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THE DRAFT CONSTITUTION AND FUNDAMENTAL RIGHTS

LAW & SOCIETY TRUST

Editor's note.....

In this issue we publish the report of the Consultation on the Draft Constitution held on the 26th and 27th of June. This Consultation is a sequel to the Consultation that was organised by the Trust in August 1997. At the Consultation, three main areas were discussed: the fundamental rights chapter, devolution and people's participation in the constitution making process. Several eminent people from overseas as well as locally participated in the Consultation, including the Minister of Justice and Constitutional Affairs who chaired the session on Fundamental Rights.

Subsequent to the Consultation, the Trust took part in a civil society initiative to improve the text of the draft Constitution. We publish a lobby document prepared by this civil society initiative which was presented at a press conference held in July.

We hope that this issue of the *LST Review* would facilitate and enrich the debate and dialogue on this very important document which would be of significance to every Sri Lankan.

The 1st death anniversary of Dr. Neelan Tiruchelvam fell on the 29th of July. Several events were held to commemorate his life and work including the awards ceremony of the all-Island Essay competition on National Reconciliation and a lecture on "Human rights, Political Conflict and Compromise" by Mr. Ian Martin, former Special Representative of the United Nations Secretary-General for East Timor and former Secretary-General of Amnesty International.

This issue of the LST Review is devoted to constitutional law and constitutionalism as a mark of respect to the remarkable contribution this renowned scholar made to these two areas.

Consultation on the Draft Constitution of Sri Lanka*

Patricia Hyndman**

1. INTRODUCTION

The consultation on the Draft of Constitution of Sri Lanka was convened by the Law & Society Trust in Colombo on June 26th and 27th, 2000, at the Bandaranaike Memorial International Conference Hall in Colombo. This consultation was a follow-up to the previous consultation on the draft constitution held on 9th and 10th August 1997.

The meeting was opened by Justice Bhagwati, former Chief Justice of the Indian Supreme Court, who observed that underlying the convening of the meeting was the resolve of the Law and Society Trust to carry forward the late Dr. Neelan Tiruchelvam's mission for a negotiated solution to the ethnic conflict in Sri Lanka. Justice Bhagwati referred to the need to ensure that fundamental rights are inalienable and that safeguards were necessary in order to ensure that a Constitution constituted of more than just "pious platitudes."

During the inaugural session the topics selected for discussion - fundamental rights, constitutional experiences in addressing autonomy issues, and the enhancing of public participation in the constitution making process - were outlined. It was noted at the present time each of these topics is of critical importance to Sri Lanka in its efforts to reach a negotiated peace.

It should be noted that during the discussion the participants were unable to work from an up-to-date version of the proposed new constitution. Although significant changes were known to have been made to the October 1997 draft text at meetings between the government and opposition parties, the precise nature of the changes had not been made public; hence there was no public draft available from which to work.

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*Held on June 26-27, 2000, Bandaranaike Memorial International Conference Hall, Colombo. The Consultation on the draft Constitution, held in July 2000, was a follow-up to a previous Consultation held in August 1997 and followed a similar format. The Trust also organised a consultation on the topic of Women and the draft Constitution, held in December 1997. The Trust appreciates the efforts, among others, of C.S. Dattareya, Damaris Wickremasekera, Rukshana Nanayakkara, Pubudini Wickremaratne, M.C.M. Iqbal, Sumangali Atulugama, Avanthi Gunatilake in organising the consultation. The Trust is grateful to Sumudu Atapattu, Mario Gomez, Ashfaq Khalfan and C.S. Dattatreya for their contribution to this report.

**Fellow, Wolfson College, Cambridge; Research and Teaching Fellow, Human Rights Centre, University of Essex.

For this consultation the Law & Society Trust had, for the second time, brought together a variety of experts both from Sri Lanka and from other countries, to offer their experience and comments on constitutions and on the process of constitution–making. (See Schedule I for a list of participants). The assembled participants combined a wide experience in issues of constitutionalism, including processes used in various countries in drawing up new constitutions, drafting of constitutional texts, of the workings and interpretation of constitutions, and of the content and the relevance of international human rights law and its application and interpretation.

Among those present were: legal academics; legal practitioners; historians dealing with the development and change in societies; members of political parties both in opposition and in office; members of the judiciary and representatives of non-governmental organisations.

This combined expertise ensured a frank, vigorous and informed discussion, from which, it soon became clear, many of the ideas and much of the experience put forward could prove helpful in successfully drawing up a constitution which would meet the major needs and aspirations of its different groups.

Among the many issues canvassed, several stood out as being of absolute and fundamental importance.

One was the need for the unequivocal acceptance of the supremacy of the constitution. The participants emphasised the need for courts to be able to review all existing legislation for conformity with the Constitution and that there should not be time limits on this exercise.

Another was the point made very early in the discussions, that human rights are universal and inalienable. Every constitution must conform to those rights which the state in question is bound to observe under international law, and must, in addition, provide an effective mechanism for the enforcement of those rights. It was noted that Sri Lanka had ratified, and was legally bound by this ratification to observe, and implement, the requirements of a number of international human rights instruments.

Autonomy issues, difficult as they are, must be addressed sensitively and creatively. The approach need not be one of identical devolution packages for the different regions, but could incorporate asymmetrical devolution, as is being attempted in other places. Sub-regional delegation of power was suggested as a means of involving

ordinary people in the administration of the constitution where it most impacts on their lives. Also indicated was the need for the regions to be given a place at the Centre. Such power-sharing could be accomplished by establishing a second house of the legislature.

Also accepted as fundamental was the requirement that any constitution, to be viable, must give effect to the soul of a nation, must be home-grown, and must emanate from its history and culture. The consensus of the meeting, however, was that this requirement, in itself, did not require a reinvention of the wheel for each new constitution, and each new constitution-making process. It is possible to borrow from the experience of other nations, as long as the approach used is not merely to copy what has been done elsewhere but is adapted, sensitively and appropriately, to the circumstances of the country in question.

In order to meet the above requirement it was taken as another essential that there be effective public participation in the creation of a new constitution. No constitution must be simply handed down from above. In order that the people can identify a constitutional document as their own, its terms should genuinely reflect a broad consensus of members of the community and reflect the moral and ethical views, and concerns that underlie all societies. Hence, it was agreed, by most of those present, that wide popular participation in the making of a constitution is a vital component of the constitutional creation process.

Since a constitution is not a mere piece of paper, but rather enshrines a value system, and comes alive only when enforced according to the values of the society owning it, and since all societies develop and change, the point was made that no constitution can be a static document, and that there will always be a need for creativity and adaptability in the construction and application of constitutional terms. It was accepted as a *sine qua non* here that the need for construction in accordance with the state's obligations under international human rights law could never be in question.

SESSION I: FUNDAMENTAL RIGHTS

The session on fundamental rights was chaired by Professor G.L. Peiris, Minister for Justice, Constitutional Affairs, Ethnic Affairs and National Integration. He gave the delegates an overview of the current status of the chapter on fundamental rights, and of the process which could be expected during the next few weeks prior to the dissolution of parliament which, as required by the present Constitution, will occur towards the end of August, 2000.

He noted that this chapter had been long in preparation, and that the Parliamentary Select Committee appointed to draft the new constitution's text had considered the chapter over the course of an extensive series of meetings. He told the participants that behind the new text was a clear philosophy, which is that the doctrine of the absolute sovereignty of parliament was not suitable to the circumstances in Sri Lanka. He said that these circumstances are very different to those of the United Kingdom, where the doctrine had evolved over centuries, and even in that different situation had been achieved only with considerable trauma and pain.

He said that the concept of the sovereignty of parliament is, on the whole, a system suitable to a homogeneous political culture, but that where there is a significant amount of linguistic, religious and cultural diversity in a society, it is not the best form of government.

1.1 New Rights Protected

Professor Peiris observed that in the 1978 Constitution fundamental rights had assumed greater significance than had been the case in either the 1948 or the 1972 constitutions.

In the new draft constitution the intention was to strengthen the fundamental rights chapter by a variety of means. One was by the selection of rights appropriate for protection in the particular context of the circumstances of the country. Several rights were to be included, as justiciable rights, in the new constitution for the first time. Two of these were the right to life, and the right to information. Professor Peiris observed this legal provision is necessary if the public is to be reliably and fully informed. In addition, the time made available for a person to seek redress for the violation of a fundamental right had been increased from one month to three months in order to make the protection of fundamental rights more accessible to the people.

On the issue of social and economic rights, he said that in the early stages of drafting these rights had been included in the new constitutional text, and that their coverage had been considerably extended. However, during later consultations, some of these rights had been diluted.

Professor Peiris stated that this had been done for pragmatic reasons – that it was important to include only rights which will be enforced, because it was essential that there should not be a divide between aspiration and the enforcement of that aspiration.

Hence, if rights are to be spelled out in detail, as they were in the present draft, it is necessary to ensure that there are viable and adequate methods of enforcement for those rights, otherwise little will be achieved. If the vast majority of people are not able, as a matter of fact, to take advantage of those remedies which are available under the Constitution, the consequence will be cynicism with the constitution.

Professor Peiris continued that any chapter of fundamental rights must acknowledge that some departures from their provisions are possible, and that the whole question is one of social engineering. This goes to the root of the social contract and has to be counterbalanced with the need for security for the public at large, so that it is always necessary to have some departures from public freedom. He said that this is so with the fundamental rights chapters in all countries and all cultures. However, he added that, in the new text, there is an inflexible requirement that any departure from the fundamental rights protected by the new constitution must satisfy a court of law that the departure is one which is necessary in a democratic society; this requirement is totally new.

1.2 Locus Standi and Public Interest Litigation

Professor Peiris then went on to his second major point, which was with reference to public interest litigation, i.e. the possibility that someone without a direct interest in a matter concerning a breach of a fundamental right might apply to the court to secure the enforcement of the right in question. He noted that laws are relevant only if they are capable of being invoked without the need for great expenditure, or complexity, and that any constitution must be relevant to the lives of the people, if they are to be able to identify with it. If this is not the case the constitutionally protected rights will not be regarded as a relevant part of the lives of ordinary people. Hence, public interest litigation is essential to ensure that the system works on the ground; and that remedies will be available to members of the public when they need them.

Regarding access to the courts on fundamental rights, Professor Peiris said that he felt that a situation where all the fundamental rights work becomes the sole responsibility of the Supreme Court was not a good solution. He commented that if a matter being heard by any court involves a point of constitutional interpretation, the requirement that the matter should be immediately sent to the Supreme Court would be undesirable for a variety of reasons. One was that it would overload the Supreme Court, but another essential consideration was that a diffusion of responsibility was needed here, and that it was desirable that this function be undertaken by courts operating in the regions. This would bring about more contact with the grassroots,

and ensure that the constitution had greater relevance to the lives of the people – an aim which the present government is anxious to pursue. Experiences from India and the United States had shown the value of jurisprudence by regional courts.

1.3 Judicial Review of Legislation

Regarding the issue of judicial review of legislation, Professor Peiris said that the government had rejected the argument that *ex post facto* judicial decision on the legitimacy of statutes is a threat to stability, and had accepted that legislation can be challenged even after enactment and, if so challenged, any law found to be in contravention of the fundamental rights protected by the constitution will be void. He observed that such a rule affects the relationship of the judiciary with the parliament, and is an example of the departure from the notion of the absolute sovereignty of parliament.

Professor Peiris noted that the next issue to be raised was the period of time within which such a challenge would be permissible. Here again he referred to the need to balance fundamental rights with other interests of society as a whole, and said that there is a countervailing social interest in this area, which is that settled expectations should not be disturbed, for example in commercial cases, contract law, property law, etc., that there was a need for certainty and consistency, particularly in terms of large contracts, and that this certainty was essential if important matters such as foreign investment were to be encouraged. Hence, such challenges should not be allowed for an unlimited period of time. Professor Peiris admitted that any time limit was bound to be arbitrary, and he informed the delegates that had been decided upon was two years - during that time a statute can be challenged.

1.4 Existing Law

The next issue addressed by Professor Peiris was whether existing laws could be challenged. He told the delegates that the decision had been taken that they could, but that the whole corpus of legislation could not be exposed to this challenge, and that the solution chosen instead is that the President will, within three months of the coming into force of the new constitution, establish a body to review the entire corpus of law in order to establish whether any statutes are in conflict with the constitution. Where this is the case, the breaches will then be examined by parliament and a decision made as to what action should be taken.

Professor Peiris ended his address with a tribute to Dr. Tiruchelvam, noting that the best way to honour him was to continue to work to achieve the objectives which had motivated his life and work.

The floor was then open for discussion. Among the many matters brought forward in the ensuing discussion were the following:

1.5 Discussion: Fundamental Rights within the Draft Constitution:

Mr. Rohan Edrisinha, of the Centre for Policy Alternatives, stated that the most basic aspect of a constitution must be that it is the supreme law and, if that is the case then all legislation must conform to it. Hence there should not be a two-year limit on challenge. Either the constitution is supreme or parliament is supreme and, in the event of the former, challenges on the basis that a law is contravening constitutional provisions should always be allowed. The point was made that comprehensive *ex post facto* challenge had been possible in Sri Lanka between 1948 and 1972. Various examples were cited, one case being that of *Leanage* v. *The Queen*. Finally, Mr. Edrisinha pointed out that the provision limiting challenges had no parallel in the Constitution of any other democratic society in the world.

A number of delegates noted that the time limit was neither logical nor just, and that it would be unfair for future generations to be disadvantaged by the loss of the right of review in the first two years after a law comes into existence.

The consequences of ruling legislation invalid because it is contrary to the constitution need not have destructive results. Various measures can be taken to ameliorate the situation. In the South African case, when a court finds a legislative provision in violation of the constitution, legislation may be declared invalid prospectively, that is from the time of the judgment and not from the time of its enactment. In addition, the parliament may be given time during which the statute may be amended in order to bring it into conformity with the constitution.

Professor Peiris agreed that the two year time limit was not logical, but argued that it is experience rather than the law which is more important. There is a need for certainty and specificity, particularly with regard to commercial activities. This would help attract as a large a section of society as possible. He further argued that the minorities lack confidence in the judiciary, as exemplified by the decision in *Kodakam Pillai* v. *Mudanayake*, decided under the Soulbury Constitution. This is another reason for maintaining such limits.

Professor Peiris further stated that there was a need to proceed carefully in Sri Lanka on the grounds that emotional reactions to government initiatives are a major problem. It makes sense to do something modest as to do more may place in jeopardy all that has been gained. In a few years, it may be possible to do more.

Professor Toope, from McGill University, addressed the question of experience and indicated that Canadian courts have found the need for continuing reflection on human rights issues over time, particularly with regard to the need to balance competing rights. The proposed time limit in the draft constitution rests on the erroneous positivist assumption that the bare words of the Constitution are sufficient to guide the courts. There is a danger that the courts may overvalue the scope of a right at first and would not be able to revisit the issue later, given that no challenge on the law in question would be permitted. Furthermore, where different courts have made inconsistent decisions on a law, there may be no possibility for the Supreme Court to render judgment on such a law, and this would allow inconsistent jurisprudence to stand.

Again, where commercial certainty is a real concern, there do exist doctrines developed in other states which might prove to be of assistance with this particular issue, for example, the doctrine of "past and closed transactions" which has been used in Pakistan. In many cases the experience in other places can be adapted to local circumstances and utilised to solve problems such as these.

Justice Bhagwati pointed out that there was no time limit imposed on the bringing of challenges in India, and that this had not proved to be a problem. The situation was simply that if the court found a statute to be in conflict with the constitution it would be void as from the time of the decision. Indeed, it was asked why legislation contrary to the constitution could have any legitimacy at all, whether or not there is intervention by a court. In addition, the proposed time limit would arbitrarily create two classes of people, based on whether their rights were violated before or after the limit.

Justice Bhagwati further stated that there was no need to insulate existing laws from judicial review, and that in India, judicial review had never been a problem, particularly with regard to personal laws. He emphasised that the existence of pluralism in a society was no excuse to reject judicial review, pointing to its positive experience in India, which possesses at least as much cultural, linguistic and religious diversity as does Sri Lanka.

It was also observed that the basis of the value of fundamental rights chapters is their vibrancy. Since international human rights law is being continually developed, this in turn requires development in the interpretation of fundamental rights provisions in the Constitution, both in order to keep the text in conformity with Sri Lanka's international obligations and in touch with the constantly evolving fabric of society. The time limit imposed by the draft constitution would have the effect of hindering the progressive development and implementation of fundamental human rights.

A plea was made that this issue be reconsidered, and that, as a compromise, personal laws might be exempted from judicial review, but that otherwise recourse to the courts should be possible whatever the passage of time.

Secondly, considerable concern was expressed regarding the dilution of the protection afforded to economic and social rights as apparently had occurred. There was unanimous acknowledgement that these rights are extremely important in the context of Sri Lankan society, indeed that, to ordinary people, these rights are often of more importance, and certainly of equal importance, to civil and political rights.

Professor James Paul, from the International Centre for Law in Development in New York, observed that it is vital to deal constructively with issues of human development and the eradication of poverty, and that to take these rights seriously is not only required by justice and fairness of administration, and by international requirements, but would also serve to interest the poor and make them feel involved. The point was made that, in any event, the government had been bound for many years now to observe and implement these rights as a consequence of its ratification of the International Covenant on Economic, Social and Cultural Rights. Ms. Manouri Muttettuwegama of the Human Rights Commission indicated that the majority of complaints to the Commission related to social and economic rights. Examples were the access to education and the right of the displaced to retain their land, in the face of legislation that would extinguish their rights after ten years of non-cultivation.

Hence the prevailing feeling of the meeting was, very clearly, that the deleted social and economic rights should be restored into the draft constitution.

There was considerable discussion on the violation of fundamental rights by private actors. Professor Peiris agreed that to restrict the application of the constitution to the public sector would be to erode the very content of the right. However, he pointed to experience with the attempted introduction of the Equal Opportunity Bill, which led

to a strong negative public reaction, before the contents of the bill had been comprehensively discussed. A number of delegates indicated that fundamental rights must apply not only vertically between government and society, but should also apply horizontally across society. This is of particular importance to vulnerable groups, including the poor and the infirm.

In relation to disadvantaged groups, quotas were proposed as a method of ensuring that such disadvantaged groups could be placed on "a level playing field." Professor Peiris argued that quotas had an unattractive and condescending aspect. It was emphasised by Ms. Maja Daruwalla, Director of the Commonwealth Human Rights Initiative, that quotas must always be considered as a lower limit and should not be used to freeze the representation of a disadvantaged group at a particular level. Professor Toope, however, cautioned that the discussion on equality should not be equated with quotas, and that it was important to consider a full range of remedies that may be applied before one resorted to quotas, partly in order to remove the bitterness that may be created by their application. This approach had been applied by the Supreme Court of Canada in the case of Action Travail des Femmes.

The participants agreed that women, particularly rural women, and other disadvantaged minorities must be given rights which are easily enforceable, and that these groups could not be neglected in any new constitution if it were to effectively command the allegiance of the Sri Lankan population as a whole.

1.6 Key Recommendations:

- **The Constitution must be supreme. While processes such as prospective invalidity and the suspended invalidation of laws may be applied in the interests of stability, in no case should a law be allowed to stand if it is inconsistent with the fundamental rights set out in the Constitution.**
- **Economic and social rights, given their vital importance to the Sri Lankan population, must be retained and strengthened.**
- **The Constitution must apply to both the private and public sector. This is a crucial element in addressing the concerns of the most economically vulnerable groups in Sri Lanka.**

SESSION II: CONSTITUTIONAL EXPERIENCES IN ADDRESSING AUTONOMY ISSUES

In this session, references to the necessity of involving the wider public in the process of reaching a negotiated settlement are left aside, since this issue will be dealt with in the next part of this report covering the final session of the consultation.

This session began with an exposition of the experiences with a variety of issues relevant to questions of autonomy, including the vexed questions of self-determination, secession, and options short of secession which had been dealt with, or faced by, a number of different states. These included experiences in India, Pakistan and Canada. The experiences of three states were considered in particular detail – those of Sri Lanka, Northern Ireland and Ethiopia.

2.1 Sri Lanka and Attempts to Devolve Power

Mr. Rohan Edrisinha, of the Centre for Policy Alternatives (CPA) gave a brief overview of the Sri Lankan experience with attempts to provide autonomy in response to the demands of the Tamil minority. These included the 1957 Bandaranaike-Chelvanayagam Pact and the 1965 Senanayake-Chelvanayagam Pact, each of which was withdrawn by the government in the face of significant opposition. The 1972 Constitution for the first time introduced a highly centralised majoritarian Constitution which labelled Sri Lanka a unitary state. The 1978 Constitution maintained such arrangements, and went further to introduce an executive presidency that would increase centralisation through the establishment of a hierarchic political culture.

In 1987, the first devolution arrangement was introduced under external pressure. The Provincial Council system enacted did not succeed in introducing a genuine devolution of power. Under the 13th Amendment, the Provinces did not completely exercise power in relation to any subject. Even apparently devolved subjects, such as local government were minimised by various limitations "to be determined by law." There was also an obnoxious provision stating that all national policy was to be decided by the central government. In addition, national schools and hospitals were to come under the control of the Centre. However, there were no criteria delineating which of these schools and hospitals were 'national.' Thus, there were fundamental flaws with the constitutional provisions in question, which were magnified by the lack of political will in launching devolution.

It was ironic that it was in the North and East of the country that the provincial councils system was not effectively established due to the military conflict. In other areas, people have not perceived any benefit from devolution.

In 1994, the People's Alliance came to power on a platform of constitutional reform directed towards safeguarding human rights and providing a solution to the ethnic conflict. Soon after, the government started a dialogue with the LTTE. However, the LTTE was reluctant to discuss these substantive matters until the government had started confidence building measures such as lifting of the embargo on the North and East. There were no discussions on constitutional reform and the LTTE warned the government against developing unilateral solutions to the conflict.

The government then released a set of devolution proposals, which were put into legal form in January 1996 and released to the public in Oct 1997. The opposition did not co-operate so as to give the government a 2/3 majority in Parliament. However, after the December 1999 elections, the UNP and the government have started a dialogue on these proposals.

Mr. Edrisinha noted that the October 1997 version had several positive features. It had the courage to delete the reference to a unitary state. In addition the lists of national and regional jurisdictions were drafted in a clearer manner. The concurrent list, which had been the source of much uncertainty under the 13th Amendment was abolished. However, there remain several features to which the Tamil parties are strongly opposed. These relate to national control over the allocation of land, national control of police, the appointment of the Regional governor by the President and the separation, if ratified by a referendum, of the Northern and Eastern Regions.

Mr. Edrisinha pointed to several other limitations in the October 1997 draft. The Constitution does not provide for power sharing at the Centre. There is no mechanism, such as provided in South Africa, where there is representation of the elected regional bodies in a Second Parliamentary Chamber. This is unfortunate as it is important that the voices of the minority groups are reflected at the Centre. Furthermore, there is no commission to deal with disputes relating to devolution. The current draft only provides for informal dispute resolution between the parties. Finally, the package has been rejected completely by the LTTE. The rejection of this proposal by an important party thus raises a question as to its viability.

Mr. Edrisinha then pointed to some alternative approaches to resolving the ethnic conflict, that would not involve a separate state. One option would be to set up a

confederation where the Sinhala and Tamil nations would join together as a confederation. It would also be possible to accommodate the Thimpu Principles within a single state. These principles, maintained by all the Tamil groups as necessary for a solution, include sensitive and controversial issues such as the recognition of the Tamils as a distinct nationality, a Tamil homeland in the North and East and self-determination for the Tamil peoples. Article 225 of the South African Constitution provides a model allowing for internal self-determination.

Mr. Edrisinha concluded on the point that Sri Lanka requires a solution far beyond what the political parties have proposed, including such options as asymmetrical devolution and power sharing at the Centre. One key issue would be whether a bar on any right to secession should be indicated in the Constitution.

2.2 Nationality and the Ethiopian Constitution

The next speaker was Professor James Paul, from the International Centre for Law in Development, who had been involved in the Ethiopian constitution-making process. He gave an account on ethnicity and the Ethiopian Constitution. Ethiopia was an entity created when the Amhara-Tigray kingdom annexed large areas of present-day Ethiopia and Eritrea in 1952. The Empire was extremely centralised and no space was given for the expression of different ethnicities. Resistance to the Empire and the Marxist regime which followed it, was based on ethno-linguistic grounds. In 1990, the Derg regime was defeated by a coalition of ethnically-based parties, led by the Tigrayan People's Liberation Front. This coalition established a de-facto one party state.

The Ethiopian Constitution was developed without any popular organised expression with regard to its contents. The political elites developed the Constitution in secrecy and then submitted it for ratification on take it or leave it basis. The justification for this action was the belief among the Constitution makers that they alone had the vision and capacity to carry out this task and that the alternative was anarchy. Professor Paul, however, pointed out that this lack of participation is a denial of the rights of the people. Their exclusion will also prevent the Ethiopian people from considering the law as a resource for their benefit.

On the topic of human rights, Professor Paul stated that one must consider the context of the country and the process by which one can provide for their realisation. Human rights can and should be tied up with human development, in the economic, cultural and social sphere. This would give people a stake in the constitution and the impetus

for participation. It is, therefore, necessary to provide mechanisms for the implementation of socio-economic rights.

On the topic of autonomy, the Preamble of the Ethiopian Constitution refers not to the people of Ethiopia, but rather to the nationalities which make up the population of Ethiopia. The Constitution provides that every ethnic group is a political unit and is entitled to secede if certain procedures are followed. However, Professor Paul indicated that there are some problems with this formulation. It is not clear that all ethnic groups are separate corporate units. For example, Somali-speaking groups are very clan-oriented. There has not been very much debate on this issue and it is questionable if the Ethiopian Constitution can endure if its implications are not understood by the people.

2.3 Northern Ireland - The Sunningdale and Good Friday Agreements

Professor Fraser of the University of Ulster, presented an overview of ethnic conflict in Northern Ireland and the Good Friday Agreement. The seeds of the conflict began in 1920 when, in the name of self-determination for Protestants, Britain retained control over North Ireland. This action was a crude manner in which to resolve the clash of identities between Protestants and Catholics, in that while granting self-determination to Protestants, it denied that same right to Catholics. The latter group formed 34% of the population of Northern Ireland at the time, a proportion that has since increased to 43% of the total. Catholics were too small a group to effectively compete for political power. Due to the entrenched division between the two groups, one Unionist party remained in power in the province between 1922 and 1972. Unionists, therefore, never had to seriously question their political ideology.

Catholic groups were effectively discriminated against under this arrangement. They had three options, to work within the system, to exit the political sphere or to engage in violence. From 1969 onwards, street violence between the two groups occurred, prompting the British to deploy its army. The Provisional IRA was formed to defend Catholic areas and Unionists set up their own militias, leading to a civil war between the two groups.

In 1973, the Sunningdale Agreement attempted to achieve a solution, in which the province would remain within the United Kingdom as long as the majority of the population wanted this arrangement, but where there would be executive links with the Irish Republic. This was consistent with the demands of most Unionist parties and of the Catholic SDLP. However, the agreement failed. It omitted key players

such as the IRA and the ULP. John Faulkner - the main Unionist leader - was seen to have moved too far from the grassroots of his party and to have neglected the core Unionist requirements.

The early stirrings of a political solution came with the election, on a Sinn Fein ticket, of Bobby Sands, while on a hunger strike that led to his death. This gave a political opening for the Sinn Fein. In the 1990's, Britain began contact with Sinn Fein with a view to holding negotiations based on an IRA cease-fire. Britain declared that it was for the people of Ireland alone, by agreement to bring about a united Ireland if they so wished. This addressed the basic republican demand, contingent on the consent of the majority.

The peace process failed in 1996, but was restarted in July 1997. In April 1998, the Good Friday Agreement was developed. This recognised that a substantial section of the population wanted a united Ireland, but that the present wish of the Northern Ireland people was to preserve a union with Britain. This had the advantage that the Unionists retained their preference, but the Republicans could present this as a transitional stage towards a future united Ireland. Concerns for Catholic representation was dealt with by a parliamentary system that required a vote of at least 40% of both Unionists and Republicans on key issues, in order for a decision to be valid. In addition, two executive councils were set up to give effect to the aspirations of Unionists and Republicans. One council comprised representatives of the Irish Republic and Northern Ireland and the other of representatives of Britain and Northern Ireland.

Various other issues had to be dealt with. These included the issue of prisoners and Catholic representation in the police force, 92% of whom were Protestant. Decommissioning was a significant challenge given that it was the parties who had signed the agreement and not the armed groups.

Gaining the acceptance of political formations was difficult. Only a thin majority of Unionists accepted the Good Friday Agreement. Unionist dissent was mainly based on the IRA's maintenance of an arms arsenal as well as plans to modify the police force, so that 50% of its members would be Catholic and to change its insignia. An executive was formed on the understanding that arms would be decommissioned.

The Executive was suspended by Britain following disagreement on this issue. However, in May, the IRA offered to put its arms "verifiably beyond use" and to

allow inspections of the storage areas by international inspectors. This was accepted by David Trimble, the Unionist leader, and by 53% of the Unionist leadership.

Professor Fraser concluded with the point that for the agreement to succeed, each side had to make historic compromises. If either side was seen to be winning too much, a backlash was the forgone conclusion. As had been the case in arriving at an agreement, the devil remains in the details. However, the broader context in Northern Ireland offers hope.

2.4 Discussion: Regional Autonomy within Sri Lanka

The discussion was then open for comments, which related primarily to the resolution of the conflict in Sri Lanka.

There was agreement that an extremely important question was on which parties should be privy to discussions on constitutional reform. Mr. Edrisinha stated that it was necessary to involve the LTTE in negotiations. An agreement without the LTTE would not be sufficient to bring about a peace. With the assurance that devolution would lead to peace, the Sinhala public would probably be more flexible in the terms they would be prepared to accept than has been the case until now. There may be a willingness, hitherto unexplored, to accept a more expansive form of internal self-determination for Tamils in the North and East. This would apply especially to less popular proposals that would involve asymmetrical federalism.

Mr. Sampanthan, the Secretary-General of the Tamil United Liberation Front (TULF), argued that prior to such a process, the leaders of the two main Sinhala-based parties, the People's Alliance and the United National Party, must arrive at an agreement to enact meaningful constitutional reform to meet Tamil aspirations. The history of such efforts has always involved the problem of the two main parties representing Sinhala groups, being unable to come to agreement on the reform process. Generally, when one party has tried to bring reform, the other party has obstructed or not contributed to such a process. Each party has taken the short-term political view that the achievement of a settlement would prove an advantage to the governing party and, therefore, must be destroyed. Until the two parties are agreed on meaningful and viable devolution, which has the real commitment of both parties, the LTTE will be justified in claiming that they cannot trust the government and should not engage in negotiations.

Mr. Sampanthan indicated that it was therefore necessary for the PA and the UNP to enact meaningful devolution so as to create a political challenge to the LTTE. However, he noted that the present situation was not positive. Ever since the proposals had been put on the table in August 1995, Tamil leaders, including Dr. Tiruchelvam, had been able to fine-tune the proposals. However, since then, such proposals had been whittled down. Therefore, history will repeat itself and the Tamil people will once again feel that their interests had been betrayed. This defect has given the LTTE an opportunity to escape the political process.

Professor Paul indicated that it was important to ask what the substantive content of an autonomy package involves and whether autonomy will lead to a more just society and give people meaningful control over their lives. Even though the Ethiopian Constitution recognises the country as a collection of nationalities, the central government continues to have the lion's share of power. It has command of taxation, commerce, economic development plans, education, civil rights, full powers in cases of emergency, criminal law and mining.

At this point, it was pointed out by Mr. Lawrence of the Up-Country People's Front (UPF), that any overall constitutional reform should take into account the interests of the Up-Country Tamils. He indicated that the autonomy package developed for the North and East would be of great use to the regions inhabited by this community.

A further angle brought out during the discussions was the implementation of devolution on a symmetrical approach to devolution to all regions in the country. Mr. Sampanthan said that the Sinhala people have not asked for devolution and have been content with rule by the Centre, whereas to Tamils, substantial devolution of power from the central government is a *sine qua non* of any agreement to remain within the present state boundaries. It may well be that an asymmetric devolution package would be preferable.

It was pointed out that an asymmetrical approach to devolution is being tried elsewhere, for instance in the United Kingdom, where very different structures have been set up in the systems established for the devolution of power to Scotland, Wales and Northern Ireland. Professor Toope, however, referred to the Canadian example where there has been much popular opposition to allowing asymmetrical federalism and the recognition of a distinct identity for Quebec, but that such measures were broadly considered as acceptable when applying to Canada's aboriginal peoples. It was recommended by most delegates that the possibility for asymmetrical devolution should be explored in the context of the Sri Lankan situation.

Professor Toope noted that there is a considerable amount of fear about secession following the granting of self-determination to the Tamil peoples, as demanded in the Thimpu Principles. It is necessary to raise the question as to whether some form of internal self-determination could be provided. The distinction between secession and internal self-determination is becoming increasingly accepted in international law. Justice Bhagwati referred to the Vienna Conference on Human Rights and its Plan of Action which clearly indicated that the right to self-determination in Article 1 of both the ICCPR and ICESCR does not provide a right to secession.

Professor Paul responded to questions as to how the right to secession had been included in the Ethiopian Constitution. He put forward two views for this unique provision. The benign view is that at the end of the dictatorship, the country had effectively fallen to pieces and that the only way to bring it together was to take a peace treaty approach to state consolidation. The cynical view was that the groups which defeated the dictatorship were led by the Tigrayan Peoples Liberation Front, which can claim to represent, at a maximum, only 10% of the population. In order to safeguard their new dominance, and to break the traditional hold on the country by Amhara elites, it was necessary for them to undermine the homogeneity of the country and divide it on national lines.

Mr. Edrisinha suggested that the whole system of devolution may well work more satisfactorily if a form of power-sharing arrangement was established at the Centre, perhaps by an additional legislative chamber. This help the regions to maintain greater contact and commitment to the country as a whole, as well as to protect devolution.

Mr. Salman Rajah raised the issue of sub-regional devolution. He said that in order for devolution to work, it should be taken by delegation not only to the level of regional councils, but also to the grassroots of society. It was necessary to involve the people at these levels also, and not leave all the arrangements to politicians and experts drafting a legal text in "smoke-filled rooms." Sub-regional devolution, it was suggested, would enable ordinary people to have an input into the system, and to involve themselves directly where the issues of the constitution in fact impact on their lives. Hence, sub-regional devolution was recommended as another issue which should be taken on board as the negotiations continue. However, it is worth noting that successive Pakistani military governments have promoted this form of devolution for the cynical reason that it was easier for them to dominate smaller units. Professor Toope added that while sub-regional devolution is crucial to reach the grassroots, regional devolution should not be ignored as it is required for the purposes of

recognising group identities. Thus both regional and sub-regional devolution are important.

On the issue of the measures facilitating an overall peace, the experience in South Africa and, currently in Northern Ireland, has been that in order for belligerents to seriously entertain the giving up of their weapons, and in order for them to take a constructive part in negotiations, there must first be a clear and definite structure in place, within which negotiations can be realistically conducted.

In South Africa the Constitutional Assembly elected in 1994 had a clear mandate to work on a new constitutional text, and hence the disarmament, negotiations and drafting took place against that background. In Northern Ireland, the British and the Irish governments, and the major British and Irish political parties have been firm in their agreement and support for a negotiated settlement. This commitment has provided a structure within which the different view points, often ferocious in nature, can be expressed.

Professor Tissa Vitarana of the National Peace Council, pointed out that the militant Republican movement had a political wing, Sinn Fein, and a military wing, the IRA. This fact helped ensure that the IRA was represented indirectly in the negotiations. This factor is not present in Sri Lanka as the LTTE does not have a political wing that can easily engage the other mainstream parties. Nimalka Fernando, from the Movement for Inter-Racial Justice and Equality (MIRJE), argued that constitution-making can only constitute one aspect of an overall peace. One cannot have an effective discussion on power-sharing if the requisite confidence-building environment is not put in place. In order to have a genuine resolution of the conflict, this process must be simultaneous to constitutional efforts. Professor Fraser added on this issue that an important confidence building measure was the success of the Americans in ensuring that they became acceptable to both parties as an even-handed mediator.

With regard to decommissioning of arms, it was noted that this had been a crucial element of the Good Friday Agreement. Professor Fraser said that this controversy over this issue reflected the fears of the majority and minority communities. In the negotiations, decommissioning moved from being a precondition to a post facto condition whereby the political movements agreed to use their influence to convince the military wings to decommission their arms. Mr. Ebrahim noted that, over the last 50 years, belligerents have been very reluctant to give up arms unilaterally.

Disarmament only took place in South Africa once a set of agreements were in place. It is therefore important to be realistic in claims for decommissioning.

2.5 Key Recommendations:

- **The current constitutional process must result in a devolution that is substantial and which meaningfully addresses the aspirations of all minority groups.**
- **The option of asymmetrical federalism for the Tamil minority should be explored.**
- **Confidence building measures and an agreed framework for negotiations should accompany the constitutional reform process, so as to institute negotiations involving all parties and to set in motion a process of decommissioning.**
- **An attempt should be made to grant self-determination to minority communities within the framework of a united Sri Lanka.**
- **Power-sharing for the regions at the Centre should be instituted so as to protect devolution and safeguard national unity.**

SESSION III: ENHANCING PUBLIC PARTICIPATION IN THE CONSTITUTION-MAKING PROCESS

In this session the discussion moved its focus to the necessity of engaging public participation in the process of constitution making. This was agreed to be essential if the resulting document is to command the allegiance of the people for whose governance it has been drafted.

3.1 India's Contemporary Constitution-Making Process

Maja Daruwala, the Director of the Commonwealth Human Right Initiative, referred to the current process of constitutional reform in India. She stated that there are very significant deficiencies in this process. The body constituted to oversee the process has been exclusive, comprising former politicians and legal experts, with little representation of the broader public and which lacks an adequate gender balance.

There has been no attempt to engage the public in this process at the widest possible level. Instead, the body overseeing the process has understood the term 'public' to mean a wider body of experts. The work on constitutional reform has been sub-contracted out to think-tanks and other research bodies, without any clear criteria for

selection. There has been no attempt to engage other civil society groups such as developmental groups. Advertisements for submissions by the public have been written in a manner which is inaccessible. In addition, the commission has failed to use the most obvious and effective mechanism to reach out to people, that being the panchayat (village council) structure.

Ms. Daruwala added that one explanation for this failure to consult the public is the feeling among constitutional experts that the ordinary person has nothing to teach them about such complex issues as centre-state relations. However, while it was true that the public, for the most part, was not aware of the intricacies of the Constitution, its experience with the organs of government gives it the knowledge base to make well-informed recommendations as to how the government should operate. In addition, civil society organisations in India have shown a strong level of sophistication and knowledge of constitutional processes. The dalit and women's movements have gone so far as to make representations to various UN treaty bodies. The Indian dalit movement successfully lobbied for the consideration of caste-based discrimination by the United Nations Committee on Racial Discrimination. Ms. Daruwala added that public participation would improve the substance of the Constitution, particularly with regard to the protection of human rights. It would be unlikely that the decision not to ratify the UN Torture Convention, recently taken by the conference of Chief Ministers, would have been approved by the public.

3.2 Public Participation and the South Africa Constitution.

The second speaker was Hassan Ebrahim, who had served as the Chief Executive Officer of the South Africa Constitutional Assembly. His presentation indicated that many of the issues raised by Ms. Daruwala had been satisfactorily resolved in the South African constitution-making process.

Mr. Ebrahim commenced by stating that a constitution should not be drafted in very technical legal language, but rather that it should be a "basic document" understandable by ordinary people. A constitution is much more than a text setting out legal rules; it is a "window to the soul of a nation", a reflection of where the society is, where it has come from and where it wishes to go. In addition, the Constitution, by its very nature, refers to how a people will interact with the rest of the world. While the document is, of course, representative of the concerns of the majority in its society, a constitution is nothing if it does not also take into account the fears and concerns of minorities, and reflects the compromises, tensions and

difficulties inherent in the fabric of that society. It sets forth the aspirations and values of the whole populace.

Mr. Ebrahim pointed out that one should be wary of having a foreign constitutional model foisted upon a state. Constitutions will differ depending on the social and political values in their respective societies. However, different countries can still share their constitutional experiences, to their mutual benefit. Furthermore, it is extremely important that a Constitution is not produced by experts and politicians sitting away from the hurly-burly of society in secluded "smoke-filled rooms." The Constitution, given its relevance to all sectors of society, should also be discussed and developed in villages and informal settlement areas. In order to command respect and ownership by the people of a state, a constitution must be made with the full awareness of, and consultation of, the ordinary people. This was carried out in the South African constitution-making process, bringing about a situation in which people from all sides in that divided society found themselves working together for a common aim. Even though many South Africans may question certain aspects of the provisions of the Constitution, the respect and legitimacy with which it is regarded was never in question.

After years of violence, people in South Africa were not prepared to take the *bona fides* of the opposing side at face value. In South Africa the transparency with which the negotiations were conducted was seen as essential to re-establish trust in what until then had been a country in a state of war. Weapons were not decommissioned until the Constitutional Assembly was voted into place in May 1994, with the mandate to prepare a new constitution. At this point, it was broadly felt for the first time that South Africa now had a legitimate government.

The South African Constitutional Assembly was elected, with members chosen on the basis of the constitutional values they were seen to hold. While this bolstered the legitimacy of this body, it was felt that an election was not enough and that the people needed to be extensively consulted in this process. It was felt necessary to ensure that the Constitution was not just a bilateral agreement between the African National Congress (ANC) and the National Party (NP), the two main parties. Transparency and negotiations in public were required in order to remove the sense of suspicion felt by the populace towards politicians.

In the process of taking submissions, it was extremely important to show that the Constitutional Assembly was open to the opinions expressed and that the decisions had not already been made. It was ensured that the panels which went to take

submissions included members of different parties and races and included members having opposing political viewpoints. The members of the Constitutional Assembly did not wait for the people to come to them, rather they actively engaged the populace. All forms of media were used, including television, radio and print as well as more unconventional means such as street theatre. A fortnightly newsletter was established with a circulation of 160,000. Market surveys were carried out to find out which groups were not being reached in this process.

The Assembly found that it had to make a special effort to target disadvantaged areas, particularly rural areas. In order to do this, extensive collaboration occurred with civil society organisations and educational and religious institutions. The panels went out to meet the people and listen to their views. Civil society had the crucial role of facilitating a lot of these meetings. This aspect was important in ensuring that the constitutional process was seen as independent and not a initiative of the government in power. However, it was found that mere openness to views was insufficient. The Assembly had to be pro-active and show the public, particularly the disadvantaged sectors of society, exactly how the constitution would be of relevance to them and how it would affect their basic needs such as land, health and similar issues. In many cases, various constitutional terms has no translations in local languages and the Commission had to create the necessary vocabulary. The bulk of the Commission's resources was spent on this process of education and empowerment.

At the end of the process, the Assembly had heard over 2 million submissions, which is very significant for a country with a population of 45 million people. Views were expressed on all kinds of issues, education facilities, employment, health, participation in local affairs, etc. Many of the submissions, including those by rural persons without any formal education, had been very articulate, having been based in tangible experience with the authorities. These views were taken into account by the Assembly. The Constitutional Assembly had been given only 18 months to carry out the process, and this was felt by the international community to be too short a time-frame. However, Mr. Ebrahim felt that the South African process had proven such reservations wrong.

There were criticisms that the entire process was merely a public relations exercise and at the end of the day, it would be up to the politicians to decide on how the Constitution would be framed. Mr. Ebrahim indicated that this point could be correct in that the public relations aspect had an intrinsic value. However, the impact of the process went much further than that and affected the substance of the Constitution. The sheer number of submissions forced politicians to sit up and take notice of these

views, and to realise that they could not devise the Constitution in secluded " smoke-filled rooms."

The negotiations became a matter of daily public debate, and were carried out in full public view. The discussions were televised, reported on the radio, published in the press, and after the conclusion of meetings the minutes were put on the internet. There was at least one article in the newspapers about the Constitution every day. The members of the Constitutional Assembly, on a continuing basis, went back to the countryside, to the proponents of the varied views and reported what had happened when the relevant topics were raised for negotiation.

Of course, not all views could be included in the final text, nor would this have been possible. However, the involvement of a large number of the people, and the manifest openness with which the views were heard and considered, ensured a vibrancy which caught the imagination, interest, and finally commitment, of the population. Mr. Ebrahim noted that some mistakes were made, most significant among them being the failure to sufficiently involve poor rural women. This should be taken note of in future constitution-making processes.

The text of the constitution was distributed in the form of a pocket-sized book, translated into 11 different languages, and millions of copies were printed, all of which were distributed. The first printing of 7 million copies was exhausted in the first few hours after its distribution. The consequence was that the text was accessible to people in many walks of life throughout the country, and meant they were able to discuss, in an informed manner, the relevance and meaning of the document and how it would impact on their lives and those of their neighbours. The delegates were told that recently Thailand also has produced a booklet containing its constitution in order to enable ordinary people to have access to it.

On the role of legal experts, Mr. Ebrahim stated that it was necessary to distinguish between constitution-making and constitution drafting. Constitution-making is a process that is the responsibility of all sectors of society and not just experts. Experts are indispensable as a sounding board for suggestions and can share experiences from other countries. However, one must be very careful to ensure that their technical expertise does not result in a 'diktat' for the country. In the same vein, there is a need to avoid legalese, including such words as 'whereas' and 'notwithstanding,' and to avoid making exactitude and perfect grammar the prime qualities of the constitution. It is similarly necessary for the text to capture non-traditional terms such as 'national unity' or 'ubuntu' (which roughly translates to 'people' and 'healing'), that reflect the

values of society. Similarly, with regard to political parties and civil society, it is necessary to be aware of their uses in reaching out to the public, but also of their disadvantages. Politicians are often restrictively guided by their political ideology, while civil society groups are often dedicated towards a specific issue-area.

Since constitutions are generally renewed after revolutionary periods, there is a need to express those changes in creating a new order. Politicians, political parties and constitutional experts are clearly very important. However, for any constitutional settlement to have real meaning it must have popular support, and in order to gain that support there must be involvement of society at large in the whole constitution-making process. After all, if a constitutional order is to succeed, ultimately it will have to be sold to the people for whom it sets forth a map of governance. If this is not done there will be no sense of allegiance to it. This may well have the consequence that it can be changed with impunity, along with loss of human rights protections, and the inclusion of draconian provisions, by one authoritarian dictatorship after another.

Mr. Ebrahim concluded on the point that since the values of a society change, it in necessary to allow for a continuous process of review. This is particularly required in the first few years after the passage of a new Constitution, where the order it establishes is in its early stages of its development.

3.3 Discussion: Public Participation in the Current Sri Lankan Process

The floor was then opened for comments. Among the issues brought up were the following:

On the Sri Lankan situation, Ms. Sunila Abeysekera, President of the Movement for Inter-Racial Justice and Equality (MIRJE), indicated that the early stages of the Sri Lankan process had shown a few similarities to that in South Africa. Civil society groups had catalysed a public debate on the Constitution and made representations to the Parliamentary Select Committee on Constitutional Reform. However, after the government released a proposed draft Constitution in October 1997, this process had been overtaken by the mainstream parties. The draft Constitution has been frequently amended without public notice.

Dr. Vigneswaram, of the Eelam People's Democratic Party, gave the opposite viewpoint, stating that Sri Lankan experience has shown that the best way to prevent the resolution of an issue is to bring the maximum number of people to the table. This had been done particularly at the All-Party Conference of 1983, which had ended with

no agreement. He argued that one reason for not being open about the process was the irresponsibility of the print media. Dr. Vigneswaram stated that in the current case, there is an opportunity to solve the conflict by constitutional reform and that this should be carried out through parliamentary means.

Most delegates disagreed with this position. Dr. Mario Gomez of the Law & Society Trust argued that the Sri Lankan government was repeating past mistakes. A consequence of the lack of openness was the deletion of social and economic rights from the draft constitution without any indication that the public was opposed to such rights. C.S. Dattatreya of the Trust indicated that a sense has crept in that the constitutional reform process is nothing more than a charade. The deletion of social and economic rights had not occurred after a process of discussion and simply because one of the parties involved in discussion had wanted to assert its weight in the formulation of the fundamental rights chapter.

Other delegates made the point that a referendum on the Constitution could not be equated to public participation in its formulation. The point was also made that the resolution of conflict by Constitutional reform requires trade-offs between the interests of ethnic groups. The public needs to engage in a discussion on such decisions if they are to feel that their interests have not been betrayed by their leaders.

Mr. Salman Raja, a Pakistani lawyer, stated that the Pakistani Constitution has been characterised by a lack of public ownership. At no point have the people of Pakistan been involved in the process of constitution making. Constitutions have simply been handed down by the regime in power. This has affected the credibility of the democratic process and undermined the principle of constitutional rule in Pakistan.

Professor Toope referred to the Canadian experience with constitutional reform. The Meech Lake Accord was developed as a result of backroom deals between politicians and easily failed. The second Charlottetown process seemed more open and public, with consultations facilitated by respected leaders. However, the perception of the public was that the major political parties were not listening to their representations and that a backroom deal was being 'sold' to the public. It failed the test of a referendum. Professor Toope then referred to the role of the media in constructing public experience during these processes. A common problem was that certain individuals were singled out as experts and held up as speaking for the people at large. The media did not realise that not all law professors are constitutional experts. There is a need for media training on this issue.

Mr. Ebrahim then responded to some of the issues raised. He emphasised that a Constitution cannot be manufactured. It represents a commitment by a society to structure itself in a certain manner. It is the commitment of the society to the document that matters rather than whether it is written in good language.

With regard to the South African experience, civil society was extremely useful in articulating the views of the public. However, such groups often did not report the results of their dialogue back to the public. Civil society participation is, therefore, not an adequate substitute for public participation.

One major criticism, which the Human Right Committee brought up before the Constitutional Court, was that civil society was excluded from the last stages of the process, where the most important elements were decided upon. This process mainly affected excluded groups. Mr. Ebrahim pointed out that it was useful for the very last stages to be decided in bilateral meetings behind closed doors and where deadlocks could be resolved. There was a tendency for politicians to grandstand when they were in public. However, it could not be conclusively said that this is the best method for constitution-making, as opposed to taking the package back to the public for further discussion. The decision can go either way, and only history can show whether that decision was correct.

A final point made by Mr. Ebrahim was on the relationship between constitutional reform and the ethnic conflict. It should be noted that a Constitution is not a panacea to solve all problems. However, it can make a significant process to the national reconciliation. In South Africa, the constitution-making process was cathartic and part of the healing process. Finally, it is helpful if it is made clear that some demands are not foreclosed upon, and that they can be addressed later. In the South African case, this was important in order to make the Constitution acceptable to autonomy-minded Zulu and Afrikaner groups. Constitution-making requires imagination and creativity. If the will and commitment is there, it can be done. The South African process was not perfect, women were not given a fair deal for example, but many aspects of the experience are useful for states such as Sri Lanka.

In concluding, Ms. Daruwala indicated that civil society cannot take the place of government in holding an effective consultative process as it cannot have the required legitimacy, but that it could pressure the government into carrying out such a process. She noted that the resources required for an effective process are a significant concern. However, from a cost-benefit analysis, such resources should be made available given that constitutional education and consultation are so closely linked to

the population's commitment to the constitutional order. She referred to the Fijian example where one of the better constitutions was suspended due to the actions of seven armed men. Ms. Daruwala said that no constitution can compensate for the lack of good faith by an actor. The only effective safeguard for a Constitution is to ensure that the people are genuinely consulted and are therefore committed to the Constitution.

3.4 Key Recommendations:

- **The Sri Lankan constitution-making process needs to be made more open and transparent. Full details of constitutional proposals and negotiations between the parties should be made public.**
- **The parties to the constitution-making process should set up a mechanism to effectively and accountably consult with all societal groups. To merely facilitate public discussion on the Constitution is insufficient. A constitution developed by elected politicians who have not consulted the public cannot be considered to represent of the people and will lack legitimacy.**
- **Civic education programmes are required in order to show the public how the Constitution will relate to their lives. This will empower the wider public to contribute to the process.**
- **The Constitution must be written in an accessible and easily understandable manner.**

List of Participants

International Participants

1. Justice P.N. Bhagwati	Former Chief Justice, Indian Supreme Court
2. Ms. Maja Daruwala	Director, Commonwealth Human Rights Initiative
3. Mr. Hassan Ebrahim	Former Chief Executive Officer, South African Constitutional Assembly
4. Professor Thomas Fraser	University of Ulster
5. Ms. Patricia Hyndman	Fellow, Wolfson College, Cambridge
6. Professor James Paul	International Centre for Law in Development, New York
7. Mr. Salman Akram Raja	Lawyer, Pakistan.
8. Professor Stephen Toope	McGill University, Montreal.

Sri Lankan Participants

1. Professor G.L. Peiris,	Minister for Justice, Constitutional Affairs, Ethnic Affairs and National Integration
2. Ms. Sunila Abeysekara	President, Movement for Inter-Racial Justice and Equality
3. Mr. T. Baskaran	Amudhu Editorial/ANCL
4. Ms. Radhika Coomaraswamy	UN Special Rapporteur on Violence against Women, Director, International Centre for Ethnic Studies
5. Mr. Vasuki Devadas	Movement for Inter-Racial Justice and Equality
6. Mr. Douglas Devananda, MP	Eelam People's Democratic Party (EPDP)
7. Mr. Rohan Edrisinha	Centre for Policy Alternatives, Faculty of Law, University of Colombo
8. Ms. Nimalka Fernando	President IMADR, Movement for Inter-Racial Justice and Equality
9. Mr. Kesaralal Gunasekera, MP	Democratic United National Front – Lalith Front
10. Mr. Alan Keenan	Researcher, International Centre For Ethnic Studies
11. Ms. Manouri Muttettuwegama	Human Rights Commission

12. Mr. Nishan Muthukrishna	Co-ordinating Officer, Ministry of Justice, Constitutional Affairs, Ethnic Affairs and National Integration
13. Mr. Lynn Ockersz	Journalist
14. Mr. Jehan Perera	National Peace Council
15. Ms. Kishali Pinto-Jayawardene	Journalist & Attorney-at-Law
16. Mr. Mahinda Samarasinghe, MP	United National Party
17. Mr. R. Sampanthan, MP	General Secretary, Tamil United Liberation Front (TULF)
18. Dr. Paikiasothy Saravanamuttu	Centre for Policy Alternatives
19. Mr. M. Sivalingam	General-Secretary, Upcountry People's Front
20. Dr. Deepika Udagama	Civil Rights Movement & Faculty of Law, University of Colombo
21. Professor Tissa Vitarana	National Peace Council
22. Dr. Vigneswaran	Eelam People's Democratic Party (EPDP)
23. Mr. Bradman Weerakoon	Centre for Policy Alternatives
24. Dr. Jayampathy Wikramaratne	Consultant, Ministry of Justice, Constitutional Affairs, Ethnic Affairs and National Integration
25. Ms. Suriya Wickremesinghe	Secretary, Civil Rights Movement

Law & Society Trust Participants

1. Dr. Sumudu Atapattu	Consultant
2. Mr. C.S. Dattatreya	Researcher
3. Dr. Mario Gomez	Consultant
4. Mr. M.C.M. Iqbal	Consultant
5. Mr. Ashfaq Khalfan	Intern
6. Ms. Ramani Muttetuwegama	Consultant
7. Mr. Rukshana Nanayakkara	Researcher
8. Mr. Madhuranga Ratnayake	Intern
9. Ms. Damaris Wickremasekera	Administrator
10. Ms. Pubudini Wickremaratne	Intern

JOINT STATEMENT ON PRIORITY AREAS OF CONCERN REGARDING THE DRAFT CONSTITUTION AND FUNDAMENTAL RIGHTS*

A consensus has been reached between the People's Alliance and the United National Party on several key provisions of the draft constitution. This achievement could be a key step towards effectively addressing the issues underlying the current conflict in Sri Lanka provided that it is acceptable to minority parties. Progress towards a consensus between the PA, the UNP and other political parties, including those representing ethnic minorities will be of paramount importance.

A coalition of civil society organisations and groups[1] has welcomed the consensus-building process between the People's Alliance and the United National Party. However there is widespread concern regarding the lack of transparency and openness in the constitution- making process. Furthermore the draft Constitution presented by the government in October 1997 and adapted in its discussions with the UNP has significant deficiencies relating to fundamental rights.

If the proposed Constitution is successfully passed it may remain in place for a number of years. Therefore the coalition of civil society groups stress that it is extremely important that this opportunity to strengthen the protection of human rights in Sri Lanka is not wasted. In addition, it is important to recognise the need for strong fundamental rights provisions to help resolve the conflict and reduce tensions over the long-term.

The final stages of the Constitution-making process are occurring behind closed doors. This lack of transparency and public participation has denied citizens the opportunity to learn about the current state of the draft Constitution and to register their concerns with their representatives. People's participation in the Constitution

*This is the lobby document developed by civil society groups meeting in the month of July 2000. This document is based on the October 1997 draft Constitution. The final version was based on a meeting of civil society groups on the 18th of July at Sasakawa Hall. It included the comments of these groups to the results of the PA-UNP dialogue, reflected in a series of minutes of these meetings. A media conference was held the next day to present the document. All the concerns contained here remain with regard to the draft constitutional reforms bill, presented by the government on 3 August 2000, with the exception of the provisions relating to citizenship, which has been satisfactorily resolved.

[1]Groups that have been involved in this series of discussions and whose proposals are reflected in this document include the Law & Society Trust, the Centre for Policy Alternatives, Institute for Human Rights, Marga Institute, PAFFREL, PEACE, Human Rights Centre - BASL, Lawyers for Human Rights and Development, Forum for Human Dignity, Civil Rights Movement, and the Movement for the Defence of Democratic Rights.

making process is integral because a Constitution determines the relationship between the People and their government and sets out the fundamental values that govern society. Therefore it is necessary for the government to promote extensive public participation in its creation. It is important that the government and UNP provides access to details regarding the review process of the last six months and facilitate widespread public discussion on the draft constitution.

Civil society groups have been commenting on the proposed Constitution and collecting the views of the public since the Parliamentary Select Committee began considering the matter in September 1994. Most of these recommendations have been ignored. The proposals below indicate the provisions that must be included in the draft Constitution as a matter of priority.

Priority Areas of Concern

- The Supremacy of the Constitution over all Laws.
- Time Limits on Fundamental Rights Litigation
- The Retention of Economic, Social and Cultural Rights
- The Inclusion of International Human Rights
- Violations by Private Persons
- Discrimination against the Aged and Disabled
- Representations of the Regions at the Centre
- Independence of the Judiciary
- Retention of Right to Written Reasons of Arrest and Protection from Excessive Bail
- Safeguards for the Protection of Minority Rights
- Retention of Public Interest Litigation
- Retention of Provisions Granting Citizenship to Stateless Resident.

1. The Supremacy of the Constitution over all Laws.

The draft Constitution states that existing laws are valid even if they violate provisions in the Constitution. This clause undermines the principle of the supremacy of the Constitution - which is the widely accepted norm in constitutional democracies. If the Constitution is to be the supreme law of the land, courts should have the power to strike down all laws that violate the Constitution.

The October 1997 draft Constitution permits a fundamental rights challenge to a law only within the two years after it has been passed, which is inadequate. Two years is not enough time for the implications of a law to become clear, particularly since it takes up to a year for a law to be implemented.

The PA and the UNP have reportedly agreed that where the Supreme Court has decided on the constitutionality of a provision before it is enacted, the same provision cannot be challenged on the same ground. This stipulation should be removed. A Court should be able to declare a law invalid when new facts come before a Court which indicate that a law has the effect of violating a fundamental right.

2. Time Limits on Fundamental Rights Litigation.

In addition, a person who alleges the infringement of a fundamental or language right has only three months after this event to apply for relief. This time limitation should be removed. This is required as many victims of violations cannot apply for relief due to resource limitations, fear, lack of legal knowledge or lack of necessary information regarding the case

3. The Strengthening of Economic and Social Rights.

Economic and social rights were included in a limited form in the October 1997 draft Constitution. It has been revealed that they were removed during the consultations between the PA and UNP, but have again been included. Uncertainty over such a fundamental issue is worrisome. In a developing country like Sri Lanka, such rights are of paramount importance to the public. They include a number of rights that specially affecting women and children. Economic and social rights must be retained and made comprehensive. This will implement Sri Lanka's international obligations under the International Covenant on

Economic, Social and Cultural Rights (ICESCR). Several developing countries, including South Africa, Thailand, Namibia, Ethiopia, Ghana and Nepal, that have re-written their constitutions in the last decade have included a wide range of justiciable economic and social rights. For Sri Lanka to reject or downgrade this emerging norm would be abdicate its place among the forward-looking developing nations.

4. The Inclusion of International Human Rights

The Constitution must be interpreted in accordance with Sri Lanka's obligations under international human rights law. This would include some of the treaties that Sri Lanka has ratified such as the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, among many others. This would enhance the range of human rights protections accorded to Sri Lankans. There should be a specific provision mandating a court to consider international law in fundamental right cases.

5. Violations by Private Persons and the Judiciary

Remedies for violations of fundamental rights are currently available only against the State. Private actors should also be made accountable for violations of fundamental rights. In addition, there should be a remedy for persons whose rights are violated by judicial action in bad faith.

6. Discrimination against the Aged and Disabled

The Constitution must include protection against discrimination on the grounds of age and mental and physical disability. The equality provision should not be restricted to the specified grounds and should be made open-ended.

7. Representation of the Regions at the Centre

As a fundamental principle, there must be political representation of the regions within the central government. This will help protect the devolution of power and to articulate regional concerns at the Centre. It will also promote national unity and help ensure that the regions feel part of the whole. Regional representation will help ensure minority rights by acting as a further safeguard against the discrimination of minority groups.

8. Independence of the Judiciary

In order to ensure that fundamental rights are implemented in an impartial manner, faithful to the spirit and purpose of the Constitution, it is proposed that there should be some checks and balances in the appointment of senior judges. The President should require the approval of the Constitutional Council in appointing the Chief Justice. This will create a need for greater consensus over the appointment to this position.

The judges of the Supreme Court, who have the final say on fundamental rights cases, and the judges of the Court of Appeal should be appointed by the President in consultation with the Chief Justice. This will ensure that appointments are not only in the hands of one person and to ensure that the candidates' relevant judicial experience is taken into account.

9. Retention of Right to Written Reasons of Arrest and Protection from Excessive Bail

It is reported that the PA and UNP have amended the October 1997 draft constitution to remove the right of an arrested person to receive written reasons, upon request, for the arrest. This right must be retained as a means of promoting greater accountability by police forces and to ensure that evidence of the stated reasons for the arrest is preserved. In addition, the provision that stated that no bail will be excessive must be retained. This will ensure that a court is required to make realistic decisions on bail amounts and thereby prevent unnecessary incarceration.

10. Safeguards for the Protection of Minority Rights

The Interim Council in the Northern and Eastern Regions will include special protections for minorities within that region. The government should clarify whether these rights will be retained after the period of the Interim Council. It should also consider applying these safeguards to other regions of the country, particularly where there are large numbers of minorities.

11. Retention of Public Interest Litigation

The PA-UNP consensus has reportedly restricted the use of public interest litigation only with regard to group rights. This limitation should be removed. It is

not clear exactly what constitutes group rights under the draft constitution. Furthermore, public interest litigation is intended to ensure that fundamental rights are guaranteed to persons who are not able to go to court, for reasons such as lack of resources, fear or other impediment. To undermine this right is to restrict the protection of the Fundamental Rights chapter to some groups of society.

12. Retention of Provisions Granting Citizenship to Stateless Residents

The October 1997 constitution stated that all stateless persons who were resident in Sri Lanka since October 1964, or who are descended from such a person will be granted citizenship. This provision has reportedly been deleted. This action must be reversed. Denial of citizenship to many Up-country Tamils will result in a denial of many fundamental rights. This is particularly important given this group's economically marginalised position. One must further note that the position of public international law on nationality would require the grant of citizenship to historically resident and stateless up-country Tamils.

The full text of the proposed priority changes are listed below in Annex I, in the form of proposed amendments to selected sections of the October 1997 draft, together with explanations. Annex II lists clauses on Economic, Social and Cultural rights that appear in the Constitutions of South Africa, Thailand, Namibia and Ethiopia. These provisions should be considered for inclusion in the draft Constitution.

ANNEX 1:
PROPOSED PRIORITY CHANGES TO THE DRAFT CONSTITUTION

Freedom From Arbitrary Arrest, Detention and Punishment and Prohibition of Retroactive Penal Legislation, &C.

(10) (3) (b) ***Any person arrested, if the person so requests, shall at the time of the arrest be informed in writing of the reasons for the arrest within a reasonable time.***

Explanation: This right was provided for in the October 1997 draft and has been reportedly removed by the PA-UNP proposals. The grounds given were that this may cause a practical problem and the Criminal Procedure Code

should be amended to provide for the issue of "B" reports to suspects. The alternative legislation will be welcome, but is not sufficient given that there often is a time lag in the issuance of such reports. The right to written reasons is important to retain as a means of promoting greater accountability by police forces and to ensure that evidence of the stated reasons for the arrest is preserved.

(10) (7) (b) ***The amount 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.***

Explanation: This right has been removed from the draft constitution by the PA-UNP proposals. It should be retained to ensure that a court is required to make realistic decisions on bail amounts and thereby prevent unnecessary incarceration. The stated reason for withdrawing this provision was that a person has a right to move the Court of Appeal by revision. However, this argument ignores the fact that to move to the Court of Appeal is itself a costly endeavor and is not therefore a sufficient alternative.

(10) (16) ***All persons deprived of their liberty will be treated humanely and with respect for the inherent dignity of the human person.***

Explanation: This right has been removed from the October 1997 draft by the PA-UNP proposals. The ground for this removal is that the content of this right is covered in Article 9(1) which provides that "A person shall not be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Article 10(16) is different in that it refers to the inherent dignity of the person. The existence of 10(16) will also serve to reinforce the observance of Article 9(1) within the context of incarceration, particularly with regard to judicial interpretation as to acceptable levels of force used.

Right to Equality

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

(a) Subject to sub-paragraphs (b) and (c) of this paragraph, a citizen shall not be discriminated against on the grounds, ***including, but not limited to,*** ethnicity, religion, language, caste, gender, sex, political or other opinion, national or social origin, place of birth, mode of acquisition of citizenship, marital status,

maternity, parental status, ***age, physical or mental disability*** or any one of such grounds,

Explanation: It is necessary to include age and disability as grounds for protection from unreasonable discrimination. It is also necessary to keep this provision open-ended for other grounds of discrimination.

(b) ***No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of sub-paragraph 2(a). National legislation must be enacted to prevent or prohibit unfair discrimination and provide for measures that will enable equal opportunity in the workplace, including the right to maternity leave with full pay.***

Explanation: This new clause is required to extend the protection of the Fundamental Rights Chapter to the private sphere. It is preferable to mandate the state to legislate against discrimination in this manner, rather than to rely on private parties to bring all discriminatory laws before the courts. This new clause draws on Article 9 of the South African Constitution. The removal of discrimination will also require corollary measures, such as maternity leave as mentioned above. This right is indicated in Article 35(5) of the Ethiopian Constitution.

Special Rights of Children

22 (2) Every child has the right –

(a) to family care or parental care or to appropriate alternative care when removed from the family environment; and

(b) to basic nutrition, shelter, basic health care services and social services.

(3) The State shall take ***all*** reasonable legislative and other measures ***to the maximum of its*** available resources with a view to achieving the progressive realisation of the rights guaranteed by paragraph (2).

Explanation: This provision should be amended to follows the less ambiguous wording of Article 2(1) of the *ICESCR*. This wording will render the state more accountable for failing to implement programmes that are

manifestly necessary for the realisation of these rights and for budgetary spending that is indisputably inconsistent with their realisation.

(6) Every child between the ages of five and ***eighteen*** years shall be provided access to free education provided by the State. ***Education between the ages of five and fourteen shall be compulsory for all.***

Explanation: The age for which education is to be provided free is proposed to be increased to eighteen years from fourteen. This provision follows Article 13 of the *ICESCR*. The requirement for compulsory education will help ensure that children are not prevented from receiving basic education due to political, economic or cultural obstacles. The provision of compulsory primary education is a state obligation provided for in Article 13 of the *ICESCR*. It is also included in Article 20 of the Namibian Constitution.

(7) A child shall not be employed ***when under the age of fourteen or*** in ***work which is economically exploitative, is likely to be hazardous or is likely to interfere with the child's education, safety, health or its physical, mental, spiritual, moral or social development.***

Explanation: This phrase replaces the prohibition on work that is 'hazardous' by specifying clearly the criteria for restricting the use of child labour. It recognises the need to ensure that employment does not undermine the most basic rights of the child. It further recognises the right of working children to a fair wage, given their extremely vulnerable position in the workplace. This amended provision follows Article 32 of the *Convention on the Rights of the Child* and Article 3 of the ILO Convention No.182 on the Elimination of the Worst Forms of Child Labour. It is similar to provisions in the Constitutions of South Africa, Namibia and Ethiopia.

Right to safe, just and fair conditions of work.

24(1) Every person has the right to safe, ***just and fair*** conditions of work.

Explanation: This amendment recognizes that labour rights go beyond safety. They include protection from exploitation and over-work and ensure reasonable limitation of working hours, ensure remuneration for public holidays and equal pay for equal work. The right to fair labour practices is recognised in Article 23 of the South African Constitution is set out in detail in

Article 7 of the *ICESCR* and Article 42 of the Ethiopian Constitution. Given that this right is subject to progressive realisation, to exclude just and fair conditions of work is to reject the most minimal of labour rights.

(2) The State shall take ***all*** reasonable legislative and other measures ***to the maximum*** of its available resources with a view to achieving the progressive realisation of the rights guaranteed by paragraph (1).

Explanation: Refer to explanation for Article 23(3) (Children's rights).

Social Rights

25(1) ***Every citizen has the right to -***

Explanation: The phrase 'the right to have access to' should be removed as it leads to ambiguity, especially by using wording that is inconsistent with Sri Lanka's obligations under the *International Covenant on Economic, Social and Cultural Rights (ICESCR).*

(a) ***the highest attainable standard of physical or mental health;***

Explanation: The previous version simply refers to the right to health services and the right to emergency medical treatment. The proposed version above draws on Article 12 of the *ICESCR*, which requires that the quality of services provided is proportionate to resources available.

Emergency medical treatment, not subject to progressive realisation, should be included under the right to life in Article 8.

(b) ***an adequate standard of living, including adequate food and water, clothing and housing, and the fundamental right to be free from hunger;***

Explanation: The previous version mentioned only food and water. This revised version, drawing on Article 11 of the *ICESCR,* includes clothing and housing as basic rights. It gives special priority to the right to food.

(c) ***to social security, including social insurance***

Explanation: The previous right to 'appropriate social assistance' is inadequate and vague. The proposed version makes this right clearer, and draws on Article 9 of the ICESCR. It provides a constitutional basis for ensuring that programmes such as the Samurdhi scheme are protected from arbitrary denial by any administrative body and that the assistance is provided to the most needy citizens as a matter of right. The right to social assistance/social services is included in the Constitutions of South Africa (Article 27) and Ethiopia (Article 41).

(2) ***The State shall allocate resources to provide social assistance to the aged, the physically or mental disabled and to children who are left without a parent or guardian, where such persons have insufficient income.***

Explanation: This clause is intended to ensure that appropriate provision is made for the aged, the orphaned and the disabled. This recognises the interpretation provided by the Committee overseeing the *ICESCR* stating that where resources are limited, the State should ensure that provision is made for the most vulnerable persons within society[1]. This clause is adapted from Articles 54 and 55 of the Thai Constitution and Articles 41(5) of the Ethiopian Constitution.

(3) The State shall take ***all*** reasonable legislative and other measures ***to the maximum of its*** available resources with a view to achieving the progressive realisation of the rights guaranteed by paragraphs (1) ***and (2).***

Explanation: Refer to explanation for Article 23(3) (children's rights). In addition, the new proposed clause (2) above is made subject to progressive realisation.

(4) ***No one may be refused emergency medical treatment***

Explanation: Emergency medical treatment is fundamentally related to the right to life. This right should not be made subject to progressive realisation, given there are no legitimate grounds for denying emergency treatment. This right, not subject to progressive realisation is provided for in Article 27 of the South African Constitution.

[1] Committee on Economic, Social and Cultural Rights, *General Comment No.3.*

(5) A person shall not be evicted from the person's home or have the home demolished, except as permitted by law ***upon the order of a court that has considered all relevant circumstances. No legislation may permit arbitrary evictions.***

Explanation: This section will create an important safeguard against arbitrary executive action, including action that is permitted by legislation. The adaptation is based on Article 26 of the South African Constitution.

Existing Written Law and Unwritten Law

28 (1) ***Where existing written or unwritten law is found inconsistent with the provisions of this Chapter, a court may make any order that is just and equitable, including:***

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

(b) ***an order suspecting the declaration of invalidity for a reasonable period not exceeding one year in order to allow the relevant authority to correct the defect.***

Explanation: All legislation, whether currently or previously passed should be in compliance with the Constitution and therefore face judicial review. To hold otherwise to undermine the principle of the supremacy of the Constitution, by allowing Parliament to determine the constitutional validity of its previously passed laws.

In order to address concerns about instability arising from the striking down of legislation, the above criteria are inserted to guide a court in minimizing any disruptive effects of invalidating legislation. When finding a law unconstitutional, courts in India, South Africa and Canada have delayed the invalidation for a specified time period in order for the government to bring the law in line with the Constitution. The above criteria is drawn from Article 172(1)(b) of the South African Constitution, with some modification to limit the amount of time of the delay to one year.

Furthermore, the need to preserve the various personal laws can be provided for elsewhere, such as by stating that their application to specified cultural or

religious groups is not to be considered discriminatory on that ground alone.

Remedy for the Infringement of Fundamental Rights

(30)(1)(a) Subject to sub-paragraphs (b) and (c) of this paragraph and Section 2 of this Article, every person shall be entitled to apply to the Supreme Court as provided by Article 171 in respect of the infringement or imminent infringement by State action, including executive, ***judicial, legislative*** or administrative action, ***or in respect to the infringement or imminent infringement by any person or persons,*** of a fundamental right to which such person is entitled under the provisions of this Chapter.

(b) Where the person aggrieved is unable or incapable of making an application under Article 171 by reason of physical, social or economic disability or other reasonable cause, an application may be made on behalf of such a person, by any relative or friend of such person, if the person aggrieved raises no objection to such application.

(c) ***An application under this Article may be made in respect of any person or persons affected, in the public interest, by any person or by any incorporated or unincorporated body of persons acting bona fide.***

(2) ***For the purposes of this Article and of Article 171, the Fundamental Rights chapter binds a natural or legal person if, and to the extent that, it may be applicable, taking into account the nature of the right and the nature of the duty imposed by the right.***

Explanation: 1(a) and 2. This article is adapted to extend the provisions of this chapter to all persons that violate a person's fundamental rights. It therefore goes beyond the 1997 draft Constitution as it applies to legislative action and to all judicial action. This is required because it would be unfair to deny relief to individuals whose rights have been violated by State action that is permitted by law, or by judicial action has been exercised in bad faith.

This clause extends the Chapter to action by private individuals and groups. This change is justified on two grounds. The provisions must apply in the private sector, which constitutes the bulk of economic and social life. To state otherwise would be to create two classes based on whether these citizens worked for the government (or government owned corporation) or not. This

article will also apply the chapter to the actions of private armed groups and non-governmental organisations. Paragraph (2), however, binds private persons only when the creation of a duty would be reasonable. The wording, slightly adapted to the Sri Lankan Constitution, is based on Article 8(2) of the South African Constitution.

Explanation: 1(c). It is proposed to change this provision back to its formulation in the October 1997 draft. The limitation of public interest litigation to group rights should be removed. It is not clear exactly what constitutes group rights under the draft constitution. Furthermore, public interest litigation is intended to ensure that fundamental rights are guaranteed to persons who are not able to go to court, for reasons such as lack of resources, fear or other impediment. To undermine this right is to restrict the protection of the Fundamental Rights chapter to the wealthier groups of society.

Interpretation of the Fundamental Rights Chapter:

(31)(1) When interpreting the Fundamental Right chapter, every court, tribunal or forum -

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law, civil law or personal law, every court, tribunal or forum must promote the spirit, purport and objects of the Fundamental Rights chapter.

(3) The Fundamental Rights chapter does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, civil law, or personal laws, to the extent that they are consistent with this chapter.

Explanation: This new article will minimize inconsistencies between the law and the Fundamental Rights chapter, as well as divergences between domestic and international law. In addition, it prevents the undue restriction of human rights to those specified in the Fundamental Rights chapter. The above clause,

modified to the Sri Lankan legal system, is drawn from Article 39 of the South African Constitution.

CHAPTER V - CITIZENSHIP

(52) (6) ***Every person who-***

(a) at the commencement of the Constitution, has been a permanent resident of the Republic from October 30, 1964 and who is not a citizen of any country; or

(b) being the permanent resident of the Republic and not being a citizen of any country at the commencement of the Constitution is a descendent of any person who was a permanent resident of the Republic on October 30, 1964 and who was not a citizen of any country on that date, shall have the status of citizen of Sri Lanka with effect from the date of the commencement of the Constitution and the provisions of Sections 3,4,5 and 6 of and Schedules A and B to the Grant of Citizenship to Stateless Persons shall, mutatis mutandis, apply to any in relation to such persons.

Explanation: This provision in the October 1997 draft has reportedly been removed by the PA-UNP proposals on the grounds that this issue could be resolved in discussion with the Indian government and separate legislation to be brought to Parliament. This alternative will have the effect of delaying, and perhaps indefinitely postponing the resolution of this issue. In the interim, many Up-country Tamils will face continuing uncertainty over their status. Denial of citizenship to many Up-country Tamils results in a denial of many fundamental rights, including particularly social rights such as the right to employment, property and others. This is particularly important given this group's economically marginalised position. One must further note that public international law with regard to nationality would require the grant of citizenship to historically resident and stateless up-country Tamils, given their effective link to Sri Lanka.[2]

[2] The judgment of the International Court of Justice in the *Nottebohm case* (1955 ICJ Rep. at 22) assesses the criteria of 'effective link' by way of reference to the habitual residence of the individual, the centre of his interests, family ties, participation in public life and attachment shown by him for a given country and inculcated in his children. The individual must be more closely connected with the population of the State conferring nationality than with that of any other state.

CHAPTER IX - THE CENTRAL LEGISLATURE

Parliament

There is no provision in this section for any representation of the regions in the Centre. However, as a core principle, there must be political representation of the regions within the Centre. This will help protect the devolution of power and to articulate regional concerns at the Centre. It will also promote national unity and help ensure that the regions feel part of the whole. Regional representation will help ensure minority rights by acting as a further safeguard against the discrimination of minority groups.

The exact details for regional representation are beyond the scope of this document. However, the institutional arrangements should include a separate chamber, constituted of delegates from each region. Such a Chamber must have a meaningful legislative role and be able to act as a check on the national representative assembly by allowing for further debate and requiring larger majorities on the issues that are most contentious to the regions.

Models for such representation can be taken from the Constitutions of India and South Africa, which embody the principles above. The Indian model provides for a House of the People (Lok Sabha) or Council of States (Rajya Sabha). The Rajya Sabha consists of delegates elected under proportional representation by the elected members of State legislatures (with a small number of nominated representatives). The Rajya Sabha can introduce any bill, except money bills. Where there is disagreement between the two houses other than on a money bill, there is a joint sitting of the two houses where the bill is voted upon. The representatives from the Rajya Sabha constitute about a third of the total delegates as such a joint sitting.

The South African model provides for a Council of Provinces consisting of delegates selected by parties represented in provincial legislatures. The Council of Provinces can discuss any issue, but cannot introduce money bills. On bills not affecting provinces, the Council of Provinces can send any bill back to the National Assembly for reconsideration together with suggested amendments. On bills affecting provinces (other than money bills), where the Council of Provinces and National Assembly disagree, there is mediation. If disagreement continues, the bill lapses unless a two-thirds majority in the National Assembly passes the bill.

CHAPTER XVIII - THE JUDICIARY: THE INDEPENDENCE OF THE JUDICIARY.

Appointment & C. of Judges of the Supreme Court and Court of Appeal.

(151)(1) The Chief Justice shall be appointed by the President of the Republic by warrant under the hand of the President ***after receiving the approval of the Constitutional Council.***

Explanation: The previous provision left the appointment of the Chief Justice in the hands of the President. In order to ensure that fundamental rights are implemented in an impartial manner, faithful to the spirit and purpose of the Constitution, it is proposed that there should be some checks and balances in the appointment of senior judges. This version requires that the appointment of the Chief Justice be approved by the Constitutional Council. The Constitutional Council comprises a broad range of parliamentarians, two retired judges and the Chair of the Chief Minister's Conference. Thus there is room for greater debate and a need for more consensus on the appointment of the Chief Justice.

(2) ***The President of the Court of Appeal and every other Judge of the Supreme Court and Court of Appeal shall be appointed by the President of the Republic by warrant under the hand of the President after consulting with the Chief Justice.***

Explanation: The October 1997 version required only that the President 'ascertain the views of the Chief Justice', which is an extremely weak clause since this not require any joint decision-making. The amended version, requiring consultation with the Chief Justice will limit the discretion of the President since the President will be bound, to a greater extent, to follow the advice of the Chief Justice.[3]

[3] Under the Indian Constitution, the President is required to consult the Chief Justice for judicial appointments. A number of Supreme Court cases have dealt with this issue and established that the President is not bound to follow the advice given, but must have good reasons for not accepting the advice of the Chief Justice. See *S.P. Gupta* v. *Union of India,* 1981 Supp SCC 87, *Union of India* v. *Sankalchand* (1977) 4 SCC 193. In 1993, in the decision on *Advocates on Record Association* v. *Union of India*, the Supreme Court held that the advice of the Chief Justice shall have primacy over the 'discretion of the President.

CHAPTER XIX - THE JUDICIARY: THE JURISDICTION OF THE SUPREME COURT, THE COURT OF APPEAL AND THE REGIONAL HIGH COURTS.

Power of review of Acts passed after commencement of the Constitution.

(169)(1) ***The Court shall, on its jurisdiction being invoked under paragraph (2) of this Article and subject to the provisions of this Article, have jurisdiction to determine whether any Act of Parliament passed after the commencement of this Constitution or any provision thereof is inconsistent with any provision of Chapter III of this Constitution and where it so determines, to declare that Act or provision void to the extent of that inconsistency.***

Explanation: The phrase 'without prejudice to anything previously done thereunder' should be deleted. This phrase would deny a remedy to any party an opportunity to gain redress, including compensation, for the violation of the person's light. Note, however, that under the suggestion for revising Article 28 would allow a Court to limit the number of claims by resorting to prospective (rather than retrospective) invalidation where this would be just and equitable.

The PA-UNP proposals reportedly state that The PA and the UNP have reportedly agreed that where the Supreme Court has decided on the constitutionality of a provision by way of pre-enactment judicial review, the same provision cannot be challenged on the same ground. This stipulation should be removed. A Court should be able to declare a law invalid when new facts come before a Court which indicate that a law has the effect of violating a fundamental right.

(2) ***The jurisdiction of the Court to determine any such question as aforesaid, may be invoked by any person by a petition in writing addressed to the Court.***

Explanation: The restriction of challenges to fundamental rights to 2 years is unwise and should be removed. A specified time limitation will increase the amount of constitutional litigation launched on hypothetical grounds. It will deny courts the opportunity to adapt their judgments based on experience. It will create an artificial division between persons whose rights were violated

within the limitation period - who will have redress, and those whose rights are violated after this period and who will have no remedy.

Note that the proposed amendment to Article 28, which allows a court to minimize any disruptive effects flowing from an invalidation of a law, will equally apply to the above situation.

In addition, this clause is adapted so as to apply to 'persons' rather than just 'citizens.' Since some fundamental rights apply to non-citizens, it would be unfair and illogical to deny an opportunity for redress when these rights have been violated.

(3) ***In paragraph (2) of this Article, "person" includes a body persons, whether incorporated or unincorporated, if not less than three fourths of the number of members of such body are residents of Sri Lanka.***

Explanation: Following on the above section, "person" replaces "citizen" and states that at least three fourths of the body in question should be residents - rather than citizens - of Sri Lanka.

Jurisdiction Regarding Fundamental and Language Rights

171 (2) ***Where any person alleges that any such fundamental right or language right relating to such person is infringed or about to be infringed, such person personally or by an Attorney-at-law or a person or body of persons in terms of Article 30 may, on the person's behalf, in accordance of the rules of Court as may be in force, apply to the Court by way of petition in writing addressed to such Court praying for relief or redress in respect of such infringement.***

Explanation: This change removes the limitation of three months for a valid claim for the infringement of a fundamental or language right has only three months after this event to apply for relief. An open-ended provision is required as many victims of violations cannot apply for relief due to resource limitations, fear, lack of legal knowledge or lack of necessary information regarding the case.

This provision is adapted, in line with the proposed changed in Article 30 so as to not limit its application to the State.

CHAPTER XXVI

TRANSITIONAL PROVISIONS

Interim Council for the Northern and Eastern Provinces

The PA-UNP proposals include a provision for an Interim Council to administer the Northern and Eastern Regions. This will include special protections for minorities within that region, including the requirement for weighted majorities or parallel consent on issues related to vital minority issues, cabinet representation for minority groups, cultural councils for each group, and further guarantees in regard to law and order, land, sharing of resources, etc. The government should clarify whether these rights will be retained after the period of the Interim Council. It should also consider applying these safeguards to other regions of the country, particularly where there are large numbers of minorities.

ANNEX II:

Key provisions on Economic, Social and Cultural Rights in the Constitutions of South Africa, Thailand, Namibia and Ethiopia

A. GENERAL PROVISIONS

SOUTH AFRICA: Article 27 - Health Care, Food, Water and Social Security

(1) Everyone has the right to have access to -

(a) health care services, including reproductive health care,
(b) sufficient food and water, and
(c) social security, including, if they are unable to support themselves and heir dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights,

(3) No one may be refused emergency medical treatment.

ETHIOPIA: Article 41 - Economic, Social and Cultural Rights

(1) Every Ethiopian has the right to engage freely in economic activity and to pursue a livelihood of his choice anywhere within the national territory.

(2) Every Ethiopian has the right to choose his or her means of livelihood, occupation and profession.

(3) Every Ethiopian national has the right to equal access to publicly funded social services.

(4) The State has the obligation to allocate an ever increasing resources to provide to the public health, education and other social services.

(5) The State shall, within available means, allocate resources to provide rehabilitation and assistance to the physically and mentally disabled, the aged , and to children who are left without parents or guardian.

(6) The State shall pursue policies which aim to expand job opportunities for the unemployed and the poor and shall accordingly undertake programmes and public works projects.

(7) The State shall undertake all measures necessary to increase opportunities for citizens to find gainful employment.

(8) Ethiopian farmers and pastoralists have the right to receive fair price for their products, that would lead to improvement in their conditions of life and to enable them to obtain an equitable share of the national wealth commensurate with their contribution. This objective shall guide the State in the formulation of economic, social and development policies.

(9) .....

B. RIGHT TO EDUCATION

THAILAND: Section 43

A person shall enjoy an equal to receive he fundamental education for the duration of not less than twelve years which shall be provided by the State thoroughly, up to the quality, and without charge.

In providing education by the State, regard shall be had to participation of local government organisations and the private sector as provided by law.

The provision of education by professional organisations and the private sector under the supervision of the State shall be protected as provided by law.

SOUTH AFRICA: Article 27 – Education

(1) Everyone has the right -

(a) to basic education, including adult basic education; and

(b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

(c) .....

NAMIBIA: Article 20 [Education]

(1) All persons shall have the right to education.

(2) Primary education shall be compulsory and the State shall provide reasonable facilities to render effective this right for every resident within Namibia, by establishing and maintaining State schools at which primary education will be provided free of charge.

(3) Children shall not be allowed to leave school until they have completed their primary education or have attained the age of sixteen (16) years, whichever is the sooner, save in so far as this may be authorised by Act of Parliament on grounds of health or other considerations pertaining to the public interest.

ETHIOPIA: See Article 41(4) above within 'A - General Provisions.'

C. RIGHT TO HEALTH

THAILAND: Section 52

A person shall enjoy an equal right to receive standard public health service, and the indigent shall have the right to receive free medical treatment from public health centres of the State, as provided by law.

A person shall enjoy an equal right to receive standard public health service, and the indigent shall have the right to receive free medical treatment from public health centr es of the State, as provided by law.

The public service by the State shall be provided thoroughly and efficiently and, for this purpose, participation by local government organisations and the private sector shall also be promoted insofar as it is possible.

The State shall prevent and eradicate harmful contagious diseases or the public without charge, as provided by law.

SOUTH AFRICA: See Article 27(1) and (3) above within 'A - General Provisions.'

ETHIOPIA: See Article 41(4) above within 'A - General Provisions' and Article 35(9) below on the right to family planning education under 'E - Economic and Social Rights of Women.'

D. ECONOMIC AND SOCIAL RIGHTS OF CHILDREN

THAILAND: Section 53.

Children, youth and family members shall have the right to be protected by the State against violence and unfair treatment. Children and youth with no guardian shall have the right to receive care and education from the State, as provided by law.

SOUTH AFRICA: Article 28 - Children

(1) Every child has a right

(a) .....
(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
(c) to basic nutrition, shelter, basic health care services and social services;
(d) to be protected from maltreatment, neglect, abuse or degradation;
(e) to be protected from exploitative labour practices;
(f) not to be required or permitted to perform work or provide services that -
  (i) are inappropriate for a person of that child's age; or
  (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
(g) .....
(h) to have a legal practitioner assigned to the child by the state and at state expense, in civil proceedings affecting the child, if substantial injustice would result, and
(i) .....

(2) A child's best interests are of paramount importance in every decision affecting the child.

NAMIBIA: Article 15 [Children's Rights]

(1) .....

(2) Children are entitled to be protected from economic exploitation and shall not be employed in or required to perform work that is likely to be hazardous or to interfere with their education, or to be harmful to their health or physical, mental, spiritual, moral, or social development. For the purposes of this paragraph children shall be under the age of sixteen (16) years.

(3) No children under the age of fourteen (14) years shall be employed to work in any factory or mine, save under conditions and circumstances regulated by Act of Parliament. Nothing in this paragraph shall be construed as derogating in any way from Paragraph (2).

(4) arrangement or scheme employed on any farm or other undertaking, the object or effect of which is to compel the minor children of an employee to work for or in the interest of the employer of such employee, shall for the purposes of Article 9 be deemed to constitute an arrangement or scheme to compel the performance of forced labour.....

(5) .....

ETHIOPIA: Article 36 - Rights of Children

(1) Every child has the right:

(a) .....

(b) .....

(c) To know and be cared for by his or her parents or legal guardians;

(d) Not to be subject to exploitative practices, neither to be required nor permitted to perform work which may be hazardous or harmful to his or her education, health or well-being;

(e) .....

(2) In all actions concerning children undertaken by public and private welfare institutions, courts of law, administrative authorities or legislative bodies, the primary consideration shall be the best interest of the child.

(3) .....

(4) .....

(5) The State shall accord special protection to orphans and shall encourage the establishment of institutions which ensure and promote their adoption and advance their welfare, and education.

In addition, see Article 41(5) above within 'A - General Provisions' on the obligation of the state to allocate resources, within available means, to provide rehabilitation and assistance to children who are left without parents or guardian.

E. ECONOMIC AND SOCIAL RIGHTS OF WOMEN

ETHIOPIA: Article 35 - Rights of Women

(1) Women shall, in the enjoyment of rights and protections provided for by this Constitution, have equal right with men.

(2) Women have equal rights with men in marriage as prescribed by this Constitution.

(3) The historical legacy of inequality and discrimination suffered by women in Ethiopia taken into account, women, in order to remedy this legacy, are entitled to affirmative measures. The purpose of such measures shall be to provide special attention to women so as to enable them to compete and participate on the basis of equality with men in political, social and economic life as well as in public and private institutions.

(4) The State shall enforce the right of women to eliminate the influences of harmful customs. Laws, customs and practices that oppress or cause bodily or mental harm to women are prohibited.

(5) (a) Women have the right to maternity leave with full pay. The duration of maternity leave shall be determined by law taking into account the nature of the work, the health of the mother and the well-being of the child and family.

(b) Maternity leave may, in accordance with the provisions of law, include prenatal leave with full pay.

(6) Women have the right to full consultation in the formulation of national development policies, the designing and execution of projects, and particularly in the case of projects affecting the interests of women.

(7) Women have the right to acquire, administer, control, use and transfer property. In particular, they have equal rights with men with respect to use, transfer, administration and control of land. They shall also enjoy equal treatment in the inheritance of property.

(8) Women shall have a right to equality in employment, promotion, pay, and the transfer of pension entitlements.

(9) To prevent harm arising from pregnancy and childbirth and in order to safeguard their health, women have the right of access to family planning education, information and capacity.

SOUTH AFRICA: Article 9 - Equality

(1) .....
(2) .....
(3) .....
(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3) (*which includes gender).* National legislation must be enacted to prevent or prohibit unfair discrimination.

F. LABOUR RIGHTS

(This section does not include provisions that relate to the right to form a trade union).

SOUTH AFRICA: Article 23 - Labour Relations

(1) Everyone has right to fair labour practices.
(2) .....

ETHIOPIA: Article 42 - Labour Rights

(1) Women workers have the right to equal pay for equal work.

(2) Workers have the right to reasonable limitation of working hours, to rest, to leisure, to periodic leaves with pay, to remuneration for public holidays as well as healthy and safe work environment.

(3) .....

G. ECONOMIC AND SOCIAL RIGHTS OF THE AGED

THAILAND: Section 54

A person who is over sixty years of age and has insufficient income shall have the right to receive aids from the State, as provided by law.

ETHIOPIA: See Article 41(5) above within 'A - General Provisions' on the obligation of the state to allocate resources, within available means, to provide rehabilitation and assistance to the aged.

H. ECONOMIC AND SOCIAL RIGHTS OF THE DISABLED

THAILAND: Section 55

The disabled or handicapped shall have the right to receive public conveniences and other aids from the State, as provided by law.

ETHIOPIA:

See Article 41 (5) above within 'A - General Provisions' on the obligation of the state to allocate resources, within available means, to provide rehabilitation and assistance to the physically and mentally disabled.

I. THE RIGHT TO HOUSING

SOUTH AFRICA: Article 26 - Right to Housing

(1) Everyone has the right to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of a Court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

J. THE RIGHT TO DEVELOPMENT

ETHIOPIA: Article 43 - Right to Development

(1) The Peoples of Ethiopia as a whole, and each Nation, Nationality and People in Ethiopia in particular have the right to improved living standards and to sustainable development.

(2) Nationals have the right to participate in national development and, in particular, to be consulted with respect to policies and projects affecting their community.

(3) All international agreements and relations concluded, established or conducted by the State shall protect and ensure Ethiopia's right to sustainable development.

(4) The basic aim of development activities shall be to enhance the capacity of citizens for development and to meet their basic needs.