LST REVIEW
Volume 10 Issue 147 January 2000

Dr Neelan Tiruchelvam: A Visionary Of Our Times

LAW & SOCIETY TRUST

LST REVIEW

(This is a continuation of the Law & Society Trust Fortnightly Review)

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Editor's note.....

We thought that it was appropriate to start the new year with a special issue on the work of Dr Neelan Tiruchelvam, whose contribution to the law, humanity and civil society as a brilliant academic, a great scholar and a human rights activist is perhaps unparalleled. We pay tribute to his work by publishing in one volume some of the articles published in our previous Reviews so that his work will be better accessible to practitioners, students, academics and NGOs.

It is also appropriate that this volume will coincide with his 56th birth anniversary which falls on the 31st of January and the commemoration organised to celebrate his life and work which will take place from the 30th January to 1st February 2000.

Dr Tiruchelvam had the extraordinary ability to apply a multi-disciplinary approach to the study of the law and was able to write extensively on subjects ranging from constitutional law to international law and from human rights law to commercial law. This special issue of the *LST Review* is a tribute to this extraordinary scholar whose untimely and sudden death has left a huge void in academia, the legal profession and civil society.

CONTENTS

THE CRISIS OF CONSTITUTIONALISM IN SOUTH ASIA*

There is no task that gives me greater satisfaction than the opportunity to deliver a lecture in memory of Chandra Soysa whose sudden and untimely death in 1987, left all of us bereft of a close and intimate friend, colleague and intellectual companion. Chandra had a truly exceptional mind, a rare capacity to design projects which were intellectually innovative and socially relevant, and the enthusiasm and the entrepreneurial skill to carry these ideas to fulfillment.

Chandra's most enduring contribution was his role in recongising the importance of civil society as an instrument of democratic development. By civil society I mean 'the totality of social institutions and associations, both formal and informal, that are not strictly production related nor governmental nor familial in character.' Chandra believed that civil society was not merely a counter weight to state power, but also had the creativity and vibrancy to address more imaginatively pressing societal issues. Chandra believed that social movements and civic associations must not only have an institutional focus, but their autonomy should be nurtured and protected. He was responsible for several initiatives to provide support services - to forge strong linkages with like - minded NGOs in the North, and to provide more stable and continuous sources of funding for NGOs. This aspect of Chandra's life leads me to the topic of this evening's talk, the crisis of constitutionalism. One view of the idea of constitutionalism is the acceptance of the idea of civil society serving as a check against the arbitrary exercise of state power.

At no other moment in recent history have the questions of constitution making and constitutional reform been of such importance to central focus in political discourse. The dramatic transitions in Eastern Europe compelled all of these nations to reconstitute the state and the institutions of the state. The critical elements in this reconstruction were the institutionalisation of a multi-party system, a competitive electoral process, an enforceable bill of rights and

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* The Third Annual Chandra H Soysa Memorial Lecture. Published in Fortnightly Review, Volume II, Issue No. 39, 1 June 1992.

an independent judiciary as the custodian of the new constitutional values. In Hungary almost the entirety of the Constitution was rewritten before the transfer of political power to a popularly elected government. In the Czechoslovakian federation the task of constitutional change became more complex, and reopened the wounds of Slovakian resentment against the decades of Czech dominance. In Yugoslavia even a bold attempt to transcend the conventional federal model through sovereignty - associations came too late to save the federation from disintegration. The dissolution of the Soviet Union has caused a myriad of problems to the framers of the constitutions of the individual Republics, and the loose association, the Commonwealth of Independent States. In Southern Africa we have the most complex and daring effort to reconcile Black nationalism and Afrikaan nationalism which have been in opposition to each other for centuries. South Africa faces the awesome challenge of facilitating black-majority rule, while establishing political institutions which uphold the rule of law, racial equality, and respect for the universal principles of human rights.

Even in the more established democracies like Canada the future of the nation state rests on questions of constitutional reform. With the collapse of the Meech Lake Accord, Canada is engaged in a widespread process of public consultation, with a view to accommodating Quebec's aspiration to be recognised as a distinct society, and the increasingly strident assertion by native Canadians of their collective identity and of their group rights. In the United Kingdom, until the middle of this century scholars firmly believed that the British constitution was a glorious achievement, worthy of emulation by less fortunate nations. But this complacency has given way to the realisation that the unitary and centralised Parliamentary system of government has alienated Northern Ireland, failed to accommodate the autonomy demands of Scottish nationalists, and has failed to adequately secure individual human rights. There is, therefore, pressure in Britain to break out of its constitutional isolation and to adopt arrangements including a bill of rights which are more consistent with its membership of the European Community.

These examples point to two contradictory trends. The first trend is characterised by an intense faith in the capacity of modern constitutions to enthrone popular sovereignty, to empower disadvantaged groups and individuals and to fashion institutions of democratic accountability. This intense faith in the triumph of constitutionalism, is accompanied by an equally intense scepticism of the efficacy of constitutional arrangements in being able to cope with the horrors of ethnic fratricide, political violence, religious

bigotry, and the crude and cynical manipulation of electoral and political processes. It is this scepticism which leads to the view that the constitutional arrangements are impermanent and indeterminate often needing to be reconstituted and reconstructed to cope with new complexities and realities. The crisis of constitutionalism is to reconcile this passionate faith in the normative power of constitutionalism, with intense scepticism and even cynicism arising from the failure of constitutions in many societies to uphold human rights or democratic values, and the appalling disparity between constitutional theory and constitutional practices.

Comparative constitutionalism is a hazardous enterprise. Baxi has somewhat contemptuously described it as 'hazardous occupation of the upwardly mobile Asian academic, all too keen to share the high table with the Master.' What I hope to do in this presentation is to disaggregate the concept of constitutionalism and to focus on the need for constitutional theory and thought to respond more imaginatively to some of the pressing social and political issues of our time. I will then endeavour to highlight some commonalities which distinguish constitutionalism of South Asia, from that of East Asia, Latin America and Africa.

We may now proceed to contrast three distinct ways in which the idea of constitutionalism has been perceived.

Firstly, Constitutionalism is viewed as a form of discourse, as a means by which issues relating to the construction of the institutions of the state, questions relating to legal and political legitimacy, democratic accountability, and the limits of political freedom, are conceptualised and articulated within a society. Baxi has in a recent essay emphasised that the dominant mode of constitutionalism is Euro-centric. He adds 'the dominant mode, overall insists that Asian constitutions be assimilated to Euro-centric discourse and its languages. For, after all is not constitutionalism and aren't constitutions either gifts of colonial history or marks of modernity, lying outside the historical grasp of Asian societies.' No doubt Asian constitutional theorists firmly reject this approach and contend that Asian constitutional theory and practice richly antedates by millennia the western tradition.

However, the discourse of constitutionalism raises several issues which are central to the present crisis. Is constitutionalism a project of an elite minority, and is it morally legitimate for this small elite to impose ideals and values on those who do not share them? In any event is it realistic to expect those who

remain outside this discourse to work political and institutional forms which are otherwise unintelligible to them?

Several Indian scholars including Nandy, Kothari, Madan and more recently Kaviraj have grappled with these issues. In this regard although the constitutional experience of India, Bangladesh and Sri Lanka were shaped by a common colonial experience, the impact of the nationalist movement in the Indian sub-continent on this experience was different from our own. Throughout the Indian colonial experience there was a difference between the modernist discourse of the Indian elite and the more traditional discourse of the lower orders of society. One of the crucial contributions of Mahatma Gandhi was to bridge the gulf between these two sides, and to keep the values, objectives, and conceptions of the political world of each side intelligible to each other. Kaviraj also makes the point that the process of political mobilisation during the nationalist movement was such as to create an implicit trust by the masses in the initiatives of their political leaders. There was therefore no dialogue between these conflicting discourses on equal terms. Nonetheless the Constituent Assembly was able to enact a Constitution which was not seriously contested. Kaviraj sees this as a consensus of discourse rather than of ideological positions. The constitutional frame and the institutional pattern that had been put into place came up for serious ideological criticism from the left, but there were commonalities at a different level. Looked at from the outside there were underlying unities based on common ways of arguing about structures, purposes, and ideals.

In the second phase of constitutional development, we see the falling apart of the Gandhian language, and a growing gap between elite discourse and popular consciousness. One of the glaring failures of this period was the inability to take the conceptual vocabulary of rights, institutions and impersonal power into the everyday vernacular discourse of village or small town India. As a result, the ideals of modern nationalism, industrial modernity, democracy, and minority rights came to be regarded not as achievements of a common nationalist movement, but as ideals intelligible and to be pursued by a modern elite which inherited powers from the British. The expansion of the state resulted in the recruitment of personnel from groups who speak and interpret the work in terms of the other discourse. At the point of implementation this personnel reinterpret government programmes beyond recognition, and there is a slide into a style of power which is irresponsible and unaccountable. Institutional forms come under more pressure as more common people enter party politics. There is a conflict

between the institutional logic of democratic forms and the logic of popular mobilisation. The more one part of the democratic ideal is realised, the more the other part in terms of a secular policy, protection of minority rights, is undermined. This leads to the loss of the moral and legal legitimacy of the constitutional frame that was put into place by the modernising post independent elite.

A similar conclusion is reached with regard to the erosion of the legitimacy of political institutions in Sri Lanka by the Youth Commission in March 1990. The Youth Commission reached this conclusion through a process of political diagnosis which emphasised ideology as opposed to the structure of discourse. I shall however deal with this analysis here, as it would facilitate an assessment of the constitutional and institutional prescriptions which flow from such a diagnosis.

According to the Commission the erosion of Youth confidence in existing political and social institutions is due to two broad reasons. Firstly the institutions have been so eroded or reduced to atrophy due to excessive politicisation or institutional paralysis that they do not seem to perform any significant societal function. Secondly, youth grievances are not accorded any importance in these institutions and they remain unresponsive to the changing nuances and priorities in youth aspirations. These two explanations give rise to somewhat contradictory responses. The first is said to have given rise to ideologies with a strong anti-institutional bias, while the second gives rise to the demand for larger youth representation within the very institutions which have been so repudiated.

The agenda for constitutional and institutional reform include strengthening of the Public Accounts Committee, the Consultative Committee system and its extension to the district level, and the provision of legislative interns. Similarly with regard to youth disenchantment with regard to the legal processes, the Commission recommended procedural reforms to strengthen individual and group access to the Supreme Court, including the provision of judicial interns to strengthen the technical and institutional capacity of the apex court. One of the more ambitious proposals with regard to reform of representative institutions was that relating to the creation of separate constituencies to ensure that youth constitute 40% of the representation in Provincial Councils and local bodies. However fearing a range of constitutional and more pragmatic objections to such a proposal the Commission proposed more modestly that political parties be mandated to

nominate 40% of candidates from within the age group of 18-30. the Commission also urged political parties to engage in a process of self reflection on the lack of active involvement of youth in their organisational structure.

The Commission also made several other recommendations for institutional reform. These included a Nominations Commission to screen appointments to public institutions; a Media Commission to oversee both the print and the electronic media; a National Commission on Education to address long-term educational needs; and a Task Force on caste and caste related issues. With regard to Youth grievances the Commission recommended the creation of a Youth Ombudsman with powers to address grievances both at the national and village level.

The Commission's agenda for re-democratisation is a remarkable example of pragmatic empiricism or procedural constitutionalism of the British constitutional tradition. It is grounded on an intense faith in the normative power of constitutions, and in the capacity of reformers to revitalise democratic institutions through procedural and representational changes. The Commission's faith was unshaken by youth alienation 'the intensity and ramifications of which are without parallel in regard to any other problem which besets society.' It is an approach grounded in the dominant mode of constitutional discourse, and presumes without critical examination that the ideological critique is located within that discourse. The loss of institutional legitimacy could be recovered if youth could be actively engaged in the formal institutions of democratic governance and of adjudication. No doubt the Commission had to evolve pragmatic solutions, and was handicapped by the lack of an institutional agenda which was explicit or implicit in the youth's ideological critique.

The Commission's report was by and large very well received, and it appeared that a national consensus could evolve around its principal recommendations. An All Party Conference was convened and mandated to implement one of the most ambitious programmes of constitutional and political reform envisaged for decades. The objectives of this exercise included a fundamental reappraisal of all the institutions of governance including the legislature, the executive and the judiciary, and the induction of forces who remained outside the political mainstream. At one stage all the major political formations were represented within the Conference including the principal opposition in the South, the Sri Lanka Freedom party, and the

political-military formation dominant in the North-East, the LTTE. But with the collapse of the Southern insurgency, the Conference soon lost its sense of urgency, and part of its legitimacy, as both the SLFP and LTTE progressively withdrew from this exercise. The remaining political parties plodded along with diminishing enthusiasm. The only significant legislative reform was the requirement relating to a youth quota in nominations to local bodies. A National Education Commission was established, but its deliberations have yet to elicit any serious public interest. The Media Commission ran into serious opposition within the journalist community who remain unconvinced that it is a progressive measure. Nonetheless concerns relating to the liberalisation of the media have partly contributed towards the relaxation of the rigid state monopoly of the electronic media. The centre piece in the Youth Commission reform package was the Nominations Commission. A truncated Nominations Commission Bill was not pursued due to reservations by the Supreme Court relating to its constitutionality. However, there is an acknowledgement by the state that recruitment to the public service should be free of interference by the political party in power. Credit for this significant shift in policy must go to the Youth Commission.

The All Party Conference also devoted enormous time and effort to the revision of the chapter on Fundamental Rights and to the establishment of a Human Rights Commission. The government assured both the UN Human Rights Committee last year, and the Human Rights Commission in February that the enactment of these laws would be part of its new resolve to protect human rights. But the prospect of an early passage of the 17th Amendment seems unlikely given the growing polarisation with Parliament. As we review these events we must sadly conclude that despite some modest gains the programme of constitutional reform envisaged by the Youth Commission is largely in a state of disarray. The All Party Conference continues to drift without clear political direction. To some elements within the ruling party the very process seems more important than the substantive outcome, as it serves the immediate need of improving the human rights profile of the government. Some recent studies seem to confirm that disillusionment of the youth in universities, and the higher forms within secondary schools remains intense.

We must now move on to an equally complex issue how did the dominant mode of constitutional discourse respond to the crisis of ethnicity and of nationalism. In exploring this issue I must initially emphasise the fluidity of the concepts and ideas which form the core of this discourse. As we have emphasised in this lecture most countries in South Asia share a common

colonial experience. The colonial constitutional discourse dealt with questions of 'limited government,' and the struggle for progressive transfer of powers to hybrid legislatures with nominated and popular representatives. With the advent of political independence, this discourse shifted to questions of legislative supremacy and the distribution of power between the different organs of government. Such a discourse presupposed that the post-colonial constitutional arrangements were primarily intended to give effect to the major majoritarian principle.

A politically and culturally resurgent majority deployed legislative and executive power to deny equal treatment to ethnic and cultural minorities. A vote in the hands of an intolerant majority was soon viewed as 'an instrument of oppression.' The focus of constitutional discourses began to shift to the need for restraints on the majoritarian principle and limitations on the exercise of state power.

More recently, the discourse has more sharply focussed on the constitutional arrangements necessary to preserve the multi-ethnic character of the polity. These issues relate to power sharing arrangements, pluralism, secularism and equalisation of opportunities, through the removal of historic and regional disparities. Within this discourse there are those who challenge the hegemony of the constitutional ideas associated with the modern state and inherited political institutions. The arrangement is that this form of discourse is no more than an extension of the colonial discourse, and does not offer any concepts, or categories of analysis which are capable of comprehending the experience of South Asian societies. They contend that this discourse must be extended to accommodate the forces of ethnicity and of nationalism. These concerns further point to the need for new concepts and principles designed to protect ethnic, linguistic and religious minorities. The protection of such minorities must form a fundamental component of any bill of rights. Such protection should primarily be directed towards insulating minorities from any activity capable of threatening their very identity or existence. Such activities range from genocidal violence or pogroms directed against specific minorities, to policies of assimilation including state aided settlement schemes intended to alter the demographic profile of regions where a minority predominates. States need also to be mandated to actively foster and protect the linguistic, cultural and educational rights of minorities.

At the centre of this exercise is the effort to reconcile the protection of individual rights with the protections of group rights. Important and

preliminary work in this direction is being undertaken both within the CSCE (Conference on Security and cooperation in Europe) process and within the European Community. Constitutional theorists in South Asia need to be more attentive to these developments.

The discourse of constitutionalism and international human rights jurisprudence have yet to imaginatively respond to challenges which place in jeopardy not merely the nation state but the very foundations of a constitutional order. These concerns compel reappraisal of the very nature of the nation state and the concept of national sovereignty. The entrenchment of the unitary state in constitutional texts often leads to the absurd contradiction of imposing a mono-ethnic state on a multi-ethnic polity. The very definition of the state must increasingly reflect the ethnic diversity of the polity, and acknowledge that the state is an aggregation of ethnically and linguistically distinct regions and sometimes several distinct nationalities.

Colvin R. de Silva who played a part in the introduction of the concept of a unitary state into the first Republican Constitution (but not its subsequent entrenchment in the Second Republican Constitution) viewed it as no more than an intellectual construct. In later years he feared that the idea might become so embedded in legal consciousness as to inhibit innovative constitutional experimentation. Dr. de Silva argued that there was no ideal type unitary constitution locked up in some mythical vault. He believed that unitary and federal constitutional arrangements formed part of a continuum, with the former being compatible with the most extensive forms of devolutionary and quasi-federal arrangements. Recent judicial practice in the interpretation of this clause point to some of the difficulties of constitutional adjudication. The apex judiciary's self perception in constitutional adjudication is not that of a neutral arbiter between the centre and the province, but more of a custodian of the authority and power of the centralised state. This approach has contributed to the progressive erosion of the devolutionary arrangements. But there is even more serious danger to the very integrity of constitutional discourse and to constitutional adjudication.

The dissenting judgments in the 13th amendment case, (and some subsequent legal commentary) point to the danger of deep popular prejudices being elevated and rearticulated in the form of rational constitutional discourse. The transparency of this process, seems to undermine the very rationale of constitutional adjudication as a process with techniques of reasoning, recourse to neutral principles and in the very style of argumentation, which is distinct

and independent of the discourse of the political arena.

Another area in which the discourse of constitutionalism needs to be enriched is in the enforcement of fundamental rights. The rhetoric of basic rights and freedoms is based on statist and individualistic conceptions. The base of support for fundamental rights can be expanded if it is linked to belief systems which have given content and meaning to the social and religious experiences of the people within South Asia. These indigenous, cultural and religious traditions emphasise communitarian conceptions of justice, and conciliatory and consensual approaches to the resolution of conflict.

Obligations of reciprocity within a family facilitate attitudes and values supportive of the right of the child and the needs of the elderly. Such an approach leads to more effective protection of social rights, than what could be available in a legal culture which views these issues exclusively in terms of an individual's claim against the state.

There are other ideas such as 'dharma' which are central to the Hindu-Buddhist theory of justice and define the moral limits which rulers may not transgress if they are to command the allegiance of their subjects. Very little effort has been made to imaginatively build on such concepts to articulate principles of governance and democratic accountability which draw on the language and idioms which form part of the Hindu-Buddhist tradition. Similar attempts need to be made to draw the linkages between constitutional values and the rhetoric of rights on the one hand, and the concepts, ideas and institutions which are central to the belief systems and the world view of Islam, on the other.

This point is perhaps illustrated by the recent intercession of the Thai monarch in the constitutional confrontation between pre-democracy forces and the military. It is significant that most comparative constitutional lawyers have often commented on the transient and evanescent nature of Thai constitutions. Between June 27, 1932 and January 29, 1959, Thailand had as many as seven constitutions of which two were described as provincial (1932, 1947), and one as interim (1950). One scholar described this process as the practice of factional constitutionalism, which is the "process of drafting a new constitution to match and protect each major shift in factional dominance." But the more perceptive observation is that Thailand had 'two constitutions, the written constitution which is ephemeral and the more enduring substantial structure of law and custom which have remained as the foundation upon which

government rests.' Tambiah points to the Theravada doctrine of Kingship (the king as Boddhisatva - the cosmic liberator - and as Chakkravarti - the terrestrial emperor) as being resilient throughout Thai history, and legitimating changing forms of state power. Tambiah refers to a remarkable myth which leads to the assimilation of Manu's Dharmasastra and indigenous customs in the Theravada Buddhist countries of Burma and Thailand. This process of reincorporation required the creation of a new Manu to legitimise his code. The myth described him as a cow herd who because of his flair for adjudicating disputes was made the King's minister, while he was a child. Dissatisfied with one of the decisions involving the ownership of cucumber, he decided to retreat, practise meditation and to endure severe austerities. Eventually, he ascended to heaven, where he found the "dhammathat laws engraved on the boundary wall of the solar system." He brings these laws back to the King, who is reconstructed as 'the embryo Buddha and an embodiment of justice.' In the Thai tradition of kingship, this leads directly to the "amalgamation of rajasthan (the individual acts and applications of law by the king) with dhammastham (absolute moral law)."

The second meaning that is accorded to constitutionalism is to view it as an ideal of liberal democratic governance, accountable and answerable to popular will. It is in this symbolic and idealistic meaning that constitutionalism has been invoked as a rallying flag in the struggle against authoritarianism. During the Emergency in India and the struggle for the restoration of democracy in Pakistan, Bangladesh and Nepal and in the movements against constitutional authoritarianism in Sri Lanka, it is this conception of constitutionalism which gained ascendancy.

Mick Moore in a recent essay has expressed optimism that strong forces in Sri Lanka would remain supportive of the democratic ideal. Firstly, he refers to the norms of democracy and constitutionality having long commanded a following amongst the Sri Lankan electorate, even though the self-interest of politicians have led to their routine violation. He sees no weakening in that commitment despite the political violence, and chaos of recent years.

Similarly, he believes that the associational life of the Colombo bound middle classes provides a strong reservoir of resistance against authoritarianism. He sees that middle class as being ethnically heterogenous and having overseas links and providing a base for political dissent and for a more dispersed civil rights movement. He also sees the changing international environment leading to the more direct articulation of international concern about democratic and

human rights abuses; through an emphasis on a link between aid and developmental assistance. Critical to this analysis is state-civil society relations, and the relative autonomy of private business, professional, welfare and developmental organisations. Although there has been no explicit articulation of an ideology of comprehensive state control of private associational life, recent developments cause concern with regard to the continuity of the existing legal, and policy framework on state-civil society relations.

The third meaning accorded constitutionalism arises from the realisation that constitutionalism requires much more than a constitution. Constitutionalism requires a legal and political culture on which durable institutions could be firmly grounded. We have already noted that constitutional concepts are fluid, with old meanings giving way to new interpretations and even new concepts assuming the centre stage. In addition to the fluidity of concepts, constitutional arrangements are also in the South Asian experience, of a transient nature. It was Ivor Jennings, the framer of many defunct South Asian constitutions who cautioned us that 'Constitutions come like water, and if they don't go like the wind, strange things happen to them which were even beyond the contemplation of their framers.' It is in this sense that constitutionalism is equated with the process of value formation, and the effort to build democratic values, civic virtues and communitarian attitudes. The Italian social theorist Bobbio has argued that the democratisation project must go beyond the state and even make the institutions of civil society democratically accountable. This does not necessarily mean constitutions must always be based on a shared culture between the rulers and ruled. Bolivar Lamounier has argued that a Constitution must evolve out of a process of self-reflection, rather than appear to emerge organically from social roots. A constitution ought to be more enlightened than the prejudices of the population at large. It is accordingly argued that constitutionalism can remain the project of a minority - a middle class elite which acquires legitimacy because of either its role in bringing about political transformation, or by subsequently acquiring legitimacy through electoral politics on which durable institutions could be firmly grounded.

While being sensitive to the specifities of the national context within which constitutional experiences must be assessed, some general perspectives may be offered which distinguish the South Asian experience with constitutionalism.

First in South Asia the strength and vibrancy of institutions as the party system, the bureaucracy, the judiciary and the press is partly the result of a long experience with universal adult franchise and competitive political process. This tradition of political democracy enabled the legal constitutional order to withstand periodic challenges from insurrectionary movements, coup d'etats, subversion of constitutional values and institutions by the ruling elite. This is probably less true of Pakistan and Bangladesh where there had been a break in constitutional continuity with forcible seizure of power by the military. However, even in these countries the institutional legacy and the legal and bureaucratic culture of the pre-authoritarian years retained some resilience and helped mediate the recent transition from authoritarian rule. In comparison the enterprise of constitutionalism has been more fragile and vulnerable in Africa, South-East Asia and even in parts of Latin America.

Secondly, despite the apparent resilience of political institutions and processes, South Asia is in the process of a major upheaval where there is a continuing effort towards redefining the nature of the polity, and the relationship between the different religious, ethnic communities, tribal and caste groups. The political compact which followed the transfer of political power provided a framework for the resolution of inter group tensions. This framework no longer seems to hold and the concepts which were at the centre of the compact are being rejected. In India, the balance between different communities differentiated by religion, ethnicity and caste were sustained concepts such as federalism, secularism, and affirmative arrangements causing social upheaval and disintegration. Revivalist and fundamentalist forces have also called into question the state's commitments to secular principles. The state is no longer viewed as the neutral arbiter between competing religious claims, and is being increasingly called upon to preferentially support the religious beliefs, institutions, and places of worship of a resurgent majority. There is a growing realisation that there can be no finality in the resolution of these questions and that there would be constant need to renew and reconstruct societal arrangements for the resolution of inter-ethnic and inter-group conflicts. In South-East Asia, Africa and Latin America there is less agonising reappraisaL of the basic relationship between groups and the very nature of the polity. The question of inter-group conflict seems less central to the process of constitutional reconstruction in Latin America, and (with the exception of South Africa), even possibly Africa.

Thirdly, there is to a much greater extent the element of civic participation, through human rights groups, and social action organisations engaged in

creative interactions with journalists and lawyers towards redefining the constitutional agenda and the nature of the discourse. In India the emphasis on socio-economic rights in the enforcement of fundamental rights was partly the result of this process. It is thus clear that constitutional imagination and innovation is no longer the sole monopoly of law professionals or party leaders, and that all elements within civil society can play a part in expanding the frontiers of fundamental rights. It is not clear whether such civic involvement in expanding the base of legitimacy of constitutionalism is as pronounced in other Asian and African or Latin American experiences.

South Asia faces the dazzling and yet daunting prospect of expanding the frontiers of constitutionalism to reconcile the challenges of a reawakened civil society and the disintegrative process of ethnic and religious fratricide with the imperatives of modern nation states. This is an opportunity which needs to be grasped.

CONSTITUTIONAL TRANSITION IN KAZAKHASTAN*

History: The Kazakhs are from a mix of indigenous Turkic tribes and nomadic Mongols. In 1919-1920, the Red Army defeated nationalist forces and occupied Kazakhastan. The Kazakh Soviet Socialist Republic (KSSR) was formed within the Russian Soviet Federal Socialist Republic (RSFSR) in 1920, and Kazakhastan was made a constituent republic of the USSR in 1936.

Area: 2,717,300 square kilometers (1,049,155 square miles). **Capital:** Alma-ata. **Population:** 16,464,460; Kazakhs, 40 percent; Russians, 38 percent; Germans, 6 percent; Ukrainians, 5 percent; Uzbeks, 2 percent. **President**: Nursultan Nasrbayev.

Nursultan Nasrbayev, the son of a shepherd who became the first President of the Republic of Kazakhastan, is widely regarded as the ablest leader within the Commonwealth of Independent States. Nasrbayev has been described as being intelligent, politically astute, eager to learn and anxious to moderate the forces of ethno-nationalism and to preserve stable ethnic relations. Since he became the First Secretary of the Communist Party in 1989, the country has witnessed dramatic changes, without parallel in any equivalent period of its political history. Elections were held to the Supreme Soviet in April 1990. Presidential elections were concluded, and with the demise of the Soviet Union the country reluctantly declared its independence on 16 December 1991. In quick succession it has been hastily admitted to the United Nations, the Conference on Security and Cooperation in Europe, the International Monetary Fund and the World Bank. The enactment of a new Constitution is the culmination of these processes.

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* Neelan Tiruchelvam was a member of a group of Constitutional lawyers who visited Kazakhastan at the invitation of the government to undertake a review of the draft constitution. Published in Fortnightly Review, Volume III, Issue No. 46, 16 October 1992.

The importance of Kazakhastan is linked to a combination of geo-political and strategic factors. It is the largest Central Asian Republic - almost three - fourths the size of India, with the population of Sri Lanka. Its oil reserves are said to rival that of Kuwait, and it has extensive deposits of coal and natural gas. It is a treasure house of minerals and precious metals. As late as 1989, Kazakhastan produced almost 19% of the former Soviet Union's coal, 10% of its iron ore, 7% to 8% of its gold and 60% of its silver. Its mineral deposit includes copper, zinc, titanium, magnesium and almost 80% of the world's chrome. In addition to mining and industry, agriculture also plays a major role in the economy of Kazakhastan. It has 20% of the arable land of the former Soviet Union which produced almost a third of its wheat. Although Kazakhastan has moved its short-range nuclear weapons, it will remain for some time a major nuclear power. It has yet to dismantle or dispose of its long-range nuclear missiles, fuelling the recent speculation that it may have sold 3 nuclear warheads to Iran. The Government has dismissed such speculation and publicly proclaimed its intention to sign the Nuclear Non-Proliferation Treaty and declared its strong support for the implementation of the disarmament treaty. Besides, Kazakhastan conceives of itself as a bridgehead between Central Asia and Europe.

The economic potential and the relative political stability in Kazakhastan has often been projected as a model to other Central Asian Republics. However, not all commentators share this optimism. They point out that Kazakhastan has more than 100 ethnic groups among which are 9 principal nationalities. This includes almost 6.5 million Kazakhs, 6.2 million Russians, and almost a million Germans. Thus the indigenous Kazakhs constitute only 40% of the population while ethnic Russians who were settled during the Czarist and the Soviet rule constitute almost an equivalent proportion. Russians are concentrated in the North and East where the industrial cities are located and constitute an overwhelming majority of the industrial and technical workforce. The Kazakhs were largely concentrated in the South. It has thus been argued that the country 'is too diverse to forge a cohesive sense of nationhood and too vast to defend its borders.' Despite its economic potential, it faces formidable economic problems and it is heavily dependent on manufactured goods from other Republics.

The process of constitutional reform in Kazakhastan, therefore, faces many formidable challenges. The political transitions that have taken place were not the result of a broad based social movement or popular revolutionary struggle for independence. There are few countries in history who have acquired

nationhood so reluctantly. Nationhood came to Kazakhastan almost accidentally as a result of the collapse of the Soviet Union. There is, therefore, no revolutionary political programme or social agenda which can be embodied into a constitution as the substantive achievement of a political process. Some guidance was however, available from the declaration of independence on 16 December 1992 which provided some basis for the enactment of the constitution.

The principal task confronting the drafters of the Constitution was to frame a political instrument which provides special protection for the Kazakh nationality, language and culture without further placing in jeopardy the sense of 'nationhood' of other ethnic minorities. The other challenges facing the drafters were also daunting. How should the constitution accord primacy to the rights, freedoms and the dignity of the individual while safeguarding the right of the state to derogate and restrict such rights during times of emergency and where the stability and integrity of the nation state were in issue? How could you establish a strong and interventionist Presidential system while providing for such checks and balances that would ensure the separation of powers between the different branches of government? How would you institutionalise an effective multi-party system and facilitate the growth of strong civil society institutions in a society with little or no tradition of political pluralism? How would you establish an independent judiciary where the judiciary had been for decades subordinate to the political executive at the national, regional and local levels, and where the Public Procurator was the custodian of socialist legality? How would you reconcile a centralised unitary state with the need to establish territorial organisations at the regional and local levels which could provide an effective measure of local self-government in a geographically vast and under-populated state? How do you reconcile the need to ensure that land and mineral resources are exclusively vested in the state, with the economic reforms which emphasise private sector development and the divestiture of state enterprises?

The complexity of these tasks was further compounded by controversy over the very legitimacy of the process of constitutional reform. Some political groups questioned the legitimacy of the Supreme Soviet, as presently constituted being clothed with the authority to enact a new constitution.

The Government established a working group led by L. Fetodova, the Vice-Chairman of the Supreme Soviet to prepare the text of the constitution. Other members of the Working Group included jurists and academics drawn from

the University, and the Kazakh Academy of Sciences, officials of the Justice Ministry and of the Supreme Soviet, and two judges drawn from the Supreme Court of Kazakhastan and the State Arbitration Court.

The group approved the draft text of the constitution of the 25th of March 1992 and further amendments were introduced at a consultation at a broader political level headed by the Prime Minister Sergy Terestichenko. The constitution was subsequently published and the public was invited to submit its comments and observations. The Working Group was expected to further refine the draft proposal and submit the same to the Supreme Soviet for enactment.

There were, however, political parties and groups who questioned the legitimacy of the very process of constitutional reform on the ground that it was being orchestrated by a government and a Supreme Soviet which had not been constituted through a multi-party electoral process. The elections to the present Supreme Soviet were conducted in March 1990 and it was alleged that out of 358 seats in Parliament, 338 are held by the former members of the Communist Party. These elections did not take place within the framework of a multi-party system and many of the candidates were uncontested. Similarly, in the Presidential elections held in 1991, Nasrbayev was the only political candidate and despite the overwhelming popular endorsement of his candidacy, concerns remain about the fairness of this process. Two Kazakh political parties, Zheltoksan and Azat, staged a protest rally and a two-week sit-in in mid June on the main square in Alma Ata, demanding the resignation of the Government and the Supreme Soviet. At present transitional provisions envisaged that the President and the Supreme Soviet would continue to serve their term, notwithstanding the enactment of a new constitution. This principle would also apply to the Supreme Court and the Constitutional Court, whose members serve ten-year terms. The concern is that the principal state and constitutional functionaries are in place, and would continue to remain in office. This is believed to derogate from the immediacy of the constitutional transition.

Both the ethnic balance between the Kazakhs and the ethnic Russians and the concentration of ethnic Russians in the industrial and mining regions of the North and the East, renders it imperative that the constitution provides an equitable framework from the coexistence of diverse nationalities and ethnic groups. However, many Kazakhs recall their membership in the multi-national Soviet state, as one in which they were 'demographically,

linguistically and administratively dominated by the Russians.' They bristle with resentment at the neglect of their language, and complain bitterly that only two of the two hundred schools in Alma Ata - the nation's capital - teach in the Kazakh language. They, therefore, contend that the Constitution needs to acknowledge a process of decolonisation and legitimise the cultural and political resurgence of the Kazakhs. This was to be achieved by imposing a duty on the state to develop and renew the culture, language and traditions of the Kazakh nationality, including the obligation to address the cultural needs of Kazakhs living outside the Republic. These measures have fuelled the insecurity of ethnic Russians, particularly in the North who are apprehensive that they may be reduced to second-class status. President Nasrbayev has, however, sought to moderate Kazakh nationalistic sentiment, and to assure Russian and other Slavic minorities of equitable treatment. The constitution declares that Kazakh would be the state language, while Russian is officially recognised as the language of inter-ethnic communication. The constitution further guarantees a secular state, and religious equality. Religious groups are further prohibited from forming political parties.

One of the basic features of the draft constitution is the primacy accorded to fundamental rights. There is a clear elaboration of the more important civil and political rights including the right to dignity and privacy, and the right to freedom of belief and movement. Further, the right to political participation, information and the freedom of assembly and of association are also recognised. There is also an elaborate chapter on economic and social rights. The constitution contains an extraordinary provision that international standards on human rights (embodied in treaties recognised by the Republic) would take priority over domestic laws. This chapter needs to be strengthened in three important respects. The major lacuna is the lack of a clear and an effective remedy for the enforcement of fundamental rights against abuses by states. The Courts need also to be expressly vested with the power to grant relief and to issue such direction as they may deem just and equitable where an infringement of fundamental rights has taken place. Secondly, the legislature is given the power to impose vague and unlimited restrictions on the exercise of this right and there is no precise criteria for the derogation of such rights. There is, therefore, the need to expressly incorporate into the Constitution, international standards with regard to permissible limitations and derogations of fundamental rights. Thirdly, the standards with regard to rights of a person accused of a criminal offence to a fair trial in accordance with the due process of law needs to be more clearly spelt out. There are also very few human rights or civil society groups which are capable of monitoring and

documenting human rights abuses and political freedoms.

The new constitution clearly envisages a strong Presidential system drawing heavily from the French and the United States experience. It is argued that the process of political consolidation of the nation state and the management of a difficult and painful economic transition calls for a strong Presidential system. However, there is a need to ensure that there are adequate checks and balances to facilitate the separation of powers so that each branch of government does not transgress its constitutional limits and remains democratically accountable to the People on whom sovereignty is reposed. In this regard it is not only important for the constitution to ensure the independence, impartiality and the competence of the judiciary, but this needs to be also guaranteed in practice. The Constitutional Court is a pivotal institution and needs to be clothed with the real authority to defend the constitution, its supremacy and values.

An important chapter of the constitution relates to the foundations of the economy. An important article in this regard is Article 47 which provides that the land, mineral and other resources are the exclusive property of the Republic of Kazakhastan. This provision seems to be incompatible with the programme of economic reforms which the government is called upon to implement with its emphasis on private sector development and privatisation. The government has already entered into agreements with Chevron to develop the Tenghiz oil field and significant foreign investment is also envisaged in the development of the mining industry. Dr. Marat Sarsenbayev of the Law Faculty of the Kazakh State University explained, "ideologically it is difficult to turn our minds away from socialist consciousness - the essence of which is the denial of private ownership. The transition to a market economy cannot be done overnight, that is why you cannot find these formulations in the draft constitution."

The future and durability of the Kazakhastan constitution would depend on two critical factors, the stability of the economy, and the management of ethnic relations. The popular response to the process of constitution making was, however, muted. Public officials, academics and representatives of political parties were familiar with both constitutional schemes and the details of specific articles, and were willing to discuss them openly and candidly. It is difficult, however, to discern a great deal of popular enthusiasm for this process. Dr. Marat Sarasenbayev summed up the popular mood; "during the period of Perestroika, there was a great deal of popular enthusiasm and active

engagement in political issues. However, there were many promises, many words but the quality of life of ordinary people continues to deteriorate. We do not even know what to do tomorrow. The constitution, therefore, is not one which would be an eternal document. We all expect to change it in five years."

A TRAGEDY IN TWO ACTS*

WITHIN a short span of ten days Sri Lanka has plunged into one of the most serious political crises in recent decades. Both DUNF leader Lalith Athulathmudali and President Ranasinghe Premadasa, leader of the United National Party, have been assassinated in quick succession.

Since the assassination of S.W.R.D. Bandaranaike in 1958, Sri Lanka's history of representative democracy and competitive party politics has been marred by several dramatic assassinations. The leaders of almost every political party including TULF leader Appapillai Amirthalingam, SLMP leader Vijaya Kumaranatunga and the EPRLF leader K. Padmanabha were slain at some stage of the island's troubled history. The anti-Tamil pogrom of July 1983 was perhaps the darkest period in the post-independence history. Within the past decade the country has been besieged by two insurgencies, and the militarisation of civil society.

Will Sri Lanka ever exorcise the evil of political violence from its body politic? Will the political parties be jolted by the recent tragedy to work in unison towards an orderly transition? Or will political animosity and intolerance drive the nation to further fratricidal violence and destruction?

Critical to the resolution of Sri Lanka's crisis of democracy is the urgent and immediate need to resolve the crisis in the North-East. President Premadasa was widely regarded as the political leader most likely to succeed in evolving a political resolution of the national question, and yet his approach to these problems was deeply flawed.

First, he endeavoured to isolate the North-East economically and psychologically from the South and to insulate the South from the consequences of the civil war. It was a strategy which enabled him to project the South as a haven for investment, trade and infrastructural development. The strategy, however, accentuated the economic disparities between the regions and made the populace is the South indifferent to the severe deprivations to which more than a million refugees and internally displaced were exposed in the North. The Government further downplayed the financial

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* Published in Fortnightly Review, Volume III Issue No. 58, 16 May 1993.

and human costs of the civil war and thereby did little to develop a peace constituency.

Secondly, the President distanced himself from the efforts of the Parliamentary Select Committee engaged in the search for a political solution. While he undertook to implement a consensus, he did very little to forge such a consensus and allowed the Committee to drift for months without political direction. The Committee could have been energised if President Premadasa had devoted even a fraction of his extraordinary energy and enthusiasm to the substantive issues relating to the unit and substance of devolution. The government has been further accused of eroding the existing devolutionary arrangements and creating divisional secretariats which in effect would strengthen the centralised and authoritarian character of the state.

On the other hand, President Premadasa was free of the envy, rivalry and inhibitions which constrained the ethnic attitudes of the Sinhala middle class. He empathised with an urban underclass which was effectively bilingual and socially uninhibited. He was the first head of state to speak in Tamil or otherwise to insist that his public speeches be simultaneously interpreted.

Although he was the least secular head of government in modern Sri Lanka, he was no Theravada Buddhist purist. He openly embraced a form of popular religiosity, which recognised the syncretism between Sinhala Buddhist and Hindu practices, rituals and beliefs. He regularly engaged in religious worship in Hindu temples and devales, and less frequently in mosques and churches. Tamil and Muslim entrepreneurs and traders felt that Premadasa's policies created a more even economic playing field than what was possible in previous regimes. However, President Premadasa failed to build on this goodwill and to move decisively towards a political resolution.

Many legal and political commentators link Sri Lanka's present woes to the Second Republican Constitution of 1978. Radhika Coomaraswamy fore-warned in the early 1980s that the executive presidential system could be the harbinger of authoritarianism and the first step towards dictatorship. Power inevitably gravitated towards the Executive President, who was able to secure undated letters of resignation from Members of Parliament.

These centrepetal tendencies were further accentuated by the bizarre entrenchment of the unitary state. The disenfranchisement of Sirimavo Bandaranaike, the extension of the life of Parliament, the Sixth Amendment

which expelled the TULF from Parliament, the abuse of emergency powers and of the electoral process, contributed to an erosion of confidence in constitutionalism.

On the other hand, it was the executive presidential system which enabled President Jayewardene to rise above popular passions and sign the Indo-Sri Lanka Agreement, which continues to influence political discourse on a negotiated election. President Premadasa transformed the Presidency with his activist and interventionist style. The Cabinet ceased to be a collegial decision-making body, and subordinate officials received instructions directly from the President and were accountable to him. Parliament's role further declined and it became less capable of scruitinising executive action or in ensuring financial accountability.

The state media projected the development vision, the personality and style of the President to the exclusion of other political actors. President Premadasa dominated the political life of the country, and his impatient and somewhat imperious style fuelled resentment and led to the impeachment crisis.

The tragic assassination will now result in a shift in the balance of power in Parliament which will now elect the next President. Section 40(1) of the Constitution provides that when the office of the President shall become vacant before the expiry of its term, Parliament shall elect as President one of its members. The election shall be by secret ballot, and take place within a month of the vacancy arising. The candidate who receives an absolute of votes would be declared elected. Until the new President assumes office, the Prime Minister will act as the President.

The Prime Minister, D.B. Wijetunge, was sworn in to act as President on 1 May, Saturday. At the Cabinet meeting the consensus appeared to be that he would be the UNP candidate. Although political observers have generally regarded Wijetunge as a weak and ineffective political actor, one should not underestimate his political acumen and resilence. Neither Sirisena Cooray nor Ranil Wickremasinghe, presidential aspirants, have as yet made any moves to challenge Wijetunge's leadership.

The UNP has 125 seats in a Parliament of 225 and an absolute majority is within its grasp. On the other hand, Sirimavo Bandaranaike can only be certain of 75 SLFP votes and possibly six or eight additional votes from other Opposition parties.

The only serious challenge can come from the DUNF Leader Gamini Dissanayake in the event he is endorsed as a common Opposition candidate, in which event he could make a serious attempt to woo back some of the UNP dissidents who supported the impeachment resolution. But Dissanayake is at present not a Member of Parliament and would need to be quickly inducted as a National List member of one of the Opposition parties.

Whoever is elected, the new President will face daunting challenges with regard to restoring investor confidence in the economy, and in addressing critical problems relating to the ethnic conflict and the need for political and constitutional reform. An interim President with a limited term would have little capacity for bold initiatives. He must recognise that what is in issue is not the continuity of the regime but the very survival of the political system. It seems inevitable that the new President would seek a popular mandate before the end of the year. Most Sri Lankans would hope that there would be an orderly transition with no more bloodletting.

Courtesy Frontline

THE POLITICAL TRANSITION IN SOUTH AFRICA*

Introduction

The Law & Society Trust is very pleased to commemorate this important moment in the constitutional and political history of South Africa which has fired the imagination of those who cherish human rights and democratic ideals throughout the world. In this presentation, I would like to focus on -

(a) the process of national reconciliation;

(b) the process of constitutional reform; and

(c) the role of Nelson Mandela as the historical figure who shaped both these processes and brought them to a successful conclusion.

Hilary Clinton has described the inauguration of President Nelson Mandela as the greatest day of the twentieth country. You are all aware that ANC had to travel on a long and arduous road before they reached the top of mountain. One of the important objectives was peaceful transition to black majority rule, the institutionalisation of a multi-party system, and the enthronement of a constitutional order grounded on the principles of equality and respect for human dignity. In a deeply polarised nation where township violence had consumed the lives of 15,000 people and had left a trail of blood and destruction, the process of national reconciliation was as important as the outcome. It is in this context that the National Peace Accord which was concluded in September 1991 assumes critical importance.

The Peace Process

The National Peace Accord was entered into by all of the participants in the political process in South Africa. It included political parties, organisations and governments who came together for a common purpose to bring an end to political violence and set out the codes of conduct, procedures and

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* Published in Fortnightly Review, Volume IV Issue No. 78, 1 June 1994.

mechanisms to achieve this goal. The peace accord embodied three key elements. Firstly, a code of conduct for political parties; secondly, a code of conduct for police officers including an agreement on the security forces; thirdly, guidelines for social reconstruction and the development of the community. In addition, the code defines the peace structures which are the mechanism and institutions designed to implement the accord. The objective is to aid the transition of a deeply divided and segmented society from a state of confrontation to a culture of co-operation.

The National Peace Accord is an imaginative document without any real precedent in countries which continue to experience a high degree of political violence. The Accord took as given, the imperfections and inadequacies of political systems and it recognised that it could not be a substitute for the process of political reform. It could have at best, addressed some of the symptoms of political violence but not overcome its structural causes. Its significant successes were in the progressive development of peace constituencies, in securing an ideological commitment from the principle political actors to 'political tolerance,' and in being able to establish procedures and mechanisms for crisis management. It was primarily a civil society initiative and the peace structure at the national and regional level was dominated by relatively successful businessmen, politicians, and churchmen. They were, predominantly white and almost invariably spoke no African language. They were however persons who were extremely energetic and even at times effective in mediating between the political leadership of the ANC and the Inkatha Freedom Party and in restraining the security apparatus.

The Peace structure includes a National Peace Secretariat, with regional and local dispute resolution committees. These committees mediated on disputes at the community level, and appointed peace monitors who observed marches, rallies, and funerals, in order to defuse tense and explosive situations. The peace monitors may not have completely eliminated political violence in South Africa but without them the violence would have been much greater. Above all they forged linkages at the community level and established processes in which one could have confidence.

The National Peace Committee was an important component of the peace structure. It represented the political leadership at the national level and was the body to whom the peace structure would be ultimately accountable. This form of political accountability was critical in a period of transition when the state itself was being progressively eroded of the credibility and its

effectiveness. The international community represented by the United Nations, the European Community, the Commonwealth, and the Organisation for African Unity also played a complementary role supporting the peace process, and at times intervening to mediate between the principal political actors when the domestic processes appeared to have exhausted themselves. There were also numerous non-governmental organisations which supported the process of constitution making, national reconciliation and social reconstruction.

A lynchpin of the peace accord has been the Goldstone Commission which is empowered to inquire into incidents of public violence and its causes. The Commission's bold uncovering of the third force 'consisting of rightist elements in the intelligence and security apparatus' sometimes directing and encouraging township violence contributed to a reorganisation of South African security forces. The Commission has been a symbol of justice and fairness in a new South Africa.'

The Making of a Constitution

A major turning point in South Africa was the release of Nelson Mandela after 27 years of incarceration which he himself has described as 'the lonely wasted years of his life.' Soon thereafter in December 1991, we saw the commencement of formal negotiation at the Convention for a Democratic South Africa (CODESA). These negotiations were stormy, tense, physically and emotionally demanding on the principal negotiators on both sides. There were moments when the talks broke down and there were other moments when the negotiators themselves almost broke down in exhaustion. The early issues that stalled the negotiating process related to the status and the rights that should be conferred on the Zulu monarch King Goodwill Zwelithine and the issues relating to incorporation of independent homelands. There were however agreements on an interim government, on the composition of the national assembly and the Senate and on the general constitution principles upon which further negotiation were to take place. Subsequently, it was agreed that the party negotiate an interim constitution which would lead to the election of an interim legislature and constitution making body. This body would thereafter debate on a permanent constitution and resolve several of the outstanding issues. A critical issue in the constitution making process related to the issue of power sharing both at the national and the regional level. This was an issue which was critical to both the National Party representing the substantial interest of the minority whites and the Inkatha Freedom Party

which represented the interests of the Zulu people.

We can now highlight some of the key features of the Interim Constitution. The first relates to the composition of the bicameral legislature. It was decided that the Lower House of Parliament called the National Assembly consisting of 400 members would be elected directly on the basis of proportional representation, and the second Chamber called the Senate consisting of 90 members would be elected by the provincial legislatures.

Second, each province would be conferred a significant measure of autonomy and would be entitled to draft its own constitution. Provincial constitutions could prescribe the structure of each provincial legislature and the executive. There would be devolved on each province powers relating to education, health, welfare and policing. The centre would, however, regulate National Economic Policy and matters relating to security. Third, there would be an Executive President who would be elected by the National Assembly. The first Deputy President would also act as a Prime Minister and would act as a representative of the majority party and the second Deputy Prime Minister would represent the second largest party. The Cabinet of Ministers would consist of 27 persons drawn from all parties which would win more than 5% of the national votes. There was a debate as to whether the President could act with only 2/3 majority vote of the Cabinet, and it was decided that the President would be required merely to consult the Cabinet in a consensus seeking spirit on major issues.

Fourth, there would be a comprehensive Bill of Rights including guarantees for the freedom of speech, movement, religion, political activity and guaranteeing fair trials. The Constitution further prohibits torture and forced labour and discrimination on the grounds of gender and race. Fifth, there would be a Constitutional Court consisting of 11 jurists who would be appointed by the President for seven years. The Constitutional Court will interpret the constitution and resolve disputes between the different levels of the government. It would consist of four members appointed by the President and 7 to be chosen from a list of 10 persons submitted by the Judicial Service Commission. Sixth, the Constitution further guarantees the rights to jobs and pensions of white civil servants and white soldiers. It further provided for the integration of the South African army and anti-apartheid guerilla forces into a single army. It was agreed that there would be 11 official languages including English, Afrikaans, and Xhosa.

Subsequently, with a view to appeasing the right-wing and the Inkatha Freedom Party, President Mandela offered further concessions. They included the acknowledgement of the principles of self-determination of ethnic minorities and even left open possibilities for the Afrikaners negotiating a homeland after the elections. Further powers were devolved on provinces including the power to diminish the powers of the provinces agreed to in the interim constitution accepted last November. As a further concession to the Inkatha Freedom Party and the Zulu people, it was agreed that a constitutional status be accorded to the Zulu king Goodwill Zweluthine.

Although there is a great deal of euphoria that the electoral process has been concluded relatively peacefully, it is important to recognise the long and arduous process of constitutional negotiation that preceded it. The ANC negotiating team was strong in its determination to forge consensus and evolve process which would be inclusive of all the political forces within South African society. It remains steadfast in its commitment to principles while being realistic and pragmatic in accommodating competing groups. When the process was about to break down, Nelson Mandela commanded the moral stature, political vision and intellectual imagination to make critical concessions in order to ensure the process would move forward.

The role of Nelson Mandela

The political transition in South Africa must ultimately be viewed as an event which demonstrated the triumph of the human spirit against the most incredible odds. It was no doubt spearheaded by an extraordinary man who had the courage, the resolve and the compassion to change the course of history. There were many in the history of the 20th century who changed the course of human destiny. But how many of them who changed the course of human history, have been able to ensure that their moral stature and authority remained undiminished. There is one clear example: Mahatma Gandhi, the' 'half-naked Fakhir', the apostle of non-violence, who was instrumental in facilitating the liquidation of the British Empire in the Indian sub-continent. One may include in this list Martin Luther King whose moral courage dismantled the inhumane system of segregation in the United States.

Winnie Mandela once mentioned that there could be no struggle without suffering. In the euphoria of the recent political events, it may be tempting to forget the dark and brutal aspects of apartheid and the cruel oppression

which that regime represented. But as Milan Kundera has cautioned us the struggle for rights 'is a struggle of memory against forgetfulness'. While it may be legitimate to forgive, it would be morally inappropriate to forget.

We remember the Sharpeville massacre of 69 demonstrators in 1960 and the Soweto uprising in June 1971. We must remember the murder of Steve Biko who was killed under torture in 1975 when he was 31 years old. It was Biko who spearheaded the black consciousness movement and reminded South Africans than an oppressor's most potent weapon is the domination of the mind of the oppressed. In 1982 Ruth First, the wife of the leader of the Communist Party, Joe Slovo became the victim of a letter bomb widely believed to be the work of the South African security forces. Ruth First was in the vanguard of the anti-apartheid movement. And last year Chris Hani, the charismatic and widely loved Secretary of the Communist Party of South Africa was cruelly murdered by the extreme right.

Mandela and Walter Sisilu were tried on 9th October 1963 in Pretoria on charges of being responsible for 222 acts of sabotage. At the end of the trial, Mandela addressed the court for more than four hours. It was an intensely personal and moving statement at the end of which he stated - "During my life time I have dedicated myself to the struggle of the African people. I have fought against white domination, and I have fought against black domination. I have cherished the ideal of a democratic and free society in which all persons live together in harmony with equal opportunities. It is an ideal which I hope to live and for and to achieve. But if need be, it is an ideal for which I am prepared to die.' Mandela was sentenced to life imprisonment together with his colleague Walter Sisilu. Among those who pleaded for the migration of sentence was Allan Paton, the author of 'Cry, The Beloved Country'. Mandela and his friends being political prisoners were confined to Robben Island which has been compared to Soizenitsyn's Gulag Archipelago. Prisoners were made to build their own prison. Mandela slept on the floor of a cell which was approximately 7 ft. square. He was given tasteless food, allowed one letter of 500 words and one half hour of a visit every six months. Winnie often had to travel 1000 miles from Johannesburg to Cape Town for the 1/2 hour meeting. They were initially forbidden exercise, locked for the whole day in solitary confinement. During the summer, chained and manacled at the ankles, they had to engage in backbreaking hard labour in the lime quarry. The authorities tried every method of breaking their morale and their spirit but Mandela preserved his dignity and integrity, and continuously struggled for improvement of the prison conditions. He took advantage of

every opportunity to further his legal knowledge and his understanding of contemporary developments. He befriended his jailors at least one of whom, Sergeant Gregory shed tears on his release. After 27 years of his ordeal, he bore no bitterness, no hatred, no hostility towards those who tormented him and deprived him of some of the best years of his life.

Another incident which is deeply etched in the collective consciousness of the Zhosa people took place during the middle of the 19th century. It is the story of a young girl Nongqawuse who prophesied the regeneration of the living and the resurrection of the dead. "She was able to lure an entire people to death by starvation, pathetic victims of a beautiful but hopeless dream. Tens of thousands of Xhosas died; tens of thousands fled their homes and hundreds of thousands of cattle were slaughtered and crops destroyed. While the Xhosa nation was lying prostrate, Sir George Gray trampled on this human wreckage. He exiled the starving, crushed the survivors and seized more than half of Xhosa land for "a colony of white settlement."[1]

The processes of ethnic and national reconciliation in South Africa are relevant to countries which face similar problems. The constitutional reforms provide us with the important models, concepts and ideas for power sharing. They include not only the federal/quasi federal arrangements at the provincial level but also the prospect of proportional representation in the composition of the National Cabinet. They also remind us of the importance of civil society processes and the need to forge linkages between communities at social, political, and economic levels. **Constitutional structures need to be firmly anchored in the collective wills of communities to co-exist. The South African experiment reminds us how futile it is to give way to despair and to abandon hope. It reminds us that no problem is truly intractable and given the right leadership any society can rise above the trauma of violence, hatred and destruction and collectively frame a vision of the future which is positive and ennobling.**

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[1] See J.B. Peiris, 'The Dead Will Arise' - Nongqawuse and the Great Xhosa Cattle-Killing Movement of 1856-7.

THE ETHNIC AND CULTURAL DIMENSIONS OF HUMAN RIGHTS POLICY*

The purpose of this presentation is to out line some human rights concerns relating to ethnic conflict and its complications for a policy of human rights and development cooperation.

Ethnic conflict has contributed to some of the most serious and persistent violations of human rights in many parts of South Asia. Most of the serious violations relate to disappearances, torture and extra-judicial killings and arbitrary and indiscriminate arrests have been linked to on-going ethnic conflicts.

In the recent history of the Indian subcontinent, ethnic violence has become an increasingly common phenomenon. From the Pathan-Bihari clashes in Pakistan to the anti-Sikh riots in New Delhi, anti-reservation stir in Gujarat and the Sinhala-Tamil conflict in Sri Lanka, racial violence has left a trail of destruction of property and human life. The emotional and physiological scars that remain after such out breaks are in fact more destructive than the physical damage. The sense of community within a plural society is often shattered by the cruelty, terror and suffering unleashed by the forces of mob violence.

The competition for scarce resources and economic opportunities has fuelled the antagonisms arising out of the sharp cleavages of race, cast, tribe, religion, and language. Fragile political institutions have failed to accommodate adequately the demands for power and resource-sharing by marginalised ethnic and religious groups. Policies to advance national cohesion have been pursued at the expense of the linguistic and cultural traditions of minority groups. Ethnic discontent began manifesting itself in secessionist movements resulting in repressive responses by the state posing serious social justice and human rights concerns. These problems have been further compounded by millions of internally displaced persons, and the flight of refugees from internal conflicts.

But more recently there has been a growing awareness of the universality and complexities of ethnic problems and the need for concerted action to devise

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* Published in Fortnightly Review, Volume III, Issue No. 59, 1 June 1993.

strategies, programmes and structures for the management of ethnic conflicts. Several multi-ethnic policies have incorporated federal forms of devolution into constitutional and political orders. In the evolution of these constitutional models, there has been continuing conflict between unitary and centralised and decentralised forms. In India, the federal polity is based on division into linguistic states, while in Malaysia there is a federation of states headed by local rulers and new territories, which were given special concessions. The former Nigerian model provides an interesting contrast, with the overlap of certain regional tribal groupings in the demarcation of states. The diverse ethnic, tribal and regional groupings have varying perceptions of federalism, and these perceptions have tended to shape the conflicts and tensions in the operation of federalism in each of these societies. There is a growing debate in each of these societies on the need for structural rearrangements to strengthen the federal character of these polities. These efforts have been directed towards the need to redefine centre-state relations in educational and cultural policy, police powers, resource mobilisation and redistribution, emergency and residual powers. Such efforts and problems evoke basic issues relating to equitable power sharing between ethnic groups. Federal and quasi federal models of devolution also have a relevance to strife-ridden societies such as the Philippines, Pakistan, and Sri Lanka, which have recently enacted new constitutions or are on the threshold of redesigning their present constitutional framework.

The question of self-determination, which has been often asserted by ethnic minorities in the course of armed struggle or non-violent political agitation has been most problematic. Nation states become extremely defensive in the context of such assertions and often have recourse to extreme measures of repression to contain ethnic demands, which they perceive would result in secession or disintegration.

Another focal point of ethnic conflict has been preference policies directed towards disparities in access to education and employment and in economic opportunities. These policies are often founded on competing perceptions of deprivations, which in turn give rise to rival notions of social justice. India one of the most complex and hierarchically structured societies has a constitutionally mandated policy of preference towards weak and vulnerable minorities and tribal groups. Policy makers and judges have had to grapple with issues of bewildering complexity in defining constitutional limits of such policies, balancing the interest of historically depressed cast and tribal groups with those of economically backward classes. Preference policies directed in

favour of a politically assertive and dominant majority such as the new economic policy in Malaysia pose qualitatively different socio-political issues relating to the legitimate limits of preference policies based on proportionality.

The international community must accord highest priority to evolving principles and concepts with regard to minority protection which will gain universal acceptance and contribute towards to the peaceful resolution of conflicts. It must be emphasised that given the evolving and changing nature if ethnic identity and the contents of ethnic demands and the shifting balance of powers between ethnic groups, most structural arrangements would remain fluid and transient. There is therefore the need to continuously renew and reconstruct these arrangements to respond to new challenges and demands.

Ethnic conflicts pose fundamental issues relating to human rights and social justice, which need to be addressed within the framework of the community's policy on human rights and development co-operation.

First, the United Nations recently adopted a Declaration on Monitories, which emphasises the need to respect and promote ethnic, cultural and linguistic identity without any distinction. It also emphasises the right of persons belonging to ethnic and linguistic minorities to protect themselves against any activities, which may threaten their existence or the full enjoyment of human rights and fundamental freedoms. In pursuance of this Declaration, the state should be encouraged to ensure that minorities participate effectively in political arrangements at the national and regional level. The commission should therefore ensure that national policies and programmes in aid-recipient countries are planned and implemented so as to ensure that minorities participate fully in the political, economic progress and development of their countries. Programmes of development cooperation should be reviewed so as to ensure they do not adversely affect the interest of ethnic groups and indigenous people by forcibly displacing them from their traditional habitat or result in disturbing the demographic balance in the region in which they predominate. Programmes of development assistance also endeavor to heal the scars of civil wars, and internal conflicts by assisting in programmes of rehabilitation and reconstruction and by encouraging projects which provide emotional and psychological support to those who have been traumatised by ethnic violance. Developmental assistance programmes also need to address issues of regional imbalance and ensure that regions in which an ethnic minority predominates secure an equitable share of external developmental assistance.

Second, human rights policies and developmental assistance should be able to assist in addressing the underlying causes of ethnic conflict. This would include programmes of research into the economic social and ideological origins of ethnic conflict and educational programmes which are intended to promote attitudes of tolerance and mutual respect in multi-ethnic societies. Such programmes could include from educational programmes in schools and universities, to media programmes directed towards a much wider constituency.

Programmes can also include the sharing of information and technical assistance to promote constitutional reform, building of new institutions such as Language Commissions, Minorities Commissions and the design of autonomy or devolutionary arrangements which are responsive to the political aspirations and socio-economic needs of the ethnic group. Such programmes could also include the strengthening of the formal institutions of the state, such as the judiciary to address more effectively problems relating to ethnicity and to empowering civil society's institutions which are committed to the advocacy of group rights, the documentation of human rights abuses, to education, and dissemination of information on questions of inter-racial justice and equality.

Third, an important area relates to conflict resolution and conflict avoidance. The international community needs to be active in the resolution of internal conflicts which have destabilised several nation states and even pose a threat to regional stability. Such international concern should primarily be directed towards strengthening of domestic political processes for conflict resolution both at the state and non-state level. Where the domestic processes appeared to have exhausted themselves the international community needs to be in a position to facilitate political contacts between contending groups and to encourage such groups to work constructively towards a durable solution.

Fourth, community and Member States should adopt a policy on diversity, which is analogous to that adopted by some private philanthropic foundations. The objective of such a policy on diversity should be to promote pluralism and equal opportunity and to end discrimination based on ethnicity or gender. Such a policy includes the encouragement of projects designed to strengthen plural societies and to increase opportunities available to minorities and historically disadvantaged groups. Partners in development cooperation should be encouraged to promote diversity in the management and staff of organisations receiving and implementing aid. Partners should be required to clarify their goals with regard to diversity, the scope of their efforts to achieve

diversity, and the barriers that exists to achieving diversity. Diversity concerns should include ethnicity, gender and national origins. While there is need for sustained efforts, strategies may need to be modified to the needs and challenges of particular societies.

Fifth, if the community and the member states are to be effective in maintaining this policy, there is a need for both credibility and consistency. Credibility is related to the ability of the North to ensure that in the South within its national boarders, groups such as refugees, migrant workers and its own under-class are not subject to discriminatory an arbitrary treatment. There can be no such credibility if there is conspicuous disparity between domestic practices and international policies on human rights questions. The issue of consistency arises when there is selectivity with regard to the countries who are subject to punitive measures. Is the decision to suspend or terminate developmental assistance based solely on human rights considerations or is it more probable that factors such as geo political importance, the economic model pursued by the recipient country and the domestic politics of the donor country are likely to influence such decisions?

Note: This presentation was made at a public hearing on HUMAN RIGHTS AND FOREIGN POLICY, before the Committee on Foreign Affair''s and Security, sub-committee on Human Rights and Committee on Development and Co-operation of the European Parliament in Brussels, 2-3 June 1993.

The Redress of Administrative Grievances
The Reform of the Institution of the Ombudsman*

The goal of creating an effective institution for the redress of administrative grievances has eluded Sri Lanka for many decades. From the mid fifties many Sri Lankan students of Public Law have followed with great interest the Office of the Ombudsman, an institution which originated in Sweden in 1809 for the purpose of receiving and investigating complaints from citizens against unjust administrative action. This institution was subsequently adopted by Finland in 1909 and spread to Denmark, Norway and New Zealand. Even the United Kingdom which had for many years resisted this institutional innovation, established a Parliamentary Commissioner for Administration in 1967 and a Commissioner for Local Administration in 1974 to remedy injustices caused by mal-administration. There was, however, an important conceptual difference between the institution of the Ombudsman as it operated in Scandinavia from that in Britain. In the Scandinavian model, the Ombudsman was conceptualised as an institution which was independent of existing political and administrative agencies, while in the British model the Ombudsman was conceived as an adjunct to Parliament. The Sri Lankan experiment with the institution has, however, floundered between these two models.

The first significant public discussion on the Office of the Ombudsman was during the United Nations seminar held in Kandy in 1959. The Danish Ombudsman presented a paper on his office and its operations and this stimulated New Zealand's interest in the concept. A Cabinet Sub Committee was appointed during the Dudley Senanayake Government which included Mr. C.P. de Silva, Mr. J.R. Jayawardene, Mr. M. Tiruchelvam and Mr. A.F. Wijemanne. This Committee adopted a rather cautious approach and recommended on 22nd December 1965 that the Ombudsman receive complaints only through Members of Parliament which were further filtered through the Public Petitions Committee. In 1978, the Law Commission under the Chairmanship of Chief Justice Victor Tennekoon was requested to give urgent consideration to the creation of a Parliamentary Commissioner for Administration as envisaged by Section 156 of the Constitution. I was a

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* Published in Fortnightly Review, Volume V Issue 84, 16 October 1994.

member of the Law Commission at that time. The Law Commission gave the most urgent consideration to this request and prepared a report and a draft Bill on the establishment of the Office of the Ombudsman. The report which provides an extensive and insightful commentary on the proposed Bill, needs to be reprinted and be more widely circulated. The Law Commission proposal followed the Scandinavian model and empowered the Ombudsman to directly receive complaints from any aggrieved persons or to conduct investigation on his own motion. It also provided that a group or body of persons could invoke the jurisdiction of the Ombudsman by means of a written complaint. However, this recommendation was not accepted by the then Government. President Jayewardena decided to proceed on the basis of the report of the ministerial Sub committee established in the mid 60s and to establish the office as an adjunct to Parliament in general and the Public Petitions Committee in particular.

This Bill, therefore, seeks to restore the recommendation of the Law Commission and remove those procedural constraints on the Office of the Ombudsman which have progressively eroded its effectiveness. Parliamentary Commissioner Mr. Sam Wijesinha in his Annual Reports to Parliament has complained about the procedural limitations of the law and the jurisdictional constraints which prohibited him from reviewing complaints against government policy or reviewing the exercise of administrative discretion. One of the principles which underline the jurisdiction of the Ombudsman is that he will focus on issues of 'mal-administration' and not have the authority to re-examine decisions on the basis of their merits. The reports, however, do not refer to a more basic jurisdictional limitation which is that the Ombudsman could not investigate the recommendations and decisions of Ministers.

There are a number of reasons as to why the Parliamentary Commissioner for Administration, whose office was established in 1981, has failed during the last 13 years to fulfil the expectations of the public of an independent, impartial and informal watchdog against mal-administration. Firstly, the Office of the Ombudsman was essentially a very personal institution which derives its strength from the personality, vision and vigorous commitment to the value of justice and fairness which are critical to the office. I do not think that governments have attached adequate importance to this office in the selection of the Parliamentary Commissioner for Administration and in the financial and human resources that have been placed at his disposal. Secondly, public understanding and confidence in the institution of the Ombudsman is limited. No meaningful programme of public education has

been undertaken and those who are aware of the institution have a negative view of its effectiveness. This is particularly marked in the case of fundamental rights. Thirdly, the Ombudsman had an ambiguous relationship in a presidential parliamentary system. His appointment is made by the President and is accountable to Parliament. The principle Act now being amended envisaged a close link with Members of Parliament and the Public Petitions Committee. But this link has proved to be more formal than real. The Public Petitions Committee has not provided the legislative overview that the Select Committee on the Ombudsman has provided in the UK Parliament. In the circumstances, the authority of Parliament has not been invoked to give teeth to the Ombudsman, and there has been little legislative interest in the reports of the Parliamentary Commissioner and his recommendations. It is also significant that despite the explicit requirement of the law that the Ombudsman shall at least once in every calendar year send to the President and the Parliament a report of the work done, there were only two such reports which were presented. Fourthly, a very important aspect of the jurisdiction and powers of the Ombudsman related to administrative practices which were unreasonable, discriminatory and oppressive. There has been no meaningful impact of the office of the Ombudsman on the review of such practices. In Sweden, the penal system was reformed as a result of the work of the Ombudsman. In New Zealand, the Ombudsman's recommendations had a significant impact on the reform of administrative systems.

The Public Petitions Committee needs to be reconseptualised to provide legislative oversight over the work of the Ombudsman. The Committee can (1) review the reports of the Ombudsman, (2) examine administrative practices which require review, (3) advise aggrieved individuals where the Ombudsman reports under Section 17(3)(c) that no effective departmental action has followed his recommendations, (4) receive petitions with regard to injustices in respect of matters which fall outside the jurisdiction of the Public Petitions Committee. There are at present almost three thousand petitions pending before the Public Petitions Committee, and Parliament needs to augment the investigative capacity of the Committee.

In the circumstances, the proposed amendment to the Parliamentary Commissioners Act of 1981 needs to be welcomed. It represents a serious attempt to restore some credibility to this institution, both with regard to the procedures of receiving complaints and with regard to the nature of the determinations of the Ombudsman and the recommendations that he may make to the head of the institution concerned. In regard to Section 10 of the

principal Act, it should be clear that the complaints may be made either by an aggrieved individual or a body of persons acting in the public interest. We would also urge the Government to manifest the seriousness of its commitment to administrative reform and administrative justice by appointing an Ombudsman who will immediately command public confidence and to empower such a person by providing him with adequate resources including the appointment of a Deputy Ombudsman as envisaged by the law.

The Paradox of Tolerance: Some Conceptual Issues*

UN has taken an important initiative in declaring 1995 as the year of tolerance, and desigating UNESCO to assume the role of the lead organisation. This declaration is issued in the context of widespread and disturbing intolerance, which leads to acute nationalism, extremism, discrimination, and blatant disrespect for human dignity. The objective of this exercise is to create a culture of peace based on the principles of tolerance. The United Nations Charter forged an inextricable link between tolerance and peace, and the UNESCO declaration has emphasised the interdependence of tolerance, human rights, and democracy.

In fact, the UNESCO Constitution, which was established on the 16th November, has stated that it is in the "minds of men that the defenses of peace must be constructed".

At the threshold of this discussion, it is important to clarify the central concept of tolerance and related ideas. Martha Minow in an essay called 'Putting Up and Putting Down Tolerance Reconsidered' has provided some important definitions, which we need to consider. "Tolerance is a political and psychological stance toward varieties of viewpoints, customs and behaviours that signals passive acceptance and that allows the variety to exist without interference and disapproval." Tolerance is thus envisaged as a passive response to diversity and an approach in which there is neither interference nor disapproval of that diversity. On the other hand, the respect for cultural diversity is a more active demand than tolerance for it may call for accommodation of sub-group practices and therefore changes in dominant institutions. It appears that the UNESCO Declaration seems to encompass both the passive and active dimension of this concept as the Director General of UNESCO has pointed out that the tolerance should not mean "simply the acceptance of others with their differences." It must also mean "a spontaneous movement towards others, to know them better and to know ourselves better through them, to share with them, to extend to them the hand

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* Presented at the Conference on *Human Rights Tolerance: The Asian Perspective*, Karachi, 27 April 1995. Published in Fortnightly Review, Volume V, Issue No. 90, 1 & 16 March 1995.

of fellowship and compassion, so that universal values common to all are enriched by the precious individuality of every culture and every language."

Michael Ignatieff in a recent review essay refers to the renewed interests in the concept of civil society in countries, which have recently undergone rapid political transitions in Eastern and Central Europe. This ideal provides us with a wider framework of interlocking institutions, structures and processes within which the spirit of tolerance can become meaningful. According to Ignatieff "in a civil society, church and state were separated, as in the United States, or, as in England, religious nonconformity coexisted with an established church. Toleration and religious pluralism were the necessary preconditions of the spirit of free inquiry that inspired its capacity for innovation and sustained its political liberty." Civil society was one which was ordered by the rule of law and while it was inconceivable without a market, it was not the creature of the market. On the other hand, it was civil society and especially public opinion that ensured that the market would be free, efficient and honest. Civil society prevented the concentation of arbitrary power and guaranteed a set of checks and balances designed to prevent unjust accumulation and influence.

One of the paradoxes of a society committed to tolerance and to respecting the viewpoints and customs of diverse people is to encounter the challenge posed by those who themselves do not agree to respect the viewpoints of customs of others. As Martha Minow points out the "liberal commitment to tolerance required at some point intolerance for those who would reject that very commitment."

A component of this programme is to focus on the role of the media in fostering greater tolerance and by providing a less partial view of the problems in conflict situations. In many of our societies, media has not played a constructive role in strengthening respect for diversity, or in providing a balanced reporting on incidents of ethnic violence or on the proposals for the resolution of such conflicts. In this regard, I wish to quote from an earlier report of the international commissions appointed to inquire into the Balken Wars of 1912 and 1913.

> *The real culprits in this long list of executions, assassinations, drownings, burnings, massacres and atrocities furnished by our report, are not we repeat the Balken people... the true culprits are those who mislead public opinion and take advantage of the*

people's ignorance to raise disquieting rumours and sound the alarm bell, inciting their country and consequently other countries into enmity. The real culprits are those who by interest or inclination, declaring constantly that war is inevitable, and by making it so... and who hold up to their country a sterile policy of conflict and reprisals.

The Judiciary and the Rights Discourse*

There is a strong tradition which has been sustained by the Supreme Court during its long history of almost two centuries. It is a tradition which dates back to the turn of the nineteenth century with the appointment of Alexander Johnson to the court. Johnston devoted a great deal of energy and effort towards collecting 'local and customary laws' of the island and has been described as the founder of literary and scientific research in British Ceylon. Edward Creasy became the Chief Justice in 1860. Creasy had a brilliant academic career in Eton and Cambridge; and was later appointed a Fellow of King's College, Cambridge and a Professor of History at the University of London. He authored several important studies on history including an incomplete History of England. Most schoolboys of his generation were familiar with his book *The Fifteen Decisive Battles of the World.* He was described by his contemporaries in Sri Lanka as 'a veritable intellectual giant.' It is appropriate here to also refer to Tom Berwick, who in a judicial career of rare distinction which spanned for 40 years, was widely regarded as the 'foremost authority.' on Roman Dutch Law. He translated and annotated parts of Voets, Pandects. In the last part of the nineteenth century, John Budd Phear, who had a brilliant career at Cambridge, was appointed Chief Justice. He wrote a book on the *Aryan Village in India and Ceylon* which has been recently reprinted. In the twentieth century, there were many others who combined an active career in the bar and the bench with scholarly pursuits. They included Walter Perera, C.G. Weeramantry, A. St. V. Jayewardene, E.W. Jayewardene, H.W. Thambiah, and R.F. Dias.

Justice Amerasinghe was recently described as one of the most prolific and versatile scholars who served the Supreme Court. His scholarship has straddled the divide between private and public law, law and public policy, and legal theory and social practice. Time would not permit me to refer to the long list of monographs and articles since his first book on the law of defamation in South Africa and Ceylon was published in the Acta Juridica in 1957. It would be more realistic for me to focus on the last ten years of his scholarly career while being mindful that it represents no more than a small fraction of his scholarly output, over almost forty years.

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* Presentation made at the ceremonial release of Justice A.R.B. Amerasinghe's book *Our Fundamental Rights of Personal Security and Physical Liberty* on 21 May 1996 at the Sri Lanka Foundation Institute. Published in Fortnightly Review, Volume VI Issue No. 104, June 1996.

In 1986 he published a monumental study of the Supreme Court of Sri Lanka, which majestically spans 185 years of the history of the bench and the bar. This study is unlikely to be replicated or surpassed for many a decade. His study on *Professional Ethics and Responsibilities of Lawyers* published in 1993 is another important work of scholarship based on extensive comparative research on the rules and decisions in a number of jurisdictions. In 1994, Vishwa Lekha Press published *Life is Simply a Duty*, a collection of essays and speeches by Justice Amerasinghe. The collection revealed his extraordinary range of interests, the intensity of effort and seriousness of purpose that he brought to bear even on the minutest task. These essays and lectures ranged from the administration of justice, law enforcement, insurance and include several biographical essays. Between publishing three monographs and the release of the collection of his essays, Justice Amerasinghe also published two major studies on Alternative Dispute Resolution and on Legal Aid. The latter was the Kanchana Abayapala Memorial Lecture delivered in 1995 and challenged many of our settled assumptions about the delivery of legal services within Sri Lanka. Justice Amerasinghe therefore seized every opportunity to engage in personal introspection and reflection and endeavoured to place his own judicial work within a broader canvas of ideas and concepts.

Within the last few years, three major monographs on Fundamental Rights have been published in Sri Lanka. The book to be released today *Our Fundamental Rights of Personal Security and Physical Liberty* represents a distinct contribution to this literature. Firstly, it focuses on the more important of the rights enshrined in the constitution which are linked to the integrity of the person. The book therefore concentrates on questions of immediate relevance to the human rights discourse within Sri Lanka and addresses issues relating to the disappearances, extra-judicial killings, torture and arbitrary arrest and detention. Secondly, Justice Amerasinghe in this study not only draws on his career as a judge of the Supreme Court, but also on his experience as a member of the Advisory Committee, under the Prevention of the Terrorism Act and as Secretary of Justice. The work therefore combines the conceptual grasp of a legal scholar and an appellate judge with the practical insights of a judicial administrator. The scheme of the book has been carefully thought through. The introductory chapter provides a broad overview of the conceptual and historical antecedents of human rights from the Magna Carta to the Declaration of the Rights of Man, the Declaration of Independence and the Bill of Rights. The author also looks at the Vienna Declaration and critically examines the thesis that human rights

are "universal," "quintessential" and "inherent". He also looks at the accountability of private actors, and the difficult questions relating to the derogation and the limitation of rights. The second chapter focuses on the constitutional provisions and the case law relating to torture, cruel, inhuman and degrading treatment. Chapters 3 and 4 deal with issues of arrest while Chapter 6 deals with the production before a judge and procedures relating to continuing detention. Chapter 5 outlines the law relating to access to counsel, and access to members of the family. We are particularly grateful for the inclusion of several important documents relating to human rights which are not otherwise readily accessible. These include UN Body of Principles on Detention and Imprisonment, the extracts from the Prisons Ordinance and the rules framed thereunder, and the Code of Conduct for Law Enforcement O fficials.

I will make no attempt to comment on the positions taken by Justice Amerasinghe in his book on the more important questions relating to the right to life and the integrity of the person. It would, however, be appropriate to make some broad observations with regard to the context in which questions of fundamental rights need to be approached both within Sri lanka and more generally within the international community.

Since the Vienna Conference in 1993 and the 50th anniversary of the United Nations, we have had several opportunities to reflect on the international efforts to secure and advance human rights. These assessments have given rise to both intense optimism and deep cynicism of the capacity of the international community to secure human rights and democratic values. There are two truly substantive achievements. First, notwithstanding the persistent acts of inhumanity, lives have been saved and freedom regained in many parts of the world. More importantly, human rights have been firmly established in the conscience of public opinion as the paramount social ethic of our time. Second, there has been significant institutional and instrumental gains, and the institutionalisation of human rights activists internationally and in several developing countries. On the other hand, we continue to be dismayed by the gross and persistent violation of human rights and appalling manifestations of collective violence, ethnic and religious fratricide. The perpetrators of these abuses continue to operate with legal and political immunity and the efforts to hold such perpetrators accountable to face a mix of apathy and cynicism from the global community.

In Sri Lanka also, our troubled record of human rights points to a similar contradiction. At the ideological level, the second Republican Constitution embodies a strong commitment to fundamental rights which shall be respected, secured and advanced by all organs of the government. On the other hand, UN Working Group on Disappearances in its report on 1990 and 1991 stated that Sri Lanka had the highest documented cases of disappearnces in more than 40 countries investigated by the Working Group. The three Truth and Justice Commissions have received more than 45,000 complaints. Reports of the Human Rights Task Force reveal that every month an unacceptable number of persons are unaccounted for even today. Again Article 11 of the Constitution states that no one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment. However, human rights groups document, and our case law reveals the most cruel and degrading forms of torture which are routinely practised during interrogation. Similar concerns have been expressed with regard to arbitrary arrests and detentions. Presidential directives that where issued in 1995 with regard to humanitarian and procedural safeguards are widely and callously disregarded even within the city of Colombo. We are the inheritors of religious traditions which emphasise compassion and tolerance and yet we confront appalling cruelty and abuse in our daily lives. Any study of fundamental rights needs to grapple with the erosion of the rule of law that we continue to confront with regard to respect for the dignity and security of persons.

The second constraint relates to the expanding corpus of literature relating to human rights that any serious scholar needs to take note of in elucidating and clarifying the provisions of the Constitution. Firstly, we have the international instruments such as the International Covenant on Civil and Political Rights the Convention on the Elimination of Discrimination and the reports of the treaty bodies established under these instruments. In this regard, we need to take into consideration not only the rulings of the Human Rights Committee when the individual complaint mechanisms have been invoked but also the general comments of the Committee on Specific Articles of the Covenant. Second, within the inter-governmental system, the reports and resolutions of the UN Human Rights Commission, the Sub-Commission on the Elimination of Discrimination and the Protection of Minorities, and the Reports of the Special Rapporteurs and the Working Groups established within this framework are critical to the understanding of contemporary developments. Each of the sessions of the Human Rights Commission, Sub-Commissions and the Working Group also generate a vast body of material which are ordinarily accessible only to those scholars who closely follow these proceedings.

Thirdly, there are the regional instruments of the Council in Europe, the Organisation of American States and the Organisation of African Unity. Of particular importance in this regard is the European Convention for the Protection of Human Rights, and the eleven protocols to the Convention, and the decisions of the European Commission and the European Court on Human Rights. A recent regional instrument of importance is the Framework Convention for the Protection of National Minorities adopted in 1994. Similarly, there have been innovative developments within the OSCE process which no scholar can ignore. Finally, there has been an extraordinary growth in the scholarly writings on human rights. Within the last five years, there are at least 100 major monographs and books which have been written on general themes relating to human rights and humanitarian law. There are 13 international journals on human rights of high scholarly repute. In addition, there are declarations of principles by international and commonwealth jurists such as the Bangalore Principles on the domestic application of international human rights norms which are crucial to the evolution of international standards.

Despite the limitations of the libraries within Sri Lanka, Justice Amerasinghe needs to be complimented for integrating the international and comparative case law and other writings into his analysis of our domestic constitutional provisions.

A third constraint relates to the very nature of the human rights discourse in a post-modernist society. Human rights discourse can no longer be predicated on the assumption that constitutional arrangements would be permanent and enduring. In a post-modern world, given the evolving and changing nature of group identity and the content of group demands and shifting balance of powers between groups, most structural arrangements would remain fluid and transient. There is therefore the need to continuously renew and reconstruct these arrangements to respond to new challenges and demands. We see in Canada how both the Meech-Lake Accord and the Charlottetown Agreement failed to respond adequately to these new challenges and demands particularly of the indigenous people of Canada who were not part of the original constitutional design. Rights discourse must therefore in the elaboration of group rights and in reconciling the tension between individual rights and group rights be attentive to the impermanence and the fragility of modern constitutional arrangements.

With these broad observations, I would like to commend Justice Amerasinghe's book to you. R.K. Newmeyer in his biography of Supreme Court Justice Joseph Story has pointed out that the American revolution had generated a debate on questions of government and law which had been grounded on the bedrock of Republican ideology. He added that "those touched by this revolutionary vision were compelled to think and act boldly, comprehensively, idealistically, and passionately - to see the nation in providential terms and themselves as instruments of civic regeneration. Matters large and small, as with the old Puritans, were plotted on the curve of history and took on a cosmic morality." Justice Amerasinghe has reminded us that a similar moral and political vision must animate our endeavours to reconcile 'the spirit of our age' with the 'realities of our times.'

AN INTERNATIONAL CRIMINAL COURT: THE MISSING LINK IN HUMAN RIGHTS LAW*

One of the most remarkable aspects of the post-cold war world is that wars within states vastly outnumber wars between states. It is estimated that there are 30 current armed conflicts which have resulted in deaths and displacement. Many of these conflicts involve states in transition such as Azerbijan, Bosnia-Hercegovina, Croatia, Georgia, Moldova, Russia, Serbia and Tajkistan. There are others, however, which involve established states with long histories of discord. These include Afghanistan, Algeria, Burundi, Liberia, Mozambique, Rwanda, Somalia, Sri Lanka and Sudan. In Rwanda in 1994, more than a half million people were killed in the clashes between the Tutsis and the Hutus. The problem of preventing genocidal violence and mass murder in failed states is a central concern to the international community.

In many of these failed states the judicial system is paralysed. Prisons are overcrowded and are in insanitary conditions. There are no records of arrests or details of alleged offences. In Rwanda 2300 persons died in detention between July 1994 and end of 1995. Seven persons are reportedly dying everyday in Kigali prisons where over 62,000 people have been detained. Seventy detainees are crowded into a single cell and 22 people have died of suffocation. Amongst the inmates are 100 children including 20 babies. There are no sanitary facilities and the cells are so overcrowded that prisoners cannot lie down. Many detainees have been tortured and severely beaten.

Similarly in Burundi, thousands of people were victims of political killings committed by security forces and armed groups. Most were killed solely because of their ethnic origin or political affiliation. Authorities have failed to investigate these killings and political detainees are routinely tortured and thousands have been arrested and detained without charges.

What is in issue in most internal conflicts is human values and, more particularly, the most basic value relating to the sanctity of human life.

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* This is an extract from the Sixth Kanchana Abhayapala Memorial Lecture on '21st Century Challenges for the Human Rights Movement' delivered on 30.08.96. Published in *Fortnightly Review*, Volume VII, Issue No. 107, September 1996.

International civil society cannot remain silent or indifferent when fundamental human values are at stake. It has both the political duty and moral responsibility to respond to crises involving mass killings, indiscriminate deaths and violence. Our response to such situations defines ourselves not merely as individuals but also as members of nation-states and of regional groupings. Accordingly, human suffering in Burundi or Rwanda will ultimately have an effect on the human condition in New York, Tokyo or Brussels.

1. An International Criminal Court

A central issue in international human rights is whether a new system of international justice can be established to hold human rights perpetrators to account. Human Rights Watch has pointed out that the "establishment of such a system would revolutionalise the defence of human rights by adding a powerful threat of international prosecution and punishment to the existing tools of stigmatisation and economic pressure." In October 1995, President Clinton speaking in Connecticut to commemorate the 50th anniversary of the Nuremberg Trials spoke of the need "to send a signal to those who would use the cover of war to commit terrible atrocities, that they cannot escape the consequences of such actions." He continued "and a signal will come across even more loudly if nations all around the world who value freedom and tolerance establish a permanent international court to prosecute, with the support of the United Nations Security Council, serious violations of humanitarian law." In February 1995, the judges of the International Criminal Tribunal for the former Yugoslavia argued that "an international criminal court is urgently required. It is truly the missing link of international law."

Despite this rhetoric and the eloquent public pronouncements, members of the Security Council and, more particularly, several of its permanent members have not worked vigorously towards the establishment of a strong court. An ad hoc committee of experts was set up by the General Assembly to examine the draft statute for the court which was drafted by the International Law Commission. Several members including France and Russia argued that the draft be converted into a treaty and that the court be set up without delay. However, a small group of influential states including China, the United Kingdom and the USA raised a number of major objections which are likely to further delay this process. An important question which remains unresolved relates to the jurisdiction of the court. It is generally agreed that the court should only act when states are unwilling or unable to try suspects.

The question remains - who should decide this issue; the court or the states themselves? Amnesty International and other human rights organisations have argued that the court should have exclusive power to decide this question. Others have, however, opposed the giving of power to the independent prosecutor to decide as to when he should initiate investigations and prosecutions. They have argued that he should act only after he received a complaint from a state or from the UN Security Council. Judge Goldstone, the independent prosecutor before the tribunals on former Yugoslavia and Rwanda has argued that this would seriously compromise the independence of the court and politicise the process. If the ad hoc committee continues to meet in 1996 and resolve these difficulties, there is a possibility of an international conference being held in 1997 to finalise the treaty. Even then, the court is unlikely to be established until 1998.

The ad hoc tribunals of the former Yugoslavia and Rwanda again point to the difficulties of translating into reality the goal of bringing perpetrators of human rights abuses to trial. The tribunal of former Yugoslavia has continued to face many financial and political obstacles. By the end of 1995, 12 indictments have been framed against 52 people. However, only one of these suspects was in custody and the authorities in Croatia, the Federal Republic of Yugoslavia, the de facto Bosnian Croat authorities and the Bosnian Serb authorities have failed to hand over 51 suspects living in their territories. Accordingly, only one pre-trial proceeding regarding the only suspect in custody, commenced in April 1995. These proceedings were, however, adjourned until 1996 to allow the defence time to interview witnesses living in the former Yugoslavia. Judge Antonio Cassese, President of the former Yugoslavia Tribunal explained to the UN General Assembly in November:

> *Our tribunal is like a giant who has arms and no legs. To walk and work, he needs artificial limbs. These artificial limbs are the State authorities; without their help the tribunal cannot operate.*

Despite this appeal, only 14 of the 185 UN members have passed legislation enabling their police and other authorities to cooperate with the former Yugoslavia Tribunal.

The Rwanda Tribunal faced similar frustration and delays due to financial and personnel constraints. During 1995, the Tribunal, which is based in Arusha, Tanzania issued 8 indictments, to those persons suspected of being responsible

for genocide and other gross violations in 1994. Some states such as Belgium, Zambia, and Zaire did start arresting suspects being investigated by the Rwanda Tribunal.

The UN's financial crisis also resulted in a freeze on recruitment, travel and spending for both tribunals. Amnesty International in its annual report for 1996 has called on states to ensure that both the tribunals were given long-term financial security.

The questions of truth, justice and reconciliation have sometimes been perceived as competing goals. This has led some to argue that in war-torn societies, the quest for reconciliation must prevail over the search for truth and justice. But as Human Rights Watch has eloquently pointed out in its 1996 report, it is only justice that provides the foundations for lasting peace and reconciliation. The report further points out:

> *Only justice for today's killers can deter those who might resume their bloodshed tomorrow. Only justice can offer unequivocal condemnation of warfare waged by the slaughter of civilians. Only justice can establish the rule of law to replace a cycle of summary revenge.*

2. Commissions of Inquiry into Disappearances

It is important at this stage to digress for a moment to focus on the three commissions of inquiry in Sri Lanka which were appointed in late November 1994 to inquire into the disappearances which had been committed since 1st January 1988. Each of these three commissions, covered a different geographical area. One was mandated to investigate disappearances in the Western, Southern and Sabaragamuwa Provinces. The other covered Central, North-Western, North-Central and Uva Provinces. The commissions were mandated to determine the evidence available on alleged disappearances, the whereabouts of persons so removed and evidence of the persons responsible for such disappearances. The Commissions were also required to recommend relief to persons affected and the legal proceedings that may be instituted against those responsible.

By early 1995 each of the Commissions had received an average of 10,000 complaints of disappearances. The Law & Society Trust in its annual review of human rights, had noted that the Commissions could have employed

forensic anthropological methods to excavate graves and analyse skeletal remains. It was further pointed out that the mandate should be extended to include disappearances before 1st January 1988, as Amnesty International has documented a large number of disappearances in the custody of security forces from 1984 to 1987 in the North-East and in the South. The report also expresses concern about the overlap between the work of the three Commissions and the importance of ensuring a unified and consistent set of recommendations which should address the underlying institutional and structural factors. The concern that has been consistently voiced was the lack of adequate resources to enable the Commissions to work effectively. The Commissions needed to have control over their own budget and not to have to rely on the Presidential Secretariat for funds.

The decision of the government to direct two of the three commissions of inquiry to finalise their work before the end of June has raised serious concerns that the government may be reneging on its commitment to bring justice of perpetrators of past human rights violations. This was despite the fact that these Commissions had heard no evidence in relation to more than half the complaints before them. Civil rights groups protested against this decision, and two of the commissions were given extensions till the end of September 1996, while the commission on the North-East was required to complete its work before the end of October. Given the sheer volume of work before these commissions and practical difficulties involved in investigations of this kind, the commissions should have been given a more realistic time frame and adequate human and material resources for their work.

Equal Opportunity and the Role of Civil Society*

Honourable Minister, Honourable Tyronne Fernando, Your Excellency, distinguished members of the diplomatic Co., ladies and gentlemen,

The Law & Society Trust is very pleased to have this opportunity of inaugurating the Equal Opportunity Programme which is an important component of the Trust's programme of work for the next few years. Both the Minister and Mr. Tyronne Fernando have outlined the philosophical, constitutional and contemporary political issues relating to Equal Opportunity. From the perspective of the Law & Society Trust, and those who are engaged in the struggle for the protection of human rights in this country, what is particularly relevant is the kind of role that civil society can play in promoting programmes and policies with regard to Equal Opportunity. Engagement of civil society in Sri Lanka commenced in a formal sense I think after the insurrection of 1971, when the Civil Rights Movement was established to protect the rights of the detainees who were incarcerated after that insurrection. Since then, civil society organisations, concerned with human rights issues, have worked at different levels with a view to ensuring more effective protection and promotion of human rights in this society.

As the Honourable Minister and Mr. Tyronne Fernando pointed out, one of the levels at which this engagement has taken place has been in the articulation of constitutional standards with regard to civil and political rights and the machinery that has been put into place for their enforcement. We have endeavoured both at the normative and institutional level and at the international level to encourage the Government of Sri Lanka to become a signatory to international human rights instruments, and to accept the complete machinery envisaged by those instruments with a view to improving the framework for the protection of human rights in our own society. These initiatives led to the Government of Sri Lanka becoming a signatory to the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child, the Convention against Torture and so forth.

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* Presented at the inauguration of the Equal Opportunity Programme of the Trust on 21st July 1997 at the BMICH. Published in Fortnightly Review, Volume VII, Issue No. 118, August 1997.

The third level, at which the struggle of human rights has taken place has been at the institutional level, by encouraging the state to establish institutions such as the Official Languages Commission which was based on legislation and a model which had been applied in Canada; the Human Rights Commission and the Ombudsman. There was also a Commission which was established under the Human Rights Commission Law for the Elimination of Discrimination, another institution established as a result of these efforts. But despite the extraordinary energy that has been devoted to human rights work both at a normative level and at the level of institution building, the human rights community today in this country remains deeply frustrated and disappointed in view of the continuing contradictions between promise and reality in the human rights field. The continuing violations of human rights, which are documented by the international human rights organisations, and which are carefully researched and documented by domestic human rights organisations, point to this disturbing reality. In 1990 and 1991 UN Working Group on Disappearances pointed out that out of 53 countries which they had investigated, the highest number of disappearances took place in Sri Lanka. These were documented cases of disappearances, an appalling fact which is deeply embarrassing to the human rights community, which has over two decades worked towards the more effective promotion and protection of human rights.

Where have we gone wrong in the field of human rights? We have endeavoured to draw on concepts and principles based on international instruments. We have attempted to draw on the constitutional jurisprudence of a number of countries in the Commonwealth. We have drawn on new countries which have, since the collapse of the Cold War, both in Central and Eastern Europe, adopted a new constitutional model. Therefore, in the conceptual and in the normative sense, a great deal of energy has gone into the elaboration of these concepts and ideas. We have, as the Minister pointed out, established very important institutions, manned them with reasonably good people, with a commitment to some of these values and concepts. But none of these institutions appear to function effectively and to be able to respond to fulfil their full potential. The weakness here is again the failure of civil society. Civil society needs to mobilise itself, to organise institutional counterparts to the Official Languages Commission, to the Human Rights Commission, to enable that complaints which are not adequately directed towards these institutions are in fact effectively directed towards these institutions. Despite the fact that we have a chapter on fundamental rights, which prohibits gender discrimination, there is not a single case of gender

discrimination, which has been argued before the Supreme Court of Sri Lanka. Thus, there is a need for advocacy on human rights issues, for greater intellectual effort being devoted towards the study of systematic discrimination, for the presentation of cases before these institutions, to present, as the Co-ordinator point out, amicus curiae briefs which research the law, and place the law in the context of recent developments. This is another important obligation that civil society needs to fulfil. The scope of this project, therefore, is threefold; one is the level of education, which is public education, the second is the level of research and the third is the level of advocacy, by mobilising the energies, the efforts of civil society organisations and the work which is being done in our universities, by our scholars and academics would, I think, significantly bridge this gap between promise and reality in the field of human rights.

With these observations, I wish to thank all of you for having attended the inauguration of this project and particularly the Minister and Mr. Tyronne Fernando and I hope that two years from now, the Co-ordinator would be able to organise a similar event where the outcome of the project would be presented to a similar audience. I hope that we will be able to end on a more optimistic note. Thank you.

Sri Lanka and the New Frontiers of International Law*

Dr. Rohan Perera is to be congratulated for publishing a second book within a few months. The first book was based on his doctoral thesis and has been favourably reviewed by several persons including the Bombay based Constitutional lawyer and columnist Gaffoor Noorani. It is not often that a Sri Lankan publishing house will publish a book on international law by an author who is based in Sri Lanka. It, therefore, presents us with an opportunity to review the contributions Sri Lankans have recently made to the development of contemporary international law.

The pride of place in any assessment of the contribution of Sri Lankans to international law must be given to Shirley Amerasinghe as President of the Law of the Sea Conference for steering one of the most complex and comprehensive international law conferences of the second half of the twentieth century. He was Conference President from 1970 until his death in 1980, and has been described as "a moderator par excellence" who was determined to search for consensus. It has been said that nonetheless, on occasion, he attempted to push decisions through rapidly, which earned him the nickname of "fastest gavel in the East." His interventions as President provided crucial sources of momentum at times when the negotiations were in difficulties. He evolved innovative and what some scholars have described as 'controversial,' even 'desperate' procedural devices to enable delegates to overcome their differences and to produce an agreed single text. These 'active' consensus procedures resulted in a concentration of power in the hands of the chairman of the three Committees and had a salutary impact by providing incentives to delegates to initiate compromises.[1] This method of working which was considered unique to the United Nations Conference on the Law of the Sea (UNCLOS) was clearly attributable to the boldness and the imagination of Hamilton Shirley Amerasinghe whose untimely death in December 1980 prevented him from being at its successful conclusion.

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* Review of Dr. Amrith Rohan Perera's book *International Law-Changing Horizons* published by Sarvodaya Vishva Lekha Publishers, Ratmalana, Sri Lanka, 1997, Rs. 400/=. Published in Fortnightly Review, Volume VIII, Issue No. 121, November 1997.

1 Barry Buzan, "Negotiating by Consensus: Developments in Technique at the United Nations Law of the Sea Conference," AJIL vol. 75 (1981), p. 324 at p. 334.

Another Sri Lankan who rendered a significant contribution to the development of modern international law is Christopher Pinto who served as a member of the International Law Commission from 1973 to 1981 and became it Chairman in 1980. He established the Legal Division at the Foreign Ministry. He has represented Sri Lanka at every session of the UN Committee on the Sea Bed from 1968 to 1972, and again represented Sri Lanka at every session of the Third UN Conference on the Law of the Sea from 1973 to 1977. Christopher Pinto's own role as a key negotiator and mediator has been commended by several scholars and he was seriously considered as a successor to Shirley Amerasinghe as a man of infinite patience, but his candidacy was apparently resisted by those who considered him to be "politically too left wing." Pinto, as Chairman of the Sea Bed Committee's 33 nation working group drew up the principles of a draft treaty and develop[ed the international machinery for the exploitation of sea bed minerals. He also served as the chairman of a Special Working Group on Joint Ventures and was also the Secretary-General of the Iran-US Claims Tribunal.

Jayantha Dhanapala has also received high commendations for the diplomatic and negotiating skills he demonstrated in negotiating the indefinite extension of the Nuclear Non-Proliferation Treaty which is the principal international instrument aimed at preventing the spread of nuclear weapons.

Three other Sri Lankans have provided imaginative, legal and intellectual input into the work of international organisations. Lakshman Kadirgamar in respect of the World Intellectual Property Organisation (WIPO), Sinha Basnayake in respect of the United Nations Commission on International Trade Law (UNCITRAL), and M. Shanmuganathan in respect of the International Atomic Energy Agency (IAEA).

Two scholars who have contributed significantly to the development of public international law are my former law teachers, C.F. Amerasinghe and M. Sonnarajah. C.F. Amerasinghe has written extensively on international law issues and his most recent publications include *Local Remedies in International Law*, published by Cambridge University Press in 1990 and *Principles of Institutional Law in International Organisations* also published by Cambridge University Press in 1994. Professor Sonnarajah, who presently teaches at the University of Singapore, published a book on the nationalisation of foreign property called the *Pursuit of Nationalised Property* in 1986 and a more widely read book on *International Commercial Arbitration* published by Orient

Longman in 1990. His book on the *Law of Joint Ventures* was published by Cambridge University Press in 1994. Some reference alsowho needs to be made to Christopher Weeramantry whose contribution to the development of international law as a member of the International Court of Justice (ICJ) has been referred to by the author who has quoted from his dissenting opinion in the *Lockerbie Case*, the Case Relating to the *Nuclear Tests in the Pacific* and the Advisory Opinion requested by WHO on the *Legality of the Use of Nuclear Weapons in Armed Conflict*.

The collection of selected essays on international law draws attention to some of the more important conceptual developments in international law as reflected in the decisions of the ICJ and other developments which he has characterised as "changing the horizons of international law." These have included important normative and institutional developments such as the Treaty on the Law of the Sea, the Maastricht Treaty and the effort to establish an International Criminal Court. An important concern of the author has been the peaceful settlement of disputes, including current trends relating to non-use of force and the role of the ICJ in advancing the frontiers of international law. These essays are, therefore, not only directed to the specialised reader but also enable the less specialised reader to examine some of the more important developments in the international community such as the disputes over the French nuclear tests, the issues relating to the exploitation of the global commons, the Lockerbie dispute between the US and Libya and the campaign for the elimination of the use of nuclear weapons in armed conflict. Even an average reader is able to examine these issues in the context of the interaction between competing interests and conflicting conceptions of international law. Dr. Rohan Perera has the advantage of a close familiarity with academic writings, the principal judicial decisions in the field of public international law, complemented by the practical insights that he has gained as the legal advisor to the Foreign Ministry in some of the more important multilateral negotiations.

One of the particular issues on which Dr. Perera has focused on relates to what he describes as "the dismantling of the concept of the common heritage." He points out in this essay that the concept of common heritage was a revolutionary principle which implied a new order for the oceans based not on

competition and conflict but on co-operation.[2]

In the early phase of the negotiations relating to the UNCLOS much emphasis was placed on the need for a strong regulatory authority for the equitable exploitation of the resources of the deep sea bed, particularly by developing countries whose claim was premised on a strong belief in the principle of the common heritage of mankind. However, the crucial features which were evolved at the protracted UNCLOS conferences were shaped by the changes taking place in the international political scenario, the most significant of which was the ushering in of the Reagan administration in the United States in 1980, just as the conference seemed to have broadly agreed upon the terms for the exploitation of the deep sea bed. The Reagan administration campaigned for the establishment of a sea bed regulatory regime which allowed the developed countries greater freedom to exploit the deep sea bed. This ultimately resulted in the Deep Sea Bed Authority being reduced to a mere licensing authority rather than the initially contemplated regulatory authority. The concomitant conceptual change was a substantial erosion of the principle of the common heritage of mankind as the premise for the mandate of the Deep Sea Bed Regulatory Authority. The author thereby has skillfully outlined the dominant ideas during the different phases of the negotiations and points out how the shifting nature of the balance of negotiating power impacted on the final outcome. He has pointed out that, in insisting on a mandatory transfer of technology, developing countries over-reached themselves and with the deletion of these provisions the joint venture mechanisms assumed significance in facilitating the transfer of mining and processing technologies.[3]

Many of the essays are also centred on the ICJ, given its important role both in the development of public international law and in fulfilling its role as the principal judicial organ of the UN. He has examined the judgment of the Court arising out of the dispute between Libya and the US in relation to the aerial incident at Lockerbie i.e. the crash of a Pan Am flight over Lockerbie in Scotland. A Grand Jury in the US indicted two Libyan nationals charging them, *inter alia*, with having caused a bomb to be placed on board the plane

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[2] Amrith Rohan Perera, *International Law - Changing Horizons: A Collection of Selected Essays on International Law* (Sarvodaya Vishva Lekha Publishers, Ratmalana) (1997), pp. 136-145.

[3] Ibid.

which subsequently exploded. The Libyan government refused the UK and US governments' requests to extradite the suspects and opted, instead, to prosecute the suspects in its own courts. The matter was thereafter taken up in the Security Council which adopted Resolution 731 urging Libya to fully co-operate in establishing responsibility for the criminal acts committed against Pan Am flight 103. Libya instituted proceedings before the ICJ invoking the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. Under this Convention, Libya claimed the right to either extradite or prosecute the offenders before its own courts and pointed out that US pressure to surrender its nationals was in breach of its international legal obligations. Three days after the close of hearings, the Security Council adopted Resolution 748 which called upon Libya to cease all forms of terrorist actions and to demonstrate its renunciation of terrorism.[4]

The Court, in a majority opinion, held that the obligations of the parties under the Charter to comply with Security Council Resolution 748 supersedes any other treaty obligations under the Montreal Convention. The Court also found that the circumstances of the case did not warrant the exercise of its power to grant provisional relief to Libya. Dr. Perera is rightly critical of the majority decision pointing out that the Court "wilted under the weight" of the political issues surrounding the case and sought refuge in a strict and technical interpretation of the Charter provisions. He has further critiqued the Court for its failure to discharge its obligations to prevent the escalation of disputes and to facilitate peaceful settlement of disputes.[5]

Similarly, the ICJ declined to give an advisory opinion sought by the WHO on the legality of the use by a state of nuclear weapons in armed conflict. The court came to the conclusion that the WHO Constitution could not be interpreted to confer competence on the organisation to address the legality of the use of nuclear weapons. The Court further reasoned that international organisations are governed by the principle of "speciality" in that their powers are limited to only the promotion of those common interests which states entrust to them. Accordingly, the regulation of armaments and disarmament was outside the competence of specialised agencies. Here again, the author is critical of the majority for its rigid and formalistic application of the

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4 *Supra* n.3, pp. 55-56.

5 Ibid.

"speciality" principle. He has rightly argued that the rigid compartmentalisation of the UN system will be prejudicial to the humanitarian objectives of the Charter.[6]

On 21 August 1995, New Zealand sought to involve the jurisdiction of the ICJ in view of the announcement by the President of France that France would conduct a series of eight nuclear weapons tests in the South Pacific commencing from September 1995. The Prime Minister of New Zealand pointed out that the objective was to bring as much moral and political pressure as possible on France in relation to the decision to resume testing. The Court on a divided vote of 12 to 3 dismissed the request by New Zealand for an examination of the situation on what the author has critiqued as a retreat into judicial formation. The Court reached the conclusion that its judgment of 1974 dealt exclusively with atmospheric tests and consequently it was not possible for the Court to now take into consideration questions relating to underground nuclear tests.[7]

The author has not limited his analysis to judicial doctrine; he has also examined several policy recommendations to strengthen the role of the ICJ in relation to the peaceful settlement of disputes. Firstly, he has supported the view that the scope of the advisory jurisdiction of the Court should be widened to enable entities other than the UN and its specialised agencies to seek advisory opinions from the Court. These could include the UN Secretary-General, regional organisations and other international organisations charged with the protection of the global commons. He also favours the proposal that other international judicial institutions and even national courts should submit, through the General Assembly, requests for advisory opinions with a view to promoting the uniform application of international law. Secondly, he concurs with the view that the consensual character of the Court's jurisdiction needs to be re-examined and that all states should be required to accept the unconditional compulsory jurisdiction of the Court with regard to disputes involving human rights, genocide and the protection and immunities of diplomats.[8]

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6 Ibid at pp. 167-176.

7 Ibid at pp. 149-165.

8 Ibid at pp. 37-52.

Although the different essays in this volume deal with distinct themes, the author has endeavoured to locate them within a wider framework which he has described as the changing structure of international law. Implicitly he has sought to address issues relating to the nature and function of international law. There are two competing view points. The first view point is that international law is about rules. It consists of a system of neutral rules and all that international lawyers have do so is to identify and apply them. The classical formulation of this view was made by judges Fitzmaurice and Spender in the *South West Africa Cases* in 1962 where they stated as follows:

> *We are not unmindful of, nor are we insensible to, the various considerations of a non-judicial character, social, humanitarian and other ... But these are matters for the political rather than for the legal arena. They cannot be allowed to deflect us from our duty of reaching a conclusion strictly on the basis of what we believe to be the correct legal view. This formulation reflects the assumption that the "correct" legal view can be discerned by applying "rules" that is to say "the accumulated trend of past decisions regardless of context or circumstances." This view further seeks to distance international law from social policy. The ICJ pointed out in 1966 that "Law exists, it is said, to serve a social need, but precisely for that reason it can do so, only through and within the limits of its own discipline."*[9]

The opposing view that has been advanced by scholars such as Rosalyn Higgins, presently a member of the ICJ, is that international law is not a system of rules but a normative system that is harnessed to the achievement of certain common values. They argue that "without international laws, safe aviation could not be agreed, resources could not be allocated, people could not safely choose to live in foreign lands." The proponents of this view argue that, while rules play a part of law, they do not form the only part and international law is more appropriately described as a process rather than as "rules." Rosalyn Higgins points out that "international law is a continuing process of authoritative decisions... it is not just a trend of past decisions which are termed rules ... where the trend of past decisions is not overwhelmingly clear there is ... (a concern inevitably) ... with policy alternatives for the future." They contend that only such a view of

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[9] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press, Oxford, 1994), p. 4.

international law would enable it to contribute to and cope with a changing political world."[10]

A third approach to international law has been advanced by the Critical Legal Studies school. They take as the starting point the view that law is deeply rooted in social theory and legal processes are located in social contexts in which the place of values is quite explicit. A Critical Legal Scholar believes that the "contradictions are either historically contingent or inherent in the human experience." Critics of this approach argue that this leads to the pessimistic conclusion that "what international law can do is to point out the problems but not assist in the achievement of goals."[11]

Professor David Kennedy contrasts the writings of the 'primitive' scholars with the 'traditional' international legal scholarship of the post-Westphalia period and the 'modernists' of the twentieth century. In his reading the traditional scholars emphasise state sovereignty and made a sharp distinction between international and national law, while 'modernists' attempt in various ways to overcome this, without returning to the native universalism of the 'primitives.'[12]

Professor Sol Picciotti argues that the central limitation of international law lies in the personification of the state, which drawn a veil over the very real contradictions and changes that have been taking place in the nature of the state and the international system."[13] The conceptualisation of international law, according to him, requires a rethinking of the relationship between law and power. Usually this leads the students of international law either to collapse law into a simplified and absolute notion of power and assert that international law merely legitimises the interests of the powerful; or to idealise law as the expression of popular needs or the embodiment of justice which is

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[10] Ibid, p. 1.

[11] Ibid, p.9.

[12] Professor Sol Picciotti, "International Law in a Changing world" in Geoffrey P. Wilson (ed.) *Frontiers of Legal Scholarship* (John Wiley & Sons, Chichester) (1995), p. 154.

[13] Ibid, at p. 202.

flouted by the powerful states.[14] He points out that the new wave of debate in the 1980s, as writers from various perspectives sought to rethink the nature and role of law in international affairs, pre-dated the major changes in inter-state relations which occurred in the 1990s. Much of the writing on international law in the 1970s had taken a functionalist and even instrumentalist view of law, arguing for an adaptation of law to the changed 'realities' of international society, especially the creation of many new states by decolonisation. The current international scholarship in this area reflects, he opines, the ferment of intellectual debates about the possibility and limits of reason, order and justice in society. In earlier periods dissatisfaction with traditional perspectives and explanations led either to projects for a new world order, or at least to critiques of the existing bases of social power, aiming to empower the oppressed. In relation to the central issue of the changing nature of the state and of the global system, the limitations of some of the critical and theoretical approaches which are confined to the conceptual framework of international law have become apparent.[15] He also opines that in general, there seems to be a large gulf between the debates within theory and any engagement with or attempt to understand the changes taking place in international society."[16] Dr. Rohan Perera does not seek to explicitly locate himself within this debate. It is, however, clear that he would not associate himself with the ultra-classicist position of Fitzmaurice that international law is about "rules." He has argued that the international community must harness international law in a positive and creative manner to regulate the conduct of states in such areas as the peaceful use of outer space, disarmament, and in developing the principles of environmental law relating to the global commons. Unlike the Critical Legal Scholars, Dr. Perera is animated by an almost passionate faith in the informative power of international law and the potential of international institutions to respond to the challenges of a changing political world.

Finally, the question remains as to whether international law is really a universal system. Historically, socialist and developing countries, had a different view of its nature and content. However, in the last three years there has been a radical shift in the approach of international legal scholars

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[14] Ibid., at p. 189.

[15] Ibid., at p. 191.

[16] Ibid., at p. 192.

based in the former socialist states. The emphasis now is on interr
as the articulation of a universal interest in the common threat
survival. International law is thus conceived by these scholars as a
achieving universal human values.

Developing countries have, on the other hand, consistently pointed
they played little or no part in shaping much of customary internatio
The author has correctly observed that, "until recently, it was little mo
the public law of Europe. The early jurists who profoundly influen
nature and content of international law from the sixteenth century
nineteenth century were almost entirely based in European centres of lea
Pre-eminent amongst them was the Dutch scholar, jurist and diplomat G
(1583-1645) whose systematic treatise on the Law of War and Peace
appeared in 1625. He thus created the first comprehensive framework fo
modern science of international law.

Rosalyn Higgins has argued that, while developing countries have questio
the substance and content of international law, they have not questioned
universality or refused to be bound by its detailed provisions.[17] O
significant development has contributed towards the increasing trend
question the universality of human rights law in particular. The economi
success of East and South-East Asia is the central strategic fact of the nineties
For the first time since the adoption of the Universal Declaration of Human
Rights, countries which are outside the Judeo-Christian intellectual traditions
are in the first rank. These countries are becoming increasingly conscious of
their own civilisations, traditions and institutions. It is, however, disturbing
that even the consensus achieved in framing the Universal Declaration of
Human Rights is now being questioned but wrong to insist that everything has
been settled."[18] In South Asia where there is a legal and ideological
commitment to multi-party democracy, fundamental rights, the rule of law,
and the independence of the judiciary, this thesis cannot be accepted.
Certainly, South Asian civil society is extremely sceptical of any effort to
question human rights in the guise of protecting Asian values or a model of

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[17] Ibid., at p. 12.

[18] B. Kaushikan, "Asia's Different Standards" in Steiner and Alston (eds.), *International Human Rights in Context - Law Politics Morals: Texts and Materials* (Clarendon Press, Oxford, 1996), p. 230.

development authoritarianism. On the contrary, we believe that the discourse on human rights should not be appropriated by the West, and that South Asia should draw on its own traditions and experiences to further advance the frontiers of international human rights law.

Aung San Suu Kyi has effectively refuted the challenge to the university of the Universal Declaration. She has argued "it is a puzzle to the Burmese how concepts which recognise the inherent dignity and the equal and inalienable nature of human rights, which accept that all men are endowed with reason and conscience and which recommend a universal spirit of brotherhood can be inimical to indigenous values. It is also difficult for them to understand how many of the rights contained in the thirty articles of the Universal Declaration of Human Rights can be seen as anything but wholesome and good."

I do, however, agree with the author that the developing world cannot once again be left behind in the formulation of international norms and principles which would govern the international community in the years to come. The question remains, are we adequately equipped to respond to the challenge? In the Colombo Law Faculty, international law is still an optional subject. The revisions to the curriculum adopted recently have made international law a compulsory subject in the third year of study. Even the Law Faculty's collection on international law has significantly declined and it is barely able to acquire the basic text books. It is almost impossible to gain access to the more important journals or the decisions of international judicial organs or those of arbitral tribunals. There were private libraries such as that of the late S. Ambalavanar which had an excellent collection of journals on public international law, or specialised aspects of international trade, investment and tax law. But these libraries are no longer intact and are unable to sustain the collection. The lack of access to books is further compounded when we confront the problems of teaching in Sinhala and Tamil.

The author has made a significant contribution to our understanding of the contemporary challenges faced by international law. Vishva Lekha Press must be commended for the high quality of the printing and the boldness of its commitment to serious publications in the law.

Rosalyn Higgins has pointed out that "we must expect in the international system an endless kaleidoscope of problems. Major charges in the international system ... will change the pattern of the problems, but not

eliminate the phenomenon. International law is a process for resolving problems. And it is a great and exciting adventure."[19]

[19] Rosalyn Higgins, *supra* n. 9 at p. 267.