



# LAW & SOCIETY TRUST

## Fortnightly Review

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In this issue we publish the proceedings of the Consultation on the Draft Constitution organised by the Trust in collaboration with the Commonwealth Human Rights Initiative, London. This Consultation took place on the 9<sup>th</sup> and 10<sup>th</sup> of August at the BMICH and was attended by many distinguished personalities from several countries. The meeting was chaired by Dr Kamal Hossain, the Chairman of the Commonwealth Human Rights Initiative.

In his introductory address, Dr Kamal Hossain urges us to look at the experience of South Africa in relation to constitution making. He calls the South African Constitution "a monumental achievement" incorporating concepts of freedom, equality and justice in a multi-ethnic society. Dr Neelan Tiruchelvam, speaking on behalf of the Trust, outlined the principal themes which gave rise to the Consultation: electoral reform; political polarisation and confrontation; fundamental rights and judicial review; and the devolution of power.

The Leader of the Opposition, Mr Ranil Wickremesinghe, draws attention to the conflict between the concepts of supremacy of parliament and the supremacy of fundamental rights still reflected in the draft. Pointing out that the ultimate goal is to bring peace to the country, he poses an important question: when and in what circumstances is the government going to have negotiations with the LTTE? While accepting that talking to the LTTE is no easy task, he points out that without their support the devolution proposals are bound to fail.

The Minister of Justice and Constitutional Affairs, National Integration and Ethnic Affairs, Professor G.L. Peiris, focused on the themes identified by Dr Tiruchelvam. With regard to electoral reforms he discusses the merits and the demerits of the two main electoral systems and proposes a hybrid version of the two: the first-past-the-post and proportional representation. With regard to judicial review of legislation and the time limit within which to do so - criticised by the Leader of the Opposition - he points out the disadvantages of not setting a time limit. He also points out the difficulties that arise with regard to existing personal laws and a possible conflict with the fundamental rights enshrined in the Constitution. With regard to devolution of power and negotiations with the LTTE, he points out that there is no question that the LTTE must be involved in the process. Many important issues, however, must be agreed upon by both parties as well as the Opposition before such negotiations can take place.

In her report on the proceedings of the Consultation, Ms Patricia Hyndman identifies three items as being considered by the participants "to be of absolute and fundamental importance" which should be reflected in the Constitution: the necessity for the unequivocal acceptance of the supremacy of the Constitution"; the independence of the judiciary; and the importance of judicial review for consistency with the Constitution, of laws whether or not they come into effect after its commencement."

## CONSULTATION ON THE DRAFT CONSTITUTION

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**Report to the Parliamentary Select  
Committee on the Consultation**

*- Prepared by Ms Patricia Hyndman*

# CHANGING CONSTITUTIONS AND THE CHALLENGE OF ORDERLY CHANGE\*

*Dr Kamal Hossain*

I feel privileged to be invited to participate in this consultation on the draft Constitution of Sri Lanka. Over the years one has been impressed by the fact that Sri Lanka, our island neighbour, has proved to be the least insular, and has welcomed and indeed promoted, exchanges of thoughts and ideas, the sharing of experiences, and the striving together to seek solutions to the many problems which our societies face. This is the fiftieth year of the end of the colonial relationship with Britain, of the end of the empire in this region and of the birth of the Commonwealth in Asia. Since then the Commonwealth has continued to grow and in its latest phase of evolution its members pledged in Harare in 1991, a pledge re-affirmed in Auckland in 1995, to uphold certain fundamental political values: democracy, the rule of law, the independence of the judiciary, respect for human rights, and just and honest government.

The emergence into independence meant for all of us the beginning of a quest - for freedom and justice - a free and just society, in which many and diverse expectations and competing interests would seek fulfilment. It fell to those placed in leadership roles to articulate those aspirations and to devise constitutional instruments and institutions to realise them.

Looking back to the early years, one is struck by the similarity of the language in which those aspirations were expressed. We had asserted our right to self-government, to representative institutions to be established through free and fair elections, to the rule of law, to an independent judiciary, and through these institutions to strive for social and economic transformation of our societies, in which there existed unacceptable levels of social and economic inequality. The commitment to social and economic change was powerfully expressed by Dr B.R. Ambedkar, the architect of the Indian Constitution, thus: "We are going to enter into a life of contradictions, in politics we shall have equality and in social and economic life, we shall have inequality. We must remove this contradiction at the earliest possible time." This was to be a daunting task for all of us. How difficult it proved to be was brought out in Pandit Nehru's reply in the last year of his life to Andre Malraux's question: "What has been your greatest difficulty since independence?" The answer was: "Creating a just society by just means." Some three decades later those words have a strange contemporary ring as the quest for freedom and justice still continues in each of our societies.

Our post-independence constitutions reflected the values of our independence movements which were based on assertions of human dignity and equality, of "human rights," long before they were formally accorded recognition in the Universal Declaration. The realisation of these rights has, however, remained a continuing challenge. Our subsequent constitutional history has been

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\* Text of the speech delivered at the Inaugural Session of the Consultation on the Draft Constitution of Sri Lanka, Colombo, 9 August 1997 organised by the Law & Society Trust. Edited for publication.

one of changing constitutions - of reforms and amendments, and even replacement by new constitutions - in many instances as a response to that challenge.

As part of a global neighbourhood, our sharing of experiences should extend beyond exchanges with next door neighbours. When the subject-matter is constitution-making, we need to look beyond, in particular across the Indian Ocean to South Africa to draw upon their recent experience of constitution-making. The new South African Constitution is a monumental achievement, the product of a sustained and successful struggle, culminating in a brilliantly negotiated consensus for establishing the values of freedom, equality and justice in that multi-ethnic society. The wisdom that derives from that experience is well expressed in his book on human rights by Justice Albie Sachs, thus:

*The constitution is all embracing precisely because it neither seeks to eliminate differences between people nor to eradicate social tensions and strife. On the contrary, the essence of the constitution is that it pre-supposes differences, but states that they shall not be the basis for discrimination and inequality, and it acknowledges the inevitability (even value) of social struggle, but provides a framework within which it can occur peacefully and democratically... a common constitution is the basis for finding a common harmony.*

He further asserts: "While forever insisting on the specificity of our experience and our solutions, we firmly deny any idea of South African exceptionalism. The universalisation of human rights is one of the great achievements of our era. What we want is for the universal idea to link up with our special striving and become a living force in our land." On a more practical plane he counsels: "By their nature, human rights documents know no copyrights, indeed there is a certain resonance, a certain sense of security, to be gained from utilising tried and tested formulations." Wise counsel indeed, and an encouragement to us to search for the best practice and to learn from those who have had to grapple with similar problems and devised innovative solutions. Among these are constitutional provisions: setting up an independent human rights commission with power to monitor compliance with constitutional mandates, in particular with respect to economic and social rights; extending constitutional remedies so as to provide access to redress in the form of public interest or social action litigation; granting the right to have access to information held by the state in order to secure transparency and accountability in government; and setting limits and checks on the exercise of executive powers, in particular during states of emergency.

The implementation of human rights, and in particular economic and social rights and schemes for devolution, present a challenge to creativity, which is needed to adapt those solutions to one's own situation and circumstances, keeping in view the culture and values of those who make up a pluralistic society. The draft has incorporated many improvements over earlier formulations. There is a desire further to refine and draft through a process of consultations which are on-going. The great advantage of drafting constitutional provisions today over doing this in the fifties through the seventies is that one can draw upon the international human rights jurisprudence which has developed since then as well as the jurisprudence which has been

growing in different national jurisdictions through judicial interpretation and juristic writing and the innovative leaps forward in many recent constitutions.

The Commonwealth Human Rights Initiative would like to thank the Government of Sri Lanka for responding so positively to the initiative, to the Governments of Australia, Britain and Canada for their support, and the organisational work done by the Law & Society Trust to make this consultation possible.

We look forward to a stimulating discussion and to learn from you of your creative responses to the needs of your society. It is indeed impressive to see the government and the opposition in Parliament working together in the process of consensus-building and constitution-making. I would like to wish success to all those involved in Sri Lanka in this challenging task as we commence this consultation.

## **CONSTITUTION MAKING AND THE NEED FOR MULTI-PARTY INVOLVEMENT\***

*Mr. Ranil Wickremesinghe*

Honourable Ministers, Excellencies, Chairman and friends,

I must thank the Commonwealth Human Rights Initiative (CHRI) for having sponsored the workshop which is a review of the draft, so far presented by the Chairman of the Select Committee of the Constitution. I must also say a few words about Dr Neelan Tiruchelvam of the Law & Society Trust, who put in a lot of work, which has made it that much easier for those who are engaged in the task of constitution making to find the background papers and the reference material necessary for them to come to their conclusions.

There seems to be a view with regard to the Chapters on Fundamental Rights and the Judiciary, that the draft so far presented, is final. I believe, however, that there is still time to go into some of the matters that could be raised. Looking at the Chapter on Fundamental Rights, I do not think it would be possible, at this time, to keep on adding large numbers of provisions, but a review of what is there cannot be excluded. Fundamental Rights is an area which has been overshadowed in the preparation of the report of the Select Committee, since the political debate has been either on devolution or on the abolition of the executive presidency. Fundamental Rights are as important and should receive as much coverage and publicity. Looking at the draft I still see the conflict between the concepts of the supremacy of parliament and the

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\* Text of the speech delivered at the inauguration of the Consultation on the Draft Constitution by Mr. Ranil Wickremesinghe, the Honourable Leader of the Opposition, at the BMICH on 9th August 1997. Edited for publication.

supremacy of the fundamental law of the people. If we go back into time, having been brought up in a British legal system, despite the fact that we had a written Constitution, despite the fact that the Constitution was supreme after 1947, and the law making powers of parliament were restricted under Article 29, we have always grown up in the belief of the supremacy of Parliament. The 1972 Constitution enshrines the supremacy of parliament. It took away the restrictions imposed on the legislative powers of parliament and, secondly, it permitted parliament to pass laws inconsistent with the Constitution. The 1978 Constitution really came up in two stages. Firstly, the 1972 Constitution was amended on the recommendation of the Select Committee of the National State Assembly, to introduce the Executive Presidency in January 1978. Subsequently, the Select Committee proposed a new Constitution - the second republican constitution - which was based largely on the 1972 Constitution, with a chapter on Fundamental Rights. The 1978 Constitution copied the Chapter on Fundamental Rights from the 1972 Constitution. It was made justiciable and the question of judicial review was taken up, although it did not receive that much attention. We thought it was an improvement that we had dealt with the question of the justiciability of executive action as well as limiting powers under the public right to the Public Security Ordinance. After 1978, when power was devolved, the concept of the supremacy of parliament came to an end, in the sense that executive power is vested with the President and judicial power is now firmly exercised by the Supreme Court and, the legislative power is shared between Parliament and the Provincial Councils. This is different from the 1972 Constitution, where the executive power and even the judicial power was vested in Parliament, and there was very little safeguard with regard to the judiciary. We should at some stage determine this conflict. But even in the present draft one aspect which has really concerned me - Article 23 of the new draft - is that it still gives the Public Security Ordinance the power to derogate from the provisions of the chapter on Fundamental Rights. The present Constitution does not give that power. According to Article 152 of the Constitution Emergency Regulations cannot override, suspend or amend the provisions of the Constitution. When we drafted the 1978 Constitution, one fact that was borne in our minds was the use of emergency powers from 1971 onwards.

In 1978 we made the extension of the powers under the Public Security Ordinance, subject to a vote in parliament every month. This is why we had emergency rule debated monthly as a means of Parliamentary control of emergency rule. Secondly, the regulations were made subordinate to the provisions of the Constitution. Even before the Executive Presidency was established in 1978, the executive, in the form of a Prime Minister, had been strengthened by the use of emergency power. The Executive Presidency gave the head of government stability. The process may have reduced the interaction between parliament and the Chief Executive but it nevertheless gave him the stability to carry on. The question is whether the 1978 Constitution strengthened the Executive too much, at the expense of Parliament. That issue is now academic, since we are talking of abolishing the Executive Presidency, but the second arm, which was there even before 1978, was increasing the use of emergency powers by the executive and the government. If we are to have a provision which will allow the Public Security Ordinance to derogate from fundamental rights, then it is a step backwards. We are now in the process of appointing a Select Committee of Parliament to go into the matters affecting the media, including the laws which impose restrictions on media freedom. On the

one hand, you can remove the laws; on the other hand, you can have further encroachment of media rights, because an emergency can arise when there are floods, a cyclone, or when there is a general strike.

We have to look at the provisions of the Public Security Ordinance to see how it can be refined. There are instances in our experience when the Public Security Ordinance has been put into action to deal with natural disasters and with the civil administration being affected with the stoppage of work. So that is one category. The second is the use of the Public Security Ordinance when you have the present state of affairs or in a situation of war against another country. Are we going to allow the public security provisions which are embodied in the present Constitution to remain or are we to take another look at them? Another question that has come up in the Select Committee is: are we to allow the Public Security Ordinance to determine the scope of censorship? ie. is to make regulations under the Public Security Ordinance that can be enforced. Should we have separate legislation - more focused - which would allow the control of censorship in very specific instances? The same with regard to preventive detention? These are some of the questions that we have to go into. I am very concerned about the derogation of fundamental rights through the Public Security Ordinance. We must look at the extent to which we could further restrict the exemptions to the fundamental rights. The restrictions that have been imposed on fundamental rights in the same chapter can and should be narrowed, but to bring in this clause would be to take away the impact of the chapter on fundamental rights and strengthen the executive because the practice in this country with the Public Security Ordinance has been that, except at the debate on emergency, it is very difficult to raise any questions, particularly for the government back-benchers.

The draft has certainly made an advancement in allowing judicial review of legislation, but for a limited period of time. There seems to be debate on it and there are views which cut across parties. I have always felt that a time limit was not necessary.

The devolution of power and even of constitution making has always involved the question of language rights and the right to develop your own areas; and some of the problems may date back even to the making of the Orders in Council in the 1920s. The demarcation of the Colombo seat, and the decision by Ponnambalam Arunachalam to withdraw, can be seen as the beginning of the dispute. Section 29 of the Soulbury Constitution was a compromise arrived at between all parties, and the removal of Section 29, without another similar provision or other adequate safeguards, in 1972, led to the demand of a separate state. The 1978 Constitution brought in the recognition of Tamil as a national language and as the language of administration in the North and the East, together with the chapter on fundamental rights. Further advancement was made in 1987 with the 13<sup>th</sup> Amendment which brought in the Provincial Councils and made Tamil an official language. The Indo-Lanka Accord, on which the 13<sup>th</sup> Amendment was based, was also an agreement to bring to an end the conflict that was going on in the North and the East. So at every turn of constitution making some aspect of language or of devolution, of developing your own areas, has cropped up. This is so even in this instance. Where the United National Party is concerned, we are committed to further devolution. Having introduced the 13<sup>th</sup> Amendment, we then established the Select Committee

chaired by Mr. Mangala Munasinghe to determine further areas of devolution. Even in the proposals that are being discussed there have been areas of agreement and also areas in which agreement has not yet been reached, including on some of the more important aspects.

Leaving that aside we must also query as to how one can use this process? Is this process going to be linked in any way in the quest of bringing peace to the North and the East? In 1987 we were fortunate with the Indo-Lanka Agreement, which brought all the groups into the mainstream of politics. But one group, the LTTE, left the agreement and took up arms. Two discussions, by successive governments, one by President Premadasa and the other by President Kumaranatunga, did not prove to be successful and the outcome was renewed military action. Is the constitution making process here to be linked in any way to the question of peace and, if so, how? Or are we going to allow that to be determined elsewhere? When these proposals on devolution were presented by the Government, the Government itself said that this was a means of bringing peace. There seem to be two options. One is to militarily weaken the LTTE to such a position that any constitution, any new law passed by Parliament would be accepted by the majority of the people and the LTTE would be too weak to resist. The second arises in case that does not happen. What is the option then? If the Government is going to talk to the LTTE when is it going to take the decision to do so? It is not an easy decision to make. Talking to the LTTE is no easy task. But I think we have to be aware of this issue and make up our minds as to which direction we are travelling in. We also have to keep in mind the interests of all the other political parties, including the Tamil parties which are in Parliament. In addition, we have to keep in mind the concerns of India. It is even more difficult than a few parties getting together to draft a constitution. But that is a decision we cannot ignore. Since we have already had a bi-partisan agreement, it is a question which neither the government nor the opposition can ignore for much longer.

The next question that arises is regarding the procedure that should be followed. How does it get related to the Select committee? Peace itself is becoming more and more important and to those refugees in the Vanni, to those living in the camps of Puttalam, to those who are living in the villages of Medawachchiya and Padaviya, this would be more important than a constitution. In a country which has a large number of people who are unsettled or whose homes are under threat, in those areas where a normal life cannot be led, this is an important question. It also is an important question for the rest of the country. This issue cannot be divorced from the process completely and a decision has to be made as to whether the constitution making process will continue with the existing parties or whether it will have room for new parties. The two important questions I thought of highlighting and which cannot be ignored are: the one relating to the supremacy of parliament and the supremacy of the fundamental law; and the other relating to the parties that will take part in the consultation of the devolution process.

Thank you.



# CONSTITUTIONAL REFORM AND DEVOLUTION OF POWER\*

*Professor G.L. Peiris*

Dr Kamal Hossain, Mr. Ranil Wickremasinghe, the Honourable Leader of the Opposition, my colleague Mr. Ashraff, Members of Parliament, distinguished members of the Commonwealth, ladies and gentlemen,

Dr Neelan Tiruchelvam in his introductory remarks dealt with the principal themes underpinning the current exercise in constitutional reform. I think one can accurately state that there are four such themes. They are the main objectives towards the accomplishment of which we have devoted ourselves.

## 1. Electoral Reforms

The first is the electoral process. That is fundamental. I think we can regard it as the point of departure. Anybody who believes in the democratic way of life will have to put a very sharp focus on the integrity of the electoral system because Parliament quintessentially must mirror public opinion. Parliament is a representative body and the electoral system must ensure that Parliament reflects accurately and genuinely the prevailing public opinion in the country. Otherwise, the whole concept of legislative supremacy will be illusory. We believe that the system that we have in Sri Lanka at the present time is fundamentally flawed. Until 1978 we had the British system: the first-past-the-post-system. In 1978 we rejected that system altogether and substituted, for that, the system of proportional representation. On the whole, the present government believes that proportional representation is healthy and desirable. However, there is at present a very fundamental problem: the complete absence of any nexus between the Member of Parliament and his constituent which detracts very substantially from the value of Parliament as an institution. A constituent who has a problem must know who his Member of Parliament is; whom to go to. There must be an allocation of responsibility to a particular member of the legislature with regard to problems faced by constituents - that basic element is lacking in the present system. We do not, however, propose to go back in its entirety. This is because the first-past-the-post-system has tended to produce unbalanced parliaments. In 1977 when the Honourable Leader of the Opposition first entered Parliament, the Sri Lanka Freedom Party, led by the present Prime Minister, polled almost 30% of the votes but ended up with only eight seats in Parliament. Thus, there was a horrendous imbalance between the number of votes polled by a political party and the number of seats to which they eventually became entitled. To my mind that is the fundamental problem with regard to the first-past-the-post system. We saw this happen quite recently in the United Kingdom when the difference between the number of votes polled by the Labour Party of Tony Blair and the votes polled by the Conservative Party was certainly not proportionate to the size of the majority of the Blair

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\* Text of the speech delivered at the inauguration of the Consultation on the Draft Constitution by Prof. G.L. Peiris, the Honourable Minister of Justice and Constitutional Affairs, National Integration and Ethnic Affairs, at the BMICH on 9<sup>th</sup> August 1997. Edited for publication.

administration in the House of Commons. This is the basic problem with the first-past-the-post system. It produces authoritarian regimes that ride rough shod over the rights of others. It is a structural flaw. Our view, therefore, is that what the country needs is a hybrid system, a mixture of proportional representation and first-past-the-post system. That is the basis on which we are working. We are trying to marry these two systems in order to give our country the benefit of a system that combines elements and characteristics of both those systems.

## **2. Political polarisation and confrontation**

The second central problem which we are seeking to address is the problem of political polarisation and confrontation. We have here, participating in these deliberations, distinguished representatives from India and Bangladesh. I think it is an accurate reflection that in the Sub-Continent as a whole we do have a very significant problem of political polarisation and confrontation. Look at the British system which we have been applying in this country ever since independence: when there is a dissolution of Parliament a caretaker government takes over. It is the caretaker government which is responsible for the conduct of elections. But in Bangladesh and Pakistan we have had situations in which the opposition political party has objected to elections being held by the caretaker government, and situations have arisen which have necessitated a group of people coming from outside as in Bangladesh. A Chief Justice, for example, is invited, together with distinguished lawyers, representatives of NGOs and so on for the explicit purpose of conducting an election after which they would be *futus officio*. Now that represents a degree of suspicion and mistrust. You cannot play the game of cricket unless you have agreed with regard to the basic rules. When does a batsman get out? If there is an argument with the umpire, obviously you cannot play the game. That is the magnitude of the problem in a great part of South Asia. It is necessary to deal with this problem.

A few months ago when I was in Kathmandu, King Birendra told me that to his mind the most significant proposal that we had made in the draft proposals was with regard to the establishment of a Constitutional Council which is an all party mechanism that is responsible for identifying people who would be appointed to particular offices, like the Auditor-General, the Commissioner of Elections, the Attorney-General, the members of the Public Service Commission, the members of the Official Languages Commission and members of the Permanent Commission on Bribery and Corruption. These are people who must enjoy the confidence of the community as a whole, and they must not be seen as friends of the ruling party. In order to achieve this result, in order to break down the conventional barriers that separate political parties, we have come up with this notion of a Constitutional Council. King Birendra stated that he regarded this a very dramatic advance and a concept which would be of comparative value and interest not only in Sri Lanka but in many parts of Asia.

## **3. Fundamental Rights and judicial review**

The third one is with regard to fundamental rights. I think the observations made by the Leader of the Opposition were very valuable. With regard to fundamental rights the basic situation is this: the Leader of the Opposition spoke of the fundamental conflict between the principal

relating to the sovereignty of Parliament and the principle relating to the sovereignty of the Constitution. How do you reconcile these competing objectives? Traditionally, we have been wedded to the British concept relating to the omniscience, the suzerainty of Parliament. Parliament makes laws. The courts are not there to adjudicate upon the legality or the constitutionality of legislation passed by Parliament. The courts are there only to interpret and apply those laws. That is the traditional British theory. We began to depart from that in 1972 with the enactment of the first Republican Constitution. That was a seminal concept which was involved in the promulgation of the first Republican Constitution. For the first time we accepted the American theory that the powers of Parliament must themselves be circumscribed and they are circumscribed by reference to principles which are enshrined in the constitutional instrument. Fundamental rights are protected. If Parliament seeks to derogate from those fundamental rights, then judicial remedies are available. In other words, Parliament can function only within certain frontiers that are established by the Constitution. If Parliament steps beyond those limits, legislation that is in conflict with the fundamental rights that are spelt out in the Constitution would be regarded as *ipso facto* null and void. That emphasises the supremacy of the Constitution over the legislature. We have, therefore, moved very much in the direction of Marbury and Madison, away from the conceptual underpinnings of British public law.

The Honourable Leader of the Opposition then raised a very important question - he said that he himself would be inclined to favour the absence of time limits with regard to judicial review. There is of course conceptually an inextricable link between fundamental rights and judicial review. If fundamental rights are to be meaningful in any country then there must be judicial review. Somebody must have the power to set aside legislation that is offensive to fundamental rights. If there is no such power vested in the judiciary, then fundamental rights are a mere pious aspiration which have no concrete content nor practical importance. Therefore, judicial review is a necessary adjunct and corollary to fundamental rights in any pragmatic and substantial sense. We certainly believe that fundamental rights should be enforceable. They are not mere moral prescriptions. They are not merely directive principles of social policy. They must be enforceable. The courts must have a role with regard to that matter. But should it be open ended, or should there be some kind of time limit?

Under the 1978 Constitution, by which we are governed at the present moment, you can challenge legislation on the ground of incompatibility with fundamental rights only so long as you are dealing with a Bill. When the Bill becomes an Act, when it is enacted into law by the certification of the Speaker, then the legislation becomes invulnerable, and impregnable. You can no longer challenge that legislation. That is the present position.

What the present Government is proposing is a dramatic advance on this situation. After the law is enacted, after it has entered the statute books you can still challenge that law before the Supreme Court. The question then is, can you do it for all time? Or has there to be some sort of limit? The Leader of the Opposition feels that there ought not to be a limit. That is the position in the United States of America. But that is a very complicated issue. There is an argument the other way. I am not necessarily saying that the contrary argument is more

convincing but the contrary argument is that you must also have regard to settled expectations. People must know what their rights are. You cannot have these rights perpetually in a state of suspense; a matter of surmise and conjecture without any certainty or finality. Supposing laws are passed with regard to partition, devolution of property rights, interstate succession and 25 years later those laws are challenged on the basis of contravention of constitutional principles including fundamental rights, and if those provisions are then upset or overturned by the courts what is the impact of that on the settled expectations of the community? This, therefore, is an area where you are dealing with conflicting social interests and ultimately you have to resort to levers and mechanisms of social engineering of the kind that were so persuasively articulated by Rosco Pound, for example. It is a very complex area of public policy.

There is also another consideration which I must draw attention to. That is the fact that Sri Lanka is a multi-cultural and multi-ethnic society. We have a plethora of laws operating within the country. There is customary Tamil law - the Thesawalamai - which applies to Tamils with a Jaffna inhabitancy. We also have special laws applicable to sections of the Sinhalese themselves living in the Kandy area. Now, complexities arise from that situation and these are matters which the Indian courts have dealt with. What if a Muslim woman goes to the Supreme Court and says "I am discriminated against simply because I am a Muslim: I am claiming alimony from my husband. If I happened to be a Hindu or a Buddhist I would get very much more as alimony. My alimony is reduced because I happen to be a Muslim. That is a violation of my right to equality under Article 12." What is the position with regard to that? Can the Court hold that this is a matter of classification rather than discrimination? In other words, the applicability of Muslim Law to this particular woman marks her out as belonging to a category that is governed by a special cluster of legal norms. Although there is discrimination, it is neither capricious nor arbitrary. It is principled and is based upon a rationale. These are problems that can arise in an acute form in Sri Lanka. This could not happen in Japan or France, but it could happen in Sri Lanka.

There is another point that arises in that connection. If you are going to open the floodgates, if laws can be examined from the standpoint of inconsistency with fundamental rights provisions, what about the existing corpus of law? Certainly for the future, when Parliament enacts laws the Supreme Court will test those laws against the standards reflected in the Constitution. But what about the entire corpus of law that is in existence today in our statute books? Is one to say that those laws also can be examined and set aside by the Supreme Court in perpetuity? This is another difficult problem and I do not know whether one can really go as far as that. We are open to new suggestions and the Draft of the Fundamental Rights Chapter is certainly not final. That is the whole point in having a Consultation of the kind we are embarking upon today; to have the benefit of your insights and ideas, and to see whether we can improve the text having regard to the views that you express in a forum such as this. What we are proposing is that, as far as existing law is concerned, the courts will not be given the opportunity to overturn those because that will have very serious repercussions on the rights of minority communities - the Muslim community in particular - and this has been pointed out in Parliament by Muslim members on several occasions. If you were to do that, there would be serious tensions with regard to the rights of the minority communities. Thus, what we have

proposed is that these matters will be referred to a Commission which will report to Parliament within two years and Parliament will be advised about legislation which ought to be critically scrutinised and examined from this particular stand point. We think that that is a viable and pragmatic compromise. But these are all very difficult issues and we are flexible and malleable in our approach to them.

#### **4. Devolution of power**

The fourth and final theme that we are addressing is the devolution of power. We believe that the way to peace is through a sharing of power. We do not think that a unitary state is really amenable to the achievement of these objectives, because a unitary state by definition, is a state which has a central legislature that has the legislative competence to deal with any subject, to legislate in respect of any matter with regard to any part of the country. Thus, if you were to hold fast inflexibly to the concept of a unitary state, then, that would stand in the way of the kind of devolution that is contemplated in the Constitutional Draft. We have the political will to do this; that is not a response to external pressures. That is an immediate point of contrast with the 13<sup>th</sup> amendment which was the product, largely, of external circumstances. We believe in drawing the line very clearly between central government functions and regional functions and we wish to do so in a manner that does not admit of ambiguity or doubt. We are also committed to symmetrical as opposed to asymmetrical devolution of power for this reason: we think that although devolution has its principle, utility and application in the context of the ethnic problem, its rationale is by no means limited to a proposed solution to the ethnic problem.

We think that there is another problem; the problem of equitable and balanced economic development of different regions of the country. We think that adequate resources must be available to the remote regions; they must be in a position to decide for themselves. The central problem of Sri Lanka today is an acutely perceived sense of alienation on the part of a large segment of the community. They do not feel that they are sufficiently involved in the decision making processes and that is a tool that should be at the disposal of people in this country, whatever part of the island they may choose to reside in. The economic dimension, the focus on social equity which is an integral aspect of the rationale of devolution, should by no means be neglected because of the very sharp focus that is justifiably and legitimately being put on the current magnitude of the ethnic issue.

#### **5. Negotiations with the LTTE**

Finally, I would like to comment, very briefly, on what the Honourable Leader of the Opposition, said about the question of talks with the LTTE. This is a matter which has been repeatedly discussed. If I may summarise the arguments of the Leader of the Opposition, what he said is this: here we are engaged in an exercise in constitutional reform. What is the guarantee that this will bring us peace? One of the principal actors in the current drama is the LTTE. At the moment the LTTE is not a part of the negotiating process. It would, therefore, seem likely that at some point of time, one would have to have open negotiations with the

LTTE. When one does so, the LTTE will not sign on the dotted line. The LTTE will want to make its own input into the process which culminates in the preparation and the adoption of a new constitutional instrument. The Leader of the Opposition has, therefore, queried the way to deal with this element of the problem. What is the pragmatic value of this exercise if the LTTE is out there in the cold; if the LTTE is not on board? This question in a slightly different form was put to me recently by the Australian Foreign Minister, Mr. Alexander Downer. This was also discussed when Mr. Malcolm Rifkin, the former British Foreign Secretary was in Colombo. My answer to both was that: there is no question of talking or not talking to the LTTE, as of course one must talk to the LTTE. It is evident that in the end a solution will not be fully implementable if the LTTE is excluded from the process. That is so self evident that it does not require explicit assertion or articulation. Nobody in the Government is suggesting that the LTTE is irrelevant and that one should not talk with the LTTE. On the contrary, talking to the LTTE is the first thing that this Government did. As a result of those discussions we did have a cessation of hostilities from the 8<sup>th</sup> of January until the 19<sup>th</sup> of April 1995, at which point the LTTE unilaterally repudiated that process. So there is no doubt whatsoever about the need to talk to the LTTE. The question, however, is: at what time? Under what conditions? In what circumstances? And after what preliminary measures? The UNP has a great deal of experience of talking to the LTTE. There has been extensive protracted discussions with the LTTE under the aegis of successive UNP administrations. However, talking to the LTTE is not the simplest thing in the world. There is no merit in talking to the LTTE for the sake of talking. Simply to go through the motions of a discussion will not be meaningful. One has to learn from contemporary experience.

If one were to identify the principal defects or infirmities in the negotiating process that was conducted with the LTTE under the present Government, two things stand out clearly. The first is that you must get an assurance from the LTTE that they would be prepared to talk about the substantial political issues and that discussions will not be confined to humanitarian concerns. That is absolutely crucial. Secondly, and no less importantly; there must be an explicit assurance by the LTTE that they are agreeable to a time frame within which these negotiations are completed. They cannot meander along without focus, without direction like Tennyson's brook. There must be some point of termination and you must note where it is going to end. That is very important. The talks have to be structured; they have to be focused; they cannot be all encompassing, roving discussions because that would not be useful.

My position as I articulated it to Mr. Alexander Downer, was this. If we go to the LTTE and make a proposal, they would probably ask the value of these proposals. These proposals have been made over the years. Regrettably, the core issue here, is the whole question of political polarisation and confrontation. In the time of S.W.R.D. Bandarnaike, in the time of Dudley Senanayake, in the time of J.R. Jayewardene, when a moderate proposal was put forward by the ruling party it was shot down by the opposition. That has been the history of this matter for the last fifty years. There is no one miscreant. Everybody has played that game and that is why this problem has proved intractable. The LTTE would naturally want to know how this position would be any different. Will there not be a repetition of the course of history? One would, therefore, want to be in a position to assure to the LTTE, if the talks are going to be

meaningful, that on this occasion the situation is different, because there is a consensus between the two major parties, the Peoples Alliance and the United National Party. That would put a fundamentally different perspective on the overall situation, and it would make a great difference to the potential response of the LTTE. That is absolutely necessary. You must first agree on a basic framework on which a proposal is to be made to the LTTE. I am not saying that the minutiae must be agreed upon. However, there must certainly be a fundamental consensus with regard to the basic parameters within which discussion would take place with the LTTE. Otherwise, those discussions are not going to lead anywhere. We must agree among ourselves - the UNP and the PA - how far it is possible for us to go, and that certainly can be done without any acrimony or rancour whatsoever because it is genuinely and obviously a national issue. Without it, it is all hanging in the air, and it certainly will not lead anywhere, nor will it produce any more results than any of the previous abortive attempts have produced.

We also believe that you have to assuage the feelings of the Tamil people. You have to propose a solution to them. It was Mao Tse Tung, who apart from being a political leader was also a strategist, who said that just as much as a fish needs water to sustain life, a guerrilla movement requires the goodwill and the support of the people with whom they work. If there is disillusionment, anger, indignation, cynicism on the part of the Tamil people and if that problem remains unaddressed over the years, then, that is fertile ground for the emergence and the flourishing of a guerrilla movement. You have to deal with that problem in juxtaposition with the war effort that is being made. That is why the Government has consistently emphasised that it has a two pronged strategy: military initiative directed against the LTTE and the political proposals which are offered to the Tamil people of the country as a whole. That is the comprehensive approach which, in our view, will be the precursor to a lasting and durable solution to this problem.

I am very happy that this symposium is being arranged at this most appropriate time. It is entirely propitious and opportune as the Government prepares the final stage of the constitutional reform process. We have been working according to certain deadlines, and we are reaching the end of the road rapidly and this is certainly the point of time at which we would benefit greatly from the exposure to the ideas and suggestions that you articulate in the deliberations that are beginning today.

It only remains for me to thank Dr Kamal Hossain in his capacity as the Chairman of the Commonwealth Human Rights Initiative, Dr Neelan Tiruchelvam, and all others who have been associated with the organisation of this workshop. I would like, on my own personal behalf, as well as on behalf of the Government, to express my appreciation to the Honourable Leader of the Opposition for his presence here on this occasion. I wish your deliberations every success and I give you the earnest and sincere assurance on behalf of the Government that everything you propose in the course of these deliberations will be very seriously considered by the Government before completing the constitutional reform process.

Thank you.

# CONSULTATION ON THE DRAFT CONSTITUTION OF SRI LANKA

## Report to the Parliamentary Select Committee on the Constitution

*Prepared by Patricia Hyndman  
1997*

### INTRODUCTION

The Consultation on the Draft Constitution of Sri Lanka was convened in Colombo on August 9th and 10th, 1997, under the auspices of the Commonwealth Human Rights Initiative and the Law & Society Trust. This Consultation involved a mix of foreign and local participants who together combined wide experience of constitutional law and of the workings and interpretations of constitutions, of international law and its application and interpretation, people with experience as legal academics, as legal practitioners, as members of legislatures and judiciaries, as members of political parties both in opposition and in office, representatives of non-governmental organisations, people skilled in the techniques of legal drafting as well as holders of ministerial positions.

At the outset of the Consultation the foreign delegates stated how mindful they were of the considerable work reflected in the Draft Constitution and complimented the drafters and the members of the Select Committee on the extensive care clearly evident in the drafting to date.

The issues identified by the agenda for discussion were as follows: Fundamental Rights; The Constitutional Council, Judicial Review of Legislation and the Jurisdiction and Powers of Superior Courts; Electoral Reform, the Representational System and the Role of the Election Commission and Election Disputes. Consequently, it was to these points that attention was focused. A time for the separate discussion of the devolution chapter had not been assigned to the meeting but, although as a consequence no examination was made of the text of those proposals, of necessity the aspirations it sought to achieve were taken into account during the consideration of many of the items which were raised.

It should be noted that throughout the meeting the delegates were working from the March 1997 text supplemented by the proposals on social and economic rights which had been released to the media on Friday 18th July (see Schedule).

As would be expected from such a programme, and such a mix of delegates, the discussion was animated, informed and touched on many topics. Three items stood out among the many canvassed as being considered by the delegates to be of absolute and fundamental importance. These were the necessity for:



- (i) the unequivocal acceptance of the supremacy of the Constitution, and the conformity both of its terms and of the interpretation of those terms with the standards laid down by international law,
- (ii) the independence of the judiciary, and
- (iii) the importance of judicial review, for consistency with the Constitution, of laws whether or not they came into effect after its commencement.

## **I FUNDAMENTAL RIGHTS**

These discussions commenced with a description by Dr. J. Wickremaratne of the proposals which the government will be placing before the Select Committee regarding amendments to the March 1997 Draft. Dr. Wickremaratne indicated, among other matters, that the word "intentionally" is to be deleted from Article 8 and that it, and a number of other rights not currently so protected in the March 1997 Draft, are to be made absolute. He further stated that the Articles concerning socio-economic rights and children's rights currently presented in the separate document referred to above would now be included in the fundamental rights chapter.

The major points arising from the discussion which then took place were as follows:

Sri Lanka has ratified a number of international human rights instruments, and the point was made that it is important that the wording of the fundamental rights chapter should be in conformity with those instruments. At present this is not always the case. As an example Justice Bhagwati pointed to Article 10(10) (regarding the mode of trial for persons charged with an offence) noting the need for additional provisions in order for the paragraph to conform to the wording of Article 14 of the International Covenant on Civil and Political Rights (ICCPR).

One concern related to the derogation sections. It was suggested that these (which currently appear numbers of times and in a variety of formulations) be simplified and that the draftsman look at the text of the ICCPR and, in particular, at its Article 4, to both simplify these sections and bring them into line with those in the Covenant. As it stands Article 23 is not in complete conformity with Article 4 of the ICCPR. During this discussion the fact that greater protection is given to some rights than is required by international law was noted and commended.

During the meeting there was repeated reference to the importance that the rights of women and Sri Lanka's obligations under the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) receive greater recognition in the Constitution. Article 11 (2), even in the form most recently proposed, was regarded as providing insufficient protection to women's rights. Article 9 of the South African Constitution provides a good model for an effective non-discrimination provision.

It was also observed that in the interpretation of fundamental rights the courts should take into account the government's obligations under international human rights instruments, and interpret these provisions consistently with these obligations. It was stressed that it is important to insert the requirement to interpret Chapter III in a manner consistent with the government's international human rights obligations into the text of the Constitution. This interpretation may take into account comparative jurisprudence on human rights instruments from elsewhere (see for example Article 39 of the South African Constitution).

A statement indicating the significance of this requirement was made in relation to the government proposal that the word "sex" in Article 11(2) be changed to "gender." It was observed that it would be preferable to retain the word "sex," although there was no objection to the addition of the word "gender", because "sex" is the terminology employed in the international human rights instruments, and use of the same wording in the Sri Lankan context would then facilitate access to comparative jurisprudence in these matters.

An additional suggestion which related to the interplay between the fundamental rights chapter and international law, was to the effect that the term "general principles of law recognised by the community of nations" appearing in Article 10(13) be replaced by the term "public international law." This would allow sourcing from a larger pool of international legal rules and principles as, for instance, the ICJ Statute recognises other sources of international law in addition to general principles of law recognised by civilized nations.

Article 24 received considerable attention. The inconsistency of this Article, and of Article 25, with the guarantee of fundamental rights intended by this chapter, and with notions of the supremacy of the Constitution, was agreed by the delegates to be unacceptable. There was considerable discussion of Article 24 because of the Sri Lankan context of the different personal laws governing the different communities. The proposal of the government to the effect that a Commission be established to examine all laws to see whether or not they were consistent with the Constitution, and report within three years to Parliament, was not considered a solution. After discussion a suggestion was made which secured general agreement as a compromise. This was to the effect that all laws, with the exception of those different personal laws which impose different requirements for different communities in Sri Lanka, should be challengeable for inconsistency with the Constitution.

The delegates took on board the concern that a gap in the legislative provisions might then arise, but pointed to ways of overcoming this problem. The experience in Canada has been that the Supreme Court has found it possible to strike down legislation while allowing the legislature the time to consider appropriate amendments prior to the invalidity coming into effect. The Indian Supreme Court has also done this and the South African Court has acted similarly - suspending the effect of the invalidity order so as to allow time for the law to be brought in line with the Constitution.

Major points particularly singled out and strongly recommended for inclusion in the substantive part of the text were:

- \* a clear statement on the supremacy of the Constitution;
- \* a clear statement on the independence of the judiciary; and
- \* a clear statement that the fundamental rights chapter is to be interpreted in the light of Sri Lanka's obligations under international human rights law.

The proposals in the attached Schedule to the effect that children's rights and certain socio-economic rights be incorporated into the chapter on fundamental rights instead of being, as originally proposed, merely included as Directive Principles, were welcomed by the delegates. It was recognised that implementation of the socio-economic rights would be brought about progressively and within the resources available to the state. It was suggested, as a recognition of the importance of these rights, and with reference to the importance of the provision of effective remedies, that the Human Rights Commission be specifically mandated to monitor the progress of their implementation.

It had been observed early on, and it was stressed at various stages during the proceedings, that in order to benefit from constitutional provisions, however well drafted, the focus must be on remedies, and that remedies must receive due place in the Constitution. The fact that the Human Rights Commission received recognition in its text was welcomed.

On a more general note, delegates noted an increasing concern at the global level that people were becoming disconnected from the constitutional processes of their governments and that world-wide, questions were being raised as to how to redress that trend. In the case of Sri Lanka, this present exercise of the drafting of a new constitution as the fiftieth anniversary of independence approached, was seen as a real opportunity to involve the population in the governance of the country. It was observed that a variety of measures could advantageously be taken to attain a greater involvement. One method would be to ensure the simplicity and clarity of language and structure of the Constitution. Other methods recommended were the giving of greater publicity to the process of the development of the new text, and the provision of greater opportunities for public discussion.

In this regard, the great significance of political rights was noted and the suggestion was made that the right to vote and the right to stand for election be included in the fundamental rights chapter, rather than remaining in Chapter XIII. (Further discussion on qualifications to these rights took place in the session of the meeting devoted to Electoral Reform, and is noted there.)

Regarding the wording of Article 26, it was suggested that state action should be defined to specifically include judicial action if this infringed on human rights generally, rather than where it impacted only on those rights appearing in Article 10. In a leading Indian Supreme Court case it has been decided that judicial action should be subject to the fundamental rights provisions of the Constitution.

In addition the following recommendations were made:

- \* that it should be specified that the right to property (Article 21) should not be extended to corporations;
- \* that there should be limitations to the right to property, in particular in the interests of environmental regulation;
- \* that other socio-economic rights should be included, one illustration was that the right to a clean and healthy environment should be specifically added; and
- \* that there be included a prohibition that no child below the age of 14 (or 16) should be allowed to work in any factory, mine or engage in other hazardous activity.

## **II THE CONSTITUTIONAL COUNCIL, JUDICIAL REVIEW OF LEGISLATION AND THE JURISDICTION AND POWERS OF THE SUPERIOR COURTS**

### **a) The Constitutional Council**

The idea of the Constitutional Council, which had been inspired by a similar provision in the Constitution of Nepal and which seeks to ensure that an independent and balanced approach is taken in relation to appointments to various public bodies and key positions, was well received. After discussion there were some suggestions for amendment. In particular it was noted that the proposed functions of the Council will require review in order to take into account, and bring into effect, the aspirations of the devolution chapter.

There was disagreement in regard to the composition of the Constitutional Council, some participants feeling that the membership was too large. It was emphasised that what must always be borne in mind in the decision as to the composition of any body such as this is the purpose sought to be achieved by its establishment. There were competing rationales. Some delegates felt it was important to have people of high-standing on the Council and questioned the need for the seven members of parliament currently proposed. Others felt that the purpose was rather to ensure a balance of political opinion which would contribute to impartiality and objectivity in appointment. In this context the members discussed the appropriateness of having two retired judges on the Council. The discussions ended with some delegates querying whether all of the suggested members were necessary.

It was recommended that it be made clear that in this Chapter the term "appointments" included "acting appointments" in order to ensure that the constitutional controls being established here cannot be by-passed. Delegates reported with concern that this had been the experience in some Commonwealth countries.

Regarding Article 117 it was suggested that "different ethnic and interest groups" should be defined so as to include women. There was also a perceived need for clarity in that it was not specifically stated by the wording of the Article who is to make the appointments.

In relation to Article 118 it was suggested that a provision be inserted to deal with the situation where the nominations made by the President were not approved by the Council - at the least there needs to be a requirement for the President to submit fresh names. There was some discussion, but no agreement, as to whether or not the Council should provide reasons for a refusal of approval.

Regarding the regulation of the Council's own procedure it was suggested there be a due process requirement for the procedure to be adopted.

#### **b) The Jurisdiction and Powers of the Superior Courts**

At the outset of this part of the proceedings the Chair, Justice Pius Langa, stressed that throughout any consideration of these topics it would always be essential to bear in mind the impact that must necessarily be made by the implementation of the intention and provisions of the chapter on devolution.

The other underlying thread to this part of the discussion was the point, strongly made, that the independence of the judiciary is a crucial aspect of any constitutional system, and that this independence must be secured by the constitutional provisions as a matter of paramount importance. As noted earlier it was recommended that a clause specifically stating that the independence of the judiciary is guaranteed should be inserted into the text of the Constitution.

With these considerations in mind the delegates turned to an examination of Chapters XVI, XVII and XVIII.

On matters relating to the power of appointment of the judges of the Supreme Court and of the Court of Appeal (Article 149), concern was expressed that this power was in the hands of the President and was virtually unfettered since the requirement "to ascertain the view of" the Chief Justice would provide little check in reality. It was felt that, in its present form, Article 149 does not sufficiently protect the independence of the judiciary, and that its wording must be amended to take care of this concern. The same views were expressed in relation to the power of appointment of judges of the Regional High Courts contained in Article 153. On this point, Justice Bhagwati observed that in India it has been decided that the word "consultation" when used in this context means "concurrence," and that public opinion in India fully accepts that this should be the position. The replacement of the word "consultation" with the word "concurrence" in Articles 149 and 153 of the Sri Lankan Constitution would be a means of resolving the problem.

Another suggestion was that all appointments, other than the appointment of the Chief Justice, could be vested in a national judicial commission. After discussion, it was agreed that the

composition of this suggested body should be as follows:

1. Chair: the Chief Justice
2. One sitting judge
3. One, or two, retired Chief Justices
4. The Attorney-General
5. Two representatives from the Bar
6. One distinguished jurist or legal academic
7. Two persons known and internationally acknowledged for their competence in international human rights
8. The Prime Minister, or the Minister for Justice and
9. The Leader of the Opposition.

Regarding the appointment of the Chief Justice, which is currently to be made by the President alone [Article 149(1)], the concern was reiterated that the matter should not be left entirely in the hands of the executive, and a suggested alternative was to require the concurrence of a retired Chief Justice.

Turning to the power of dismissal, the provisions of Article 149 concerning the dismissal of Supreme Court and Court of Appeal judges were regarded as unsatisfactory, and inconsistent with the independence of the judiciary. It was pointed out that referral to a parliamentary committee which would then be required to exercise judicial power was, as well, inconsistent with the separation of powers required by the Constitution [Article 3(c)]. It was felt that, in other respects also, the current wording of Article 149(3) and (4) did not, as those paragraphs are currently formulated, adequately protect judicial independence.

Concern was expressed about the threat to judicial independence posed by such provisions as the power which Article 145 confers on Parliament to abolish courts, and by the powers to vary or remove any jurisdiction or power vested in the Supreme Court [Article 146(10)] or in the Court of Appeal [Article 148(7)]. One suggestion was that, in order to safeguard the independence of the judiciary, it would be necessary to state that where a court is abolished the judges of that court would be given a new position.

The provisions regarding the discharge of other duties and functions by judges contained in Article 152 were regarded as problematic. Several participants were of the opinion that Article 152 should be redrafted as in its present form it permits activities which could undermine the independence of the judiciary. In regard to Article 152(3) it was agreed that there should be a blanket prohibition on former judges practising in a court of the same, or lower, level to that in which they had presided.

With regard to the desirability of the advisory jurisdiction conferred on the Supreme Court by Article 169, there was general agreement that the proceedings must be public.

It was agreed that guidelines needed to be established in order to ensure that the Regional Judicial Service Commissions were given appropriate powers. The concern was expressed that, without clear guidelines to this effect, many of the powers in relation to the regional courts and their judiciaries, which powers should properly be exercised by the regional bodies, would instead be effectively vested in the National Commission, and that such a vesting would be both inappropriate and in contradiction to the intention of the devolution chapter. For instance, it was pointed out that at present there is no provision for consultation with the regional bodies regarding the transfer of a judge from one region to another [Article 156(1)], and that Article 147(1) did not allow the Regional High Courts to make their own rules regarding certain procedures and practices. It was suggested that the Chairs of the Regional Commissions should together reach the decisions which related to the regional courts. The examples cited were just a few instances of over-centralisation. Overall the feeling of the meeting was that the whole treatment of judicial service commissions needed to be rethought in the light of the devolution developments which are proposed.

After a discussion which weighed the interests of freedom of expression against the importance of the need to protect the independence of the judiciary, it was suggested that a provision, similar to the provision in the Indian Constitution which is to the effect that no attacks on judges should be made in Parliament, should be introduced into the Sri Lankan Constitution.

### **c) Judicial Review of Legislation**

Regarding the topic of application to the court in respect of the infringement of a fundamental right protected by the Constitution, concern was expressed that Articles 26 and 168 conferred jurisdiction in these matters only on the Supreme Court. It was suggested that Regional High Courts be empowered to hear these cases as well, and that such empowerment would have the advantage also of assisting in the aims to bring about devolution of power. Since the Supreme Court sits in Colombo this makes access difficult, time-consuming and costly to many litigants, and thus effectively precludes their right to bring a challenge. The time limit of three months in which the application must be made also caused concern, both in relation to this particular difficulty for people outside Colombo, and more generally.

In response to the concern that Regional High Courts may not possess the expertise to deal with issues of fundamental rights it was pointed out that complex matters can always be referred to a higher court. As well, participants noted that very often one of the grounds to a challenge to administrative action may be a violation of fundamental rights. In such an instance, this provision seemed to require that part of the case be brought in one court and part in another. Clearly any such consequence would be unsatisfactory. It was suggested that it might, in any case, be preferable for the Supreme Court to decide questions of fundamental rights with the benefit of prior argument having been made in other courts.

Regarding the requirement in Article 168(6) that the Supreme Court dispose of all petitions under this Article within three months, it was agreed that this time frame was unrealistic and it was recommended that the wording be changed to "within a reasonable time."

There were a number of concerns in relation to Article 165, the provision setting forth the Supreme Court's power of review of legislation for inconsistency with Chapter III, and a number of proposals were made. One concern was why there was reference only to inconsistency with Chapter III and not with the rest of the Constitution. Another was to the effect that the two year limitation period to the right to challenge (Article 165(1)) should be removed. This was because, in the normal course of events, a challenge will only be mounted against legislation when action is taken under it which has detrimental effect on a particular individual. Legislation could conceivably be on the statute books for many years before any such action, giving rise to a challenge, is taken.

It was noted that no limitation period had been imposed on regional statutes (Article 166), but a concern was expressed here that a central body, the Supreme Court, was again being conferred a jurisdiction which might more appropriately be exercised by a regional body, and that the implications of the intentions behind the devolution chapter must be carefully considered throughout the drafting of all of the rest of the text of the Constitution.

The last part of Article 165(1) troubled the participants. It was recommended that the phrase "without prejudice to anything previously done thereunder" be clarified. As the paragraph stands at present it could have the result that a litigant, despite having demonstrated the inconsistency of a piece of legislation with the Constitution, was nonetheless left without a remedy.

It was urged that a specific provision be inserted to provide for an enforceable right to compensation where a violation of a fundamental right had been established.

The power of the Supreme Court under discussion here relates to challenges to legislation enacted after the commencement of the Constitution. The objections registered at the meeting in relation to the saving, by Article 24, of all pre-existing written and unwritten laws have already been noted.

### **III ELECTORAL REFORM, THE REPRESENTATIONAL SYSTEM AND THE ROLE OF THE ELECTION COMMISSION, AND ELECTION DISPUTES**

#### **a) Electoral Reform and the Representational System**

At the outset of this part of the discussion the delegates were made aware that the March 1997 Draft from which they were working did not contain the most up to date proposals. Since these were not available to the participants much of the discussion in this part of the proceedings proceeded, not on the wording of specific Articles but rather on the general principles and measures which are required in order to secure the proper representation of the people in the composition of the elected body, and to ensure fair elections and reliable results.



As noted earlier, it was recommended that the right to vote and the right to stand for elections be removed from this chapter and be inserted in Chapter III. Regarding the qualifications of electors, and of those entitled to stand for election, after some discussion as to whether it was appropriate to insert these matters into the Constitution it was agreed that the qualifications should be inserted into the Constitution and not be left to ordinary legislation. It was observed that care had to be taken when drafting qualifications to these rights and the need to be clear and specific was emphasised. So was the need to take local circumstances into account. One example given was that if conviction and imprisonment had been disqualifications during the election of the present South African government, Nelson Mandela and many of his colleagues would have been neither able to vote nor stand for office. As a consequence of these particular circumstances and the legislative constraints at the time of the passage of the relevant legislation, all adult South Africans have the right to vote, without qualification. A somewhat different approach exists in Canada where judges are not afforded the right to vote. The meeting was told that the judges do not object to this, feeling it enhances their independence of the political system.

Early in the discussion it became apparent that it was seen to be difficult to have a simple system in Sri Lanka because of the complexity of the society.

The foreign delegates had understood from one of the background papers circulated to them prior to the meeting, that at the 1994 general election both the PA and the UNP had said in their manifestos that they proposed incorporating the positive aspects of the proportional representation system and the simple plurality system by introducing the mixed representation system followed in Germany. However, the considerable discussion on the relative merits of first past the post and proportional representation systems, or some combination of each of them such as is to be found in Germany, made it clear that there remain considerable differences of opinion as to the nature of the system best suited to Sri Lanka.

One local representative explained his views regarding the necessity for a procedure to ensure that the major minority groups are in fact represented. Where these groups are not settled in one geographical area, but instead are dispersed, being thinly spread amongst other groups, it is likely that they will not be successful in electing their own representatives. Accordingly, it was suggested that in order to ensure their representation and involvement in the political process it is necessary to specifically allocate an additional number of floating seats to cope with this particular phenomenon. Another group which was mentioned as being dispersed yet requiring representation in the elected body was that of the lower castes. The meeting learned that this group has managed to achieve representation through the three preference system.

A particular circumstance prevailing in Sri Lanka, and one which has been taken into account by a recent government proposal to the Select Committee, is the situation of some "Indian Tamils" who do not have citizenship despite having lived in the island for generations. The proposal is for the insertion, into the Constitution, of a new Article to provide that a person, not being a citizen of any country, but being a permanent resident in Sri Lanka, shall be entitled to all rights conferred by the Constitution. This would include the right to vote, and such a

provision is necessary until measures have been completed to ensure that citizenship is effectively granted to all of these people.

There was discussion as to whether a specific quota should be set for seats for women representatives. In India, at the Panchayat level, there is a 30% quota. It was remarked that very often a move such as this did not immediately bring new women into the political field (i.e. those who would not have been politically involved anyway in some capacity) and thus seemed disappointing, as had been the recent experience in Canada. However, in the ensuing discussion it emerged that, overall, the experience of the delegates was to the effect that once the precedent was set this initial situation changed and more women did come into political life. One way suggested to achieve this under the system currently prevailing in Sri Lanka would be to require the political parties to have a specific allocation of no less than, for example, 30% of the people appearing in their lists to be women. There would seem a strong need for the encouragement of the political participation of women here. The meeting was told that the percentage of women representatives at the national level was five and had not risen since Independence. At the local level the proportion of women representatives is a mere one per cent.

The calculations in Articles 110 and 111 of the March 1997 Draft appear to be designed to ensure that the number of candidates elected from each district are proportionate to the number of electors. It was observed that where calculations such as these are used they need to be revised from time to time in order to take account of population shifts. The election machinery in Australia was given as an example of how this has been achieved in that country: there is a requirement of revision of the calculations in time for each general election (every three years), together with measures which ensure that the revisions then automatically come into effect (i.e. do not need government or parliamentary approval) after a period of public notice and opportunity for comment.

Another consideration which underlay the discussions in this part of the proceedings was the recognition that henceforth the electoral profile must give support to the concept of devolution of power. This led to the query as to whether this would require an increase in the already considerable numbers of political representatives. There were differing opinions regarding the issue of numbers and various suggestions were made. One was that there is a case for reducing the numbers at the national level and increasing the numbers at the local and regional levels. Since devolution implies that there must be regional representation at the centre, one suggestion was to establish a new body for regional representatives, as well as to keep a body which would basically be a continuation of the present Parliament but whose numbers would then be reduced. Another suggestion was to have different systems of elections for local and national bodies.

#### **b) The Role of the Election Commission and Election Disputes**

It was felt that the conduct of elections in Sri Lanka was not presently acceptable, and the meeting was in agreement that an independent and effective Electoral Commission was essential if free and fair elections were to be ensured. Concerns were expressed both as to the measures

required for the protection of the independence of the Commissioners and as to the necessary powers of the Commission. Various points were made.

It was stressed that the provisions for the appointment and removal of the Commissioners must ensure their independence, and that the provisions in the March Draft were not adequate to achieve this purpose. Removal must not be by the President or Prime Minister alone, but should involve some other, independent, check. To take one example which was cited to the meeting - if ill-health were the reason for removal then there should be a requirement that the matter go before the Medical Board prior to any decision on removal being taken.

Regarding the powers of the Commission, it was suggested that the Commission should be empowered to take immediate action to prevent election malpractice during the run-up to and during an election. The Indian Constitution empowers its Commission to do this and gives it punitive powers, for example, to confiscate property where there are violations of the electoral regulations. This power was reported as having been found helpful both in stopping the particular abuse and also in restraining further abuses in the same election. It was agreed that procedures should be evolved for preventive action. One way in which this could be achieved would be by the conferment of additional powers on Magistrates Courts and Regional High Courts in relation to election laws.

The South African Commission was cited by a number of delegates as a model well worth emulating. This Commission has three main functions:

- \* the technical running of the election;
- \* the monitoring of the process; and
- \* an educational function.

Of course, if this example is to be followed the appointments to the Commission must reflect the skills required to carry out these functions i.e. between them the personnel would need technical expertise, political expertise and educational expertise.

In the text before the meeting two bodies were proposed - an Election Commission and a Delimitation Commission. The question was asked as to whether the functions of the Delimitation Commission could not be given to the Electoral Commission, as it was felt to have advantages to have the functions integrated. It was noted that the functions are integrated in a number of Election Commissions, examples cited were those of Australia, Bangladesh and South Africa.

If a Commission with various functions were to be established it was noted that it may be useful to appoint a Commissioner with responsibility for each function.

It was observed that in Sri Lanka electoral lists are compiled at the local level and that the current system is unsatisfactory, that for one reason or another lists are not accurate and that reform is necessary. It was felt that this was not a matter for the Constitution but for separate legislation. Some suggestions were made, however, one being that computerisation could ultimately prove beneficial, another that the political parties should each check each local list.

To help lessen the opportunities for corruption during the election process, laws from other countries which might prove helpful were cited. The meeting was told, for example, that in India there is legislation which requires both candidates and political parties to submit, on a day to day basis, ledgers and receipts to support their claims of expenditure.

The point was made that a primary need is to ensure that the voter cannot be harassed, that currently in Sri Lanka the political parties do not prevent violence by their own members, and that these problems must be addressed. Without the resolution of this problem of might and money free and fair elections will remain unattainable. The Chairman agreed. He added that this issue needs to be addressed throughout the region, that there are many threats to the democratic process and that legislation, though necessary, will succeed only if it is a part of the development of a whole strategy. This in turn prompted a delegate to remind the meeting of the South African model with its multi-faceted approach to election control, the educational function of that Commission offering particular promise in this context.

The meeting closed with a representative of the foreign delegates thanking, on their behalf, the Sri Lankan delegates and all those who had brought about the meeting (particularly those who had done the organisation on the ground), for the opportunity they had been provided to participate in the current constitution-making process, adding that this had been both a privilege and an enriching experience. He went on to say that this discussion was an example of how, over the years, Sri Lanka had welcomed and indeed promoted, exchanges of thoughts and ideas with its neighbours in the region, and had contributed to a striving together to seek solutions to the many problems which our societies face. He added that in the modern context of a global neighbourhood, it was appropriate that our sharing of experiences should extend beyond that of near neighbours, and that in the context of constitution-making it was particularly pertinent to look, as had been done at this meeting, to the recent constitution-making experience of South Africa which had reached a monumental achievement in its negotiated consensus for establishing the values of freedom, equality and justice in that multi-ethnic society.

The representative of the local delegates thanked the foreign participants for their contribution to Sri Lanka's constitution-making process, saying how useful the comparative insights and analyses had been, and how greatly appreciated were the contributions, time, effort and thought put by the visitors into the deliberations of the past two days. All delegates expressed the wish that the meeting would contribute fruitfully to the drafting process as it neared conclusion, and expressed the hope that that process would assist in bringing peace to the island. The gathering was then declared closed.

**Proposed Social and Economic Rights in the Fundamental Rights  
Chapter of the Draft Constitution**

**1. Women's Rights**

Article 11(2) of the draft Constitution (which corresponds to Article 12(2) of the present Constitution) will be amended to prohibit discrimination on the grounds of "marriage, maternity or parenthood."

**2. Children's Rights**

- (1) Every child has the right -
  - (a) to a name from birth;
  - (b) to be protected from maltreatment, neglect, abuse or degradation;
  - (c) to special protection against physical and moral hazards to which they may be exposed;
  - (d) to be protected from exploitative labour practices; and
  - (e) to have a legal practitioner assigned to the child by the State, and at State expense, in legal proceedings affecting the child, if substantial injustice would otherwise result.
  
- (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 service and social services;

The State shall take reasonable legislative and other measures within its available resources with a view to achieving the progressive realisation of the rights guaranteed by this paragraph.

- (3) In all matters concerning children, whether undertaken by public or private social welfare institutions, courts, administrative authorities or legislative bodies the best interest of the child shall be of paramount importance.
  
- (4) Every child shall have the right to grow up in an environment protected from the negative consequences of the consumption of addictive substances harmful to the

health of the child and, to the extent possible, from the promotion of such substances.

- (5) For the purposes of this Article "child" means a person under the age of eighteen years.

**3. Right to Education:**

Every child between the age of five and fourteen years has the right to free and compulsory education provided by the State.

**4. Freedom from Slavery and forced Labour:**

- (1) No person shall be held in slavery or servitude.
- (2) No person shall be required to perform forced labour.
- (3) For the purpose of this Article, forced labour does not include -
- (a) any labour required as a result of a lawful sentence or order of a competent court;
  - (b) any service of a military character, or in the case of a person who has conscientious objections to service as a member of the armed forces, any labour which that person is required by law to perform on place of such service;
  - (c) any service that may be reasonably required in the event of an emergency or calamity that threatens the life and well-being of the community; and
  - (d) any labour reasonably required as a part of normal civil obligations.

**5. Favourable Conditions of Work:**

Every person has the right to satisfactory, safe and healthy working conditions.

**6. Social Rights:**

- (1) Every citizen has the right to have access to -
- (a) health-care services;
  - (b) sufficient food and water; and

- (c) appropriate social assistance.

The State shall take reasonable legislative and other measures within its available resources with a view to achieving the progressive realisation of the rights guaranteed by this paragraph.

- (2) No person shall be refused emergency medical treatment.
- (3) No person shall be evicted from his home, or have his home demolished, except on an order of court made according to law.

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