments from the state to ensure non-recurrence have also not been forthcoming.

The new constitution provides an important opportunity to address this historic failing, particularly in a context where the government has repeatedly committed itself both locally and internationally to ensuring truth, justice, reparations for victims of serious human rights violations, and guaranteeing non-recurrence of same.

In this regard CPA proposes the following;

- 1) Explicit recognition of past violence in the constitution and commitment to prevent recurrence of such violence.
- 2) Specific provisions protecting proposed transitional justice mechanisms to be established by Parliament.
- 3) Enshrine in the constitution general rights of victims of crime and/or human rights violations.

1. Explicit recognition of past violence in the constitution and commitment to prevent recurrence of such violence

Several countries attempting to make the transition from a post-war to a post-conflict situation have entrenched provisions in their constitutions recognising their violent past and affirming their commitment to prevent future violence. Even the Lessons Learnt and Reconciliation Commission

(LLRC) appointed by the government in May 2010 recognised the importance of acknowledging past conflicts;

“The process of reconciliation requires a full acknowledgement of the tragedy of the conflict and a collective act of contrition by the political leaders and civil society, of both Sinhala and Tamil communities.” [LLRC final report, para 9.284]

The constitution provides a platform for such a collective recognition and a pledge to do everything possible to prevent future violence. Such an aspirational statement goes beyond mere symbolism and can have a normative value. Official recognition by the state is meaningful to victims of such violence and the guarantee of non-recurrence provides a standard by which to benchmark the future actions of the state.

Some useful text from other constitutions is listed below:

Constitution of South Africa - Preamble

“We, the people of South Africa, Recognise the injustices of our past; Honour those who suffered for justice and freedom in our land; Respect those who have worked to build and develop our country; and Believe that South Africa belongs to all who live in it, united in our diversity. We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to - Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; Improve the quality of life of all citizens and free the potential of each person; and Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.”

Constitution of Kenya - Preamble

“...respects the pride of the people of Kenya in their ethnic, cultural and religious diversity and their determination to live in peace and unity as one indivisible sovereign nation;

“strengthens national integration and unity and commits Kenyans to peaceful resolution of national issues through dialogue and consensus”

Constitution of Tunisia - Preamble

“Expressing our people’s commitment...to their spirit of openness and tolerance, to human Values and the highest principles of universal human rights...” “A political system founded on the principle of the separation and balance of powers, which guarantees the freedom of association in conformity with the principles of pluralism, an impartial administration, and good governance, which are the foundations of political competition, a

regime that guarantees respect for human rights and freedoms, independence of the judiciary, quality of rights and duties between all citizens, male and female, and equality between all regions;”

2. Specific provisions protecting proposed Transitional Justice mechanisms to be established by Parliament

In light of the current discourse on transitional justice (TJ) in Sri Lanka, there now exists a unique opportunity to analyse principles of transitional justice that can be incorporated into a new constitution. Whilst Parliament is yet to adopt the relevant laws in order to set up the proposed TJ mechanisms promised by the government, granting constitutional protection to such mechanisms will signal the government’s commitment to follow through with its promises. Alternatively drafters could include language that captures the TJ commitments with references to the need to address truth, justice, and reparations in line with international norms and standards.

In light of the many promises on TJ that remain undelivered upon by successive governments, such a gesture would be of significant importance to all victims regardless of their ethnicity or religion. It will demonstrate that the government is serious about its commitments and it will build confidence among victims that there is a genuine commitment by the government to move forward on these issues. Building trust among all victims is essential for the success of reconciliation processes but also with building trust among different communities and creating social cohesion.

Examples of language from constitutions in other countries, which enshrine clauses dealing with transitional justice, are provided below:

Constitution of Colombia - Transitory Article 66

“Transitional justice instruments shall be exceptional. Their principal objective will be the end of the internal armed conflict facilitation and the achievement of a stable and lasting peace, with the guarantees of non-repetition and security for all Colombians. Such instruments shall ensure at the highest possible level, victims’ rights to truth, justice and reparation.”

“A Truth Commission shall be created by statute. Such statute shall establish its purpose, composition, powers and functions. The Commission powers shall include recommendations for the implementation of transitional justice instruments, including the application of selection criteria.”

Constitution of Tunisia - Article 148(9)

“The state undertakes to apply the system of transitional justice in all its domains and according to the deadlines prescribed by the relevant legislation. In this context the invocation of the non retroactivity of laws, the existence of previous amnesties, the force of res judicata, and the prescription of a crime or a punishment are considered inadmissible.”

3. Enshrine in the constitution general rights of victims of crime and/or serious human rights violations

Beyond merely securing human rights in the constitution, there is also a need to ensure that victims of human rights violations have access to an effective remedy. Whilst there are proposals to set up new institutions and reform existing institutions in order to ensure an effective remedy – and whilst these institutional arrangements are important – it is also useful to grant victims of crimes in general a right to an effective remedy. Such a right will set out standards which the different institutions associated with the administration of justice would have to comply with and would create an incentive for greater accountability on the part of such institutions. At present there is increased recognition of the need to ensure the independence of institutions associated with the administration of justice. Similarly it is important to ensure that such independent institutions are also accountable to the people they are supposed to serve. The constitution already recognises the right to due process and provides safeguards to protect the liberty of citizens accused of crimes. As such it is proposed that the constitution also recognise a general right to a remedy as well as a general clause dealing with rights of victims of all crimes (including grave human rights violations).

These proposals are not in any way intend to dilute the safeguards afforded to the accused in the criminal justice system or subvert due process. They are only intended to make the institutions associated with the administration of justice accountable and more responsive to victims’ rights.

Some language to consider is provided below.

Constitution of Mexico - Article 1

All authorities, in their areas of competence, are obliged to promote, respect, protect and guarantee the human rights, in accordance with the principles of universality, interdependence, indivisibility and progressiveness. As a consequence, the State must prevent, investigate, penalize and redress violations to the human rights, according to the law.

Constitution of Mexico – Article 20 part C

Victim's Rights

- I. The victim has the right to be informed about his rights and, whenever he should so require it, to be informed about the state of the criminal proceedings.
- II. The Public Prosecution Service must receive all the evidence submitted by the victim during the preliminary criminal inquiry as well as during proceedings. The Public Prosecution Service must carry out the necessary steps to assist the victim. The victim has the right to intervene in the trial and to use the legal instruments according to the law.
Whenever the Public Prosecution Service does not consider necessary to carry out the steps required by the victim, he must state the grounds of law and fact justifying his refusal.
- III. The victim has the right to receive urgent medical and psychological assistance from the moment the crime was committed.
- IV. The victim has the right to redress. Whenever it should be legally admissible, the Public Prosecution Service is obliged to require redress. The victim also can request such redress by himself. The judge cannot acquit the convict of redress in the case of conviction.
The law shall set forth agile procedures to enforce redress sentences.
- V. The judge must keep in secret victim's identity and other personal data in the following cases: minor involved; rape, trafficking in persons, kidnap, organized crime; and when necessary to protect the victim, always respecting the defendant's rights.

The Public Prosecution Service shall ensure the protection of victims, offended parties, witnesses and all others who take part in the trial. The judges are obliged to oversee proper compliance with this obligation.
- VI. The victim can request the necessary precautionary measures to protect his rights.
- VII. The victim can contest, before the judicial authority, the Public Prosecution Service's omissions in the criminal investigation, as well as the resolutions with reservation, lack of exercising,

abandonment of criminal prosecution or proceeding suspension when redress has not been completed.

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The **Centre for Policy Alternatives (CPA)** was formed in the firm belief that there is an urgent need to strengthen institution and capacity-building for good governance and conflict transformation in Sri Lanka and that non-partisan civil society groups have an important and constructive contribution to make to this process. The primary role envisaged for the Centre in the field of public policy is a pro-active and interventionary one, aimed at the dissemination and advocacy of policy alternatives for non-violent conflict resolution and democratic governance. Accordingly, the work of the Centre involves a major research component through which the policy alternatives advocated are identified and developed.

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