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ECONOMIC LIBERALISATION AND EQUAL OPPORTUNITY

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Editor's note.....

In this issue we publish a paper presented by Dr Neelan Tiruchelvam at the Academic Sessions organised by the Faculty of Law, University of Colombo, to commemorate its 50th Anniversary. In his paper, Dr Tiruchelvam looks at the impact that economic transition in the region has had on various spheres, particularly, on the legal systems of each State. He also looks at other challenges, such as environmental protection and labour issues as well as providing a speedy mechanism for dispute settlement.

Also published is a summary of the proceedings of a symposium organised by the Trust on the pros and cons of re-introducing the death penalty. Of the three panelists, two (Professor Hettige and Mr Rohan Edrisinha) spoke against the death penalty while the third (Mr Palitha Fernando) spoke in favour.

We also publish the statement made by Ms Anna Lindh, the Minister of Foreign Affairs of Sweden at the Commission on Human Rights in Geneva, particularly welcoming the abolition of the death penalty in Azerbaijan, Bulgaria and Lithuania.

The Trust organised an islandwide essay competition on Equal Opportunity for two age groups - over 17 years and under 22 years and over 22 years. In this issue we publish the winning essay in the first category. This essay competition was organised under the Equal Opportunity Programme of the Trust which is funded by the European Union.

Legal Challenges Posed by the Economic Transition: Impact on the Legal Systems of the Region*

Neelan Tiruchelvam

South Asia has witnessed, over the last decade, dramatic developments relating to the process of democratisation. Nepal, Bangladesh and Pakistan transformed themselves from monarchical and military governments to more participatory democratic political structures. South Asia is perhaps the single largest region characterised by a common commitment to a competitive multi-party system, periodic elections, justiciable human rights and an independent judiciary. It is also a region which continues to experience extraordinary experimentation and innovation of constitutional forms, representational models, power sharing arrangements and electoral systems.[1] South Asia has also witnessed a dramatic convergence of economic policies and developmental strategies.

The World Development Report of 1997 has identified four developments which had contributed towards a reappraisal of the role of the State in development. Firstly, the collapse of the command and control economies in the former Soviet Union and Central and Eastern Europe. Secondly, the fiscal crisis of the welfare State in most industrialised countries. Thirdly, the important role of the State in facilitating private investment in the newly industrialised countries of East Asia. Finally, the collapse of States and the explosion in humanitarian emergencies in several parts of the world.[2] These

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* Paper presented at the "Law and Development Session" of the Conference titled *Transition; The Post-Independence Changes and the future: Critical Issues of Law and Justice in South Asia* organised by the Faculty of Law, University of Colombo, to celebrate its 50th Anniversary, July 1998. Edited for publication.

1 Bangladesh: The Quest for Constitutional Governance (Gowher Rizvi); Pakistan: Encounters with Constitutionalism (Salman Rajah); Sri Lanka: The Sri Lankan Experience (G.L. Peiris); India: Constitutional Development in India in the last 50 years (Rajeev Dhavan), papers presented at the "Constitutionalism" lecture series organised by the Law & Society Trust (Unpublished papers).

2 See World Development Report, "The State in a Changing World" (1997), Oxford University Press at page 1.

developments coupled with a combination of domestic, political, ideological and economic factors have contributed to bring about a paradigm shift in the development ideologies of each of the countries in South Asia.

In Sri Lanka it became clear in the mid-seventies that increasing budget deficits, a severe balance of payment crisis, and widespread macro-economic instability gave rise to a change in development strategy. A new government in 1977 introduced significant economic reforms which included the dismantling of controls, trade liberalisation, promoting foreign investment, export-led industrialisation and private sector development.[3] Similarly in India between 1977 and 1991, expanding anti-poverty schemes and rural employment schemes resulted in large fiscal deficits (8.4% of the GDP in 1991) which, in turn, contributed to a rising current account deficit. India's foreign exchange reserves were virtually exhausted by mid 1991 when a new government headed by Narashima Rao came into power. Rising interest rates on foreign debt meant that the State could no longer sustain the financing of large public investment programmes. This resulted in the need to emphasise foreign investment and private sector development. It was, therefore, impending bankruptcy and the fiscal crisis which drove the reform process and resulted in the shift in the role of the State from that of principal investor to that of the facilitator of entrepreneurship. The economic and fiscal reforms included the abolition of most industrial and import licensing, the devaluation of the rupee, liberalisation of the financial sector and foreign investment, and promotion of private investment in areas previously reserved for government. The new coalition government that came into power in 1996 and the present BJP government have sustained by and large this programme of reform. The emergence of wide consensus on the broad parameters of a policy of economic liberalisation is an important feature of the political economy of modern India.[4]

In Bangladesh, several institutional and policy reforms were instituted to facilitate private sector development. This included the establishment of a Board of Investment and an Export Promotion Zone Authority. These efforts were accompanied by a programme to privatise and commercialise state owned enterprises with a view to minimising losses, improving efficiency and the

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[3] Asia Law and Practice, *Infrastructure Development in Sri Lanka: Regulation, Policy and Finance*.

[4] See supra n 2 at page 24.

quality of services. These changes were part of a broader programme of macro-economic adjustments and structural reform designed to accelerate growth, diversify the economy and make it more outward looking.[5]

It is, therefore, clear that despite the extraordinary and bewildering diversity of geography, socio-economic development, ethnicity, religion and culture within South Asia, there is a growing convergence with regard to economic policy and developmental strategy. The purpose of this paper is to examine the impact of these economic transitions on the legal system. One of the most important roles of the State in this context is to create a legal framework for development. There are four aspects of this framework which require more detailed consideration:

(1) the framework relating to the facilitation of private sector development including the promotion of foreign investment;

(2) the role of the State in establishing an autonomous regulatory framework to promote competition and efficiency between privatised enterprises and other service providers, and in facilitating private investment in infrastructure development;

(3) legal framework relating to capital market development and commercial law reforms; and

(4) the framework relating to the resolution of investment and commercial disputes.

1. Facilitating Private Sector Development

Investment Protection Agreements constitute an important component of the legal framework to promote private sector development. These agreements are intended to create conditions of certainty and predictability and clarify and protect property rights and to enforce contractual obligations. They thereby contribute to the lowering of transaction costs and the creation of a level playing field for business activity and facilitate greater access to capital.

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[5] The World Bank, Bangladesh, "Government that Works: Reforming the Public Sector" (1996).

Within South Asia, several countries have overcome the initial reluctance to enter into such agreements and now aggressively negotiate such agreements with most capital exporting countries.[6] In Sri Lanka, investment protection agreements enjoy a special legal and constitutional status. Article 157 of the 1978 Constitution of Sri Lanka requires such agreements to be tabled in Parliament and to be adopted by a 2/3 majority of all members of Parliament. Upon being so adopted, these agreements enjoy the force of law and no future legislative, executive or administrative action can be taken in contravention of such agreements. Besides, such agreements ordinarily are in force for a period of ten years with provisions for automatic extension unless terminated by either party. If terminated, the provisions of the agreements continue to apply for a further period of ten years in respect of investments made during the currency of the agreement.

It is important to examine some of the features of these agreements. The first question relates to the definition of investors and the clarification of categories of investors who would qualify for protection. The concept of an investment is invariably very broadly defined in each of these agreements. In the UK-Sri Lanka Investment Protection Agreement, investment means every kind of asset and in particular, though not exclusively, includes -

1. movable and immovable property and any other property rights such as mortgages, liens or pledges;

2. shares, stocks and debentures of company or interest in the property of such companies;

3. claims to money or to any performance under contracts having a financial value;

4. copyrights, industrial property rights (such as patents for inventions, trade marks, industrial design), knowhow, trade names and goodwill;

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[6] Sri Lanka has entered into separate investment protection agreements with Belgium, the Netherlands and Luxembourg, China, Denmark, France, Germany, Japan, Korea, Norway, Finland, Canada, Romania, Singapore, Sweden, Switzerland, the United Kingdom and the United States of America. Similarly Bangladesh has concluded bilateral agreements with the United States of America, the United Kingdom, Germany, Romania, Belgium and the Netherlands, the Republic of Korea, Thailand, Turkey, France, Italy and Malaysia.

5. business concessions conferred by law or under contract including concessions to search for, cultivate, extract or exploit natural resources.

The investors who are protected by such agreements include natural persons or companies. In respect of the United Kingdom, the agreement includes the nationals of the United Kingdom and corporations, firms or associations incorporated or constituted under the law in force in any part of the United Kingdom or in any territory to which this agreement is extended.[7] Secondly, both parties agreed to encourage and create favourable conditions for investments and to accord to such investments "fair and equitable" treatment and to refrain from impairing through unreasonable or discriminatory measures "the management, maintenance, use, enjoyment or disposal of investments in this territory."

Thirdly, investments by the contracting parties are not to be treated less favourably than those of other states. This provision which is known as the "Most Favoured Nation provision" also calls for the assimilation of standards relating to the treatment of both domestic and foreign investors with regard to the management, use, enjoyment or disposal of their investments. In this clause national treatment is coupled with most favoured nation treatment, both standards being treated as cumulative.

Fourthly, these agreements also provide for compensation for any loss suffered by investors owing to war or other armed conflicts. It is further provided that foreign investors shall be accorded no less favourable treatment as nationals with regard to restitution, indemnification or other settlement. Special provision is also made with regard to requisitioning of investor's property by a contracting party's forces. Similarly in the case of destruction of an investor's property by a contracting party's forces, the investor would be accorded restitution or adequate compensation. The investor would not qualify for such relief if the destruction was caused in combat actions or was required by the necessity of the situation. Article 4 of the Sri Lanka-UK Investment Protection Agreement was invoked in an ICSID Arbitration initiated by Asian Agricultural Products Ltd. (AAPL), a Hong Kong based

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[7] The UK-Sri Lanka Agreement was extended to Hong Kong and this enabled AAPL Limited, a company incorporated in Hong Kong to invoke this agreement in its dispute with the Government of Sri Lanka with regard to the damage caused to a prawn farm in Batticaloa as a result of military operations.

company, which had invested in a prawn farm in Sri Lanka. In consequence of certain security operations which followed the land mine explosion in January 1987 in Manmunai area of the Batticaloa district, the stock of prawns in the ponds and other assets of Serendib Seafood Ltd. were destroyed. As a result of the destruction of property and the death of several company employees skilled in shrimp culture, operations of the Manmunai farm were suspended. A claim of Rs. 130 million as compensation of the destruction of property at Manmunai was lodged with the Government of Sri Lanka by both Serendib Seafoods Ltd., and its foreign collaborator, AAPL. Since the Government did not respond to this claim, AAPL filed a claim at the International Centre for the Settlement of Investment Disputes (ICSID) in Washington. On 27 June 1991, ICSID awarded USD 460,000 plus interest at the rate of 10% per annum from 9 July 1987 to the date of effective payment.[8]

Fifth, the centrepiece of any investment protection agreement relates to the protection against expropriation. In this regard, it is important to reproduce the text of Article 5 of the Sri Lanka-UK Agreement as it is typical of such provisions. Article 5 reads as follows:

> *Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose related to the needs of that Party and against prompt, adequate and effective compensation. Such compensation shall amount to the value of the investment expropriated immediately before the expropriation or impending expropriation became public knowledge and shall include interest at a normal commercial rate until the date of payment. Payment of compensation shall be made without delay and the Contracting Party making the expropriation shall guarantee free transfer of the compensation at the official rate of exchange prevailing on the date used for the determination of value. The national or company affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt determination of the amount of compensation either by law or by agreement between the parties and to prompt*

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[8] Citation for AAPL case and legal commentary.

review, by a judicial or other independent authority of the Contracting Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph.

Commentators have pointed out that this clause reaffirms the following principles: Firstly, it confirms the principles and conditions relating to lawful expropriation. Secondly, it reaffirms the standards with regard to compensation. Thirdly, it accepts jurisdiction of the expropriating State over such issues as the legality of the expropriation and the valuation of the property expropriated. Finally, it reaffirms that non-discrimination is a requirement for a valid and lawful expropriation.[9]

On the standard of compensation for the taking of foreign property, Professor M. Sornarajah in his study of the *International Commercial Arbitration* published in 1990 argues that investment treaties do not evince any unanimity and, therefore, cannot be taken as providing the basis for any firm principle of international law. He argues that some treaties use the standard of "prompt adequate and effective compensation" which had been espoused in the First and Second American Restatement while other treaties seem to adopt a lesser standard of "just compensation" advocated by the Third American Restatement. Others refer to appropriate compensation. Professor Sornarajah's argument is that the impact of bilateral treaties on public international law has been overstated.[10]

There has also been disagreement as to what constitutes lawful expropriation having regard to UN Declarations which acknowledge the concept of Permanent Sovereignty over Natural Resources. Professor Rosalyn Higgins in her book *Problems & Process - International Law and How We Use It* summarises the existing law as follows:[11]

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[9] World Bank, "Legal Framework for the Treatment of Foreign Investments" (1992) Volume 1.

[10] See M. Sornarajah, *International Commercial Arbitration: The Problem of State Contracts* (1990), Longman Singapore (Pte) Ltd., Singapore.

[11] See Rosalyn Higgins, *Problems and Process, International Law and How we use it* (1994) (Clarendon Press, Oxford), pp.141-142.

1. *States have a very special position in regard to their own resources. If in their infancy as independent states, they assume obligations out of all line with commercial realities, and if such arrangements were made for very long periods of time, tribunals looks sympathetically at ways to liberate the State from the disadvantageous contract..... Attempts to secure negotiated changes will today be tolerantly regarded.*

2. *At the same time, nationalisations do require compensation and will only be lawful if they are not discriminatory and serve a public purpose. The concept of permanent sovereignty over natural resources does not leave a State free to ignore contracts it has voluntarily entered into.*

It is not possible to analyse all the recent arbitrations. However, in *Liamco* v. *Libyan Arab Republic* which is regarded as one of the great oil arbitration cases arising out of the Libyan nationalisation measures promulgated in 1973 and 1974, the sole arbitrator, Mahmassani, concluded that "it is lawful to nationalise concession rights before the expiry of the concession term, provided that the measure be not discriminatory nor in breach of treaty, and provided that compensation be duly paid."[12] On the other hand, in the *BP* v. *Libya Case*, the sole arbitrator, Lagergren, found that the Libyan nationalisation law constituted a clear violation of public international law as it was made for purely extraneous political reasons and was arbitrary and discriminatory in character.[13] There has been also disagreement between arbitrators on whether restitution is available in the case of an unlawful expropriation and whether damages would be limited to the value of the nationalised property or whether it could also include loss of future profits. Some arbitrators have argued in favour of a softer valuation standard for lawful takings and the inclusion of a penal element in the valuation of unlawful takings. Professor Higgins has argued that "the value of the property does not change by virtue of lawful or unlawful nature of its takings; and that it is loss of confidence, rather than penal valuation that will provide the incentive to states to nonetheless expropriate lawfully in accordance with

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[12] *Ibid.*, at pp.142-143.

[13] *Ibid.*

international law."[14]

The related problem is the efficacy that should be accorded to stabilisation clauses in investment contracts which seek to freeze the situation at the moment of contracting. It should be noted that writings of publicists and international tribunal awards are divided on how State sovereignty should be reconciled with contractual obligations in investment agreements. Several publicists have argued that since the binding force of a State contract is found in State law, a State by amending its law may alter the rights and obligations of the contract.[15] More recent publicists and international tribunal awards qualify this doctrine. They contend, *inter alia*, that (1) law of the State party may not be the only law applicable to the contract, (2) that a State is bound by an agreement to arbitrate, and (3) that the right of a State to change its laws does not necessarily mean that it may infringe rights under a contract as this would conflict with the need for certainty and security in international investment transactions.[16] However, a more pragmatic assessment is provided by Craig, Park and Paulson in their review of ICC awards.

> *If the State is a party to (the) dispute, it would be logical to conclude that any of its acts must necessarily be subject to the judgement of the arbitrators insofar as they pertain to the assessment of compliance with contractual duties. Logic gives way to reality, however, there comes a point at which acts of a State go so far beyond the sphere of the particular contractual relationship under consideration, partaking of sovereign legislative or regulatory prerogatives in the general interest, that the authority of arbitrator to rule on their validity becomes problematic. Such cases may be resolved by taking the Act of a State as a given, and simply assessing its contractual consequences in terms of an obligation to make compensation.*[17]

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[14] *Ibid* at p.145.

[15] See Mann "State Contracts and State Responsibility," in 54 American Journal of International Law p.579 at p.581 (1960).

[16] See the publicists cited in the World Bank, "Legal Framework for the Treatment of Foreign Investment" Volume 1, at p.165.

[17] Craig, Park & Paulson, International Chamber of Commerce Arbitration 653 (2nd ed. 1990).

2. The New Regulatory Framework

One of the important outcomes of the economic transition in South Asia is the creation of new regulatory frameworks to facilitate the process of privatisation of existing assets and to promote private investment in infrastructure development. These regulatory arrangements have a significant impact on governance structures and also pose important issues for public law and policy. The traditional justification for regulatory programmes is the need for an independent agency to secure the public interest as defined in their enabling statutes from market failure.[18] In South Asia economic regulation of infrastructure industries have covered issues such as prices and profitability, service coverage and quality, and investment. Economic regulation in this region has covered both State-owned and private utilities while in some Scandinavian countries separate agencies regulate State and private utilities respectively.

The following are some illustrative examples of the new regulatory bodies established in response to the economic transitions.

In India from 1994 to 1995, there was pressure from private telecom operators, including their foreign partners and representatives of foreign governments, for the establishment of an independent regulator. Under the Indian Telegraph Act of 1885, telecommincation in India is a federal subject. An amendment to the 1885 Act to create an independent regulator was introduced in Parliament and was finally passed in 1997. The Telecommunication Regulatory Authority of India (TRAI) constituted in January 1997 secures its budget from Parliament to which it reports annually. Its duties are to facilitate competition and protect consumer interest. Its functions include recommending the need for licensing; the terms and conditions of licenses; monitoring and enforcing of licenses; regulating tariff and service quality; and settling disputes between operators including interconnection agreements.

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[18] See generally on economic regulation, Stephen Breyer, *Regulation and its Reform*, Harvard University Press (1982); Norman Lewis, "Regulating Non-Governmental Bodies, Privatization, Accountability and the Public-Private Divide" in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution*, Second Edition, (1989), Clarendon Press, Oxford, at pp. 219-247; and National Economic Research Associates, *Governance and Regulatory Regimes for Private Sector Infrastructure Development*, Manila, Philippines.

The TRAI has asserted its independence from the Department of Telecommunications by invalidating a cellular licence issued by the DOT and the government internet privatisation policy on the ground that TRAI was not consulted in regard to this matter.

Similarly, with regard to the Indian power sector, the Electricity Supply Act of 1948 put into place structures which remain the norm throughout India. It provided for the establishment of the Central Electricity Authority (CEA). The CEA's role is principally policy, advisory, and conciliatory in nature. On the other hand, the State Electricity Board (SEB) was to be established with responsibilities ranging from the supply of electricity, transmission and distribution and the exercise of control in relation to generation and utilisation of electricity. A further amending Act in 1991 provided for the widening of private sector participation and allowed for the generating company in private sector. In different States, legislation has been enacted to establish the regulatory framework for the provision of services to the consumers. The state of Orissa is in the forefront of regulatory reform and has established a new regulatory authority called the Orissa Electricity Regulatory Commission. The Government of India is reported to be giving consideration to establishing regulatory bodies along the lines of the Orissa model. These amendments, if enacted, would facilitate the establishment of a Central Regulatory Commission and State Regulatory Commissions.[19]

Similarly, the Ministry for Petroleum and Natural Gas has proposed a regulatory framework for the gas industry in India.[20] These proposals envisaged the establishment of a gas regulatory body to be assisted and advised by an Advisory Council consisting of eminent persons connected with the oil and gas sector. The Advisory Council will play a dual role. On the one hand, it will advise the Regulatory Board and, on the other, it will advise the Ministry of Petroleum and Natural Gas on the changes required to be made to the regulatory environment to facilitate the development of the natural gas sector.

Similarly, in Pakistan, a new regulatory authority known as the National Electricity Power Regulatory Authority (NEPRA) was established under an

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[19] *Ibid*. National Economic Research Associates, Annex 3.

[20] *Ibid*. National Economic Research Associates, Annex 4.

Act of Parliament in 1997. NEPRA was intended to be an independent autonomous institution. Its regulatory functions included granting of licences, determination of tariff, prescribing procedures for investment and protecting the interests of consumers and companies.[21]

Similarly in Sri Lanka, a Telecommunication Regulatory Commission (TRC) was established to recommend the issue of licences to operators, allocate radio frequency, regulate tariffs of telecommunication services and to make determinations with regard to disputes between operators including interconnection agreements. The TRC represents the most far reaching attempt at regulatory reform within the telecommunication sector in the sub-continent. It has made serious attempts to assert its autonomy on issues relating to interconnection agreements, tariff determination, network expansion within the legal and policy framework established by the Government of Sri Lanka.[22]

In the design of this regulatory intervention, some effort has been made to ensure

(a) the clarity of roles and objectives,
(b) the autonomy from political intervention,
(c) participation of all relevant parties to contribute effectively to the regulatory process,
(d) accountability of regulatory decisions to ensure effective review of decisions which are unfair and incompetent,
(e) transparency of the regulatory decisions and the regulatory processes, and
(f) predictability to ensure that the regulators operate within the predetermined legal framework.[23]

A review of the regulatory design and the actual operation of the regulatory agencies point to the following trends:

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[21] *Ibid*. National Economic Research Associate, Annex 11.

[22] See generally on Sri Lanka Infrastructure Development, Asia, Law and Practice, *Infrastructure Development in Sri Lanka, Regulation, Policy and Finance* (1997).

[23] See National Economic Research Associates, supra N 18, at p.3

Firstly, there is a clear movement within South Asia towards more effective regulatory governance:

Secondly, although the progress in different sectors have been varied, more radical regulatory reforms have taken place in India, Pakistan and Sri Lanka. The need for and the importance of a transparent regulatory framework infrastructure is being increasingly acknowledged. It is also important when engaging in regulatory reform that realistic goals be established. Douglas North has identified the need to ensure that the design of regulatory mechanism adequately take note of the constitutional, legal and political characteristics of a country. These include (a) country's legal system and judiciary, (b) country's customs and broadly accepted norms and behaviour, (c) the character of contending social interest within the society, and (d) the administrative capabilities of the nation and its institutions. The National Economic and Research Associate in a report on "Governance and Regulatory Regimes for Private Sector Infrastructure Development" has pointed out that the "impact on potential investors of the dismantling of existing regulatory framework is likely to be far more serious than a reduced degree of independence within a sustainable regime." In this context, it is also recommended that we introduce sunset clauses under which there is an obligation to review the mandates of the Regulatory Agencies at periodic intervals to ensure that these agencies remain relevant and necessary.

Additionally, under the Administrative Procedure Act (the law governing federal agencies in the USA), the regulatory agencies may make major decisions only after giving advance notice and allowing affected parties to present arguments and evidence for and against the proposed positions. The agency must provide reasons for its action and publicly present evidence in support of its final decision, which the courts may review to determine both whether the decision can be "objectively" supported as rational and whether it has been reached through "fair" procedures.[24] These features can also be recommended for the South Asian region.

The independent regulatory agencies in South Asia are generally quasi-judicial bodies with the authority to impose sanctions and make binding determinations on operators. However, some of the agencies have shown a preference to move away from a strictly judicial approach to a more collaborative process

[24] See Stephen Brayer, supra n 18 at p.6

which enables the agency to work in harmony with those it regulates.[25] Concern however, has been expressed that regulators also need to guard against the risk of being captured by the industry they are supposed to supervise and regulate.

3. The Legal Framework for Capital Market Development and Commercial Law Reform

Economic reforms have also driven the process of legal and regulatory reform to develop financial and capital markets and the development of other business laws necessary for the functioning of a market economy. In 1987, the Government of Sri Lanka passed the Securities Council Act (Act No. 33 of 1987) to establish a Securities Commission with the objective of creating and maintaining a market in which securities can be exchanged and traded in an orderly and fair manner. Amongst the powers of the Commission included the power to license a body corporate as a Stock Exchange and to ensure the proper conduct of its business. Accordingly, the Colombo Stock Exchange has been established by eight firms which are, in turn, owned by its respective members of the Colombo business community. The Colombo Stock Exchange has also established a Central Depository System to facilitate corporate share transfers.

Similarly, the Code of Intellectual Property Law (1979), the Companies Act (1982), and the Banking Act (1988) are examples of legislation introduced to facilitate the liberalisation of the economy. Sri Lanka does not, however, have a comprehensive investment code. The Board of Investment Law (previously the Greater Colombo Economic Commission Law of 1978) set up a Board which was empowered to grant generous fiscal concessions and exemptions from custom duty and exchange control.[26]

There have also been continuing concern that the environment relating to debt recovery has been unsatisfactory and that almost 30% of the loan portfolio of several commercial banks were in default. These reforms provided for:

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[25] The Telecommunications Regulatory Commission of Sri Lanka has in recent communications to licensed operators emphasised the importance of a collaborative approach.

[26] See Tiruchelvam Associates, "Legal Aspects of Privatization" (Unpublished paper)

(a) special summary procedure for loans in default including the immediate operation of a decree as a writ of execution;

(b) the recovery of loans by banks through parate execution;

(c) the Mortgage Act was amended to enable banks to proceed against property other than immovable property in cases of default; and

(d) the ceiling imposed by Money Lenders Ordinance with regard to interest was considered unrealistic and abolished.

Despite such legislation, there are thousands of debt recovery cases which are still pending. Several legislative and practical measures have been recommended to further strengthen the environment with regard to debt recovery. These recommendations have included:

(a) the establishment of two or three special courts under the Judicature Act for debt recovery;

(b) to facilitate the service of process through the Post Office and to thereby eliminate the need for personal service;

(c) to prescribe a time limit of one month for showing cause against decree nisi; and

(d) to provide a time limit of 14 days for filing of objections against seizure.

Another area of concern relates to the operation of the law relating to bankruptcy. The emphasis of bankruptcy law should be on the remedial and rehabilitative rather than the punitive aspects of this process. The orderly exit of the enterprises which are unable to continue their operations is as important as the removal of barriers for the entry of new enterprises into the market economy. In Sri Lanka, involuntary bankruptcy has been a weapon in the hands of a vindictive creditor and sometimes led to the abuse of the court process. The principal purpose of bankruptcy law reform should be to procure a prompt and effective disposal of the assets and the settlement of the liabilities of all bankrupt companies. It is, therefore, recommended that the following reforms be carried out:

(a) procedural reforms designed to expedite bankruptcy proceedings by recourse wherever appropriate to summary procedures and inquiries before the Registrar of Courts;

(b) conferring greater flexibility and powers on liquidators and receivers with regard to the realisation of assets, disposal of assets and the investment of funds;

(c) establishing a specialised court to deal with cases of corporate bankruptcy;

(d) encouraging insolvency practitioners so that enterprises may be encouraged to consult such practitioners early and not delay this process until rehabilitation becomes impossible.

Substantive legal reform *per se* is inadequate to improve the legal environment relating to the private sector if there is no improvement in the legal and institutional framework within which such reforms are located.

4. The Resolution of Commercial Disputes

The development of a market economy and the effective protection of property and contractual rights calls for a legal system in which there is predictability with regard to the outcome of disputes.[27] The efficiency of a legal system in providing relief to the aggrieved party is an important factor in enhancing the confidence of economic actors.[28] Lenders have accorded importance to

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[27] For a view on the nature of the transition of judicial institutions in the context of a newly emerging free market system, see Kathyryn Hendley, "Legitimizing Judicial Institutions: Russian Economic Courts in Transition", prepared for the Conference on "Democracy and the Rule of Law: Institutionalizing Citizenship Rights in New Democracies," held at McGill University, Montreal, 18-21 March 1998. (Unpublished)

[28] On the notion of efficiency, Ugo Mattei points out that "An institution, rule, or state of the world is never efficient or inefficient in the abstract or absolute. It may only be so compared with concrete alternatives that may fit better or worse in a given context. Of course, the alternative rules, institutions, or states of the world may be provided by history, by comparative analysis, or by scholarly creativity." Further, he concludes, somewhat problematically perhaps, "From the point of view of a given legal system efficient is whatever avoids waste; whatever makes the legal system work better by lowering transaction costs; whatever is considered better by the consumers in the legal marketplace, that is, whatever does not pointlessly foreclose

the ease with which they could use legal processes to recover debts from borrowers. This, in turn, has a bearing not only on the willingness of the lenders to extend credit, but also on the collateral security that they may require and the interest rate on the loan.[29] In all parts of South Asia, there has been considerable dissatisfaction with the effectiveness of the judicial system in enforcing contractual obligations and securing rights.

> *In Bangladesh, it has been noted: That the laws and the judicial system of Bangladesh neither meet the needs of the citizen, nor create an environment conducive to transactional efficiency. Legislation is poorly designed and outdated, procedures are cumbersome, superior judiciary does little monitoring, court facilities are inadequate and there are too few well trained judges and law officers. All of this causes inordinate delay in legal verdicts. Indeed, decades can pass in expensive and time consuming litigation of a minor and relatively simple case. Public faith in the courts is understandably low. Major reforms of the judicial system are necessary to meet the demands of a modern economy.*[30]

Similar concerns with regard to the judicial effectiveness, antiquated procedures, inordinate delays and the lack of capacity of judges to adjudicate complex commercial disputes have been expressed in Sri Lanka, Pakistan, India and Nepal. Since the Colebrook Cameron Reforms of 1830, Sri Lanka has struggled to establish a court system which is cheap, expeditious and accessible. The quest towards a fair and just court system has eluded reformers since that period. The Sri Lankan judicial system continues to face many problems with regard to the disposal of cases. The large court backlog and the almost archaic and antiquated procedures for pre-trial inquiry, examination of witnesses and production of documents, service of process and

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the development of a better-organised human society; whatever legal arrangement 'they' have that 'we' wish to have because by having it they are better off." See Ugo Mattei, *Comparative Law and Economics* (1997), The University of Michigan Press, Ann Arbour, at pp. 1 and 145.

29 See Law and Development at the Asian Development Bank, 1998 edition; The World Bank and Legal Technical Assistance, Initial lessons; Malcolm Rowat, Waleed H. Malik, and Maria Dakolis (eds), *Judicial Reform in Latin America and the Carribean* (1995), The World Bank, Washington D.C.

30 See World Bank, supra n 5 at p. xiv.

execution of decrees have added to the woe of litigants. A major concern has been the system of court administration and the maintenance of court records. Litigants and lawyers have further complained that the antiquated system of court records and the corrupt administration of that system have compounded the problem of judicial delay.

Accordingly, considerable effort is being directed towards questions of judicial reforms which include (a) the enhancement of the speed and capacity of the court, (b) the improvement of the judiciary, (c) enhancing supervision and monitoring of law court, and (d) reforming the law and procedures relating to Commercial Arbitration.

Investment Protection Agreements and some of the investment codes within South Asia also provide for recourse by investors to the International Centre for the Settlement of Investment Disputes in Washington. However, in practice, in the investment Agreements that most foreign investors enter into with the Board of Investment they opt for commercial arbitration and the application of ICC rules or UNCITRAL rules. It is in this context that recent attempts to reform the laws relating to commercial arbitration in some of the South Asian countries assume importance. Sri Lanka introduced a new Arbitration Act in consequence of a long drawn out debate initiated by the Law Commission in 1988 on the reform of the arbitration law. The Law Commission pointed out that there were three reasons as to why the existing law was inadequate. Firstly, existing laws were not comprehensive in providing for the conduct of arbitration and the enforcement of awards. Secondly, the laws did not reflect the progress in other countries and modern legal developments relating to the conduct of the arbitration proceedings and the enforcement of awards. Thirdly, there was no specific legal provision to give effect to the New York Convention on the Enforcement of Foreign Arbitral Awards. The then Attorney-General, Mr. Shibley Aziz, summed up his concerns with regard to the existing law and observed that it was totally inadequate and insufficient and fragile and had created uncertainty in the minds of those who were looking for a familiar legal landscape before effecting their investments.

There are two broadly opposing models relating to domestic and international commercial arbitration. The first is one which emphasises party autonomy with regard to the choice of arbitral tribunal, the laws applicable and the procedure relating to the conduct of the arbitration. This is a model which

calls for minimum interference by the courts in the arbitration process and even permits the total exclusion by the parties of the jurisdiction of local courts. The second model is the more orthodox model. This approach recognises that the State has a certain national interest in ensuring that important disputes are not taken out of the control of its national laws and its system of courts. These interests include the protection of the local business community which is often perceived as a weaker party and, therefore, at a disadvantage in a regime of absolute autonomy.

Countries have differed in their approach to the reform of arbitration laws. Countries such as Australia, Canada, Nigeria, Cyprus and Singapore have favoured the party autonomy model. On the other hand, countries such as Malaysia have been content with the 1950 Arbitration Act which permits constant supervision of the arbitral process by the courts.

In the Sri Lankan context, the new Arbitration Act adopted the party autonomy model and this choice has been defended on three broad policy grounds. First, it has been justified in the broader context of the modernisation of commercial laws and procedures. Secondly, it has sought to signal to the international community in a clear and unambiguous manner that international legal obligations including treaty obligations would be taken seriously and that domestic laws and procedures would have to be in conformity with such obligations. Thirdly, it seeks to correct a serious loss of confidence amongst domestic and foreign litigants in the disposal of commercial litigation by the courts and seeks thereby to establish an alternative framework with emphasis on speed, expertise, privacy and neutrality.

There are, however, scholars who are critical of this approach. They point out that for historical and other reasons international commercial arbitration has been dominated by arbitral centres in Europe. London continues to be dominant with regard to shipping arbitration while Paris and Geneva remain dominant with regard to commercial arbitration. It is, therefore, further argued that as long as such dominance prevails, theories of arbitration and the substantive rules made by arbitral tribunals will be dominated by western arbitrators. They form a select and small coterie of men who reinforce each other's views on arbitration and the creation of doctrines which are then subsequently made applicable globally. One example of such doctrine is the claim that there is a coherent body of principles applicable to international

contracts which are drawn from arbitral decisions and the writings of international scholars. This body of principles known as *lex mercatoria* is independent of concepts and principles drawn from national jurisdictions. The emphasis is on a system of laws based on the free will of parties and which tends to disregard inequality of bargaining power between the contracting parties. Accordingly, these scholars are critical of this body of doctrines and its application to the resolution of all international commercial disputes.[31]

A further development has been the creation of a commercial court with a view to establishing an enclave for the efficient and effective resolution of commercial disputes. This experiment is, however, flawed in that such courts are compelled to depend on the infrastructure of the court system as a whole with regard to the maintenance and retrieval of court records and the provision of other support services.

Another example of the imaginative recourse to alternative dispute resolution arrangements has been the decision of the Telecommunication Regulatory Commission to have recourse to mediational processes in resolving the disputes with regard to interconnection agreements between wireless loop operators and the dominant fixed line operator, Sri Lanka Telecom.

5. Conclusion

While the move towards a market economy has resulted in the emphasis on complementary legal reform, no comprehensive theoretical model has been developed regarding the relationship of the law and the economy. In contemporary legal theory, there has been a continuing debate between evolutionary and deterministic approaches to law and social change. Savigni was the principal proponent of the evolutionary thesis according to which law should essentially follow and not endeavour to lead social sentiment. On the other hand, theorists such as Bentham believed that law could be "the determined agent in the creation of new norms." According to Savigni, only "when popular custom in part articulated by lawyers is fully evolved," could and should legislative action takes place. He, therefore, opposed the trend towards the codification of the law and the spread of Napoleonic Codes

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[31] See M. Sornaraja, supra n 10.

throughout the world.[32] On the other hand, Bentham was a fervent believer in the efficacy of "rationally constructed reforming laws" and devoted a great part of his life to drafting of codes for a large number of countries from Czarist Russia to newly emerging Republics of Latin America. Similar debate has taken place within the law and development movement where scholars began to critique the premise that legal change in developing countries would ultimately result in the adoption of legal ideals and institutions similar to those in the west. These critiques saw the law and development movement as imposing a foreign model of law in developing countries and accused it of "ethno-centricity, and insensitivity to local customs, values and development objectives."[33]

The Advocates of comprehensive law reforms to meet the needs of a liberalised economy confront similar dilemmas and paradoxes. Firstly, there is often a contradiction between the efforts to create a legal framework to facilitate private sector development and the need to promote sustainable development. Legal reforms for sustainable development must include laws and policies that protect the environment, and enhance the social status of women and other vulnerable sections of society. For example, laws and policies to promote foreign investment and establish export oriented industrial zones seek to contain wage demands and consequently limit the freedom of association of labour. Fiscal policies directed towards limiting and dismantling social welfare programmes impact adversely on women, children and the rural poor. There is, therefore, a need for a conceptual and policy framework which reconciles the imperative of legal reform, to promote private sector development with the imperatives of advancing social objectives of sustainable development. Secondly, there is an increasing tendency for multilateral agencies which support legal reform to complement market economies to encourage the cross-border transplantation of legal systems and concepts. It is important to ensure that each country makes its own fundamental choices about the structure and direction of its legal system and where there is a need to adopt legal transplants, they are suitably modified and developed in accordance with the indigenous values and conditions.[34] In this

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[32] See W. Friedman, *Law in a Changing Society* (1964), Penguin Books, London, pp. 1-2.

[33] See Law and Development at the Asian Development Bank, (1998). pp.18-22.

[34] Ibid.

regard, the European Community Independent States Joint Task Force on Legal Reform noted that -

> *However underdeveloped our comprehension of law and social change may be, the lesson has been learned at considerable cost that legal change is not a matter of fitting spare parts into a machine. Adaptation and even inventiveness are the skills required, with a considerable dose of imagination and a profound knowledge of the contextual framework into which the adaptations are to be introduced.*[35]

Thirdly, given the growing convergence of developmental policies and legal reform in several South Asian countries, there is a need for a more systematic approach towards the harmonisation of commercial laws and institutions within South Asia. A few years ago, the Law & Society Trust, Colombo co-ordinated an initiative involving India, Bangladesh and Sri Lanka which anticipated some of the problems and challenges of legal integration within the sub-continent in the area of economic law.[36] The International Institute for Unification of Private Laws has facilitated the development of modern commercial laws which have been usefully adopted by many countries.[37] A similar initiative within South Asia is required if legal scholars and policy makers are to imaginatively respond to the challenges posed to the legal systems of the sub-continent by the recent economic transitions in our respective countries.

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[35] Shaping a Market Economy Legal System (1993), p.13.

[36] The Report arising out of this Consultation suggested, *inter alia*, that "There is a need to further sensitize economic planners, policy makers and implementing officials to the need to use professional legal expertise to develop an agenda for legal and institutional reforms in designing and implementing liberalization programmes." See (Report on) "Workshop on Economic Liberalization: The Need for Legal and Institutional Reform" (1992) Law & Society Trust. (Unpublished).

[37] The International Institute for the Unification of Private Law (Unidroit), located in Rome, Italy, is an independent intergovernmental organisation set up on the basis of a multilateral agreement, the Unidroit Statute, whose purpose is to examine ways of harmonising and co-ordinating the private law of States and of groups of States, and to prepare uniform instruments of private law.

Should the Death Penalty be Enforced?*

*I.K. Zanofer***

The crime rate in Sri Lanka seems to have increased in recent times. The punishment for some crimes - such as murder and drug trafficking, is the death penalty. Although the capital punishment is imposed by the court, it has not been carried out in Sri Lanka since 23 June 1976. These sentences are committed to terms of life imprisonment. In order to combat an alarming increase in the crime rate in recent years, the Government has decided to reimpose the capital punishment. This decision met with mixed reaction from the general public while human rights groups, which have been lobbying the Government to abolish the death penalty expressed dismay at the decision.

The Law & Society Trust organised a symposium on this topic and the speakers were Professor S.T. Hettige, Head, Department of Sociology, University of Colombo; Mr. Rohan Edrisinha, Lecturer, Faculty of Law, University of Colombo; and Mr. Palitha Fernando, Deputy Solicitor-General (who attended the symposium in his personal capacity). The session was chaired by Ms Radhika Coomaraswamy, the UN Special Rapporteur on Violence Against Women. Professor Hettige examined the issue from a broad sociological perspective looking at the responses this particular issue has generated in different segments of society. He raised the issue of responsibility: there is an overwhelming bias towards trying to share responsibility and we try to put too much emphasis on individual responsibility without taking a closer look at the circumstances under which these crimes are committed. He further mentioned that we are not prepared to share responsibility for various social problems that we have in our society, particularly crimes.

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* Synopsis of a symposium held at the Law & Society Trust on 19 April 1999. Edited for publication.

** Research Assistant, Law & Society Trust.

He pointed out that the focus is always on the criminals; but the responsibility of society is never questioned. There are several ways to deal with criminality and we should take measures to prevent the growth of criminal elements in society.

He stated that murder is committed under varying circumstances, especially after a long period of continuous provocation; society, however, has not dealt with the situation effectively, which ultimately reflects badly on society at large and also on various institutions that are responsible for arresting crime. The shortcomings in the law enforcement agencies and the judicial system are not taken into account when responding to this particular issue.

Referring to a report published by the Prisons Department he mentioned that most criminals possess very specific backgrounds. Most of those sentenced to death were from the lowest stratum of society. In 1994, 112 were sentenced to death, out of which 44% were illiterate, 60% were educated only up to Grade 8, and only 8% had studied beyond Grade 8. It was clear that they had come from the poorest, powerless, marginalised, and socially stigmatised sectors of society, but no one has analysed why almost all criminals originate from that kind of background.

In concluding, he pointed out that we should consider whether we are looking at all the issues that deserve equal attention of the responsible citizens of this country. If we do not do so, it might lead us to move away from our social responsibility, an area we have to strengthen.

Mr. Rohan Edrisinha objected to the enforcement of the death penalty for several reasons. He felt that capital punishment is immoral as it violates basic human rights such as the right to life, the right to dignity (which is increasingly becoming important in human rights jurisprudence), and the prohibition against cruel, inhuman and degrading treatment and punishment. These rights are considered paramount and are enshrined in many international human rights conventions and Constitutions.

He added that there is no justification whatsoever for the Government's decision to reintroduce the death penalty; there is no logical nexus between the problem being addressed and the reintroduction of the death penalty. He also pointed out this does not even achieve the objectives set out by the proponents of the death penalty.

He affirmed the need to protect the values and principles such as the respect for life, standards of decency, discipline in society and argued that, in order to protect these values and principles, the State should not engage in systematic State-sanctioned murder. It would be entirely counter-productive, if in order to preserve the sanctity of life, the State which is expected to be a civilised institution, resorts to the death penalty.

Referring to international human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights, he said that although these norms tolerate the death penalty to a certain extent, they certainly do not justify the death penalty. He stated that it would be correct to say that international human rights jurisprudence generally frowns upon the imposition of the capital punishment. He also drew attention to the fact that there are a number of modern Constitutions and a number of Constitutional Courts, which have declared the death penalty to be violative of the right to life and the right to dignity.

He cited a decision of the Constitutional Court of Hungary in 1990 in which it was held that the death penalty violated the right to life and the right to dignity. The German Constitutional Court has also declared the death penalty to be unconstitutional and subsequently there has been a constitutional amendment which expressly provides for the abolition of the death penalty.

It should be noted that a number of countries, most notably South Africa, have decided to leave the constitutionality of the death penalty in the hands of the judiciary rather than the legislature. The crisis of law and order in South Africa was much worse than in Sri Lanka, and the political leaders of South Africa and the court had to decide the controversial issue of the death penalty in a context of rising crime and violence and massive public opinion in favour of the death penalty. In *Makwanyane and Mcbunu* v. *The State* in 1995, eleven constitutional court judges unanimously decided that the death penalty violated the provisions in the Constitution protecting the right to life, right to dignity and the prohibition against cruel, inhuman and degrading treatment and punishment.

One of the judges pointed out in this case that ... the death penalty degrades and dehumanises all who participate in its process ... the punishment should fit the crime, not repeat the crime and that the death penalty itself is inherently arbitrary ... whether someone is sent to the gallows or not depends so much

on issues like poverty, race, chance, competence of the lawyers, sensitivity of the judge, expert witnesses etc....

Mr Edrisinha pointed out that issues like the death penalty should be best left to institutions like the judiciary which are expected to look into such matters with a great amount of reason, of careful deliberation rather than the matter being decided by political leaders. Therefore, greater importance should be given to a decision of a Constitutional Court or a Supreme Court which outlaws death penalty rather than speeches of Ministers and Members of Parliament.

He stressed that the State will definitely lose its legitimacy and moral superiority if it descends to the level of putting people to death. He further stated that there are alternatives to the death penalty such as life imprisonment, and other forms of punishments, but he was certainly not opposed to the idea of perhaps strengthening or tying up some of the practices that go with those aspects of punishment.

He added that in his view, the most effective deterrent to violent crimes would be to ensure that the perpetrators of the crime are apprehended, convicted and punished. There are areas where reform is needed, such as developing police skills, investigation skills, strengthening the independence of the police department, ensuring that some of these law enforcement initiatives are depoliticised, and ensuring that there is a severance of links between under-world crimes and politics, which has been an unfortunate trend in this country in the last two decades.

Without paying attention to the above areas, which are really the cause for the increasing crime and for the lack of respect for law and order in the country, it is immoral and unjustifiable for the Government in a cheap, 'populist' gesture to reintroduce the death penalty. He also accused the authorities of not having discussions and studies on this issue, and for not appointing a committee to look into this matter. He also pointed out that the present Government's manifesto was totally silent on this issue.

It almost seems as if the decision was taken on the spur of the moment as a cheap, populist gimmick, and it is, therefore, totally unjustified. This is the provision that has been borrowed from the Soulbury Constitution in an entirely different political scenario, where the Minister of Justice was a member of the

Senate, who was, therefore, expected to be somewhat detached from the normal political process. We also had a President who was a nominal head of State and these two people had to look into the matter of commuting a death sentence to something less.

In conclusion, he submitted that the death penalty was not an option in the modern context, and that there were alternatives. Those alternatives have to be fully explored in order to evaluate their success. In the light of the above reasons, the Government decision to reintroduce the death penalty is totally unjustifiable.

A different view point was expressed by Mr. Palitha Fernando, who spoke in favour of the enforcement of the death penalty. He said that the death sentence has always existed and people are being sentenced to death in the courts of law of this country. They are not being executed for the simple reason that the President does not nominate a time for their execution.

If the death penalty exists, why shouldn't it be executed? If it is in the statute book, why isn't enforced? If we are not willing to enforce it, shouldn't we repeal that law? He was of the view that no steps had been taken to repeal this sentence, because the very fact it was in the statute book acted as a deterrent.

There had been several attempts to repeal the death sentence during the colonial periods. In fact, the legislature had passed a resolution proposed by the late D.S. Senanayake, but however, the colonial masters simply ignored it for the simple reason that they knew that they could not carry on without the death sentence being executed or at least it being in the statute.

Quoting from Pandit Jawaharlal Nehru's famous book *The Discovery of India* in which he has stated that, "when there is a conflict between internationalism and nationalism, nationalism should emerge victorious," Mr. Fernando said that, when we consider whether or not the death sentence should be enforced, we must forget the international picture and consider as to what is happening in this country. We should look at the interests of our people, their attitude and then consider as to whether we should abolish the death penalty or reintroduce it.

He, too, referred to the international instruments mentioned by Mr. Rohan Edrisinha. He pointed out that both the UDHR and the ICCPR, have exceptions to the abolition of the death penalty, especially with regard to life and other rights that are enshrined in these documents. The ICCPR, states that the rights therein can be enjoyed so long as they are subject to such restrictions as are necessary for the purpose of allowing others to enjoy their rights. Since in Sri Lanka, people are not in a position to enjoy those rights due to various reasons, particularly due to the escalation of crimes, the State is entitled to and is indeed duty bound to take measures to ensure that everyone is able to enjoy their rights.

He further mentioned that the 1978 Constitution does not recognise the right to life as a fundamental right. It only provides that a person shall not be sentenced to death or shall not be executed unless it is done according to the process laid down by law.

He also said that the abolition of the capital punishment was not a topic that had just sprung up recently; this has been discussed for many years even by the United Nations. He further pointed out that the UN in the year 1959 had discussed this matter and the General Assembly had requested the UN Secretary-General to gather information in order to find out what could be done. The matter was taken up before the Economic and Social Council which referred the matter to the Commission on Human Rights. The Commission made some recommendations and based on those recommendations the General Assembly passed a resolution: "On the recommendations of the Commission and the Council, the Assembly in 1968 adopted a resolution inviting the member States to ensure the most careful legal procedures and the greatest possible safeguards for the accused in capital cases, in the countries where the death penalty exists." Thus, the General Assembly did not call for the abolition of the death penalty, because most of the member States were not happy about abolishing the death penalty. Thus, the death penalty stands today supported by legal documents such as the UDHR and the ICCPR.

He further pointed out that sometimes we tend to consider international issues much more than national ones and try to look at national issues through an international point of view. Most of the time what we perceive is a misleading picture. Even the UN had been misled by the western world. The UN was of the belief that the whole world was against the death penalty and

campaigned for the abolition of the death penalty. But after collecting information they realised that they had obtained a distorted picture, because they had concentrated more on the western world. Members representing the developed world were expressing the view that the death penalty should be abolished, but it was not the view of the rest of the world.

He requested the audience not to be blind to the situation in this country and said that the very fact that it is in the statute book, has acted as a deterrent. As a result, our successive Governments have not been able to remove it from the statute books.

In 1956, late S.W.R.D. Bandaranaike's Government suspended the death penalty for a period of three years. Why did they not abolish it? They had to reintroduce it when he himself was assassinated. Mr. Fernando stressed that, since the people in our country are inquisitive and influenced by social issues, we need to have the death penalty as an effective enforcement machinery. We should not confuse morality with legality. We should have a strong legal process and an effective enforcement procedure.

In conclusion, he mentioned that we should respect our culture and find some solution to the rise in the incidence of crime within our country which will suit our people. We should protect human rights but they should be protected for all.

Statement by H.E. Mrs Anna Lindh, Minister for Foreign Affairs of Sweden at the 55th Session of UN Commission on Human Rights, Geneva*

Madam Chair, Ladies and Gentlemen,

Let me wish you and other members of the Bureau every success in your leadership of this year's Commission. I can assure you of the full cooperation and support of the Swedish delegation.

In addition to the statement by Mr. Fischer, the Foreign Minister of Germany, on behalf of the European Union which I fully support, I wish to make the following remarks:

Madam Chair,

Every hour thousands of refugees are forced to leave Kosovo,

When analysing the conflict in Kosovo, we find, among the root causes, violations of fundamental human rights. We find aggression, displacement of people, harassment and discrimination for at least 10 years.

The last days we have seen a tragedy and an ethnic cleansing before our eyes. People like Bajram Kelmendi and Fehmi Agani are two names among a considerable number of executed. Once again history teaches us that unless the inherent dignity of all human beings are recognised, there can be no freedom, justice or peace.

With the current crisis on our mind, it might be difficult to see the progress made since last year's Commission:

- the decision to establish the International Criminal Court to fight impunity,

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* 31 March 1999.

- the adoption of a declaration in support of Human Rights Defenders,

- the increased public awareness about human rights during the 50th Anniversary of the Universal Declaration,

Despite this progress, the human rights situation around the world gives no reason for complacency. Only a few travel from here, the Kurdish people are denied their language, cultural identity and democratic rights in Turkey. Turkey's behaviour towards the Kurds is not acceptable. The international community has to address its continued violations of human rights more clearly. The Turkish Government should meet the democratic forces among the Kurdish people in a dialogue. The decision to forbid the Democratic Party of the Masses, and organisation not linked to the PKK, is a sign of the contrary. Emergency laws should be lifted. Detailed political prisoners released.

Also in other continents fundamental rights are violated:

- people are being repressed for having the wrong opinion in China,

- children are being used as soldiers and maimed in Sierra Leone,

- human rights defenders, among them trade unionists, are being killed in Colombia,

- authors are being killed for their writings in Iran.

In all parts of the world, we find millions of refugees, people without a country, a home, job, education, medical care and food.

This should come to an end. The responsibility rests primarily with individual states, though the UN Charter mandates all of us to cooperate in order to ensure respect for human rights.

Madam Chair,

To improve future respect for the human rights, our focus should be on the young generation.

This autumn ten years have passed since the adoption of the Convention on the **Rights of the Child.**

The Convention is a ground-setting instrument with practically all UN Members as Parties. Let us hope that by its tenth anniversary, we will have the first truly universal convention. Not only universal ratification, but implementation is needed.

Children continue to suffer from serious violations of their rights.

- 300,000 children are made soldiers in armed conflicts,
- 11 million children fall victims to sex trafficking and prostitution,
- 250 million are used as child labour,
- 160 million suffer from hunger and starvation,
- 125 million are deprived of education,
- 25 million are denied a home country.

We find these children in all countries, cultures and contexts - rich or poor, north or south, east or west. We carry a great responsibility in translating our commitments into action and in making rights become a living reality.

Sweden's former Prime Minister, Mr Ingvar Carlsson, was among the initiators of the World Summit for Children in 1990. Now we have to assess progress and to establish the agenda for future action based on a rights approach. This Commission could make its contribution by identifying key issues to be addressed.

One of them is education. We have made great progress. Many more children can attend school today than in the past. It is time to bring the human rights principle of non-discrimination into our schools and our educational systems and to stop the still wide-spread discrimination of girls.

Children should not be soldiers. Sweden therefore supports the establishment of an internal age limit of 18 years in recruitment and participation in armed

conflicts. My Government urges states to agree to an optional protocol to the Convention on the Rights of the Child.

Madam Chair,

The right to life is fundamental. The death penalty cannot be accepted. Its continued use is an affront to human dignity. It must be abolished. I welcome the steps taken by some countries like Azerbaijan, Bulgaria and Lithuania which have abolished capital punishment.

However, I deeply regret that no improvements have been noticed in the cases of which my predecessors spoke last year. This year a man was executed who committed his crime as a 16 year old. He had been on the death row for 13 years. Elsewhere, people were executed following trials which did not meet international standards.

I have taken these examples from countries as different as the United States, China and Saudi Arabia. Although they stand out in this abhorrent practice, there are unfortunately also many other countries where the death penalty is still in use. It is particularly sad to note that some Governments are considering to reinstall the death penalty, or to discontinue a moratorium. I appeal to Ukraine and the Philippines not to resort to this primitive expression of public vengeance.

Torture is another abomination. Yet, it still prevails in a shocking number of countries.

Governments carry the responsibility if law enforcement agencies use torture. It can never be tolerated. The perpetrators of torture and those who allow it must be brought to justice.

We are following closely the situation in Turkey, in Burma, in Israel and in Palestinian territories on what is done to bring an end to the use of torture. We welcome the recent invitation by China to the Special Rapporteur on Torture.

Madam Chair,

In the year 2001 a World Conference on **Racism** will be held. My

Government will actively participate in the preparations. We need to take an active forward looking approach, while learning from past experiences.

Apartheid has been defeated. But we have not succeeded in eliminating racism, it constantly manifests itself in new shapes. Weak leaders pretend to be strong by appealing to the most primitive feelings of the people they are attempting to lead. The Universal Declaration gives everyone the right to education which promotes tolerance. All countries can and should improve education in the field of human rights.

Last year my Government launched a nation-wide project called Living History to raise awareness among young people about the Holocaust which took place more than 50 years ago. We must never forget these atrocities, to make sure that this does not happen again.

Racism, intolerance, and the harassment of others must be fought by each generation, by any society and by every civilisation.

Non-discrimination is fundamental. However, this should not prevent us from taking specific measures to ensure that persons who belong to vulnerable groups enjoy their rights and not be subject to prejudices. A lot remains to be done.

In Sweden it is difficult to find a job if you have a foreign name and dark skin. The challenge ahead lies in inviting the whole society in the task to abolish racism and fight discrimination. This year my Government has initiated the preparation of a National Human Rights Plan.

Madam Chair,

We have at our disposal a number of instruments for promoting human rights. But we have to strengthen their effectiveness. Let me name four ways. First, the implementation must be more efficient. This will require political will and adequate resources. My Government welcomes the proposals pointing to more effective use of existing human rights mechanisms. We also express our strong support for the Secretary General and the High Commissioner in their efforts.

Second, the adoption of the Statute of the International Criminal Court will give us an instrument to fight impunity. Nobody shall enjoy immunity for genocide, crimes against humanity and war crimes on the grounds of his position or because the crimes were committed by subordinates. I urge all states to join in a speedy ratification.

I recognise that the recent decision regarding Senator Pinochet by the Law Lords is a new step in the struggle against impunity.

Third, there still exists a division between international human rights and international humanitarian law.

No human being should end up in a void between the two. Identifying standards of humanity applicable to all in all situations could be one remedy, the establishment of a Sub-Committee on International Humanitarian Law another. I wish to take this opportunity to inform the Commission that Sweden plans to host a second follow up-seminar on this issue in Sweden next year.

Fourth, I would like to recall the report Our Global Neighbourhood from 1995 which introduced the idea of a right petition for civil society, providing a possibility to introduce threats against people's security into the UN agenda.

An independent Petition Council, nominated by the Secretary-General, would be given the task to look into reports on such threats and to make recommendations to the Secretary-General, the Security Council and the General Assembly. The Council would have no legal power but could develop a strong moral authority.

When rereading the report I found this to be one of the many ideas which deserves to be brought up and given more attention. In an open and global information society we need new instruments to increase knowledge, promote transparency and enhance public concern.

Finally, Madam Chair,

The UN Charter mandates us to cooperate when it comes to both development and human rights. My Government has for many years in concrete ways demonstrated its commitment in these two fields. In fact, they have to go together.

A life in dignity can only be a reality if all kinds of basic needs and rights are met and respected. The quests for democracy, sustainable development and human rights are all building blocks for a universal value system. Respect for human rights is beneficial to the economic development. Conversely, economic progress facilitates respect for human rights.

The Universal Declaration places the individual, and her rights as participant in society, at the centre. One set of rights cannot be held against another. No human being should be forced to choose between freedom of speech or bread.

Two weeks ago, President Nelson Mandela addressed the Swedish Parliament. He reminded us of his speech nine years ago in Stockholm. At that time he had just been released from prison. South Africa was still waiting for its first democratic election.

The improvements made in nine years is encouraging, in South Africa, in Eastern Europe, in Latin America and in many other parts of the world.

With joint efforts we should make the coming years equally progressive.

Equal Opportunity in Sri Lanka

Miss. Azra Hassen[*]

Today's world is an enlightened one, mainly because of the rapid advances in the fields of science, technology and mass communication. But, regrettably, we are still lagging behind in meting out equal treatment to all human beings, irrespective of class, creed, ethnicity, sex, socio-economic position or other divisions. Great injustices are caused to human beings, as a result of this gross discrimination, and is a slur on the whole human race. Discrimination, in whatever form is to be abhorred by all right thinking people. Inequality in the treatment of people, leads to ill-will, disruption of unity and peace, and breakout of clashes and war.

The United Nations Organisation (UNO), as far back as fifty years ago, recognised the need for equal opportunities for all human beings. The Universal Declaration of Human Rights, signed by the member nations of UNO, in 1948, says "All human beings are born free and equal in dignity and rights." So, it is the duty of Sri Lanka, as a member of the UNO, to honour and respect this noble Declaration, and provide equal opportunities to all her citizens.

At the same time, it is also the responsibility of every sensible person to have an understanding of his or her own importance in society. Joseph Priestly, the English non-conformist Minister, who lived in the Eighteenth Century said, "Every man, when he comes to be sensible of his natural rights, and to feel his own importance, will consider himself as fully equal to any other person whatever." Therefore, any form of an inferiority complex or superiority complex should be removed from all human minds.

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[*] Winner of 1st prize (over 17 years and under 22 years category) of the All-Island Essay Competition organised by the Law & Society Trust under the Equal Opportunity Programme funded by the Commission of the European Union. Edited for publication.

Man has made boundaries to separate one another, and flout the concept of equal opportunities for all. Let us examine some of these artificial boundaries.

The deplorable caste system, is a source of gross inequality and discrimination. The low caste people are at the receiving end of ill treatment of a nature unbecoming of the human race. "It is by deed, not by birth that a man becomes high or low." Low caste people in Sri Lanka and in neighbouring India are segregated into a world of their own, separated from the world of high caste people. Caste is also a factor to be considered in arranging proposed marriages, particularly among the Sinhalese and Tamil people. It is high time, that we cast aside the caste system for good - for the good of all citizens of Sri Lanka!

The lack of equal opportunities for people of all ethnic groups in our country is behind the present tragic and horrible Civil War. This conflict has already cost many thousands of lives of Sri Lankans. The war has also cost huge losses to the country to the tune of billions of rupees, by way of damages to buildings, power installations etc. All attempts to bring about peace have been of no avail, and the sixteen-year old war continues to be a thorn in the flesh of the nation. We should all strive earnestly for a peaceful solution to the crisis. Respect for equal opportunity for all will go a long way to achieve that elusive peace. Mother Lanka is crying for her battered children, and will only breath a sigh of relief when the war ends and peace prevails. Any war, in whatever form, or magnitude, causes equal opportunity to disappear in all fields.

Discrimination in the workplace is an ugly reality. Employees are sometimes given preferential treatment on unfair bases rather than on qualifications and ability. In some offices or workplaces there are favourites of the management. As a result, deserving employees are prevented from earning their due promotions and other benefits. Political affiliations, nepotism and sexual favouritism are some of the main grounds for loss of equal opportunity in the workplace. When discrimination is present in the workplace, the motivation of the employees will plunge, and team work will also suffer, resulting in a decline in productivity. A Universal Code of Ethics for Equal Opportunities in the Workplace should be drafted and adopted to ensure justice and fairplay to all employees.

In the advanced world we live in now, there should be no room for discrimination on the basis of sex. But the actual situation is different, and sex discrimination is very much present throughout the world, and in Sri Lanka, too. Men are still considered as superior to women. For example, in the field of employment, men get preferential treatment, not only in the actual process of securing employment, but also in relation to promotions. "The hand that rocks the cradle rules the world." So, women should be given equal treatment as men. It is refreshing to note that a number of Women's Rights movements are actively fighting for women's rights.

There is an unhealthy tendency to regard the physically and mentally handicapped people as second class citizens. While the supply of artificial limbs, crutches, wheelchairs etc. is most laudable, the disabled people also need to be given every opportunity to live on par with normal people, as far as possible. Avenues of self-employment should be opened to them. We should not be deaf, blind or mute to their condition. The common notion that the disabled people are only to be sympathised with, and protected, needs to be corrected.

The recently staged drama-opera "Butterflies Will Always Fly" with a cast which included a large number of disabled actors was most refreshing. It was a wonderful demonstration of the unrelenting courage of the disabled people, when given the opportunity to do so. Their performance proved that the disabled could overcome their disability and get the maximum from life, provided the world at large treats them as being able to stand on their own, equal with their brethren!

Through the very deprivation and disability a person could grow stronger with will-power and right guidance. So, let us give a better world to the disabled, a world they would be considered equal with their fellow human beings.

Unemployment is a burning problem in Sri Lanka today. Quite apart from the lack of sufficient employment opportunities, the filling of available vacancies in unreasonable ways causes unrest and disappointment among job seekers. Nepotism and preferential treatment of one's relations in giving jobs, also cause loss of equal opportunities in the employment sphere. The usual practice of requiring applicants for jobs to cite non-related referees is an acknowledgement of the very real possibility of nepotism in employment. While nepotism deprives deserving job seekers getting appointments, it installs

unsuitable and unqualified people in jobs. This means that the quality of work of those selected on the basis of nepotism will often be below standard. As a result the employer himself will suffer. Therefore, job vacancies should be filled based on qualifications, experience and ability only, and not on favouritism. It is a tragic truth that divisions based on religion, ethnicity etc. are sometimes used as bases for depriving equal opportunity, in areas like employment.

A large proportion of children in Sri Lanka are at the butt end of gross discrimination in society. The spectre of child exploitation haunts Sri Lanka, depriving our precious children of equal opportunity in life. In Sri Lanka, children are often used as domestic servants. Such children lose their rightful opportunity for education, and other natural needs of normal children, such as the opportunity for playing. Therefore, their precious childhood is wasted away, toiling as slaves in households of cruel hearted people. They do not enjoy the freedom to do what other children of their age love to do. To add insult to injury, these unfortunate children are subjected to physical assaults causing severe injuries. Torture by burning is also sometimes resorted to.

Records in courts of law in Sri Lanka bear testimony to the harsh and inhuman treatment meted out to children by their masters and mistresses. Another sinister side of child exploitation is the sexual abuse of children which seems to have increased phenomenally in the recent past. Apart from the sexual abuse of child domestic servants, a large number of children, both boys and girls, become victims of the child sex trade, for the benefit of paedophiles, mainly. Such child sex victims have their future shattered. More stringent laws should be enacted and enforced, to bring this situation under control. Every responsible citizen in Sri Lanka should keep a vigilant eye on any form of child exploitation or abuse, and inform the authorities on time. Religious leaders should also play a prominent role in educating the people of the need to protect our precious children. We should remember that the future of the nation depends on them.

The ongoing civil war in Sri Lanka has opened the door to another form of child exploitation. A large number of children in the North and East of Sri Lanka do not get the opportunity for education, as they are forced to leave school to fight the war. The enforced drafting of children to fight the war, is a classic example of denying the legitimate and just rights of children for equal opportunity. It is, therefore, the duty of every responsible citizen of Sri

Lanka to do everything possible to put an end to this terrible war.

The system of education in Sri Lanka fails to provide equal opportunity to all students. At one extreme, we find the so called super-schools with all facilities and the best teachers. At the other end, are the ramshackle schools in remote rural areas, where students get a measly education. Thus, although on paper equal opportunity for education is guaranteed to all students, there is inequality in education all round. Some parents leave no stone unturned in their attempts to get their children admitted to an elite school. It is high time we got rid of this super school complex. As a first step towards rectifying this situation, the education authorities should take immediate action to bring all schools to a uniform standard, as far as possible.

The wide gulf that exists between the rich and the poor of Sri Lanka is another cause for loss of equal opportunity. This gap is very severely felt in relation to food, health and shelter. Rich people have access to channeled consultations and the luxury well equipped private hospitals. The poor have to join mile long queues at the O.P.D. of government hospitals. While the rich live in palatial mansions, the poor sleep in makeshift shanties or on the streets.

The concept of equal opportunity, however, should really begin from the family unit. The family is the smallest individual unit in society. So it is the duty of parents to provide equal opportunity to all their children. For example, sons and daughters should be given equal treatment, irrespective of gender. In this modern enlightened world, there is no place for discrimination on account of sex. Sons and daughters should enjoy equal rights and opportunities within the family unit. Parents should not have any "favourites" among their children. There should not be "An Apple of the eye" in the family. All sons and daughters should be considered by their parents as "equal apples of the eye!"

On the threshold of the 21st Century, Sri Lanka too is now gearing herself to overcome the Millennium Bug. There is another type of bug which equally needs to be brought under control. This is the "Unequal Opportunity Bug." Let all of us resolve to work hard towards this end, and make Sri Lanka give the lead to the world. Science, technology and mass communications have made our world a magical one. But a truly civilised world will only be one where "Equal Opportunity For All" reigns supreme.

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