



LAW & SOCIETY TRUST

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OBJECTIVES

In this issue we publish the draft proposals on fundamental rights and freedoms proposed by the Parliamentary Select Committee on Constitutional Reform. At a discussion held at the LST on the proposed fundamental rights chapter, the participants were able to identify positive and negative aspects of the draft articles and many amendments were suggested for improvement. A summary of this discussion is also included.

We also publish the proposed draft articles on Directive Principles of State Policy and Fundamental Duties and the Constitutional Council. The latter is an attempt to introduce the principles of transparency and accountability which are essential features of a democratic society based on the notion of good governance.

In an attempt to inform the society of the activities of the LST we carry two articles: one, a commentary on a Consultation on Minority Rights held in Cambridge organised by the LST and the other, a commentary on an NGO delegation to Denmark and Norway in which a delegate from the LST participated.

RIGHTS OF MINORITIES

and

HUMAN RIGHTS NGOs

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**DRAFT PROPOSALS ON CONSTITUTIONAL REFORM:
CHAPTER ON FUNDAMENTAL RIGHTS***

8. Every person has an inherent right to life and no one shall be intentionally deprived of his life:

Provided that deprivation of life shall not be regarded as inflicted in contravention of this Article -

- (a) When it results from the execution of a sentence of death pronounced by a competent court on a person convicted of an offence punishable with death; or
 - (b) When it results from the use of force which is no more than absolutely necessary-
 - (I) in the defence of any person from unlawful violence;
 - (II) in order to effect a lawful arrest or prevent the escape of a person lawfully detained;
 - (III) in action lawfully taken for the purpose of quelling a riot or insurrection;
 - (c) When it results from lawful acts of war.
9. (1) No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
- (2) No restriction shall be placed on the right declared and recognized by this Article.
10. (1) No person shall be imprisoned or otherwise physically restrained except in accordance with procedure prescribed by law.
- (2) No person shall be arrested except by an authorized officer acting in accordance with procedure prescribed by law under a warrant issued by a judicial officer causing such person to be apprehended and brought before a competent court:
- Provided that any person authorised so to do by any law may, in the manner and in the circumstances, prescribed by law, arrest any person without such a warrant.
- (3) Any person arrested shall at the time of arrest be informed of the reason for his arrest.

* These proposed articles, if adopted, will replace the fundamental rights chapter in the Constitution.

- (4) Any person arrested shall at the time of arrest be informed that he may communicate with any relative or friend of choice, and if he so requests, such a person shall be afforded reasonable means of communicating with such relative or friend.
- (5) Any person arrested shall, if he so requests, be afforded reasonable facilities to consult and retain an Attorney-at-Law of his choice.
- (6) Any person arrested shall not be detained in custody or confined for a longer period than under all the circumstances of the case is reasonable, and shall, in every case be brought before the judge of a competent court within twenty-four hours of the arrest, exclusive of the time necessary for the journey from the place of arrest to such judge, and no person shall be detained in custody beyond such period except upon, and in terms of, order of such judge.
- (7)
 - (a) Any person detained in custody or confined who is entitled, under the provisions of any law, to be released on bail or on his executing a bond, shall be so released.
 - (b) The amount of bail and the amount of every such bond shall be fixed with due regard to the circumstances of the case and shall not be excessive.
- (8) Any person suspected of committing an offence shall be charged or indicted or released without unreasonable delay.
- (9) Any person charged with an offence shall be entitled to be heard in person or by an Attorney-at-Law of his own choosing and shall be so informed by the judge.
- (10) Any person charged with an offence shall be entitled to be tried -
 - (i) without undue delay;
 - (ii) at a fair trial;
 - (iii) by a competent court;
 - (iv) at a public hearing;

Provided that a judge may, in his discretion, whenever he considers it necessary, in proceedings relating to sexual matters, or where the interests of juveniles so require, or in the interests of national security or public order, or in the interests of order and security within the precincts of such court, exclude therefrom such persons as are not directly interested in the proceedings.

- (11) Every person shall be presumed innocent until he is proved guilty; provided that burden of proving particular facts may, by law, be placed on the accused.

- (12) No person shall be compelled to testify against himself or to confess guilt.
- (13) No person shall be held guilty of an offence on account of any act or omission which did not, at the time of such act or omission, constitute such an offence, and no penalty shall be imposed or any offence more severe than the penalty in force at the time when such offence was committed: Provided that nothing in this Article shall prejudice the trial and punishment of any person for any act or omission which at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations.
- (14) Any person who has once been tried by a competent court for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried for the same offence.
- (15) No person shall be punished with death or imprisonment except by order of a competent court in accordance with law. The arrest, holding in custody, detention or other deprivation of personal liberty of a person, pending investigation or trial shall not constitute punishment.
- (16) All persons deprived of their liberty shall be treated with humanity and respect for the inherent dignity of the human person.
- (17) The arrest, holding in custody, detention or other deprivation of personal liberty of a person, by reason of a removal order or a deportation order made under the provisions of the Immigrants and Emigrants Act or Indo-Ceylon Agreement Implementation Act No. 14 of 1967 or other such law as may be enacted in substitution therefore, shall not be a contravention of this Article.
- (18) No restriction shall be placed on the rights declared and recognised by this Article other than such restrictions prescribed by law as are necessary in a democratic society in the interests of national security, public order or for the purpose of securing due recognition and respect for the rights and freedoms of others.

RIGHT OF EQUALITY

11. (1) All persons are equal before the law and are entitled to the equal protection of the law.
- (2) No citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political or other opinion, place of birth or any one such grounds.

Provided that it shall be lawful to require a person to acquire within a reasonable time sufficient knowledge of any language as a qualification for employment or office in the Public Service, Judicial Service, Provincial Public Service or Local Government Service or in the service of any public co-operation, where such

knowledge is reasonably necessary for the discharge of such employment or office:

Provided further that it shall be lawful to require a person to have a sufficient knowledge of any language as a qualification for any such employment or office where no function of that employment or office can be discharged otherwise than with a knowledge of that language.

- (3) No person shall on the grounds of race, religion language, caste, sex, political or other opinion, place of birth or any one of such grounds be subject to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels, places of public entertainment and places of public worship of his own religion.
- (4) Nothing in this Article shall prevent special measures being taken by law, subordinate legislation or executive action where necessary for the sole purpose of the advancement of disadvantaged or underprivileged individuals or groups including those that are disadvantaged or underprivileged because of race, sex, or mental or physical disability.
- (5) No restriction shall be placed on the exercise of the rights declared and recognised by this Article other than such restrictions prescribed by law as are necessary in a democratic society in the interests of national security, public order or the protection of public health or for the purpose of securing due recognition and respect for the rights and freedoms of others.

FREEDOM OF MOVEMENT

12. (1) Every person lawfully resident within Sri Lanka is entitled to the freedom of movement within Sri Lanka and of choosing his residence within Sri Lanka.
 - (2) Every person shall be free to leave Sri Lanka.
 - (3) No restrictions shall be placed on the exercise of the rights declared and recognised by paragraphs (1) and (2) of this Article other than such restrictions prescribed by law as are necessary in a democratic society in the interests of national security or public order or the protection of public health or morality or for securing due recognition and respect for the rights and freedoms of others.
13. Every citizen shall be entitled to return to Sri Lanka.
14. (1) Every person has the right to respect for his private and family life, his home and his correspondence and shall not be subjected to unlawful attacks on his honour and reputation.
 - (2) No restriction shall be placed on the exercise of the rights declared and

recognised by paragraph (1) of this Article other than such restrictions prescribed by law as are necessary in a democratic society in the interests of national security, public order or national economy or the protection of public health or morality or for securing due recognition and respect for the rights and freedoms of others.

FREEDOM OF THOUGHT

15. (1) Every person is entitled to freedom of thought, conscience and religion including the freedom to have or to adopt a religion or belief of his choice.
- (2) Every person is entitled to freedom, either by himself or in association with others, and either in public or in private, to manifest his religion or belief in worship, observance, practice and teaching.
- (3) No restrictions shall be placed on the rights declared and recognised by this Article other than such restrictions prescribed by law as are necessary in a democratic society in the interests of national security, public order, or for securing due recognition and respect for the rights and freedoms of others.
16. (1) Every person is entitled to the freedom of speech and expression including publications. This right shall include the freedom to hold opinions and to receive and impart information and ideas either orally, in writing, in print, in the form of art, or through any other medium.
- (2) No restriction shall be placed on the right declared and recognised by this Article other than such restrictions prescribed by law as are necessary in a democratic society, in the interests of national security, public order or racial and religious harmony or the protection of the reputation or rights of others, preventing the disclosure of information received in confidence or maintaining the authority of Parliament, or maintaining the authority and impartiality of the judiciary.
17. (1) Every person is entitled to the freedom of peaceful assembly.
- (2) No restrictions shall be placed on the exercise of the rights declared and recognised by paragraph (1) of this Article other than such restrictions prescribed by or under any law as are necessary in a democratic society in the interests of national security, public order, racial or religious harmony, the protection of public health or for the purpose of securing the due recognition and respect for the rights and freedoms of others.

FREEDOM OF ASSOCIATION

18. (1) Every person is entitled to the freedom of association.
- (2) Every citizen is entitled to the freedom to form and join a trade union.

- (3) No restrictions shall be placed on the exercise of the rights declared and recognised by paragraphs (1) and (2) of this Article other than such restrictions prescribed by law as are necessary in a democratic society in the interests of national security or public order, racial or religious harmony or the protection of public health or morality or for securing due recognition and respect for the rights and freedoms of others.
19. (1) Every citizen is entitled by himself or in association with others to enjoy and promote his own culture and to use his own language.
- (2) No restrictions shall be placed on the exercise of the rights declared and recognised by this Article other than such restrictions prescribed by law as are necessary in a democratic society in the interests of national security, public order, racial or religious harmony or the protection of public health or for securing due recognition and respect for the rights and freedoms of others.
20. (1) Every citizen is entitled to the freedom to engage by himself or in association with others to engage in any lawful occupation, profession, trade, business or enterprise.
- (2) No restriction shall be placed on the exercise of the rights declared and recognised by this Article other than such restrictions prescribed by law as are necessary in a democratic society in the interests of the national economy or the environment or in relation to -
- (a) the professional, technical, academic, financial and other qualifications necessary for practising any profession or carrying on any occupation, trade, business or enterprise, and the licensing and disciplinary control of the person entitled to such fundamental right, and
- (b) the carrying on by the State, a State agency or a public corporation of any trade, business, industry, service or enterprise, whether to the exclusion, complete or partial, of citizens or otherwise.

RIGHT TO OWN PROPERTY

21. (1) Every citizen is entitled to own property alone or in association with others.
- (2) No person shall be deprived of his property except according to procedure established by law for a public purpose or for reasons of public utility or public order and upon payment of fair compensation.
22. The exercise and operation of the fundamental rights declared and recognised by Articles 10, 11, 12, 13, 14, 15, 16, 17 and 18 shall in their application to the armed forces, the police force and other forces charged with the maintenance of Public Order be subject to such restrictions as may be prescribed by or under any law in the interests of the

proper discharge of the duties and the maintenance of discipline among them.

23. (1) In time of public emergency the existence of which is duly proclaimed, subject to paragraphs (2) and (3), measures may be prescribed by law derogating from the exercise and operations of the fundamental rights declared and recognised in this Chapter to the extent strictly required by the exigencies of the situation, provided that such measures do not involve discrimination solely on the grounds of race, language, caste, national or social origin. For the purpose of this Article "law" includes regulations made under the law for the time being in force relating to public security.
- (2) There shall be no derogation from any of the rights declared and recognised by Articles 8, 9, 10(1), 10(2), 10(10), 12, 13, and 15.
- (3) There shall be no derogation from the right declared and recognised by Article 10(6) unless at the same time legal provision is made requiring -
- (i) a Magistrate having jurisdiction to be promptly informed of the arrest, and
 - (ii) the person arrested to be produced before such Magistrate within such time as is reasonable in all the circumstances of the case.

WRITTEN LAW

24. All existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the provisions of this Chapter.
25. The subjection of any person on the order of a court to any form of punishment recognised by any written law shall not be a contravention of the provisions of this Chapter.
26. Every person shall be entitled to apply to the Supreme Court as provided by Article 129, in respect of the infringement or imminent infringement, by State action, including executive or administrative action, of a fundamental right to which such person is entitled under the provisions of this Chapter:

Provided that where the person aggrieved is unable or incapable of making an application under Article 129 by reason of physical, social or economical 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:

Provided further that an application under this Article may be made, in the public interest, on behalf of any person or persons aggrieved, by any other person or by any incorporated or unincorporated body of persons.

DIRECTIVE PRINCIPLES OF STATE POLICY AND FUNDAMENTAL DUTIES

30. The following principles shall guide the State in making laws and the governance of Sri Lanka:
- (i) The State shall strengthen national unity by promoting co-operation and mutual trust, confidence and understanding among all sections of the people of Sri Lanka.
 - (ii) The State shall assist the development of the cultures and languages of the people.
 - (iii) The State shall safeguard and strengthen the democratic structure of government and the democratic rights of the people.
 - (iv) The State shall establish a just and free society the objective of which include:
 - (a) the full realization of the fundamental rights and freedoms of all persons;
 - (b) securing and protecting effectively a social order in which social economic and political justice shall inform all institutions of national life;
 - (c) the elimination of economic and social privilege, disparity and exploitation;
 - (d) the equitable distribution of the material resources of the community and social product;
 - (e) the realization of an adequate standard of living for all citizens and their families including adequate food, clothing, housing and medical care;
 - (f) ensuring social security and welfare;
 - (g) raising the moral, cultural and educational standards of the people and facilitating the full development of the human personality;
 - (h) the creation of the necessary economic and social environment to enable people of all religious faiths to make a living reality of their religious principles;
 - (5) The State shall develop the whole country by means of appropriate public and private economic activity.
 - (6) The State shall protect and preserve and improve the environment and safeguard the reefs, shores, forests, lakes, watercourses and wildlife of Sri Lanka.

- (7) The State shall protect and preserve every monument or place or object of artistic or historic interest declared by or under law to be of national importance.
- (8) The State shall promote international peace, security and co-operation, and establishment of a just and equitable international economic and social order, and shall respect, and foster respect for international law and treaty obligations in dealings with and among nations.
31. It shall be the duty of every citizen to
- (a) uphold and protect the sovereignty, unity and integrity of Sri Lanka;
 - (b) uphold and defend the Constitution and its ideals and institutions;
 - (c) foster national unity and promote harmony amongst all the people of Sri Lanka;
 - (d) respect the rights and freedoms of others;
 - (e) value and preserve the rich heritage of our composite culture;
 - (f) protect and improve the environment and conserve its riches;
 - (g) safeguard and preserve artistic or historical objects and places of national importance;
 - (h) safeguard and protect public property and combat its waste or misuse;
 - (i) refrain from directly or indirectly participating in bribery or corruption;
 - (j) uphold the rule of law and *abjure* violence;
 - (k) work conscientiously in a person's chosen occupation.
32. The provisions of the Chapter do not confer or impose legal rights or obligations, and are not enforceable in any court or tribunal. No question of inconsistency with such provisions shall be raised in any court or tribunal.

The Constitutional Council

- 65 (1) There shall be a Constitutional Council which shall consist of the following:
- (a) the Speaker;
 - (b) the Prime Minister;

- (c) the Leader of the Opposition;
 - (d) a Chief Minister nominated by the Chief Minister of the Provinces;
 - (e) five Members of Parliament nominated by the Committee of Selection of Parliament, and
 - (f) two retired Judges of the Supreme Court or Court of Appeal nominated by the Speaker.
- (2) The Speaker shall be the Chairman of the Constitutional Council.
- (3) A member referred to in sub paragraph (e) of paragraph (1) of this Article shall unless he earlier resigns from office by a letter addressed to the Chairman of the Committee of Selection or is removed from office by such Committee or ceases to be a Member of Parliament, hold office for a period of six years.
- (4) A member nominated under sub paragraph (d) of Paragraph (1) of this Article shall, unless he earlier resigns from office by a letter addressed to the Speaker, is removed from office by the Selection Committee or ceases to be a Chief Minister, hold office for a period of five years.
- 66 (1) No person shall be appointed as a member of the following Commissions and public bodies except on the recommendation of the Constitutional Council-
- (a) the Public Service Commission;
 - (b) the Commission to Investigate Allegations of Bribery or Corruption;
 - (c) the Official Languages Commission;
 - (d) the University Grants Commission;
 - (e) the Election Commission; and
 - (f) such other public body as Parliament may by law determine.
- (2) It shall be the duty of the Constitutional Council to recommend to the President, persons for appointment as members of the Commissions or public bodies referred to in paragraph (1), whenever the occasion for such appointment arises.
- 67 (1) No persons shall be appointed to any of the following offices except with the approval of the Constitution Council;
- (a) the Attorney-General;

- (b) the Heads of the Army, Navy and Airforce and the Police force;
 - (c) the Commissioner of Elections;
 - (d) the Parliamentary Commissioner for Administration (Ombudsman);
 - (e) the Auditor-General; and
 - (f) such other offices as Parliament may by law determine.
- (2) It shall be the duty of the President or the appropriate appointing authority to submit for approval to the Constitutional Council, names of persons for appointment to any of the offices referred to in paragraph (1), whenever the occasion for such appointment arises.
68. (1) There shall be appointed a Secretary to the Constitutional Council appointed by the Council.
- (2) The Constitutional Council shall meet as often as may be necessary to perform the duties imposed on such Council by the provisions of this Chapter and such meetings shall be summoned by the Secretary to the Constitutional Council.
- (3) The Chairman shall preside at all meetings of the Constitutional Council and in the absence of the Chairman from any meeting of the Constitutional Council, the Prime Minister shall preside at such meeting. In the absence of both the Chairman and Prime Minister from any meeting of the Constitutional Council, a member elected by the members present at such meeting shall preside at such meeting.
- (4) The quorum for any meeting of the Constitutional Council shall be seven.
- (5) The Constitutional Council shall endeavour to make every recommendation or approval it is required to make by unanimous decision. In the absence of unanimous decision, the decision of the majority shall prevail.
- (6) In the event of an equality of votes on any question for decision at any meeting of the Constitutional Council, the member presiding at such meeting shall have a casting vote.
- (7) Subject to the preceding provisions of this Article, the Constitutional Council may regulate the procedure in regard to its meetings and the transaction of business at such meetings.

CONSTITUTIONAL REFORM AND FUNDAMENTAL RIGHTS: SOME COMMENTS

While human rights organisations have welcomed the government's move to amend the Constitution, particularly its chapter on fundamental rights, the general consensus is that these proposed amendments contain both positive and negative elements. At a discussion held at the Law & Society Trust, the participants identified both positive and negative elements of the amendments and several suggestions were made for improvement. The discussion was based on a paper prepared by Dr Deepika Udagama, Director of the Centre for the Study of Human Rights of the Colombo University.¹

1. Positive elements

The participants welcomed the addition of several positive provisions to the Chapter on fundamental rights and these provisions were identified as follows:

- (1) The inclusion of subsections (3), (4), (5), (7b), (8), (10), (12), (14) and (16) to Article 10 and the inclusion of Article 16.

These subsections deal with the right to be informed of the reason for arrest; the right to communicate with a relative or friend of choice when arrested; the right to consult an attorney-at-law; that the amount of bail should not be excessive; right of a person to be charged/released without undue delay; the right of persons charged to be tried without undue delay and at a fair trial by a competent court and at a public hearing; that no person shall be compelled to testify against himself; the right not to be tried for the same offence twice; and the right to be treated with humanity and respect for the dignity of human person when deprived of their liberty.

Article 16 deals with the freedom of speech and expression including publication. This right includes the right to receive and impart information and ideas and the freedom to hold opinions. Although the freedom of information is not specifically mentioned, it must be noted that Draft Article 16(1) provides for the right to receive and impart information and ideas. While these two categories are not the same, the inclusion of Article 16(1) is the first step towards recognising the former.

- (2) Inclusion of the phrase "as are necessary in a democratic society" in every limitation clause.
- (3) Guaranteeing most rights to *all persons* as opposed only to citizens.

¹ The participants discussed the proposals which appeared in the Sunday Island of 16 July 1995.

- (4) Recognition of rights in Article 10 (1), (2) and (10) as non-derogable rights by Article 23 and the inclusion of clause (3) to that Article.² This goes even beyond existing international law requirements. Also the inclusion of the requirement that derogations can be "to the extent strictly required by the exigencies of the situation" is a welcome addition.
- (5) Recognition that "state action," as opposed only to executive and administrative action, violating fundamental rights could be challenged is a welcome addition.

2. Negative elements with suggestions for improvement

The participants at the discussion, while lauding the government for the bold stand taken to amend the chapter on fundamental rights, thereby according to its peoples a more substantial set of fundamental rights, generally felt that there is still room for improvement. The following suggestions transpired at the discussion in relation to the negative elements in the draft. These negative elements were categorised under substantive rights, limitations, derogation clauses and the scope of operation.

2.1 Substantive rights

- (1) The proviso to the right to life clause (Article 8) is extremely dangerous. (this proviso enumerates instances where the deprivation of the right to life is lawful). The participants voiced their opposition to the introduction of the death penalty.³ It was suggested that the proviso to the right to life clause (Article 8) should be deleted in entirety together with the word "intentionally." The substitution of Article 8 by Article 6(1) of the ICCPR was proposed which reads as:

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

- (2) The right to liberty and security of person should be included as the right to liberty means much more than the freedom from arbitrary arrest and the right to a fair trial.
- (3) The provision that every person arrested has the right to communicate with a friend, relative or lawyer *if he so requests* in Article 10(4) should be amended to read as *whether or not such a request is made*.
- (4) The right to be promptly informed of a charge against a person arrested should be included in Article 10.

² These subsections deal with the freedom from arbitrary arrest, detention and punishment and the right to be tried without undue delay, at a fair trial, by a competent court and at a public hearing.

³ Although the Government decided to reintroduce the death penalty with immediate effect, it is hoped that the Government will rethink its stand on this issue and take steps to abolish it.

- (5) That a competent court should also be independent and impartial is not included in the fair trial clause [Article 10 (10)]. Due process should also be mentioned here.
- (6) Article 10 (17) which deals with deportation orders under the provisions of the Immigrants and Emigrants Act or the Indo-Ceylon Agreement Implementation Act No 14 of 1967 should be deleted in entirety.
- (7) Non-discrimination clause [Article 11(2)] does not include the ground of ethnicity. This clause should be made open-ended by deleting the phrase "or any one of such grounds" and including "..... discriminated against on *grounds such as* race or ethnicity"
- (8) Freedom from servitude has been deleted altogether. The participants queried as to whether the deletion was due to the concept being misunderstood or whether it was due to it being confused with orthodox forms of slavery.
- (9) Article 25 provides that the subjection of any person on the order of a court to *any* form of punishment recognised by any written law is not a contravention of the provisions of this Chapter (i.e. the Chapter on fundamental rights).

It was suggested that Article 25 should be deleted because it implies that "any form of punishment" would be legitimate if the Parliament agrees to it. This can create problems especially if judicial review of legislation is non-existent or is limited.

- (10) The exception to Article 10(10) legalises administrative detention. There is no mention of an unreasonable period of detention and this should be included in the Article. Otherwise a reasonable period of time for such detention should be prescribed.

2.2 Limitations

- (1) The inclusion of a limitation clause to the equality clause and the non-discrimination clause in Article 23. International law recognises no limitations to equality except that it is implied that derogation of rights in times of public emergency may be discriminatory on grounds other than "race, colour, sex, language, religion or social origin."⁴
- (2) The right to privacy should not be limited on the basis of national economy and especially on morality [Article 14(2)] as often privacy is invaded by governments on the basis of morality.

⁴ Article 4(1) of the ICCPR.

- (3) It is inconceivable that the freedom of thought, conscience and religion should be restricted. There are no limitations to this guarantee under the 1978 Constitution.
- (4) It was suggested that the limitation to freedom of expression on the ground of "maintaining the authority of Parliament" in Article 16(2) should be deleted given the criticisms levelled against the extensive use of parliamentary privilege to stifle free expression and the right to receive information on parliamentary proceedings.
- (5) Restrictions imposed on the armed forces vis-a-vis equality, freedom from arbitrary arrest, right to a fair trial, and freedom of thought, conscience and religion in Article 22 should be deleted.
- (6) The right to promote one's culture and the use of language in Article 19(1) is limited to citizens and it was suggested that those rights should be guaranteed to every person, unless compelling reasons are put forward by the government.
- (7) Confining the non-discrimination clause in Article 11(2) only to citizens.

2.3 Derogation clauses

The inclusion of certain provisions in the derogation clauses has caused grave concern to human rights organisations. Some of these provisions were identified as follows:

- (1) No provision permitting derogation should discriminate against on the basis of religion. This should be included in Article 23(1). The grounds of discrimination already prohibited are race, language, caste, national and social origin.
- (2) It is imperative that freedom from retroactive penal legislation in Article 10(13) be recognised as a non-derogable right. Article 23(2) should be amended accordingly.
- (3) International law requires that a state of public emergency should be declared only when there is a "threat to the life of the nation." This suggestion, which is a necessary safeguard to prevent abuse of emergency powers, has been deleted.

2.4 Scope of operation

- (1) Article 24 which provides that existing laws, whether written or unwritten, will continue to be operative in spite of the inconsistency with recognised fundamental

rights is totally unacceptable.⁵ If the government's concern is about personal laws, then that exception could be specifically mentioned.

- (2) The inclusion of the phrase "including executive or administrative action" after "state action" in Article 26 is not necessary as this would give rise to problems of interpretation.

It is hoped that the government will take note of these suggestions and that they will be included in the proposed amendments to the chapter on fundamental rights.

⁵ See in this regard Section 11 of the Report of the UN Human Rights Committee [published in *Fortnightly Review*, Vol V (June/July 1995) p 42] where the Committee expresses its concern "with respect to the provisions of Article 16(1) of the Constitution which permits all existing laws to remain valid and operative notwithstanding any inconsistency with the Constitution's provisions relating to fundamental rights."

CONSULTATION ON MINORITY RIGHTS*

The second follow-up Consultation on Minority Rights organised by the Law & Society Trust took place at the Research Centre for International Law in Cambridge, U.K. on the 11th and 12th August. The LST was represented by Neelan Tiruchelvam, Damaris Wickramasekera and Kanya Champion.

The following people participated at the Consultation: Katrina Tomasevski of the Danish Centre for Human Rights; Gudmundur Alfredsson of the Raoul Wallenberg Institute of Human Rights and Humanitarian Law; Margo Picken, Centre for International Studies, London School of Economics and Political Science; Joseph Oloka-Onyango of University of Minnesota; Alan Phillips of Minority Rights Group (MRG); Veena Das of University of Delhi; Elizabeth Nissan of Institute of Commonwealth Studies, University of London; Katrina Payne of MRG; Salem Mehzoud of MRG; Asbjorn Eide of Norwegian Institute of Human Rights; James Crawford of Cambridge University; Patricia Hyndman of Cambridge University; Manon Olsthoorn of the Foundation of Inter-Ethnic Relations; and Andrew Clapham.

1.1 Objectives of the Consultation

The objectives of the Consultation were to:

- (a) re-examine some of the international standards relating to minority protection in the UN Declaration on Minorities and protection within the CSCE process;
- (b) explore the tensions between the recognition accorded to the concept of self-determination in international law and how it is articulated in the struggles of minorities and of indigenous people and re-conceptualise the right to self-determination to respond to their needs;
- (c) examine the contestation between the individual, state and community over cultural rights;
- (d) explore the need to reconceptualise both development and developmental assistance to accommodate "ethno-development" which focuses on the needs and specificities of minority and indigenous groups; and
- (e) highlight the inadequacies of existing international arrangements for the protection of minorities and ethnic groups.

Four papers were presented at this Consultation: Self-determination by Joe Oloka-Onyango; Institutional Arrangements for the Protection of Minorities by Gudmunder Alfredson;

* The Law & Society Trust wishes to acknowledge the contributions made by Kanya Champion who prepared the report on the Consultation proceedings and Professor James Crawford who sent a detailed comment on his contribution at the Consultation. These two documents were summarised for publication.

Development Co-operation and Protection of Minorities by Neelan Tiruchelvam; and Cultural Rights by Veena Das.

1.2 Present struggles of minorities and their protection in international law

Dr Neelan Tiruchelvam in introducing the theme of the Consultation noted that the current global phenomena of ethnic violence is a result of the failure of the political will and legal imagination to formulate and implement norms and mechanisms to protect the rights of minority groups and indigenous peoples.

Professor James Crawford in examining the protection afforded to minorities in international instruments, traced the history of minority protection. He noted that although Article 27 of the International Covenant on Civil and Political Rights, which was the first attempt to provide international protection to minorities, purports to provide protection, a careful examination of its provisions reveals that it does not afford significant protection, in addition to what is already afforded to individuals in the international human rights covenants. Furthermore, he identified six key features of Article 27 which were detrimental minority protection.

As regards the legal status of the UN Declaration on Minorities,¹ it was pointed out that since it is contained in a General Assembly Resolution,² it is not a binding instrument, nor is it necessarily part of general international law. It contains certain features which distinguish it from Article 27 and thus expands the concept of minority protection although still in a limited way. It, however, focuses on the rights of individuals as opposed to group rights. It was emphasised that protection of minorities should be carried out in a broader context and not just within a conflict resolution framework because it is important to protect minority interests even where no conflict exists.

In summary, it was stated that in the next few years one may see development in the regional spheres in relation to minority protection and it was suggested that a study should be undertaken of different groups in various regions to ascertain how these groups articulate the rights granted by international instruments. In particular, it was noted that Article 1 of the Declaration on Minorities does contain an element of group protection.

1.3 Re-conceptualisation of self-determination

As regards the concept of self-determination and its articulation in the struggles of minorities and indigenous people, Professor Oloka-Onyango stressed the need for a holistic approach to reinvigorate the concept and make it more responsive to the peoples and all groups within society.

Recognising that the current conceptualisation of self-determination has been done exclusively

¹ UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

² See GA Resolution 47/135 of 18 December 1992.

by euro-american experiences, he stated that the development of this concept has excluded non-western ideals and perspectives. Thus, he stressed the need to reformulate the concept in the light of the experiences and perspectives of the non-western countries including non-western feminist perspectives.

Since the concept of self-determination emerged as a product of colonial domination, UN instruments have failed to recognise this right outside the colonial context, particularly, the rights of minorities and indigenous groups within states to self-determination. This is significant in view of the fact that current articulation of this concept has tended to emerge along ethnic and primordial lines, raising difficult issues relating to 'internal' and 'external' self-determination.

The hostility of states to the concept is mainly premised on the notion that the recognition of this right will lead to a proliferation of secessionist movements resulting in violence and mass death and will threaten national unity and territorial sovereignty of status. It was argued that if this right is recognised, it would encourage separatist groups to seek a legal remedy rather than resort to warfare. It is an overreaction to believe that the mere recognition of the right to secession would necessarily lead to disintegration.

He also stressed the importance of economic, social and cultural self-determination and of the need to include these rights within the definition of self-determination.

It was pointed out that even the International Court of Justice has supported the concept only in the context of decolonisation, as a result of which reliance cannot be placed on its pronouncements for progressive development of the concept.

1.4 Cultural rights

Professor Veena Das speaking on cultural rights, stated that the definition of 'minorities' has given rise to problems in the international sphere: all international instruments, including those which provide for minority and cultural rights treat these rights in terms of individual rights.

The objective of minorities in asserting the collective right to culture, is their will to preserve a common identity. Moreover, the demand for cultural rights is articulated in a context where smaller units within a state feel that their way of life is at risk of being penetrated and engulfed by the state.

The main problem with culture was identified as being male-created and dominated, whereas women were and continue to be relegated to the private and subjective spheres of culture. Citing the *Shah Baro Case* as an example, she highlighted the oppression and violence suffered by women in the name of culture and also how culture is defined by different segments within an institutionalised group. As regards the question whether issues of family and marriage should be subjected to state jurisdiction or whether they should be within the purview of religion and culture, it was pointed out that the latter recourse would leave the rights of subordinate groups such as women and children, the victims of traditional practices, without a remedy.

During the discussion, concern was expressed over the characterisation of culture as a collective

right since value judgments of the present influence the view of the past and contribute to the rise of ethno-nationalism, the danger of which is its tendency to stress on individual culture over multi-culturalism.

The lacuna in the human rights discourse and international standard setting on culture and the anthropological perspective on the dynamics within a groups was recognised and the participants stressed the importance of a multi-disciplinary perspective in relation to international standard setting.

1.5 Minority rights and development co-operation

Dr Neelan Tiruchelvam looked at developmental issues and minority rights and pointed out that most development programmes are formulated and implemented on a bilateral level between governments or between governments and development agencies, without any attention being paid to regional disparity or ethnic diversity. Projects are designed and executed with little concern for the well-being of the beneficiaries, particularly in the areas occupied by tribal or indigenous groups. Citing a few examples of such development policies which have contributed to some of the major human tragedies of our times, he stressed the urgent need to re-examine development co-operation.

The UN Declaration on the Right to Development is not sensitive to the needs of ethnic groups, thus it is imperative that the Declaration accommodate principles of ethno-development. It must acknowledge the rights of indigenous and minority communities to negotiate with the state and to choose development programmes which are suitable to their needs. UN Declaration must also impose obligations on both state and non-state actors if it is to adequately protect the right to development of ethnic groups.

There is a significant need to re-conceptualise development to accommodate ethno-development and to ensure that development assistance is directed towards strengthening social, economic and cultural rights of ethnic minorities. The shift in the policies of international lending institutions towards indigenous peoples is yet to be extended to ethnic minorities.

In working towards changing the orientation of development co-operation, we must be prepared for: (a) the decline in the size of official development assistance and increasing competition of recipients; and (b) structural adjustment programmes changing the role of governments and moving towards increased privatisation and free markets. NGOs then would become the new aid recipients raising questions of NGO accountability.

Concern was expressed over who should represent the interests of indigenous populations to negotiate development programmes when different groups within these populations express varying interests. The need was also felt to educate NGOs on aid conditionalities and their impact etc., because NGOs' action based on wrong information could have serious repercussions.

1.6 Institutional mechanisms

In exploring the various international governmental and non-governmental institutional

mechanisms which monitor and implement human rights and minority rights in particular, Dr Gudmundur Alfredson stated that due to the politics associated with minority rights, it has been difficult at the international sphere to further evolve the legal rights of minorities. The existing international mechanisms which can be accessed for redress of minority grievances include mechanisms under the ICCPR, ACESCR, CERD, the Children's Rights Covenant including the ECOSOC complaints procedures and the war crimes tribunal. In addition, the various UN agencies such as the ILO, UNHCR, UNICEF, UNESCO etc., also have mechanisms to which individual complaints could be addressed.

Although several such institutional arrangements exist, there is no guidance at the UN as to who should access these mechanisms. Furthermore, greater cohesion, co-operation and co-ordination between these mechanisms and institutions is necessary. In addition, there should be wider knowledge of the existing mechanisms. There is a reluctance on the part of the Human Rights Commission to get involved in minority issues.

The mandate of the newly created Working Group on Minorities include:

- (a) monitoring promotion and realisation of the Declaration on Minority Rights;
- (b) seeking to find solutions for minority grievances;
- (c) making recommendations for further measures to strengthen the protection of minorities;
- (d) receiving complaints and encourage what remedies are envisaged and what they would do towards reconciliation.

It was suggested that the Working Group envisage the possibility of a Minority Rights Convention as a long-term measure.

Similar to indigenous rights, concern was expressed over who should represent minority rights given various ideological groupings within minority groups.

1.7 Migrant workers

It was strongly felt that the issue of migrant workers should also be addressed as currently only two states have ratified the Convention on Migrant Workers. Many human rights organisations do not have migrant workers on their mandate. States do not have the same obligations towards migrant workers as it does towards minorities living within its borders. Although migrants who have the same identity as national minorities should be able to enjoy their culture but cannot expect the same degree of enjoyment of their rights. Protection should not depend on whether a particular group is new or old but should be accorded against discrimination.

1.8 Outcome of the Consultation

The report of the Consultation together with the papers presented will be presented to the Minority Rights Commission of the United Nations. The papers will be reworked to include the discussions and the criticisms voiced at the Consultation and once these are re-worked the LST hopes to edit and publish these papers.

VISIT OF THE SRI LANKAN DELEGATION TO DENMARK AND NORWAY

A three member delegation from Sri Lanka met with their counterpart organisations in Denmark and Norway on the 12th - 14th of July. The delegation comprised Dr J. Uyangoda, Chairman, Sri Lanka Foundation, Mr J. Thiagarajah, Associate Director, International Centre for Ethnic Studies and Dr S. Atapattu, Consultant, Law & Society Trust. The organisations visited by the delegation in Denmark are the Danish Refugee Council; Ministry of Foreign Affairs and Danida; Dan Church Aid; Danish Centre for Human Rights; and the Rehabilitation Centre for Victims of Torture.

From the discussions with these organisations, the delegation was able to identify areas of mutual interest and collaboration: democracy and human rights education, the issue of refugees, particularly establishing a refugee policy for Sri Lanka, conflict resolution, victims of torture and trauma and the training and capacity building of NGOs.

The delegation was able to get first hand information on the situation of refugees and the Danish and Norwegian governments' policy on refugees, their integration programmes and the special status of NGOs in Denmark and Norway. The Danish Refugee Council model, although an NGO and hence an autonomous body, is nevertheless funded by the government to carry out a particular task, was considered a fascinating model by the delegation.

I. Visit to Denmark

1.1 Danish Government's Policy on Refugees

As regards the Danish government's policy on refugees, the delegation was informed that the government gives a fixed amount of money to each refugee and has initiated an integration programme. The integration programme has to be implemented within 18 months. Denmark has a quota of refugees which has been negotiated with the UNHCR (approximately 400-500) which Denmark takes in annually. This includes handicapped refugees which no country wants to take. Those asylum seekers who are taken on a temporary basis are not allowed to integrate and the children are not allowed to enter Danish schools and are housed at Red Cross asylum centres.

The provisions in the Geneva Convention are used to determine whether a person is eligible for refugee status. Special legislation had been necessary to deal with people fleeing civil wars. Humanitarian resident permits are also granted sometimes.

1.2 Danish Refugee Council (DRC)

The DRC which now comprises 18 organisations, was commenced in 1956 with the influx of Hungarian refugees. The government, wishing to establish a structure to deal with these refugees, requested the help of NGOs. Although it was initially meant as a temporary exercise, it has now become permanently established.

If the asylum-seekers are granted asylum, they are passed on to the DRC who then are dispersed all over Denmark. The DRC finds suitable accommodation for them and has initiated a Danish language programme. Victims of torture are handled with special care.

The Asylum Department of the DRC undertakes post-monitoring of refugees who have been repatriated and the delegation discussed the need to establish an institution in Sri Lanka with government sanction to be in charge of refugees in a broad context, including internally displaced people. The International Department deals with integration of refugees in Denmark and is in charge of repatriation and improving living conditions of those who are repatriated.

1.3 Foreign Ministry and Danida

The officials who met with the delegation outlined their development policy in relation to Sri Lanka and stated that although they were prepared to provide assistance, they had to discontinue due to the hostilities in Sri Lanka and that long-term development assistance is not possible now. Via the European Union, however, the Danish government continues to contribute to development aid to Sri Lanka.

Danida supports international NGOs and that in the next year, extra funds will be made available for human rights issues, although no partner organisation has so far been identified in Sri Lanka.

1.4 Dan Church Aid (DCA)

The DCA works in collaboration with local organisations and has been involved in capacity building and institution building of NGOs in Africa. The priority areas of the DCA are human rights issues, AIDS, food security, environmental issues, pollution, agriculture, sustainable development and democratisation.

The basic concern of the DCA is to assist most marginalised groups in society, to give them a voice by strengthening their local partners in order to give effect to development aid, especially in Africa. Although DCA acts mainly through church related organisations, church affiliation is not important and in Asia the DCA has acted through local organisations.

The delegation considered it necessary to promote South-South co-operation, for example, Asian and African co-operation, as it is important to share mutual experiences and learn from those who share a similar background.

1.5 Danish Centre for Human Rights (DCHR)

The main priority areas of the Centre are Africa and Eastern Europe and the backbone of the Centre is research work which it combines this with practical/traditional NGO work. The Centre was established in 1987 by a group of NGOs, academics, politicians, the bar association and several individuals to provide a resource centre for the Danish community as there was very little material on human rights issues. Although it was established by an Act of Parliament and

approximately half of its budget comes from the government, it functions as an independent institution.

The Centre deals with three broad areas of issues, viz., international issues, regional issues (European) and domestic issues. It submits memoranda to parliament on draft legislation that impinges on human rights issues. The Centre is used by politicians, NGOs and journalists. With regard to activities in Eastern Europe, the Centre assists local groups to establish awareness, by drafting laws and assisting the government.

The Centre also conducts training programmes for NGOs and government officials once in every six months. It also conducts international courses and offers a few scholarships to participants. It hopes to commence an LLM programme in the Law Faculty on human rights. It also deals with environmental law and human rights and technology and human rights. At present the Centre is engaged in research on responsibility of private companies and the rights of refugees and the obligations of states in relation to refugees.

The delegation expressed great interest and enthusiasm in the work of the Centre in relation to democracy and human rights education, research as well as its input into the government process and suggested that an exchange programme should be undertaken where one or two interns from Sri Lanka could attend these training programmes as a wealth of experience can be gained from the experience and the activities of the Centre.

1.6 **Rehabilitation Centre for victims of Torture (RCT)**

The RCT was established in 1982 and the International Rehabilitation Council of Torture Victims (IRCT) was established in 1988. The RCT uses the definition of torture contained in the UN Convention against Torture (1984) and has identified 74 countries where government sponsored torture takes place.

It does not deal with other kinds of torture such as domestic violence or child abuse. The overall aim of the RCT is networking; distribution of information; and rehabilitation and counselling of torture victims. At present it is carrying out a training programme for medical personnel in Sri Lanka to deal with torture victims in collaboration with the Rehabilitation Centre in Sri Lanka.

II. **Visit to Norway**

Dr Uyangoda from the SLF and Dr Atapattu from the LST visited two human rights organisations in Oslo, Norway on 14 July 1995. They also met with officials from the Norwegian Foreign Ministry, including the Foreign Minister and NORAD. The organisations visited were the Norwegian Refugee Council and the Norwegian Institute of Human Rights.

Norwegian Foreign Ministry officials reiterated their willingness to facilitate the peace process in Sri Lanka, but they stressed that there must be a will for peace from both sides to the conflict: the government of Sri Lanka and the LTTE. They also hinted that development assistance to Sri Lanka could be increased if peace is achieved in the country. They stated that if the

government of Sri Lanka requests the Norwegian Government to mediate in the peace process, it would be very happy to do so.

2.1 Norwegian Refugee Council (NRC)

Started in 1946 with governmental as well as non-governmental initiative, the NRC was established to ensure co-ordination and implementation of refugee work after the second world war. It follows very closely the political events that have led to an influx of refugees in a country. Their activities are mainly two-fold: emergency activities and long-term activities. They also work in close collaboration with the UNHCR and Norwegian Church Aid. Research work is also carried out on policy issues relating to refugees. Their substantial operational activities are in Bosnia, Rwanda, Afghanistan, Gautamala, Mozambique, Vietnam and Angola.

Speaking on the Norwegian Refugee Council in Sri Lanka, which was commenced in 1988, they said that a rehabilitation project involving fishermen from Tamil Nadu was successfully carried out which was organised by the Catholic Church. After 1990, however, the project had to be frozen and \$ 11 million of unutilised funds is still available to be used for refugee work.

As regards repatriation of unsuccessful asylum-seekers, NRC said that as long as these people are not returned to war-torn areas, it is not against repatriation. The NRC's proposal to send an official to monitor the follow-up on human rights situation had been rejected by the government of Sri Lanka as the government had preferred the Swiss model, which an NGO is unable to carry out.

The NRC works very closely with the Norwegian Foreign Ministry and is mainly funded by the latter. The partner organisation in Sri Lanka is MARR (Mannar Association for Relief and Rehabilitation) which is supervised by the Church. The NRC stated the present involvement in Sri Lanka is rather limited and that no plans are envisaged to expand its involvement in Sri Lanka. When asked by the NRC how the delegation envisages the future involvement of Norway in Sri Lanka, the delegation outlined two broad areas for involvement: to get the support and the involvement of NGOs in the peace process and for the establishment of a coherent refugee policy for Sri Lanka.

III. Outcome of the Visit

The delegation will continue its education and training programmes on democracy and human rights issues for various target groups with the assistance of the NGOs in Denmark. For this, the course material of the Danish Centre for Human Rights will be utilised with the necessary amendments. In addition, one or two interns will be sent to the Centre where this could be arranged and in turn, the delegation will accommodate one or two interns at their organisations in Sri Lanka.

In addition, the delegation is looking into the possibility of formulating a comprehensive refugee policy (including internally displaced persons) for Sri Lanka, with the assistance of the government of Sri Lanka with the emphasis on monitoring the progress (or lack of it) of refugees once they are rehabilitated.

The issue of torture and trauma will also be looked into by the delegation with the aim of formulating a comprehensive plan to deal with such victims. For both these issues, the extensive experience of the NGOs in Denmark and Norway would prove to be invaluable.

The delegation found the unique status of NGOs in Denmark and Norway very interesting, especially their close and productive relationship with their respective governments and despite this close relationship, the way they have managed to retain their autonomy.

VISITORS TO THE LST

Two distinguished people visited the Law and Society Trust in August. The Chairman of the Equal Opportunities Commission in Australia met with Neelan Tiruchelvam and Sumudu Atapattu on the 22nd. He was accompanied by his wife. Several issues of interest were discussed. The Chairman outlined the work of the Equal Opportunities Commission and expressed interest in the Constitutional Reforms in Sri Lanka, particularly, the effort taken by the Government of Sri Lanka to provide for equal opportunities to its people.

Mr David du Plessis, the Acting High Commissioner for South Africa in Singapore, met with Sumudu Atapattu on the 23rd. Many issues of mutual interest were discussed, particularly the constitutional reforms in both countries and the experience of South Africa in its transition from an *apartheid* regime to a multi-party democracy. The ethnic conflict in Sri Lanka was also discussed in the light of the devolution proposals of the government.

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