

Department of Law, University of Peradeniya
Proposals for Constitutional Reform (Submitted in Dec., 2020)

INTRODUCTION

We, a group of academics attached to the Department of Law, University of Peradeniya, are pleased to submit the following proposals for consideration by the committee appointed to draft a new Constitution for Sri Lanka. We do so, deeply mindful of the duty of academics to contribute ideas on matters of public importance with a view to enhancing public well-being/the quality of national life.

We recognize that the making of a Constitution is perhaps the most momentous event in the life of a democratic State. We present these proposals in earnest, in the fundamental belief that the key objective of a Constitution in a democracy is to uphold sovereignty of the people, including fundamental human rights, through accountable government.

Given the central role the Constitution is expected to play in the lives of the people, it is critically important that it be drafted in simple language easily accessible to the citizen. It is also important to use gender neutral language to convey the idea that the Constitution is inclusive and belongs to all Sri Lankans.

Our proposals deal with the following key areas:

1. The nature of the State
2. Fundamental human rights and duties
3. Language Policy/Language Rights
4. Directive principles of State policy
5. Power sharing
6. The executive
7. The legislature
8. The judiciary
9. State institutions supporting constitutional democracy
10. Franchise and elections including referenda
11. Public finance
12. Public security
13. Intra-party democracy
14. Reception of International Law

Notes are included which refer to comparative jurisprudence and experiences, for purposes of further guidance.

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1. THE NATURE OF THE STATE

1.1 Fundamental Constitutional Principles and Values

We are of the view that a firm and clear articulation of the foundational principles and values of the Constitution is a necessary component in setting out the nature of the State.

The following principles and values are therefore proposed to be included as ‘Fundamental Constitutional Principles’¹. They must form the foundation of the Constitution. Hence, interpretation of the Constitution must necessarily be within the framework of these principles and values:

- 1.1.1 Sovereignty is in the people and is inalienable. Government will be based on the will of the people.
- 1.1.2 The Constitution is supreme. Every law and policy incompatible with the Constitution shall be deemed invalid.
- 1.1.3 Power-sharing at national, provincial and local levels of government with adherence to the Fundamental Constitutional Principles and Values at all levels of government.
- 1.1.4 Government will be accountable to the people. Accountability will be ensured through constitutional government based on the principles of separation of powers and checks and balances among the branches of government.
- 1.1.5 Recognition of the fundamental human rights of the people based on the principle that all are born free and equal in dignity and rights².
- 1.1.6 Respect for and protection of religious freedom of all peoples.
- 1.1.7 Environmental protection including all flora and fauna for present and future generations.
- 1.1.8 The contents of this Chapter shall be entrenched.

1.2 The National Anthem & the National Flag

- 1.2.1 The National Anthem of Sri Lanka should be incorporated in both Sinhala and Tamil languages into the text of the Constitution with equal recognition.
- 1.2.2 The National Flag of Sri Lanka which is to be incorporated into the Constitution should be designed based on the premise of equal citizenship of all Sri Lankans and must symbolize ethnic harmony, justice and pluralism.

1.3 Structure of Government

We recommend that the structure of government must be delineated in a separate chapter of the Constitution:

- 1.3.1 The three branches of government must derive authority solely from the sovereign powers of the people. Judicial powers of the people must be directly exercised by the judiciary, and not via the legislature.

¹ For guidance, see generally: Chapter 1 of the Constitution of South Africa (1996) available at; <https://www.gov.za/documents/constitution-republic-south-africa-1996>, Preamble of the Constitution of India (1949) available at; <https://www.india.gov.in/my-government/constitution-india/constitution-india-full-text>

² Article 1 of the Universal Declaration of Human Rights, available at; <https://www.un.org/en/universal-declaration-human-rights/>

- 1.3.2 All organs of government, at all levels, must function on the basis of the entrenched fundamental principles and values of the Constitution.
- 1.3.3 All organs of government, at all levels, must respect, promote and secure all Fundamental Human Rights guaranteed by the Constitution.
- 1.3.4 The structure of government must be based on the fundamental constitutional principle of power sharing. It must be recognized that power sharing in the form of devolution of power is a necessary democratic principle which enables all citizens to engage with government at a local level and upward and provides all communities an opportunity to participate in decision making that closely affect their lives.
- 1.3.5 The Chapter must delineate the structure of government at national, provincial and local levels.

(See below for sections on Power Sharing, the Executive, the Legislature and the Judiciary)

2. FUNDAMENTAL HUMAN RIGHTS AND DUTIES

We strongly emphasize the need to include a detailed Chapter on Fundamental Rights and Duties which covers the broadest gamut of rights while also placing equal importance on corresponding duties. We emphasize though that a strong Chapter on Rights, in order to effectively protect people's rights, must necessarily be accompanied by a strong system of independent institutions and checks and balances.

We call for constitutional recognition of a full range of justiciable human rights and fully endorse the attached Draft Bill of Rights³ (hereinafter 'Draft Bill of Rights'), formulated and finalized in 2009 by a committee of experts appointed in 2006 by the then Ministry of Disaster Management and Human Rights, as one which has the required breadth of scope (see Annexure 1).

The highlights of the Draft Bill are: the recognition of civil, political, economic, social and cultural rights; recognition of individual as well as group rights; inclusion of a broad, open-ended non-discrimination clause; provision for restrictive limitation of rights and derogation of rights; and broadening access to constitutional remedy for violation of rights.

2.1 Rights and Duties

2.1.1 Rights

The Draft Bill of Rights recognizes the following rights:

1. Freedom of thought, conscience and religion
2. Right to human dignity
3. Inherent right to life; abolition of the death penalty
4. Right to recognition as a person before the law
5. Freedom from torture
6. Security of the Person
7. Right to equality and freedom from discrimination
8. Freedom from arbitrary arrest, detention and punishment and prohibition of retroactive penal legislation, right to bail and right to a fair trial
9. Freedom to hold opinions
10. Freedom of speech and expression including publication and freedom of information
11. Right of access to information
12. Freedom of peaceful assembly
13. Freedom of association
14. Trade union rights
15. Freedom to manifest religion
16. Right to enjoy and promote culture and use of language
17. Freedom to engage in any lawful trade, occupation, profession, business or enterprise
18. Freedom of movement

³ Available at: <http://www.peaceinsrilanka.lk/human-rights/bill-of-rights-final-draft>

19. Freedom to return to Sri Lanka
20. Right to privacy and family life
21. Right to ownership of property
22. Family rights
23. Rights of children
24. Right to education
25. Freedom from Exploitation
26. Labour rights
27. Right to health
28. Social rights
29. Right to an adequate environment

2.1.2 In addition to the above rights, we highlight the following rights that must, in our opinion, be incorporated into a future Constitutional Chapter on Fundamental Human Rights in keeping with progressive constitutions of the world:⁴

- a) The right to equal protection of the law should include the following--affirmative action must be declared mandatory in the event of established patterns of discrimination against identified groups.⁵
- b) Women are entitled to equal rights with men in all spheres of activity. It will be the duty of the State to ensure conditions in which women can effectively enjoy equal rights including equal opportunities. All laws, whether written or unwritten, and policies discriminating against women shall be deemed unconstitutional and void under this provision. It shall be obligatory on the part of the State to adopt affirmative action to remedy the outcome of established patterns of discrimination against women.⁶
- c) Freedom from enforced disappearances. Enforced disappearances to be criminalized by law.⁷
- d) The right to vote.⁸

⁴ See, for instance: Part III of the Constitution of India (1949); Chapter II of the Constitution of South Africa (1996); Part II of the Constitution of East Timor (2002) available at <http://www.moj.go.jp/content/000110035.pdf> ; Chapter 4 of the Constitution of Kenya (2010) available at

<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010> ; Title II of the Constitution of the Dominican Republic (2015) available at https://www.constituteproject.org/constitution/Dominican_Republic_2015.pdf ; Part III of the Constitution of Nepal (2015) available at https://www.constituteproject.org/constitution/Nepal_2015.pdf

⁵ Per Sri Lanka's international human rights obligations under CEDAW, Rights of the Child Convention and other ratified human rights treaties.

See Section 12.3.2 (5) and (10) of the Report on Public Representations on Constitutional Reform (May 2016), (Page 126-127), available at: https://constitutionnet.org/sites/default/files/sri_lanka_prc_report-english-final.pdf (The PRC Report)

⁶ See Section 29 of the Report on Public Representations on Constitutional Reform (Page 115-118), Article 35 of the Constitution of Ethiopia – available at https://www.constituteproject.org/constitution/Ethiopia_1994.pdf?lang=en

⁷ See Section 22 of the Report on Public Representations on Constitutional Reform, (Page 108-109)

⁸ *Karunatilake and another v. Dayananda Dissanayake, Commissioner of Elections and Others* (1999) 1 Sri L.R. 157 available at http://hrlibrary.umn.edu/research/srilanka/caselaw/Speech/Karunatilake_v_Dissanayake.htm – Recognized right to vote as an integral part of the freedom of expression, Article 15 of the Constitution of Japan (1947) available at; https://japan.kantei.go.jp/constitution_and_government_of_japan/constitution_e.html , Article 38(2) and (3) of the Constitution of Kenya

- e) The right of access to justice and to legal aid.⁹
- f) The right to education to include (replacing Article 14 O (3) of the Draft Bill of Rights)-- Secondary education in all its various forms, including technical and vocational secondary education, shall be available to all.
- g) Freedom of expression to include academic freedom and autonomy.¹⁰
- h) The right to just administrative action.¹¹
- i) Freedom of expression to include academic freedom and autonomy.¹²

2.1.3 Duties

Fundamental duties:

- a) To uphold and defend the supremacy of the Constitution and the rule of law;
- b) To respect the rights and freedoms of others;
- c) To foster national unity and a society based on humanism;
- d) To work conscientiously and with integrity in one's chosen occupation;
- e) To preserve and protect public property and to combat abuse of public property and authority;
- f) To protect nature and conserve its riches
- g) To have compassion for all living creatures¹³ and to pay full regard to animal rights and welfare. (largely adapted from Article 28 of the 1978 Constitution)

2.2 Limitations and Derogations

- 2.2.1 Constitutional limitations on fundamental rights should be proportionate, reasonable and justifiable and must be established to be necessary in a democratic society.¹⁴
- 2.2.2 Measures may be prescribed by law derogating from the exercise and operation of the fundamental rights declared and recognized in this Chapter during periods of public emergency only to the extent strictly required by the exigencies of the situation and necessary in a democratic society, provided that such measures do not involve discrimination on grounds recognized under the Equality Clause.¹⁵
- 2.2.3 In prescribing such measures, there shall be no derogation from freedom of thought conscience and religion, right to human dignity, inherent right to life, right to recognition as a person before the law, freedom from torture, security of the person, freedom to hold opinions, family rights and rights of children.¹⁶

⁹ See Section 24 of the Report on Public Representations on Constitutional Reform (Page 110), Article 48 of the Constitution of Kenya

¹⁰ Recognized in the Supreme Court petitions SC (SD) No.6/99, SC (SD) No.7/99, SC (SD) No.8/99, SC (SD) No.69/99, SC (SD) No.10/99, SC (SD) No.11/99 and SC (SD) No.12/99; See the Constitution of Japan – Article 23, the Kenyan Constitution – Article 33(1)(c)

¹¹ Article 33 of the Constitutional of South Africa (1996).

¹² Recognized in the Supreme Court petitions SC (SD) No.6/99, SC (SD) No.7/99, SC (SD) No.8/99, SC (SD) No.69/99, SC (SD) No.10/99, SC (SD) No.11/99 and SC (SD) No.12/99; See the Constitution of Japan – Article 23, Article 33(1)(c) of the Constitution of Kenya

¹³ See Article 51A(g) of the Constitution of India

¹⁴ See Article 15 of the Draft Bill of Rights

Restrictions on Fundamental Rights on limited grounds to be only imposed taking into account all relevant factors such as the nature of the right, the relation between the limitation and its purpose, and less restrictive means to achieve the purpose. (See Article 36(1) of the Constitution of South Africa and Article 24(1) of the Constitution of Kenya)

¹⁵ See Article 15(1) of the Draft Bill of Rights

2.3 Access to Constitutional Remedies

- 2.3.1 The constitutional remedy for rights violation must be made accessible to the public to the maximum possible extent. This includes removing substantive as well as procedural barriers.
- 2.3.2 There should be no time bar to filing a FR complaint before the courts. Filing of petitions must be permitted within a reasonable period of time.
- 2.3.3 It must be possible for a third party to petition the court where the aggrieved party is unable to do so and agrees to such representation.
- 2.3.4 Permitting public interest litigation for vindication of rights is overdue and must be expressly provided for.¹⁷
- 2.3.5 Infringements and imminent infringements of fundamental rights by both State and non-State actors¹⁸ should be actionable before courts. State action should include executive, legislative and judicial action.
- 2.3.6 The highest court at provincial level (preferably the Court of Appeal) should have original jurisdiction over fundamental rights cases. The Supreme Court shall act as the final court of appeal regarding such cases.¹⁹

2.4 General

- 2.4.1 All written and unwritten laws, which are inconsistent with the fundamental human rights recognized in the Constitution, should be invalid to the extent of their inconsistency.²⁰
- 2.4.2 International human rights standards, obligations and customs shall be considered when interpreting the contents of this Chapter.²¹
- 2.4.3 The contents of this Chapter shall be entrenched.

¹⁶ *Ibid*, Article 15(2)

¹⁷ See Section 12.3.2(9) of the Report on Public Representations on Constitutional Reform, (Page 127)

¹⁸ See Section 12.3.2(8) of the Report on Public Representations on Constitutional Reform, (Page 127), Article 8(2) of the South African Constitution –as interpreted in *In Re: Certification of the Constitution of the Republic of South Africa*, 1996, 1996 (10) BCLR 1253 (CC)

¹⁹ See Section 12.4.2 (2) of the Report on Public Representations on Constitutional Reform, (Page 128)

²⁰ See Articles 15(3)(b) and 39(3) of the South African Constitution

²¹ See Article 39(1) of the South African Constitution and Article 21(4) of the Constitution of Kenya

3. LANGUAGE POLICY/ LANGUAGE RIGHTS

Recognizing the importance of equality of status of languages of the diverse communities in Sri Lanka and equal rights as to their use in all institutions, we make the following proposals:

- 3.1 Sinhala & Tamil should be declared as national and official languages of Sri Lanka.
- 3.2 English should also be recognized as an official language of Sri Lanka in view of its widespread use for educational and official purposes.
- 3.3 A citizen should be able to get educated and communicate with the government in any of the aforementioned languages.
- 3.4 All children should be educated in the official language of their choice and have the opportunity to learn the other two official languages.
- 3.5 Parliament shall by law confer on the Official Languages Commission all necessary powers to effectively implement the official language policy of Sri Lanka.
- 3.6 The State shall ensure that the use of sign language and Braille are facilitated for official communications when requested by persons with hearing and visual disabilities.

4. DIRECTIVE PRINCIPLES OF STATE POLICY

We do not recommend having a separate Chapter on Directive Principles of State Policy. It is recommended that such principles be incorporated as justiciable rights in the Chapters on Fundamental Rights and Duties and on Power Sharing. It is emphasized that inclusion of unenforceable entitlements as the fundamental principles in determining State policy is not acceptable.

5. POWER SHARING

We reiterate that the principle of power-sharing should be a fundamental constitutional principle (see section on Fundamental Constitutional Principles & Values). This is to deepen democracy by increasing opportunities for citizens to participate in governance at all levels, and to ensure respect for diversity and develop a sense of equal belonging among the citizens. Effective power sharing is bound to foster confidence in governance and address root causes of political unrest including the demand for secession.

- 5.1 The Constitution shall recognize three tiers of governance; namely, central, provincial and local government.
- 5.2 The 'Province' shall be the main unit of devolution. There shall be a total of nine (9) Provinces. The boundaries of these provinces will be based on the need to ensure provincial development and administrative efficiency.
- 5.3 The Constitution shall grant maximum devolution of powers to the Provinces.
- 5.4 We believe that for the effective functioning of a Provincial Council, a Board of Ministers led by a Chief Minister elected directly by the people of that Province, is adequate. Thus, a Governor is not required. However, if the post of Governor is considered necessary, we recommend that the Governor shall be appointed by the Head of State with the concurrence of the Chief Minister; and will be considered to have a ceremonial role, and be a symbolic representative of national unity and harmony. Under such a system, the Governor's post will be one which promotes, rather than stifles, the spirit of devolution.
- 5.5 Local Government is to be afforded special Constitutional recognition as a distinct tier of government, to which powers will be devolved. This is aimed at recognizing the importance of local government and the critical role it plays in the everyday lives of people.
- 5.6 The Constitution will therefore recognize devolution of power, especially in the following lists: the Provincial List, the Reserved List, the Local Government List²², and the Concurrent List. More subjects are to be devolved to the Provinces, while the Concurrent List is retained to ensure coordination between the Centre and the Provinces on important subjects which can have a national impact, as well as to protect provincial/regional minorities.
- 5.7 The subject of education must be with the Central Government, with a core-curriculum being followed by all students at a national level. The provincial authorities should have devolved power to develop curriculum within the framework of the core-curriculum.
- 5.8 Land and police powers need to be devolved to the Provinces. A Land Commission must be established.
- 5.9 All institutions belonging to all levels and tiers of government shall uphold and respect the Fundamental Constitutional Principles & Values and the Fundamental Human Rights recognized in the Constitution.

²² See generally, Part 20 and Schedule 8 of the Constitution of Nepal. The recognition of local government as a distinct tier, together with a separate Local Government List, has also been proposed in the Report on Public Representations on Constitutional Reform (Page 64)

6. THE EXECUTIVE

(PRESIDENT/CABINET OF MINISTERS/PUBLIC SERVICE)

The Constitutional reform process, at present, once again provides the people of Sri Lanka with an opportunity to give serious thought to the need to abolish the Executive Presidency in order to promote a more democratic and accountable system of government. Therefore, we propose the need to introduce a Parliamentary system of government

We are of the opinion that the abolition of the Executive Presidential system, though not a panacea to the ills confronting our society, is essential. We oppose a Presidential system originally envisaged in the 1978 Constitution as well as the 20th Amendment to the Constitution. If a Presidential system is to be accepted, we believe that it will have to be subject to all necessary limitations required in a democratic system of government, to ensure adequate separation of powers and checks and balances. In other words, we believe that the only way an Executive Presidency would be acceptable, if at all, is if it is subject to the full panoply of limitations necessary in a democracy, many of which were found in the abolished 19th Amendment to the Constitution.

Some of the key features of the envisaged parliamentary system would be the following:

6.1 Parliamentary System

- 6.1.1 The Prime Minister (PM) and Cabinet of Ministers lead executive policy making, while being accountable to Parliament and the people, thereby promoting accountable and responsible government.
- 6.1.2 The PM will be the Head of Government. The PM will not hold any additional portfolios/ministerial positions in Cabinet.
- 6.1.3 There will be a nominal/non-Executive President as the Head of State, who plays an impartial role and acts as a force unifying the people.
- 6.1.4 The non-Executive President, as Head of State, will be expected to carry out certain ceremonial functions. The President shall be in constant contact with the Prime Minister where necessary, and shall intervene only in very exceptional circumstances.
- 6.1.5 The non-Executive President shall be elected by the legislature.²³
- 6.1.6 The Parliamentary system rests predominantly on the principle of accountability, which may be tested through votes of confidence/no-confidence. In order to ensure that no-confidence motions are not brought in an irresponsible manner that would lead to political instability, limitations need to be placed on the initiation of such motions. Some limitations that can be considered in this regard would be: the need for a special-majority to affect a no-confidence motion; or the need for a special-majority to trigger a national election, after passing a no-confidence motion with a simple majority.
- 6.1.7 Suggestions concerning the nature of the Cabinet of Ministers and the Public Service under the proposed Parliamentary system are set out below.

²³ See, for guidance, Article 54 of the Constitution of India, Article 62 of the Constitution of Nepal.

6.2 Cabinet of Ministers

- 6.2.1 The Cabinet of Ministers will not exceed twenty-five (25).²⁴
- 6.2.2 The number of Deputy Ministers shall also not exceed twenty-five (25).
- 6.2.3 The Constitution shall not recognize ‘State Ministers’.
- 6.2.4 The Cabinet’s composition should be inclusive and representative to the greatest extent possible. In this regard, we propose that one-third of the Cabinet positions should be comprised of women and one-third should represent the minorities (these reservations could overlap).

6.3 Public Service

- 6.3.1 The Public Service, which is a part of the Executive, shall be independent.
- 6.3.2 The Public Service Commission will be vested with the duty and powers to maintain the independence, transparency and accountability of the Public Service.
- 6.3.3 Members of the Public Service Commission will be appointed by the Head of State on the recommendation of the Constitutional Council.
- 6.3.4 Members of the Public Service Commission will enjoy security of tenure. A member can be removed only through a parliamentary process that is applied for removal of members of the higher judiciary.
- 6.3.5 The membership of the Public Service Commission should be broadened to reflect diversity in society and relevant diverse expertise.²⁵
- 6.3.6 The Public Service will be organized at national and provincial levels given the devolved system of governance proposed.

²⁴ For examples of limited composition in the Cabinet of Ministers (also referred to as Council of Ministers in certain jurisdictions), see: Article 76(9) of the Constitution of Nepal (for a membership not exceeding 25); Article 152(1) of the Constitution of Kenya

²⁵ See for example, Article 242 of the Constitution of Nepal. See also, S. 7 of the Public Service Commission Act No. 4 of 2010 in Kenya, re: qualifications for appointment as chairperson or member of the Commission, available at: <http://ilo.org/dyn/natlex/docs/ELECTRONIC/97353/115474/F550457131/KEN97353.pdf> (accessed 26 December 2020).

7. THE LEGISLATURE

The legislature, as the representative assembly of the people, plays a central role and wields much power, especially in a Parliamentary democracy. Its nature and composition should not be a burden on the people, the economy and the country's resources. We propose, therefore, the following as some of the main features governing the composition and powers of Parliament.

- 7.1 There shall be a bicameral legislature; comprising of the Upper and Lower Houses of Parliament.
- 7.2 The number of seats in Parliament (i.e. of both the Upper and Lower Houses) shall be rationalized. Effective, rather than excessive, representation is to be promoted, with the precise numbers to be decided based on aspects relating to delimitation of electoral boundaries and the proposed electoral system.
- 7.3 The term of a newly elected Upper and Lower House shall be five (5) years respectively.
- 7.4 Progressive measures should be taken to increase the participation of under-represented communities in politics. Thus, a quota of one-third of the seats must be allocated for women, and a one-third for youth (the quotas could overlap).²⁶
- 7.5 The Parliament will have supreme law-making powers. In general, a Bill, introduced by either House, would require the approval of the other to become law.²⁷
- 7.6 The law-making authority of Parliament is subject to pre-enactment and post-enactment judicial review of legislation. Post-enactment judicial review of legislation will have prospective effect.
- 7.7 Procedure relating to the enactment of Urgent Bills should be abolished.

²⁶ On such quotas (e.g. women-representation), see for guidance Article 10(4) and Article 75 of the Constitution of Rwanda, available at: https://www.constituteproject.org/constitution/Rwanda_2015.pdf?lang=en (accessed 26 December 2020).

²⁷ See generally, Article 111 of the Constitution of Nepal.

8. THE JUDICIARY

We are of the view that provisions relating to the three branches of the government require to be dealt with in consecutive Chapters of the Constitution. The following proposals are therefore made for the strengthening of the independence of the Judiciary and also reforming of the court structure with a view to meaningfully decentralizing judicial functions to enhance people's access to justice.

- 8.1 The judiciary is an independent institution. The Constitution will provide for the appointment and removal of judges in keeping with that principle.
- 8.2 The superior courts shall comprise of the Constitutional Court, the Supreme Court, and the Court of Appeal. The powers and functions of these Courts will be recognized in the Constitution.
- 8.3 Members of the superior courts will be appointed by the non-Executive President on the recommendation of the Constitutional Council. The principle of appointments based on consultation is of critical importance.
- 8.4 Members of the judiciary will hold office during good behavior. Justices of the Constitutional Court, the Supreme Court and the Court of Appeal can be removed only by an impeachment process in Parliament. Parliament shall by law provide for the impeachment procedure ensuring due process.
- 8.5 The Constitutional Court will have sole jurisdiction over constitutional matters requiring the interpretation of the Constitution. The Constitutional Court will be an essential and integral part of the judicial system of the country.²⁸
- 8.6 Fundamental Human Rights jurisdiction will lie with the Court of Appeal (at provincial level) and with the Supreme Court (on appeal).
- 8.7 In addition to the superior courts mentioned above, the structure of courts will also include: Civil, Criminal and Commercial High Courts of each Province, District Courts, Family Courts, Magistrate's Courts and Traffic Courts.²⁹
- 8.8 There shall be a Judicial Service Commission (JSC) which will be responsible for the appointment, discipline and removal of all judges other than justices of the Constitutional Court, Supreme Court and the Court of Appeal.
- 8.9 The JSC shall comprise of the Chief Justice of the Supreme Court, President of the Court of Appeal, one Justice each of the Supreme Court and the Court of Appeal and five members consisting of distinguished members of the Private Bar, the Official Bar and legal academia.³⁰ All members, save the Chief Justice and the President of the Court of Appeal, will be appointed by the Head of State on the recommendation of the Constitutional Council.

²⁸ For further guidance on the nature of Constitutional Courts, see for example: Articles 93-94 of the Constitution of Germany, available at: https://www.constituteproject.org/constitution/German_Federal_Republic_2014.pdf?lang=en (accessed 29 December 2020); Part IX of the Constitution of Spain, available at: https://www.constituteproject.org/constitution/Spain_2011.pdf?lang=en (accessed 29 December 2020); Chapter VI of the Constitution of South Korea, available at: https://www.constituteproject.org/constitution/Republic_of_Korea_1987.pdf?lang=en (accessed 29 December 2020); Article 239 of the Constitution of Colombia, available at: https://www.constituteproject.org/constitution/Colombia_2015.pdf?lang=en (accessed 29 December 2020).

²⁹ See, for instance, Part 11 of the Constitution of Nepal, specifically Article 127 which refers to the Structure of Courts within the Constitution.

³⁰ See, for instance, Article 178 of the Constitution of South Africa.

8.10 The Courts should be under an obligation to issue judgments setting out the reasons for, and the basis upon which, decisions are given.³¹

8.11 The Attorney-General will be an officer of court and will enjoy independent status; the Office of the Director of Public Prosecutions (DPP) will be responsible for public prosecutions.³²

³¹ See, for example, Article 151(3) of the Constitution of Rwanda.

³² For guidance, see generally: Articles 156-157 of the Constitution of Kenya.

9. STATE INSTITUTIONS SUPPORTING CONSTITUTIONAL DEMOCRACY

The importance of the role of independent institutions in maintaining and strengthening constitutional democracy in a country is hereby emphasized. We are of the view that there must be a separate constitutional chapter devoted to independent institutions given the centrally important role they play in strengthening and consolidating democratic governance.³³

9.1 The following State institutions are proposed to be established as independent institutions for purposes of consolidating democratic governance:

- a) The Elections Commission
- b) The Human Rights Commission
- c) The Office of the Ombudsman
- d) The Police Commission
- e) The Right to Information Commission
- f) The Commission on Gender Equality
- g) The Commission for Child Rights
- h) The Official Languages Commission
- i) The Finance Commission
- j) The National Procurement Commission
- k) The Office of the Auditor General & National Audit Commission
- l) The Office of the Attorney-General as an officer of court

(**Note:** The Public Service Commission and the Judicial Service Commission are provided for in the respective chapters dealing with the Public Service and the Judiciary. The Office of the Attorney-General should be deemed an officer of court and should be provided for in the chapter on the judiciary.)

9.2 Membership of Commissions should necessarily reflect the diversity in Sri Lankan society and also bring in relevant and diverse expertise.

9.3 Appointment of members of Commissions and individual offices shall be made only on the basis of a consultative process.

9.4 A Constitutional Council will be established to nominate members of Commissions and individual office bearers (the Ombudsman, Auditor General, Attorney-General). The Head of State shall make such appointments based only on the recommendations of the Constitutional Council.

9.5 The Constitutional Council will be chaired by the Speaker and comprise of members who will reflect the political representation in Parliament and of citizens representing diverse expertise and experiences.

9.6 A majority of members of the Council shall comprise of citizens who have earned national recognition and respect for their integrity and excellence in their respective fields of expertise

³³ See Chapter 9 of the Constitution of South Africa (1996); Chapter 15 of the Constitution of Kenya (2010).

or public service and who are not members of political parties. Appointments of distinguished citizens to the Council shall be based on approval of Parliament.

9.7 Powers and functions of each independent institution will be provided for in this Chapter.

9.8 Security of tenure for members of independent institutions will be provided for by the Chapter. Removal of members of Commissions and individual office bearers will be by way of parliamentary procedure adopted for removal of members of the higher judiciary. Emoluments of such members and individual office bearers will not be diminished during tenure.

10. THE FRANCHISE AND ELECTIONS INCLUDING REFERENDA

We emphasize the need to explicitly recognize the right to vote as a fundamental human right in the Constitution (see section on Fundamental Human Rights and Duties). In addition, the following are some of the proposals made with regard to elections and referenda, through which such a right shall be exercised:

10.1 Elections

- 10.1.1 The electoral system should be the Mixed Member Proportional System (MMP) which is a fusion of the positive features of both the First Past the Post System (FPP) and the Proportional Representation System (PR). This system is to be adopted for elections at the national, provincial and local government levels.³⁴
- 10.1.2 Dual citizens should renounce their overseas citizenship before accepting nominations to contest at elections at all levels of government.

10.2 Referenda

- 10.2.1 Referenda should be retained in deciding matters of national importance.
- 10.2.2 A referendum can be initiated by judicial determination, by the executive, or by the people. All such referenda should be held in such a way that does not promote majoritarian policies. Thus, provisions concerning referenda should recognize the importance of certain limitations, such as the possibility of judicial review to ensure that the question posed in a referendum does not violate the Constitution.³⁵
- 10.2.3 Parliament by law should provide for the initiation and the holding of referenda, regulating such matters as campaign finances, media-time, etc. related to the holding of referenda.

³⁴ See, for guidance, the recommendation on local authorities elections in the Report on Public Representations on Constitutional Reform (Page 170).

³⁵ See, for guidance, Article 107 of the Constitution of Rwanda (re. the need for the President to consult the Supreme Court before calling a referendum). See also, Article 139(3) of the Constitution of Switzerland regarding the requirements to be met when initiating a referendum, available at: https://www.constituteproject.org/constitution/Switzerland_2014.pdf?lang=en (accessed 26 December 2020).

11. PUBLIC FINANCE

We consider it imperative that Parliament has effective control over public finance, and therefore make the following broad proposals:

- 11.1 The Parliament's control and powers of oversight over public finances should be increased. In broad terms, fiscal and other institutions with powers of oversight should, *inter alia*, be independent and non-partisan, transparent, and well-resourced to carry out its functions.³⁶
- 11.2 The Office of the Auditor General (appointed by the Head of State on the recommendation of the Constitutional Council) is an independent institution and must be conferred with adequate powers to exercise oversight over public expenditure.
- 11.3 The Parliamentary Committee System should be strengthened, especially the oversight committees on Finance. Respective sectoral oversight committees should also monitor budgetary allocations for subjects falling within their mandate and expenditure. We reiterate, in this regard, the need to establish a Parliamentary Budget Office (PBO) which could strengthen Parliament's oversight functions concerning budgetary matters. A well-resourced PBO is meant to be a key institution which will provide advice and necessary expertise on financial and budgetary matters to representatives of the two Houses and help in the thorough and specialized scrutiny of public finances.
- 11.4 An independent Finance Commission and Audit Commission (appointed by the Head of State on the recommendation of the Constitutional Council) with adequate powers, are essential to ensure accountability to the public over public finance.

³⁶ See generally, 'Recommendation of the Council on Principles for Independent Fiscal Institutions', available at: <https://www.oecd.org/gov/budgeting/OECD-Recommendation-on-Principles-for-Independent-Fiscal-Institutions.pdf> (accessed 26 December 2020).

12. PUBLIC SECURITY

The legal framework governing public security is of critical importance to safeguarding rights of the people while ensuring security of the people. Public security must always have people's security as the central objective.³⁷

- 12.1 The law governing public security must necessarily be subject to regulation by constitutional provisions.
- 12.2 The declaration of emergencies should be possible only when the 'life of the nation is threatened' and a public declaration to that effect is made.
- 12.3 The declaration of a state of emergency must be subject to judicial review.
- 12.4 The continuation of a state of emergency beyond 14 days must be subject to approval and oversight of parliament.
- 12.5 Any law or regulation pertaining to public security that violates the Constitution must be deemed void.
- 12.6 If a state of emergency continues for more than six consecutive months, Parliament must approve its further extension by a special majority.
- 12.7 Emergency regulations and resulting derogations of Fundamental Human Rights should be in line Sri Lanka's international human rights obligations.

³⁷ See Articles 37 and 198 of the Constitution of South Africa (1996).

13. INTRA-PARTY DEMOCRACY

Political parties are central to democratic governance. They are the primary units that offer choices by way of nominees for public representation and contribute to the formation of political will of the people. Internal democracy and integrity of political parties is thus of critical national importance. We are of the opinion, therefore, that political parties be subjected to a constitutional regulatory framework. Modern democratic constitutions are increasingly providing such frameworks.³⁸ The following recommendations are thus made:

- 13.1 Political parties should hold a national character with an obligation to be non-discriminatory, inclusive and provide equal opportunities for all, in particular for women and youth, and must demonstrate internal democracy and financial integrity.
- 13.2 No political party whose constitution guarantees above features must be denied registration.
- 13.3 Registration must be reviewed by the Election Commission periodically to ensure such guarantees are upheld in practice.
- 13.4 Engaging in and/or inciting hate speech as defined by the law by a political party will be a ground for annulment of registration.
- 13.5 Political parties must, within the time stipulated by law, provide the Election Commission with proof of election of office bearers, submit annual audited accounts and criteria for selection of candidates for national, provincial and local government elections.
- 13.6 Details of registration of political parties and ancillary matters will be provided for by law in keeping with constitutional provisions.

³⁸ See Article 21 of the Constitution of Germany, Articles 91 and 92 of the Constitution of Kenya, and Article 269 of the Constitution of Nepal.

14. RECEPTION OF INTERNATIONAL LAW

Sri Lanka has undertaken multiple international obligations resulting from legally binding bilateral or multilateral commitments. Therefore, we propose the inclusion of novel provisions to the Constitution to respect such commitments. Gaps in this regard in the 1978 Constitution created uncertainties about the legal framework applicable to ensure Sri Lanka's compliance with those international obligations. These provisions are intended to address that *lacunae*.

- 14.1 The State shall be bound to implement in good faith all international agreements it enters into (*pacta sunt servanda*).
- 14.2 The Head of the State has the power to ratify international treaties.
- 14.3 Before ratification, the Head of State must refer the matter to the legislature for approval.
- 14.4 The legislature should enact enabling legislation to give meaningful domestic effect to ratified international treaties³⁹ in a manner which would not defeat their object and purpose.
- 14.5 If such legislation is not enacted within a year after ratification, the ratified treaty must be deemed to be incorporated and could be invoked before courts.
- 14.6 Every effort should be made to ensure that legislation will be adopted within a year of this Constitution coming into force in regard to ratified treaties which are not incorporated into the law of Sri Lanka. In the event the legislature fails to do so, the provisions in Clause 14.5 will apply.

³⁹ See Article 75(2) (a) of the Constitution of Ghana (1992) –available at: <https://constitutionnet.org/sites/default/files/Ghana%20Constitution.pdf>

Annexure 1

The draft of a Bill of Rights, prepared by a Committee reporting to the Ministry of Disaster Management and Human Rights, has now been submitted to the Ministry of Justice for review, as mandated by the National Human Rights Action Plan adopted by Cabinet in 2011.

DRAFT BILL OF RIGHTS

- 10 Freedom of thought, conscience and religion
- 10A Right to human dignity
- 10 B Inherent right to life
- 10 C Right to recognition as a person before the law.
- 11 Freedom from torture
- 11A Security of the Person
- 12 Right to equality and freedom from discrimination
- 13 Freedom from arbitrary arrest, detention and punishment and prohibition of retroactive penal legislation, &c.
- 14 Freedom to hold opinions
- 14A Freedom of speech and expression including publication and freedom of information
- 14B Right of access to information
- 14C Freedom of peaceful assembly
- 14D Freedom of association
- 14E Trade union rights
- 14F Freedom to manifest religion
- 14G Right to enjoy and promote culture and use of language
- 14H Freedom to engage in any lawful trade, occupation, profession, business or enterprise
- 14 I Freedom of movement
- 14J Freedom to return to Sri Lanka
- 14K Right to privacy and family life
- 14L Right to ownership of property 14 M Family rights
- 14N Rights of children
- 14O Right to education
- 14P Freedom from Exploitation

- 14Q Labour rights
- 14R Right to health
- 14S Social rights
- 14T Right to an adequate environment
- 14U Responsibility of the State to respect, secure and advance fundamental rights
- 15 Protection of fundamental rights in times of public emergency
- 16 Existing written law and unwritten law
- 17 Remedy for infringement of fundamental rights by State action
- 17A Rights of non-citizens permanently and legally resident
- 17B Interpretation of fundamental and language right provisions
- 35 Immunity of President from suit
- 126 Fundamental rights and language rights jurisdiction and its exercise

10 Freedom of thought, conscience and religion

- (1) Every person is entitled to freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of his choice.
- (2) No restrictions shall be placed on the exercise of the fundamental right declared and recognized by this Article.

10A Right to human dignity

- (1) Every person has inherent dignity and the right to have his or her dignity respected and protected.
- (2) No restrictions shall be placed on the on the right declared and recognized by this Article.

10B Inherent right to life

- (1) Every person has inherent right to life and no person shall be arbitrarily deprived of life.
- (2) No person shall be punished with death.
- (3) Every person against whom a sentence of death has been pronounced before the coming into force of the Eighteenth Amendment to the Constitution, shall have such sentence commuted to one of rigorous imprisonment for life.
- (4) No restrictions shall be placed on the on the rights declared and recognized by this Article.

10C Right to recognition as a person before the law

- (1) Every person shall have the right to recognition as a person before the law.
- (2) No restrictions shall be placed on the right declared and recognized by this Article.

11 Freedom from torture

- (1) No person shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.
- (2) No restrictions shall be placed on the exercise of the fundamental right declared and recognized by this Article.

11A Security of the Person

- (1) Every person has right to-
 - (a) bodily and psychological integrity; and
 - (b) not to be subjected to medical or scientific experiment without such person's informed consent.
- (2) No restrictions shall be placed on the on the right declared and recognized by this Article.

12 Right to equality and freedom from discrimination

- (1) All persons are equal before the law and are entitled to the equal protection of the law.
- (2)
 - (a) No person shall be arbitrarily discriminated against on any ground including on the ground of such as race, gender, sex, sexual orientation, maternity, marital status, caste, ethnic or social origin, colour, age, disability, religion, conscience or belief, political or other opinion, culture, language, place of birth, and place of residence.
 - (b) It shall be lawful to require a person to acquire within a reasonable time sufficient knowledge of any national language as a qualification for any employment or office in the service of the State or in the service of any public corporation, Provincial Public Service or local government service where such knowledge is reasonably necessary for the discharge of the duties of such employment or office.
 - (c) It shall be lawful to require a person to have sufficient knowledge of any language as a qualification for any such employment of office where no function of that employment or office can be discharged otherwise than with knowledge of that language.
- (3) No person shall, on any of the grounds referred to in subparagraph (a) of paragraph (2) (a) of this Article, be arbitrarily subject to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels, places of public entertainment and places of public worship of the person's own religion.
- (4) Nothing in this Article shall prevent special measures being taken by law, subordinate legislation or executive action where necessary for the sole purpose of the protection or advancement of disadvantaged or underprivileged individuals or groups including those that are disadvantaged or underprivileged because of ethnicity, gender, sex, age or mental or physical disability.
- (5) No restriction shall be placed on the exercise of the rights declared and recognized by this Article other than such restrictions prescribed by law as are necessary in a democratic society for the protection of national security, public order or the protection of public health or for the purpose of securing due recognition and respect for the rights and freedoms of others.

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

- (1) No person shall be arrested, imprisoned or otherwise physically restrained except in accordance with procedure prescribed by law.

- (2) Every person arrested, held in custody, or otherwise deprived of his or her liberty shall be treated with respect for the inherent dignity of the human person.
- (3) Save as otherwise provided by law, no person shall be arrested except under a warrant issued by a judicial officer causing such person to be apprehended and brought before a competent court in accordance with procedure prescribed by law.
- (4) Every person arrested shall be informed, in a language which the person appears to understand, of the reason for the arrest and of the person's rights under paragraphs (5) and (6) of this Article.
- (5) Every person arrested shall have the right to communicate with any relative or friend of the person's choice, and, if the person so requests, such person shall be afforded means of communicating with such relative or friend.
- (6) Every person arrested shall have the right to retain and consult an attorney-at-law. The State shall afford all reasonable facilities to enable the effective representation of the arrested person.
- (7) Every person arrested shall not be detained in custody or confined for a longer period than under all the circumstances of the case is reasonable, and shall, in any case, be brought before the judge of a competent court within twenty-four hours of the arrest, exclusive of the time necessary for the journey from the place of arrest to such judge, and no person shall be detained in custody beyond such period except upon, and in terms of, the order of such judge made in accordance with procedure established by law.
- (8) Every person detained in custody or confined, has the right to be released on bail or upon the execution of a bond unless otherwise provided by law. The amount of bail and the amount of every such bond shall be fixed with due regard to the circumstances of the case and shall not be excessive.
- (9) Every person suspected of committing an offence shall be charged or indicted or released without unreasonable delay, having regard to the facts and circumstances of the case.
- (10) Every person charged with or indicted for an offence shall be entitled to be heard in person or by an attorney-at-law of the person's own choosing and shall be so informed by the judge.
- (11) (a) Every person charged with or indicted for an offence shall be entitled to be tried –
 - (i) without undue delay;
 - (ii) by a competent court;
 - (iii) at a fair trial; and
 - (iv) subject to sub-paragraph (b) of this paragraph, at a public hearing.

(b) A judge may, at the judge's discretion, whenever the judge considers it necessary, in proceedings relating to sexual matters or where the interests of juveniles so require or for the protection of national security or public order necessary in a democratic society or in the interests of order and security within the precincts of such court, exclude there from, persons who are not necessary for the purposes of those proceedings.
- (12) (a) Every person shall be presumed innocent until the person is proved guilty.

(b) Nothing contained in any law shall be held to be inconsistent with sub-paragraph (a) of this paragraph to the extent that such law imposes upon an accused the burden of proving particular facts.
- (13) No person shall be compelled to testify against himself or herself or to confess guilt.
- (14) (a) No person shall be held guilty of, or punished for, an offence on account of any act or omission which did not, at the time of such act or omission, constitute an offence, except for any act or omission which, at the time it was committed, was criminal according to the principles of public international law.

- (b) No penalty shall be imposed for an offence more severe than the penalty in force at the time when an offence was committed.
- (15) Every person who has been convicted or acquitted of an offence in accordance with law by a competent court shall not be liable to be tried for the same offence save on the order of a court exercising appellate or revisionary jurisdiction.
- (16) (a) No person shall be punished with imprisonment except by order of a competent court and in accordance with procedure established by law.
- (b) The arrest, holding in custody, detention or other deprivation of personal liberty of a person –
 - (i) pending investigation or trial shall, if not unreasonable having regard to the circumstances, not constitute punishment;
 - (ii) by reason of a removal order or a deportation order made under the provisions of the Immigrants and Emigrants Act or other such law as may be enacted in substitution therefor, shall not be a contravention of this paragraph.
- (17) (a) No restrictions shall be placed on the rights declared and recognized by paragraph (2), paragraph (10), items (ii) and (iii) of sub-paragraph (a) of paragraph (11), paragraph (14), paragraph (15) and paragraph (16) of this Article.
- (b) No restriction shall be placed on the rights declared and recognized by paragraphs (1), (3), (4), (5), (6), (7), (8), (9), items (i) and (iv) of sub-paragraph (a) of paragraph (11) and paragraphs (12) and (13) of this Article other than such restrictions prescribed by law as are necessary in a democratic society for the protection of national security, public order, or for the purpose of securing due recognition and respect for the rights and freedoms of others.

14 Freedom to hold opinions

- (1) Every person shall have the right to hold opinions without interference.
- (2) No restriction shall be placed on the rights declared and recognized by paragraph (1) of this Article.

14A Freedom of speech and expression including publication and freedom of information

- (1) Every person is entitled to the freedom of speech and expression including publication and this right shall include the freedom to express opinions and to seek, receive and impart information and ideas, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium.
- (2) No restrictions shall be placed on the right declared and recognized by this Article other than such restrictions prescribed by law as are necessary in a democratic society for the protection of national security, public order, the protection of public health or morality, racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence or for the purpose of securing due recognition and respect for the rights and freedoms of others.

14B Right of Access to Information

- (1) Every person shall have the right of access to –
 - (a) any information held by the State, including Provincial authorities; and

- (b) any information held by any other person and that is required for the exercise or protection of the person's rights.
- (2) Parliament shall by law make provision to give effect to this right.
- (3) No restrictions shall be placed on the right declared and recognized by this Article other than such restrictions prescribed by law as are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, privacy, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

14C Freedom of peaceful assembly

- (1) Every person is entitled to the freedom of peaceful assembly.
- (2) No restrictions shall be placed on the exercise of the right declared and recognized by this Article other than such restrictions prescribed by any law as are necessary in a democratic society for the protection of national security, public order, racial or religious harmony, the protection of public health or for the purpose of securing the due recognition and respect for the rights and freedoms of others.

14D Freedom of association

- (1) Every person is entitled to the freedom of association.
- (2) No restrictions shall be placed on the exercise of the rights declared and recognized by this Article other than such restrictions prescribed by law as are necessary in a democratic society for the protection of national security, public order, racial or religious harmony, national economy the protection of public health or morals or for the purpose of securing due recognition and respect for the rights and freedoms of others.

14E Trade Union Rights

- (1) Every person is entitled to the freedom to form and join a trade union of the person's choice and for such trade union to function without undue hindrance.
- (2) Every person is entitled to the right to participate in trade union action, including strike, provided that the right is exercised in conformity with law.
- (3) No restrictions shall be placed on the exercise of the rights declared and recognized by this Article other than such restrictions prescribed by law as are necessary in a democratic society for the protection of national security, public order, racial or religious harmony or for the purpose of securing due recognition and respect for the rights and freedoms of others.

14F Freedom to manifest religion

- (1) Every person is entitled to the freedom, either alone or in association with others, and either in public or in private, to manifest the person's religion or belief in worship, observance, practice, propagation and teaching.
- (2) In the exercise of the rights declared and recognized by paragraph (1) of this Article, no person shall have the right to impair or otherwise restrict any other person's freedom to have or to adopt a religion or belief of that other person's choice.

(3) No restriction shall be placed on the rights declared and recognized by paragraph (1) of this Article other than such restrictions prescribed by law as are necessary in a democratic society for the protection of national security, public order, or for the purpose of securing due recognition and respect for the rights and freedoms of others including the freedom declared by paragraph (2) of this Article.

14G Right to enjoy and promote culture and use of language

(1) Every person is entitled alone or in association with others to enjoy and promote such person's culture and, to use the language of such person's choice.

(2) Persons belonging to a cultural or linguistic community shall not be denied the right, with other members of that community, to enjoy their own culture or to use their own language.

(3) No restriction shall be placed on the exercise of the rights declared and recognized by this Article other than such restrictions prescribed by law as are necessary in a democratic society for the protection of public order, racial or religious harmony, the protection of public health or morality, the protection of the environment or for the purpose of securing due recognition and respect for the rights and freedoms of others.

14H Freedom to engage in any lawful trade, occupation, profession, business or enterprise

(1) Every person is entitled to the freedom to engage alone or in association with others in any lawful occupation, profession, trade, business or enterprise.

(2) No restrictions shall be placed on the exercise of the rights declared and recognized by this Article other than such restrictions prescribed by law as are necessary in a democratic society for the protection of the national economy, national security, public order, protection of public health or morality, the protection of the environment or for the purpose of securing due recognition and respect for the rights and freedoms of others or in relation to –

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

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

14I Freedom of movement

(1) Every person lawfully resident within the Republic is entitled to the freedom of movement within the Republic and of choosing such person's residence within the Republic.

(2) Every person shall be free to leave the Republic.

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

14J Freedom to return to Sri Lanka

- (1) Every citizen shall be entitled to return to the Republic.
- (2) No restrictions shall be placed on the exercise of the right declared and recognized by this Article.

14K Right to privacy and family life

- (1) Every person has the right to privacy, the right to be protected from arbitrary interference with family life, the inviolability of the home, correspondence and communications and shall not be subjected to unlawful attacks on such person's honour and reputation.
- (2) No restriction shall be placed on the exercise of the rights declared and recognized by this Article other than such restrictions prescribed by law as are necessary in a democratic society for the protection of national security, public order or national economy or the protection of public health or morality or for the purpose of securing due recognition and respect for the rights and freedoms of others or for the enforcement of a judgment or order of a competent court.

14L Right to ownership of property

- (1) Every citizen is entitled to own property alone or in association with others subject to the preservation and protection of the environment and the rights of the community.
- (2) No person shall be deprived of property except as permitted by law.
- (3) No property shall be compulsorily acquired or requisitioned save for a clearly described public purpose or for reasons of public utility or public order and save by authority of law which provides for the payment of fair compensation having regard to the prevalent market value of the property at the time of such acquisition.

14M Family rights

- (1) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
- (2) Every man or woman of marriageable age shall be entitled to marry and to found a family and the rights of men and women within the family shall be equal.
- (3) No marriage shall be entered into without the free and full consent of the intending spouses.
- (4) The State shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution, in which instance provision shall be made for the necessary protection of any children.

14N Rights of the Child

- (1) Every child shall have the right -
 - (a) to have his or her

birth registered and to have a name from his or her date of birth;

- (b) to acquire nationality;
 - (c) to be protected from maltreatment, neglect, abuse or degradation;
 - (d) to family care or parental care or to appropriate alternative care when removed from the family environment;
 - (e) to basic nutrition, shelter, basic health care services and social services;
 - (f) to have legal assistance provided by the State at State's expense in criminal proceedings affecting the child, if substantial injustice would otherwise result;
 - (g) not to be detained except as a measure of last resort, in which instance, the child may be detained only for the shortest appropriate period of time, and has the right to be –
 - (i) kept separately from detained persons over the age of 18 years; and
 - (ii) treated in a manner, and kept in conditions, that take account of the child's age;
 - (h) Not to be used directly in armed conflict and to be protected in times of armed conflict.
- (2) No child shall be discriminated against on the ground of the child's or his or her parent's or legal guardian's race, colour, sex, sexual orientation, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status including the marital status of parents.
- (3) Every child shall have the right to grow up in an environment protected from the negative consequences of the consumption of addictive substances harmful to the health of the child and, to the extent possible, from the promotion of such substances.
- (4) Every child shall have the right to free education provided by the State.
- (5) A child shall not be employed in any hazardous activity, shall be protected from exploitative labour practices and shall not be required or permitted to perform work or provide services that-
- (a) are inappropriate for a person of that child's age;
 - (b) places at risk, the child's wellbeing, education, physical or mental health or spiritual, moral or social development.
- (6) The rights recognized by this Article shall be in addition to and not in derogation of any other right to which a child is entitled as a citizen or person under this Chapter.
- (7) For the purposes of this Article "child" means a person under the age of eighteen years.
- (8) In all matters concerning children, whether undertaken by institutions of state or public or private social welfare institutions, the best interest of the child shall be of paramount importance.

140 Right to education

- (1) Every person has the right to education which shall be directed to full development of the human personality and the sense of its dignity, and to the strengthening of respect for human rights and fundamental freedoms.
- (2) Primary education shall be compulsory and available to all.
- (3) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, including by free education provided by the State.

(4) Higher education shall be made available to all on the basis of capacity and equitable opportunity, by every appropriate means, including by free education provided by the State b.

(5) Basic education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education.

(6) Nothing in this Article shall exclude the right of a lawful guardian of a child, acting on that child's behalf, or of any adult to select an education provided by a private institution of education whether denominational or otherwise.

14P Freedom from Exploitation

(1) No person shall be subjected to trafficking, slavery or forced labour.

(2) "Forced labour" as used in paragraph (1) of this Article shall not include performance of labour pursuant to a sentence of a court of competent jurisdiction or any work or service which forms a part of normal civic obligations.

14Q Labour rights

Every citizen has the right to the enjoyment of just and favorable conditions of work which ensures, in particular:

(a) remuneration which provides fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(b) safe and healthy working conditions;

(c) equal opportunity for everyone to be promoted in employment to an appropriate higher level, subject to no considerations other than those of competence and appropriate qualifications including seniority and experience where relevant; and

(d) rest, leisure and reasonable limitation of working hours and periodic holidays with pay.

14R Right to health

(1) Every citizen has the right to enjoy the highest attainable standard of physical and mental health and to have access to preventive and curative health-care services including through free health services provided by the State to all who require such services.

(2) No person may be denied emergency medical treatment.

14S Social rights

(1) Every citizen has the right to have access to –

(a) sufficient food and water;

(b) adequate housing; and

(c) appropriate social assistance including social security when unable to support the citizen and the citizen's dependents.

(2) No person shall be evicted from the person's home or have the home demolished, except as permitted by law.

14T Right to an adequate environment

All persons have the right to an environment that is –

- (a) not harmful to their health or well being; and
- (b) protected for the benefit of present and future generations.

14U Responsibility of the State to respect, secure and advance Fundamental Rights

In giving effect to Article 4(d) of this Constitution, all organs of State shall take all necessary measures including the enactment and implementation of necessary legislation and the adoption and implementation of appropriate policies and programmes for the full realization of the rights declared and recognized by this Chapter.

15 Protection of fundamental rights in times of public emergency

(1) Where a Proclamation has been duly made pursuant to the provisions of Chapter XVIII, and subject to paragraphs (2) and (3) of this Article, measures may be prescribed by law derogating from the exercise and operation of the fundamental rights declared and recognized in this Chapter to the extent strictly required by the exigencies of the situation and necessary in a democratic society, provided that such measures do not involve discrimination on grounds recognized under paragraph (2) of Article 12 and for the purpose of this Article "law" includes regulations made under the law for the time being in force relating to public security.

(2) In prescribing measures under paragraph (1) of this Article, there shall be no derogation -

- (a) from any of the rights declared and recognized by Articles 10, 10A, 10B, 10C, 11, 11A, 14, 14M, 14N (except 14N(1) (e)), and 14P;
- (b) from the right declared and recognized by Article 13(7) unless at the same time legal provision is made requiring–
 - (i) the Magistrate of the area in which such arrest was made to be notified of the arrest; and
 - (ii) the person arrested to be produced before any Magistrate, within such time as is reasonable in all the circumstances of the case.

(3) In prescribing measures under paragraph (1) of this Article, the State shall have a minimum core obligation to ensure the satisfaction of minimum essential levels of the rights recognized by Articles 14N (1) (e), 14O, 14Q, 14R 14S and 14T and in discharging such obligation the State shall not discriminate solely on any of the grounds set out in Article 12 (2).

16 Existing written law and unwritten law

All written and unwritten laws in force at the time of coming into force of the Eighteenth Amendment to the Constitution shall be read subject to the provisions of Chapter III and IV and in the event of a court declaring that any such law is inconsistent with any such provision, such law shall be deemed to be void to the extent of such inconsistency.

17 Remedy for infringement of fundamental rights by State action

- (1) Subject to following paragraphs of this Article, every person shall be entitled to apply to the Supreme Court as provided by Article 126 in respect of the infringement or imminent infringement by State action of a fundamental right to which such person is entitled under the provisions of this Chapter;
- (2) Where the person aggrieved is unable to make an application under Article 126 owing to reasonable cause, an application may be made on behalf of such a person, by any relative or friend of such person, if the person aggrieved raises no objection to such application.
- (3) An application may also be made in respect of any group or class of persons affected, in the public interest, by any person or by any incorporated or unincorporated body of persons, acting bona fide.
- (4) Notwithstanding anything to the contrary in the Constitution, every person shall be entitled to apply to the Supreme Court as provided by Article 126 for a declaration that any law, statute of a Provincial Council or a provision thereof is inconsistent with a fundamental right under the provisions of this Chapter.
- (5) For the purposes of this Article and Article 126, "State action" includes legislative action, executive or administrative action and judicial action.

17A Rights of non-citizens permanently and legally resident

A person who, not being a citizen of any country, has been permanently and legally resident in the Republic on the date on which the Eighteenth Amendment to the Constitution comes into force and continues to be so resident, shall be entitled to all the rights declared and recognized by this Chapter, to which a citizen of Sri Lanka is entitled.

17B Interpretation of fundamental and language rights provisions

- (1) In interpreting the rights declared and recognized by Chapter III and Chapter IV, a court, tribunal or other body -
 - (a) shall promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - (b) shall have regard to the international legal obligations of the Republic and other sources of international law; and
 - (c) may have regard to foreign law.
- (2) When interpreting any written or customary law, every court, tribunal or other body shall promote the spirit, aims and objects of this Chapter and Chapter IV.
- (3) The rights declared and recognized in this Chapter and in Chapter IV do not derogate from any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with Chapter III and Chapter IV .

35 Immunity of President from suit

- (1) While any person holds office as President, no proceedings shall be instituted or continued against him in any court or tribunal in respect of anything done or omitted to be done by him either in his official or private capacity.

(2) Where provision is made by law limiting the time within which proceedings of any description may be brought against any person, the period of time during which such person holds the office of President shall not be taken into account in calculating any period of time prescribed by that law.

(3) The immunity conferred by the provisions of paragraph (1) of this Article shall not apply to any proceedings in the Supreme Court under Article 126 or to any proceedings in any court in relation to the exercise of any power pertaining to any subject or function assigned to the President or remaining in his charge under paragraph (2) of Article 44 or to proceedings in the Supreme Court under paragraph (2) of Article 129 or to proceedings in the Supreme Court under Article 130 (a) relating to the election the President or the validity of a referendum or to proceedings in the Court of Appeal under Article 144 or in the Supreme Court, relating to the election of a Member of Parliament:

Provided that any such proceedings under Article 126 and proceedings in relation to the exercise of any power pertaining to any such subject or function shall be instituted against the Attorney-General.

126 Fundamental rights and language rights jurisdiction and its exercise

(1) The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by State action or any question relating to the inconsistency of any law, any statute made by a Provincial Council or provision thereof with any fundamental right or language right declared and recognised by Chapter III or Chapter IV.

(2) The jurisdiction of the Supreme Court under this Article may be invoked by any person or body of persons referred to in Article 17 in accordance with such rules of Court as may be in force. Any such person or body of persons may apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief or redress in respect of such infringement or imminent infringement or for a declaration that any law, statute of a Provincial Council or any provision thereof is inconsistent with any fundamental right or language right declared and recognised by Chapter III or Chapter IV. Such application may be proceeded with only with leave to proceed first had and obtained from the Supreme Court, which leave may be granted or refused as the case may be by not less than two Judges of such Court.

(3) Where in the course of hearing in any Court, of an application for orders in the nature of a writ of habeas corpus, certiorari, prohibition, mandamus or quo warrant, it appears to such Court that there is prima facie evidence of an infringement or imminent infringement of the any fundamental right or language right declared and recognised by Chapter III or Chapter IV by a party to such application, such Court shall forthwith refer such matter for determination by the Supreme Court.

(4) Where in the course of hearing in any court a question of the inconsistency of any law, any statute made by a Provincial Council or provision thereof with a fundamental right or language right declared and recognised by Chapter III or Chapter IV is raised by a party, such court shall forthwith refer such matter for determination by the Supreme Court. Such matter may be proceeded with only if the Supreme Court grants leave to proceed with the matter and such leave may be granted or refused as the case may be by not less than two Judges of such Court.

(5) The Supreme Court shall have power to grant such relief or make such directions as it may deem just and equitable in the circumstances in respect of any petition or reference referred to in this Article or refer the matter back to the Court making the reference if, in its opinion, there is no infringement of a fundamental right or language right or there is no inconsistency of a law or statute with any fundamental or language right declared and recognised by Chapter III or Chapter IV.

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

(6) Notwithstanding anything to the contrary in the Constitution, the Supreme Court shall have power to make-

(a) a declaration that any law, any statute made by a Provincial Council or provision thereof that is inconsistent with any fundamental or language right declared and recognised by Chapter III or Chapter IV is invalid to the extent of the inconsistency; and

(b) any order that is just and equitable, including –

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for such period and subject to such conditions as would enable Parliament or a Provincial Council to take steps to make the impugned law or statute cease to be inconsistent with the provisions of this Chapter.

(7) Where at the hearing of a petition or reference referred to in this Article there are any disputed questions of fact, the Supreme Court may refer such questions to the Human Rights Commission of Sri Lanka, the Official Languages Commission or other appropriate body or person for inquiry and report.

(8) The Supreme Court shall hear and finally dispose of any petition or reference under this Article as expeditiously as possible and in any event, not later than three months of the filing of the petition or the making of the reference, as the case may be. In computing the period of three months, any period taken for inquiry and report by the Human Rights Commission of Sri Lanka, the Official Languages Commission or any other body or person referred to in paragraph (7) 0 2

(9) Where the State action complained of is that of a Judge or Judges of the Supreme Court, leave to proceed shall be granted or refused and the matter shall be heard, if leave to proceed is granted, by a Bench comprising all the Judges of the Supreme Court save those whose action is complained of and any Judge who does not wish to participate.