LST REVIEW

Volume 8 Issue 129 July 1998

SECULARISM AND PERSONAL LAWS

LAW & SOCIETY TRUST

LST REVIEW

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

EDITOR
Dr Sumudu Atapattu

Law & Society Trust
3 Kynsey Terrace
Colombo 8 Sri Lanka
Tel: 94 1 691228/684845
Fax: 94 1 686843
e-mail: lst@slt.lk

From the Editor.....

In this issue we publish a paper by Professor Narendra Subramanian of McGill University on "Secularism, Statecraft and Citizen-craft in India" presented at a Conference at the McGill University. The main focus of his paper is on secularism and personal laws in India in which traces attempts at legal reform in relation to personal laws and to draft a uniform Civil Code. He discusses the tensions between secularism, nation-building and cultural pluralism and concludes that "from the standpoint of women's rights, the presence of diverse personal laws influenced by religious norms is perhaps not the central problem. The main problem is that visions of the family are central to laws governing personal relations." He contends that the secular civil code should define ***the individual*** rather than the family as the unit it governs.

We also publish two books reviews - the first by Dattathreya C.S. and the other by Dinusha Panditaratne, interns at the Trust. In a rather scathing critique of the book *Ethnicity and Constitutional Reform in South Asia,* Dattathreya identifies a basic premise underlying the entire book - that of the ***problem of ethnicity in South Asia...*** referred to by the editor in the Introduction. Dinusha Panditaratne's review of *Public Interest Litigation in South Asia: Rights in Search of Remedies* is also critical of the publication as a whole, while admitting that at least some of the chapters contain useful information. The reviewer points out that different chapters seem to cater to different audiences and are also at different degrees of usefulness. She also believes that the publication as a whole is weighted heavily towards the Indian experience with Public Interest Litigation and not enough attention has been paid to other jurisdictions in the region.

Secularism, Statecraft and Citizencraft in India*

Narendra Subramanian**

Discussions of transitions towards democracy and the consolidation of democracies have to inevitably consider the following question: what kind of laws would best enable effective governance, the maintenance of democratic institutions and the realisation of democracy's many elusive promises? The answer to this question is likely to depend on the social context and historical legacies. At least, it cannot be presumed to be the same in all new democracies, or even to remain the same over time in societies with longer histories of democratic rule.

Legal Pluralism and Secularism

Two questions arise in connection with the task of devising appropriate laws: first, whether the same laws are to be applied to all citizens in all respects; and second, whether laws are to derive their inspiration from norms embedded in particular religious traditions or from secular sources. This paper considers these questions, as they have arisen at some crucial points in India in the context of devising laws governing matters deemed 'personal'. These are largely matters dealing with the family, such as marriage, divorce, and maintenance upon obtaining a divorce; the status of minors, adoption of children, and guardianship; wills, intestacy, and succession; and joint families and the partition of joint families. India is among the countries in which these questions have been matters of sharp public debate at crucial points, and the choices that the state made after decolonisation have had important implications for citizenship, cultural pluralism and gender relations. These choices were legitimised in terms of a long-term vision of nation-building,

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* Paper presented as part of panel on 'Accessibility for the Most Vulnerable: Extending Citizenship and Security to the Disadvantaged' at the conference on 'Democracy and the Rule of Law: Institutionalising Citizenship Rights in New Democracies,' McGill University, March 19-20, 1998.

** Department of Political Science, McGill University.

encompassing secularising ambitions and a concern for maintaining cultural pluralism. They were, however, influenced by the needs for compromise between sharply divergent opinions which enjoyed considerable public support. The tentative nature of some of these choices and the lack of consensus over them is another sign of the fragile foundations on which Indian democracy rests.

Two related arguments, with long and distinguished histories, address the question of uniform laws: one, that the principle of equal citizenship requires the application of the same laws to all citizens; and the other, that the state should use legal and other mechanisms to promote somewhat similar mores among its citizens to ensure the solidarity of the political community.[1] The likes of Kymlicka (1995) have departed partially from such views recently, arguing for differentiated citizenship rights, and specifically differentiated laws, in many societies within which cultural differences are deep. Such scholars point out that laws inevitably draw from norms specific to particular cultures, or at least very often tend to do so. They argue that if the norms governing particular areas of social life vary considerably across cultural groups in certain societies, and these groups attach great significance to following these norms, different laws ought to regulate the relevant areas of life. Such arguments provide, to varying degrees, for the adjudication of group norms with reference to some universalistic principles of justice, and for individual citizens to choose the laws which will govern them.

While political philosophers primarily justify plural legal systems with reference to considerations of justice, proponents of consociational democracy (for example, Lijphart, 1977, 1996) have argued that such arrangements are required to maintain stability and strengthen the loyalties of citizens to the political order in multicultural societies. Although sophisticated philosophical arguments in favour of pluralistic legal systems have gained prominence in the academy only over the last generation, versions of these arguments motivated various ruling elites to establish plural laws in many contexts much earlier. 'Pre-modern' rulers in the Arab world, Ottoman Turkey and southern Asia recognised plural laws, and allowed members of other cultural groups some autonomy to regulate certain areas of life, as did European colonisers in many

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1 The contractualist tradition, extending from Rousseau through Kant to Rawls, has provided the most sustained argumentation in favour of such positions.

parts of Asia, Africa and elsewhere.[2] So, post-colonial and post-imperial regimes undertaking diverse modernising projects inherited as legacies both plural legal systems and popular notions of group norms and rights which were influenced in complex ways by these plural legal systems. While some of them abandoned the existing plural laws entirely (for example, post-Ottoman Turkey), others preferred to modify and incorporate the existing plural laws within new notions of citizenship (for example, post-Ottoman Lebanon, post-colonial India).[3] Considerations of both justice and stability motivated the latter kind of choices.

In cases in which the primary cultural cleavages relevant to the formation of legal institutions are taken to follow the lines of religious affiliation, arguments for legal pluralism are also arguments in favour of some religious norms exercising influence over aspects of law. The dominant view regarding the sources of law was and continues to be that secularisation is inexorable as well as desirable, and that modernising states ought to promote secularisation by erecting a 'wall of separation' between religion and public life.[4] This is taken to be the path followed in Europe since the Reformation, and in North America subsequently. Some critics of this view point to the continued influence of Judeo-Christian norms and medieval canon law on contemporary civil law in the 'West'. Further, they argue that courts slip frequently from the 'wall of separation' doctrine, even in the United States where this doctrine was first enunciated, to a weaker 'no-preference' doctrine, for instance by granting tax exemptions to all religious institutions (thereby promoting all existing religions equally).[5] Rather than undermining the view that laws ought to be divorced from religious norms, such observations could be taken to indicate that the secularisation of law has to proceed further even in Western societies. They certainly do not conclusively show that secularist models are inappropriate for legal reform in societies where processes of secularisation began more recently and have proceeded less far.

More radical criticisms of secularism as an ideology guiding state action have emerged recently in India, whose experience I will soon discuss. Ashis Nandy and T.N. Madan, the most prominent of them, accept the dominant vision of

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2 See Hooker (1975), Merry (1988).

3 Baird (1993), Joseph (1997)

4 See Martin (1978), Berger (1973).

5 Karst (1993), Smith (1963)

the progress of secularisation in the West, but argue that secularism as official ideology is both unworkable and undesirable in South Asia/the 'East' (the distinction often being erased by the flow of eloquence).[6] They offer different reasons for their position. They point out that secularisation processes of the kind witnessed in the West have not occurred elsewhere, and indeed will not in many of these societies as the majority of people are not only active adherents of particular religions, but also believe that norms drawn from these religions ought to govern public life. Besides, they argue that the religions of South Asia/the 'East' are 'totalising,' i.e. meant to prescribe rules for every aspect of social life. They primarily have Hinduism and Islam in mind, but also mention Buddhism, Sikhism and other religions in passing.

If the anti-secularist characterisation of Eastern religions were true, then one cannot be an adherent of one of these religions and accept the relegation of religion to the private sphere.[7] So, the secular-democratic principle of freedom of religious belief and practice would necessarily come in conflict with the secularist principle of the separation of public life from religion where totalising religions are embraced by large sections of the population. It is worth noting that the anti-secularists equally reject two different versions of secularist conflict management in multi-religious societies - the one involving the separation of religion from public life, and the other involving the state's adoption of a posture of equidistance from different religions and religious groups. Instead, they offer the alternative of resuscitating the tolerance they presume to be inherent to 'religion-as-faith,' i.e. religion as understood by pre-moderns and those whose vision of religion and the world has not been deeply transformed by secularising forces. 'Religion-as-faith' is considered an antidote both to the intolerance of many religious nationalist movements, taken to be embodiments of 'religion-as-ideology,' and to secularism's supposed intolerance of religious faith. Indeed, these scholars claim that religion-as-ideology and its intolerance are themselves reactions to the marginalisation of religion-as-faith in an increasingly secular and desacralised world.

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6 See Madan (1987, 1989), Nandy (1985, 1990).

7 Their characterisation of these religions bears a resemblance to Huntington's discussion of Islam and Christianity. See Huntington (1996). This is because all these authors to some extent accept scripturalist and static visions of these traditions elaborated by Orientalists.

The all too evident crises of official secularism in countries like India, Turkey and Algeria have lent the radical critiques of secularism a semblance of plausibility.[8] However, these radical criticisms are untenable in the form in which they are articulated. Madan and Nandy too readily accept the Orientalist dichotomisation of 'West' and 'East,' which was always problematic and is only becoming more so with the increasing hybridisation of all cultures. Besides, their claims about the 'totalising' nature of Eastern religions are at odds with the evidence of considerable variation, fluidity and syncretism in the practices of adherents of these religions.[9] Such evidence indicates that these religions could become transformed by secularisation, much as Christianity has in the West since the Reformation. Further, their assertions of the tolerance intrinsic to 'religion-as-faith' conveniently skirt the many thorny problems raised by conflicts between the norms of various religious communities, as they have evolved. As a result, their formula of returning to traditional religion as an antidote to the problems raised by secularism and intolerant expressions of religious affiliation fails to yield concrete answers for building pluralism and democracy in embattled societies today.[10]

Although radical anti-secularism rests on many questionable premises, this brand of theorising has arisen in response to many genuine problems associated with official secularism in societies in which many citizens feel that religious norms ought to influence important aspects of public life. Official secularism can and has bred intolerance and undermined the prospects for democracy in many such societies, although it is hardly the primary source of legitimation of violence against the weak and the dissenting, as Madan and Nandy claim.

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8 Yalman (1990), Shankland (1996) and Spencer (1996) discuss the crises of official secularism in Turkey and Algeria.

9 The evidence for this is especially strong in studies of belief and practice across the wide range of societies with large Muslim populations. See Eickelman & Piscatori (1996), Esposito (1991). Studies that pay attention to history and society, rather than scripture alone, show the same to also be true of other 'Eastern' religions like Hinduism and Buddhism. See van der Veer (1994), Tambiah (1976, 1984).

10 Chatterjee (1994), Tambiah (1997), and to some extent Bilgrami (1994) offer criticisms of Madan and Nandy that are partly similar to mine. They examine the arguments at much greater length, which I do not discuss as that is not the focus of this paper.

A good example of this is Kemalist Turkey, which was a source of inspiration for many secular Indian nationalists like Nehru.[11] The establishment of the post-Ottoman Turkish Republic not only involved the overthrow of the caliphate, but also the replacement of the shariah and a variety of legal codes specific to particular religious groups, sects and linguistic groups with uniform and secular civil, criminal and commercial codes imported wholesale from Switzerland, Italy and Germany respectively.[12] Turkey's ruling elites believed that such rapid moves towards legally enforced secularisation were necessary for modernisation, and wished to use their control over power and popularity among Westernised urban elites to push these changes through. They were willing to disregard popular sentiments in doing so, and brutally repress opposition to their efforts at enforcing secularisation, because the dominant models of modernity offered by the experiences of industrialised countries suggested that secularism, industrialisation and democratisation necessarily came in one package. However, the effects of disregarding popular sentiments were serious. Democracy was seriously abridged, many citizens who did not identify with the new secular institutions chose to take their disputes and concerns to other informal fora especially in rural areas, and the secular state acquired some odium in their minds. Arguably, democratisation was postponed and the long-term prospects of secularisation gaining widespread acceptance weakened because of the cheerful confidence of ruling elites in secularism as the ready path to modernity.

The experience of Kemalist Turkey is only an early and good example of the dangers of enforced secularisation in societies where popular visions of legitimate authority are deeply influenced in different ways by religious norms. Similar notions of the appropriateness of secular models in all contexts, and the backwardness of public cultures imbued with religious norms, inspired authoritarian secularisation in current and formerly communist regimes (with the partial exception of Poland), pre-revolutionary Iran and, to some extent, post-colonial Algeria. The unpopularity of efforts to change public culture along secular lines contributed to the growth of Islamist opposition in Iran, and forced the Algerian regime to beat a retreat and introduce Islamic family laws in 1984. However, the banning of the FIS in Algeria in 1992, and the Welfare Party in Turkey this year suggests that

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11 Nehru first argued in his writings for a secular state as a desirable goal for India with reference to the example of the post-Ottoman Turkish Republic. See Nehru (1942: 706), Smith (1963: 53-54)

12 See Hooker (1975), Inalcik (1995: 153-164)

ruling elites are still willing to use secularism as an argument to abridge democracy or abandon transitions towards democracy.

India is undoubtedly a partial exception to the above trend. The post-colonial state adopted a secularist ideology, but was willing to defer the secularisation of personal laws in the light of public sentiments. Scholars have pointed to its willingness to accommodate religious, and more broadly, cultural pluralism within post-colonial state institutions as a major reason why democracy was consolidated in India amidst considerable cultural diversity.[13] However, it is worth noting that a commitment to secularism was incorporated into the Indian constitution only in 1976, while India was experiencing a brief authoritarian interlude. It was not coincidental that ruling elites waited 29 years after decolonisation to introduce this constitutional amendment at a point when the abandonment of open political competition insulated them from legislative and public protest. One thus, sees an association of secularism with authoritarianism to some extent in India also.

Besides, the compromise between the secularising ambitions of ruling elites and the opposition of some influential groups left many questions unresolved. The constitution included a directive to abandon the personal laws largely inherited from the colonial period, and adopt a uniform civil code at an unspecified date, but did not indicate the conditions under which such a shift would be effected. This left considerable room for legislative and judicial interpretation, and continuing public debate and conflict over the personal laws. Groups otherwise bitterly opposed to each other have found themselves on the same side on such debates, to their mutual surprise. As the personal laws pertain centrally to gender relations, the retention of these laws restricts the ability of the state to effect changes in laws governing gender relations. Besides, there was a general sense that secular laws would be more favorable to women and laws purportedly based on religious norms. Thus, the women's movement was till recently unanimous in advocating a move towards a uniform civil code, as were liberals and socialists for the most part. Some Hindu nationalists initially opposed efforts to move towards a uniform civil code, as well as to reform Hindu personal laws. But, they have more recently become even more resolute than feminists, liberals and socialists in demanding a uniform civil code, seeing in it a means to advance their project of

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13 This argument has been made in different ways by Weiner (1989), Lijphart (1996), Young (1976), Kothari (1971) and many others.

establishing Hindu cultural hegemony. As Hindu nationalists have promoted considerable intolerance and violence and for the most part advocated patriarchal visions of the family and women's roles in public life, many feminists, liberals and socialists have felt the need to reassess their positions on personal laws. This has led some of them to question whether in the current Indian context, and perhaps in other contexts too, secularism is a vision that can inspire democratic statecraft as well as what I call "citizencraft," i.e., the craft of citizens outside state institutions fashioning viable strategies for transformative action. Influenced by these considerations, the rest of the paper considers the appropriateness of secularism and uniform citizenship as visions capable of stabilizing and deepening democracy, with reference to some important features of the formulation and implementation of laws concerning family, gender and personhood in India.

Personal Laws in India: A Brief and Selective Historical Survey

A. The Colonial Period

Differentiated personal laws were instituted under British rule over a period ranging from 1772 to 1937. It is important to consider aspects of these colonial personal laws as they set the stage in many ways for post-colonial legal reform. Different laws came to be applied, initially to different religious groups, and later to territorially concentrated tribes, lineages and castes, based on a pragmatic strategy of abstaining from interference in customs taken to be ancient, to maintain stability. This approach was reinforced after the British Crown assumed direct control over India in 1858. The process of partial codification of religious and customary laws inevitably involved favouring some variants of pre-colonial practice over others. The choices made in this regard were influenced by both the predispositions of colonial law-makers and the groups from which they drew the experts they chose to consult on religious law and customary practice.

The process of legal codification and reform in colonial India and some of its social consequences have been discussed in great detail elsewhere.[14] Attention is paid here to particular features of this process relevant to the

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[14] See Hooker (1975: 55-84, 94-101), Derrett (1963; 1968: 225-320; 1978), Smith (1963: 269-277), Jain (1981: 369-482), Galanter (1989: 15-28), Parashar (1992: 46-76)

present discussion. Uniform criminal and commercial laws were established, but laws were differentiated only with regard to matters deemed personal, which were considered more central to the spirit of religion and custom. However, pre-existing religious laws and customs pertained to matters like commerce and the punishment of crime, just as much as to matters like marriage and succession. The lines were drawn between the province of differentiated personal laws and the domain of uniform law in ways influenced primarily by the division of jurisdiction between secular and ecclesiastical courts in England, and notions regarding the boundaries between the religious and the secular realms, and between the private and public spheres prevalent in Europe in the eighteenth and nineteenth centuries. This influence has been partly acknowledged, but not explored in the literature.[15] Neither has there been a careful exploration of tensions between the demarcation of the boundaries between personal and uniform law and what various local groups considered most valuable about pre-colonial practices, tensions that sometimes undermined the purpose of the colonial state in drawing these boundaries i.e. ensuring stability. Scholars have skirted these questions by observing that, despite such incongruities between colonial personal laws and pre-colonial norms, Indians' notions of group boundaries and what is central to group culture were reshaped by the colonial legal system. Although this claim is clearly true, it only makes it the more crucial to consider how the domain of the personal was defined in the colonial period, and redefined in the course of post-colonial legal reform.

A crucial feature of the demarcation of legal boundaries referred to was that the domain of personal law largely coincided with matters pertaining to rights and obligations within the family. As a result, the personal laws are sometimes referred to as family laws.[16] Two things are worth noting in this regard. First, the 'family' which was central to colonial and post-colonial personal law was sometimes the joint family and sometimes the nuclear family. Indeed, the personal laws adjudicated conditions under which joint families might be dissolved into nuclear families. To that extent, there was flexibility in the legal vision of the kind of family norms appropriate to particular groups, and thus room for contestation in this regard. Second, the domain of religious law was defined differently under colonial rule in India

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15 See for instance, Derrett (1968: 233), Mansfield (1993: 146)

16 Kapur & Cossman (1996: 87-172) show that patriarchal visions of the natural and socially desirable form of the family influence the legal regulation of women, some reference to features of post-colonial Indian personal laws.

promote intolerance and violence. Besides, the secularist proponents of a uniform civil code were largely uncritical of the gender-discriminatory features of the 'Special Laws', which were expected to be the kernel of a future uniform civil code.

Those who argued for a 'not yet' position, that a move towards a uniform civil code should be initiated by the religious minorities, included the leaders of India's main parliamentary communist party, the Communist Party of India (Marxist). They seemed unaware that such a position is contingent on a vision of the Indian nation as a composite of religious blocs, rather than the homogeneous and perhaps syncretic entity to which they usually appealed. Further, such a position is coherent only if these parties view themselves as Hindu in core, a view that vehemently reject. Perhaps these secularists failed to recognise these implications of their position because they had not reflected on the veiled majoritarian features of official nationalism (to which I earlier alluded) and how far they may have unwittingly come to share these aspects of the government's vision. Some secularists and feminists have reflected on such failings of theirs over the last decade.

Conclusion

What does the foregoing account of legal reform in post-colonial India suggest about the wisdom of the policies the Indian government followed in the early post-colonial period, and more generally about whether plural laws and secular laws were desirable in that context? The patterns of mobilisation in the late colonial period were such that many citizens viewed India as an entity composed of distinct religious/cultural blocs at the point of decolonisation, a view reinforced by the formation of Pakistan. Besides, the most influential late colonial political mobilisers had encouraged citizens to consider religious norms as appropriate bases on which to build public institutions, or had, at least, not effectively discouraged them from feeling so. These were factors that post-colonial ruling elites had to take into account in devising laws if these laws were to be regarded as legitimate by much of the population. So, the retention (even if temporary) of some laws relevant to particular religious and other cultural groups was probably necessary to establish the rule of law and consolidate democracy. To that extent, wisdom dictated the post-colonial state's strategy.

However, the state's approach had many shortcomings. Among them were the selective focus on reforming the Hindu personal law alone, and the state's disinclination to change the substance of minority personal laws. The rationale provided for this approach, which primarily turned on the concerns of the religious minorities for cultural autonomy, was deeply suspect. Even if one accepts the principle that group norms ought to dictate some of the laws relevant to a group, the norms of Hindus were no more subject to change because they constituted the vast majority of the population than the norms of other religious groups were. The argument based on group norms would suggest the adoption of institutions sensitive to changes in group norms and group boundaries. In the process of codifying Hindu law, the state took it upon itself to interpret Hindu norms. Indeed, it went even further, and shaped Hindu laws according to the directions in which it wished to guide Hindu practice. With non-Hindus, it in effect ceded authority to conservative political and religious leaders to define group norms. Mechanisms were not established to periodically ascertain the opinions of members of the groups to whom the personal laws applied. So, the Hindu personal laws were reshaped as ruling elites wished, rather than as the majority of Hindus might have wanted (assuming that a loose consensus might be taken to exist within such a large group on many contentious questions). The gate was effectively closed to changes in the personal laws of the religious minorities as the elites who were authorised to speak on behalf of these groups have shown no inclination to accept changes.

This approach to personal law reform had many pernicious consequences. The state, in presuming to legislate for Hindus but not for other religious groups, was in effect presenting itself as the representative of Hindus, but not of the religious minorities. Rather than making non-Hindus feel fully included in the national community, the state's implicit self-presentation left these groups on the margins. The lack of room provided for legislative reform in the light of changing public opinion ensured that the margins could not be redrawn, and that the religious minorities would remain in them. Further, the selective reform of Hindu personal law alone aroused the feeling among some Hindus that the state was intruding into their practices. This enabled Hindu nationalists to mobilise such groups in opposition to the Indian state and its proclaimed secularism, and to portray Muslims as particularly backward and resistant to participation in 'modern nation-building projects.' Therefore, far from restricting conflict among religious groups and enabling the closer incorporation of non-Hindus into the Indian nation, the Indian state's approach

to the personal laws perpetuated the marginalisation of non-Hindus and gave Hindu nationalists further scope to grow and promote inter-religious conflict.

The inadequate provision for reform of personal laws in the light of popular mobilisation also impeded the introduction of laws that would expand women's autonomy, and increase their rights to inherit and own property, determine how property is used and benefit from its use. The Hindu civil code did increase the rights of many women in this regard, without bringing them close to a position of legal parity, as the gender bias in the religious and customary laws which governed many Hindus before decolonisation was greater than that of the Hindu civil code. However, it is worth noting that the gender biases of the laws which the state took the initiative to formulate were not necessarily less than those of the personal laws of religious minorities like the Christians and Parsis, which the post-colonial state reshaped less in view of the minority status of these groups. Thus, the gender biases in the law were not primarily a result of the state refraining from reshaping the personal laws of non-Hindus, but the way in which it defined the implicit rules for reshaping them.

What of the Constitution's formula of eventually moving towards a uniform civil code? The Constitution, of course, left unclear how this process would happen. If the codification of Hindu (and perhaps later other) personal laws was said to be a part of this process, perhaps there was an implicit hope that changes in public opinion would lead to a blurring of boundaries between these laws, leading to the emergence of uniform laws. But, the insulation of the content of personal laws from public opinion precluded such an eventuality, which was not guaranteed to happen even otherwise. Perhaps the idea was that the state would eventually take the initiative in promoting legal syncretism, much as it upheld cultural syncretism. The state failed to set up mechanisms that would enable it to move in such a direction.

Would a move towards a uniform civil code, at whatever pace, have been conducive to restricting inter-religious conflict and empowering women in the long-run? Would such a move be desirable today? Surely, the answer to these questions depends on the content of such a civil code, which, in turn, would be influenced by the outlook of those who initiate the institution of such a code. Currently, it is the Hindu nationalists, poised to assume power in India, who are the most ardent champions of a uniform civil code, whose content they too have conveniently failed to specify. Given the patriarchal vi[illegible] of the family they advocate, the Hindu nationalists are very unlikely

to institute a civil code that empowers women significantly. Besides, the communally coded nature of the Hindu nationalist discourse regarding a uniform civil code virtually ensures that the institution of a uniform civil code by a government led by Hindu nationalists would evoke bitter protests from non-Hindus, probably leading to another wave of violence. Perhaps it is just as well that the Bharatiya Janata Party (BJP), the main Hindu nationalist party, heads an ideologically diverse coalition and that a BJP-led government cannot win a vote of confidence in parliament without support from a large number of other parties. This seems likely to ensure that the BJP will not push for a uniform civil code now, and indeed party leaders have indicated as much.

Would a uniform civil code instituted by secularists, rather than Hindu nationalists, diminish levels of ethnic conflict? The conflicts associated with the Shah Bano judgment suggest that the introduction of a uniform civil code is likely to only increase ethnic conflict unless ethnic antagonisms have declined in society, and the government instituting such a code abandons the current communally coded rhetoric about a uniform civil code.

Would a uniform civil code instituted by secularists increase women's rights? That would depend on what kind of secular laws are instituted. Secularism can coexist with patriarchy almost as much as religious norms can. Indeed, women have more rights under some of the tribal personal laws in India today than under such optional secular civil laws that exist. If a secular civil law defines the family as the unit of personal life, as colonial and post-colonial personal laws have in India, the extent of autonomy such a law permits women depends on how it envisions the family. As most visions of the family involve very unequal gender relations in India and most other societies today, it is such visions that are likely to shape laws regarding personal relations which define the family as the unit of personal life. Thus, from the standpoint of women's rights, the presence of diverse personal laws influenced by religious norms is perhaps not the central problem. The main problem is that visions of the family are central to laws governing personal relations. If a secular civil code is to considerably improve the situation of women, it should define the individual rather than the family as the unit its laws govern. Such laws are more likely to be of a secular than a religious inspiration as the patriarchal family, in some sense, is central to most religious notions of personal life.

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Book Review

Ethnicity and Constitutional Reform in South Asia., Edited by Iftekharuzzaman, (Regional Centre for Strategic Studies, Colombo, 1998)

By

C. S. Dattathreya*

The introduction to the present book, setting out the agenda for its collection of papers, presents the basic approach that has been adopted by all its contributors. The introduction by Iftekharuzzaman, the editor, contains a couple of references that betray a fundamental world view which is itself problematic to me. He starts one of his paragraphs with the words "This book probes into the *problem of ethnicity in South Asia...*"[1] (emphasis added). He starts another paragraph with the words "The challenge of transforming ethnic and religious diversities into nationhood remains endemic in South Asia..."[2] If one does not share his fundamental characterisation of the problem itself, it is difficult to go ahead and actually review the things that are being said in the book. However, acknowledging the futility of such an attitude, I would like to structure my review thus: in the first part of this review, I will try to review the papers in the book within the parameters that the Introduction itself sets for the book, and then in the second part, because my misgivings are so fundamental in nature, I will take the liberty to try and articulate my own thoughts on the themes that are in currency here.

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*Intern, Law & Society Trust.

1 p.8

2 p.8

Part I

All the contributors to the present volume share a belief in the ability of a constitutionally constructed nationhood to solve the "problem of ethnicity" in South Asia. In fact, much of the book goes even further in concurring in a positivist notion of the legitimacy and "efficiency" of constitutional mechanisms in "managing ethnicity." It is perhaps understandable that this should be so given the context in which these papers were presented, that of exchanging South Asian state experiences in "managing ethnicity." In fact, as one reads through the book, one senses that some of the material in the book is constrained by such a context. Consciously justifying such a statist approach to the "management of ethnicity," Partha Ghosh says that "The more the disaffected parties indulge in bargaining with the state the more they realise the feasibility limits of their demands as well as their own mortality"[3] and further that "so long as the Indian state vouches in the name of territorial nationalism, that is, civilisational nationalism, and not on cultural nationalism, its ethnic problems would remain manageable and would not probably threaten the territorial integrity of the nation."[4] I don't quite see how territorial nationalism and civilisational nationalism are interchangeable). How far such a belief in the nation-statist ideology of constitutionalism is any longer viable is, of course, itself in question.

At a conceptual level, there seems to be a lack of consensus among the different contributors as to what the term "ethnicity" actually means. If to the Editor, ethnicity, apart from being one of the most pervasive features of political life, is a problem in South Asia, to Mohammad Humayun Kabir, the Bangladeshi contributor, ethnicity is a form of separatism.[5] Subhash C. Kashyap, one of the two Indian contributors, invokes a series of Western scholars to seek to clarify the content and connotations of the term "ethnicity". One of the people he invokes is Werner J. Cahnman who, in what Kashyap considers to be his "definitive writings on the subject," laid emphasis on the shift from 'ethnos' to 'demos' as the basis of social organisation. This idea envisages a 'progressive development' from a kinship based 'ethnos' to a territorially delimited 'demos'. 'Demos' is purported to

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[3] p.78

[4] p.79

[5] Supra n.1 at p.24

be a fundamental premise of democracy, in a situation of whose supremacy all different ethnicities or cultural diversities can get fulfilled, transcended and subsumed.[6] Partha S. Ghosh, the second Indian contributor adopts the catch-all definition of 'ethnic' given by the UNESCO team, INTERCOCTA (International Committee on Conceptual and Terminological Analysis), according to which the term would "include problems of minority groups, nationalities and race relations, at both the intra-state and inter-state levels."[7] Lok Raj Baral, the Nepalese contributor, views ethnicity "both as a device as well as a focus for group mobilisation by its leadership through the select use of ethnic symbols of socio-cultural and politico-economic purposes."[8] One of the definitions of the term that Ambalavanar Sivarajah quotes goes like this: "The word 'ethnic' derived from the Greek word 'ethnikos' refers to: (a) nations not converted in Christianity, heathens, pagans; (b) races or large groups of people having common traits and customs, or (c) groups in an exotic primitive culture."[9] That, more or less, represents the spectrum of connotations that the term is deployed with in the book.

Viewed strictly within the parameters that the Introduction itself sets for the book, the book on the whole serves as a useful assessment although the quality of the contributions is sharply chequered.

Mohammad Humayun Kabir in his presentation of the Bangladesh situation, points out that Bangladesh is the one state where ethnically speaking, there could be said to be almost total homogeneity. The population in the Chittagong Hill Tracts forms about 1% of the total population of Bangladesh. The majority, irrespective of whether they are Hindu or Muslim, is Bengali. And further, as he notes, while the Hindu-Muslim relationship has, by and large, been peaceful, the population in the Chittagong Hill Tracts had been the main source of national instability in the country.[10] The overwhelming homogeneity in terms of demography also found reflection in Bangladesh's

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[6] p.30

[7] p.50

[8] p.84

[9] p.139

[10] pp.10-11

Constitution which originally said (in Article 6) that the 'citizens of Bangladesh shall be known as Bengalis.' This was subsequently amended. Further one of the four state principles enshrined in the Constitution was, as the author points out, Bengali, significantly not Bangladeshi, nationalism.[11] The state in Bangladesh was heavily oriented towards a purportedly overarching Bengali identity. Since this paper was written, of course, the Chittagong peace accord has been concluded which, we are given to believe, has ended the "stalemate" in that country. What is perhaps more noteworthy is that the Chittagong Peace accord conspicuously did not involve any constitutional changes.

Partha Ghosh after initially setting out the basic political and historical background, offers a detailed paper which methodically structures the different levels of constitutional organisation on which the ethnic issue has been sought to be "contained" and "managed" in India. He identifies four broad categories of politico-constitutional responses to the ethnic demand: the state centric, the intra-state centric, the region (inter-state) centric and the village or district-centric (the state here referring to a federal component).[12] He goes on to detail how each of these categories attempted to tackle the situation and also assesses the extent of their success or failure. Partha Ghosh's paper is also valuable because it draws attention, perhaps only to a limited extent, to the tragedy of the Indian state's involvement in the north-east.[13]

Lok Raj Baral's paper on Nepal concentrates on the political context of the adoption and implementation of its Constitution and also brings out a few

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[11] p.15

[12] p.60

[13] For a more critical review of the Indian state's "handling" of the "North-East" and, more importantly, a bitter look into the violence of the nation-state ideology, see Ranabir Samaddar, "A Success-Story: Territoriality, National Security State and the Indian North-East," *Lokayan Bulletin,* 14.3, November-December 1997, pp. 1-10. Towards the end of his paper he notes that "It is wrongly argued that a nation-state is disturbed by ethnicity. It needs ethnicity to produce militarism, to incessantly reproduce the ideology of national security, to define its supremacy, to strengthen its legitimacy by force as well as by manufacture of consent." Further, he says "...communities on their own basis cannot survive this ideological onslaught (the ideology of territoriality) for long, for alas, the community as a category is no longer an adversary of the state; the community has not only reconciled to the state, it has negotiated with it."

illustrative points. According to the Constitution of Nepal the Election Commissioner is to withhold registration from political organisations which restrict membership on the basis of religion, class, tribe, language, or sex.[14] In other words, the Constitution wishes that politics is not to be practised on these grounds. And yet, the Nepalese Constitution itself proclaims that Nepal is, *inter alia*, a Hindu kingdom and that Nepali is the national language. It is clear that the former provision has been included in furtherance of what may roughly be termed as the secularising desire or impulse of rational governance mechanisms. But at the same time, when it comes to the assertion of identity of the state itself, the hegemonic symbols in society come to the fore. This is a discrete instance of a fairly endemic paradox, which can, of course, be seen in Sri Lanka too.

Of the other contributors, Moonis Ahmar discusses the Pakistan situation; G.L. Pieris discusses options within traditional constitutional power sharing mechanisms; Ambalavanar Sivarajah examines the feasibility of a consociational approach to the Sri Lankan question; Lakshman Marasinghe outlines the possible constitutional changes that may be needed for ending the ethnic conflict; and Gamini Samaranayake examines the historical evolution of the ethnic conflict as an integral product or by-product of the colonial and post-colonial process of modernisation.

Much as I was determined not to let the Introduction's agenda slip out of my mind, I couldn't resist picking out one choice dash of wisdom that Subhash C. Kashyap vouchsafes us in his paper. He quotes, with approval, the Pakistani editor of *Mashal,* Iqbal Khan: "Modern politics is a game of numbers, power belongs to those who command the highest number of votes. In a backward society where people's behaviour is governed by emotions and prejudices rather than reason, and where society is fragmented into numerous groups on religious, ethnic, tribal, casteist, biradari, etc., lines, it is not surprising that politicians win votes by playing off one group against another."[15] Clearly such "analysis" is beyond redemption even in one's most charitable mood.

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[14] p.98

[15] p.41

The positivist underpinnings of the book are most overt and explicit in Professor Lakshman Marasinghe's paper. His position is announced at the outset: "The conditions that make constitutions necessary are based on mistrust. Constitutions are therefore not built on trust. They are meant to contain and deter the activities of miscreants."[16] In a foray into a discussion on the legitimacy or otherwise of extra-constitutional change in Sri Lanka, Professor Marasinghe invokes Hans Kelsen's version of positivism: "...the jurisprudence available today allows extra-constitutional changes and such changes, when they have been successfully completed, are none the less considered to be constitutional and, therefore, legal."[17] And further, he avers that even the 'Grundnorm' or 'Constitution' replaced by force or by consent, effectively, by another Constitution, by means other than legal or constitutional, was legal or valid. The crucial point here is the efficacy of the change. Now I must confess that Kelsen, as far as I am concerned, is just another positivist and even as positivists go, his jurisprudential pronouncements are a bit too obvious for him to be taken seriously, despite the fact that even the judiciaries in a number of countries have found his theory useful.[18] What I am trying to say is that Professor Marasinghe requiring Kelsen to be the arbiter of the legitimacy or otherwise of extra-constitutional change in Sri Lanka really does not amount to much more than what is obvious to most students of *realpolitik*. All Kelsen does, in other words, is to facilitate the sublimation of an opportunist kind of *realpolitik* into constitutional "theory". As if Kelsen determining that the "Grundnorm" cannot be changed by extra-constitutional methods here in Sri Lanka is ever going to stop the Sri Lankan state from having to face up to political realities! I also wish to note here that whereas the horrific dimensions of the nature of positive law as it impacts on individuals has all too well been noted, most tellingly by invoking the chilling imagery in Kafka's novels, the violence the very same positive law wreaks on communities is often overlooked. This is perhaps explained by our atomistic obsession with the individual in our cognitive, social-scientific, critical and moral imaginations at the cost of an identification of community as a gestalt entity.

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[16] pp.146-147

[17] p.155

[18] p.155.

Part II

Constitutionalism itself, as we understand it today, flows from the substance and material of liberal democratic or social democratic ideals/philosophy. It also, to a greater or lesser degree, posits a statist approach to the delicate issue of the organisation of our social lives. The statist approach in turn is today also premised on the idea of a nation. In other words, the notion of the agency of constitutionalism itself is premised on an idea of a nation, or if not even that, as a mechanism of providing content and meaning to the aspirations of self regulation (I use that term for lack of a better one), of a community of people. Each and every component in the concatenation I have noted above has been problematised by various people, on the ground, *inter alia*, of their western origins and consequently, their questionable efficacy in our contexts. I do not think it is necessary here for me to go into the details of what each such instance of problematisation has involved. I would just like to mention here recent writing by Jayadeva Uyangoda (decrying state fetishism in political science writing and also his call for imagining new forms of political associations) and also that of Lakshman Gunasekera, who in his recent columns in the Sunday Observer has been trying to articulate ideas on the nature of community vis-a-vis the state that might more meaningfully be pursued in the Sri Lankan context. Suffice it here to quote Basil Davidson on what he characterises as 'Africa's crisis of society': "The more one ponders this matter the more clearly is it seen to arise from the social and political institutions within which decolonised Africans have lived and tried to survive. Primarily, this is a crisis of institutions."[19] (The institution he is referring to is the nationalism that became the nation-statism.)

My concern here, however, is with constitutionalism as law as that is perhaps more relevant in the context of this book review. Why do we continue having problems with our praxis of constitutionalism? Is the problem that we have not been able to work out a constitutionally rational mechanism for "managing ethnicity"? Or is there something else to the whole issue? In this part I will endeavour to articulate my misgivings about the ability of law in general and constitutional law in particular, in the forms in which they are presently practised in South Asia today, to provide us with comprehensive solutions for meeting our social needs and at the very least, end ethnic conflict. I do this

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[19] Basil Davidson, *The Black Man's Burden: Africa and the Curse of the Nation-State*, Times Books, New York, 1992, p.10.

with great trepidation as I have relied here on many of my own thoughts and formulations.

I will first try to locate what many commentators have recently been perceiving as one of the central inadequacies of our present attempts to come to terms with the realities of the situation in our polities today. Commenting on the attempts to usher in modernity, rationalised governance, etc., by nationalist leaders like Nehru, Sudipta Kaviraj points out that "what they made appears to be not a political but a *cognitive* mistake, along with their generation of social scientists. They acted on an uncomplex and overrationalistic theory of social change."[20] In another paragraph Kaviraj also notes that "...the British colonial state represented the great conquering discourse of enlightenment rationalism, entering into India precisely at the moment of its greatest unchecked arrogance..... As it had restructured everything in Europe - the productive system, the political regimes, the moral and *cognitive* orders - it would do the same in India, particularly as some empirically inclined theorists of that generation considered the colonies a massive laboratory of utilitarian or other theoretical experiments."[21] D.R. Nagaraj, the eminent Kannada literary critic also points out that "(t)he material of a geo-cultural area, when it involves human processes, not of pure sciences, is better illuminated against the background of the *cognitive 'categories produced internally.*"[22] I wish to draw the reader's attention to the emphasis that these commentators have placed on the cognitive aspects of our understandings (or lack thereof) of our own societies. That emphasis, I would urge, is perhaps worth retaining. To put it briefly and at the risk of oversimplification, much of our understandings of our own societies are based on alien knowledge systems and as a consequence, the solutions we work out are also, to that extent, fallible. The problem then is, more fundamentally, epistemological.

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[20] Sudipta Kaviraj, On State, Society and Discourse in India, in James Manor ed., *Rethinking Third World Politics,* Longman, London, 1991, p.85. (Emphasis added).

[21] *Ibid.*, p.78.

[22] D.R. Nagaraj, Introduction to Ashis Nandy, *Exiled at Home*, Oxford University Press, Delhi, 1998, p.ix.

I will try to indicate the particular manifestations of this feature in the discipline of law by recourse to some polemical digression. One illustration that came to my mind takes me back to my jurisprudence classes in law school. In the context of the Nuremberg trials, as many lawyers and others would no doubt recall, there was a debate between positivists and the natural law school of thought adherents as to whether the trials of people who had, in a positivist sense, obeyed their "laws" were justifiable. To many of us the invocation of transcendental universals by the natural law school was clearly more persuasive than what we perceived to be the empty rigidity of the positivist school. (As obiter I may also mention that subsequently we succumbed to the politically charged blandishments that the Critical Legal Studies School had to offer.) What I also recall is the way our jurisprudence texts traced back the philosophy of the natural law school not to any unchanging and spontaneous "secular" founts or models of thought but to the thought of people like St. Thomas Aquinas in the 11th century A.D. Thus, even to make the point of what are purported to be evidently universal and transcendental values, recourse is taken to their evidently "non-secular" provenance. What I intend to suggest here, not for the first time, is that even a principle or value of law does not exist, to put it in a legal phrase, *sui generis*. It necessarily relies on a socio-philosophical epistemology (which could in turn also be rooted in religion) which provides that legal value or principle with its content. And further, I would also suggest that the discipline of law as it is practised in South Asia today, perhaps more than most other social science or professional disciplines, relies on an alien corpus of socio-philosophical knowledge.

I would like to further clarify this point. I am, of course, not suggesting here that the content of all law in South Asia is alien, but that the structural categories that organise its content continue to remain borrowed and, so to a great extent, alien. The content of all personal laws, for instance, is evidently South Asian, but the compartmentalising of this content into marked-out spheres of operation *qua* personal laws is not. My contention is that this compartmentalisation continues to be done according to the dictates of what is largely European jurisprudence (which in turn is heavily indebted to the "omniscient" and "omnipotent" enlightenment rationalism). This has led to some rather absurd situations. I would like to illustrate this with two examples. It has often struck me as amusing that many lawyers in India even today continue to use Maine's Hindu Law, a book originally written by an Englishman, as a standard and even revered reference text on "Hindu law."

Now at least there, in the actual content of a personal law that has evidently religious sources, one would expect Indian lawyers to refer to texts or authorities traceable directly to their original sources namely "Hindu" or Indian sources. Why does this happen? The only explanation I can find is that the structural organisation of law as it continues to exist in South Asia today works clearly on the secular organisation of law that the classical European constitutional scheme envisages. All this is, of course, traceable to the obvious fact that the law as a secular, professional discipline is one of the features that modernity, via colonialism, has brought with it. Its organising rationality is so profound that even in the now marked out sphere of "Hindu personal law" Indians have to resort to an Englishman's book to figure out what "Hindu personal law" is. The more significant insight that this illustration offers me is that "Hindu law" was, in all probability, organised differently and was part of (if it did not itself organise other spheres) a totally different structure of organisational mechanisms in the pre-colonial era.

Even material on sub-continental legal history that is already available, work by Marc Galanter, for instance, is sufficiently amenable to an analysis from this perspective although the points and nodes of emphases may be different. In fact, a reading of Galanter's book "Law and Society in Modern India" from this perspective is quite rewarding.[23] It alludes to the process of the "Hinduisation" of personal laws, collapsing a diversity of local customary practices and rules governing peoples' lives into a more or less uniform personal law whose sources were also systematically made rigid by the colonial emphasis on Brahminical and scriptural sources of rules. What is more, it also reified and even redefined the public legal space by introducing a "secular" "public law". All this is significant also because it indicates the nature and extent of the 'expropriation of law' (in the Weberian sense) that the colonial regime gradually and systematically occasioned in Indian society. What subsequently came to be labelled "Muslim law" and "Hindu law" had been applied to a variety of topics besides those usually listed under the rubric of "personal law" used by modern law. By themselves, these propositions relating to legal history may not seem to be of much significance, but when seen against the backdrop of the larger understandings of the institution of the nation-state and modern law as a concomitant component of that institution,

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[23] Marc Galanter, *Law and Society in Modern India,* Oxford University Press, Delhi, (1992) pp. 15-36. Galanter however does not, of course, share a belief in the general point that this essay is trying to make.

the discursive role played by modern law in furthering that project becomes very clear. Constitutional law in particular is, of course, directly implicated. But many of our constitutional experts pay scant regard to these verities of sub-continental history. Radhika Coomaraswamy, for instance, says in an essay: "None of the other ideologies prevalent in South Asia today are as committed to as specific and detailed a process of non-violent decision making, as the ideology of constitutionalism. Most of the other ideologies pursue substantive values, and are near Kautilyan or Machiavellian in their philosophy with regard to political process."[24] (She is defending the Eurocentric liberal/social democratic notion of constitutionalism). The scenario, I would argue, is far more complex than Coomaraswamy supposes. Further, she says "No indigenous ideology in South Asia which has gained currency as a dominant political force has such a comprehensive project for consultation, compromise and conflict resolution." If anything, this essay militates precisely against the arrogance of comprehension otherwise implicit in that project.

The second illustration I would like to make use of today is an incident that a friend of mine recounted to me in a letter a couple of months ago. A reputed law book publisher is apparently trying to bring out an Indian version of a reputed English book series on the laws of England. The publishers were wondering whether they should retain the English name for the Indian version of the series, or whether they should substitute the English name with an Indian one. A committee which looked into the matter decided that they should stick with the English name. My guess is that this was done (in addition to whatever other reasons that may have been cited), perhaps unconsciously, also to retain the aura of law as a secular and professional discipline and the association that that reputed English name would directly make available with a kind of reverence for erudition in the minds of Indian lawyers. In brief, my misgiving is that the epistemology of law whose features are taken for granted today continues to remain colonised and that perhaps because of this, law as a discipline and as an organising reality in our polities has proved to be particularly intractable and insensitive to our social and cultural realities.

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[24] Radhika Coomaraswamy, *Ideology and the Constitution: Essays on Constitutional Jurisprudence*, International Centre for Ethnic Studies, Colombo, (1996) p 17.

Sensitive scholars even in the West have begun to recognise the profundity of these issues. James Tully in his book "Strange Multiplicity: Constitutionalism in an Age of Cultural Diversity" draws attention to many of these issues.[25] He, in fact, goes so far as to call for "a reversal of world views" in order for us to come to terms with them. Reading James Tully, one is struck by how he, even in the way he articulates his thoughts, privileges cognitive sensitivity. It doesn't help matters that this country's Minister of Constitutional Affairs minister himself complained at a symposium on civil society: "In a country with all the natural advantages of Sri Lanka - an intelligent and lively population, very interested in political issues, accustomed to discussing political issues in buses, trains, boutiques all over the country, people who have been accustomed to the use of universal adult suffrage since 1931 for 65 years, I have often asked myself how is it that (rationality) is often wanting."[26] There is absolutely no doubt in my mind that Professor Pieris's is an enormous and unenviable task. But I still remain convinced that his finding of the want of rationality in the Sri Lankan people is not the most inspiring affirmation of faith in one's own people that I have ever come across. Or maybe this is just yet another symptom of the fairly endemic "the more the 'education' - the more the deracination" syndrome afflicting our societies today.

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[25] James Tully, *Strange Multiplicity: Constitutionalism in an Age of Cultural Diversity*, Cambridge University Press, Cambridge, UK, 1996. I thank Dr. Neelan Tiruchelvam for drawing my attention to this book.

[26] G.L Peiris, Five Requirements of Civil Society, in *Civil Society in Sri Lanka: A Symposium,* International Centre for Ethnic Studies, Colombo (1997) p.7. I have altered the syntax of the sentence for convenience.

A REVIEW OF

Public Interest Litigation in South Asia: Rights In Search of Remedies[*]

by Dinusha Panditaratne[**]

Perhaps I should state at the outset that as one of these ubiquitous 'foreign-trained lawyers', I read this volume without any expert knowledge of Public Interest Litigation (PIL) in South Asia. Thus this review does not critique the publication from the perspective of an experienced practitioner nor from academic expertise, but from one familiar with the essential legal concepts who wished to be apprised of the particular experiences and issues surrounding public interest litigation in this region. The volume itself does not specifically state its audience. As an introductory observation, I would remark that different chapters seemed to address themselves to different audiences: some to those who are entirely unfamiliar with laws of standing (laws determining who can enforce a legal right before a court) and which provide simple explanations of both traditional and developing notions of standing to the non-lawyer. Other chapters not only assume familiarity with the concepts but address those who actually work in the area of public interest litigation and attempt to provide pragmatic advice on the initiation of public interest suits. Still others make a general commentary on the political facets of Public Interest Litigation and its sister movement, Social Action Litigation (SAL).

Correspondingly, the publication takes on several functions. Before proceeding to a personal appraisal of these, it is worthwhile to refer briefly

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* Sara Hossain, Shahdeen Malik, Bushra Musa (Eds.) The University Press Limited, Dhaka, 1997.

** Intern, Law & Society Trust.

to the Preface of the book. First and foremost it states that the book "surveys the development of PIL/SAL within South Asia"[1] and further, that it describes its emergence "in South Asian countries as part of post-colonial constitutional regimes and as a collaborative initiative undertaken by members of the legal community and human rights activists".[2] Given that PIL is an area of discourse and practice in South Asia which is saturated with the Indian experience, the book represents a welcome attempt to provide a **regional** examination and analysis of Public Interest Litigation. The need for this arises not only from the commonalties of South Asian histories, potential destinies and political, social and economic make-up (for this may only justify the emphasis on India as representative of South Asia) but also, as is pointed out in many parts in this book, from their considerable differences. Having said this, however, it becomes apparent that even with the mandate to consider the collective experiences of South Asia and although edited by non-Indian lawyers, the book finds it difficult to avoid a quite clear emphasis on the Indian experience of PIL. I will comment on the implications of this bias in the book more specifically further on in this review.

Judicial decisions, especially of the Indian Supreme Court (which is often simply referred to in the volume as "the Court"), are frequently referred to by a number of authors. However, rather than a case-based account of Public Interest Litigation in the region, the publication can be regarded as providing a commentary on essentially four facets of PIL.

Firstly, several chapters explicitly address the context - social, political and legal - in which PIL operates. These include Clarence Dias' chapter on *The Impact of Social Activism and Movements for Legal Reform in South Asia* and Neelan Tiruchelvam's *The Politics of the Judiciary in a Plural Society* with specific reference to the judiciary as it interacts with other arms of the State in Sri Lanka. Other chapters which I would group under this heading, which deal with surrounding 'legal' issues, are Kamal Hossain's chapter on *Interaction of Fundamental Principles of State Policy and Fundamental Rights*, Rajeev Dhavan's critique of India's legal aid programmes, and two chapters which deal with preventive detention in Bangladesh, by Justice Naimuddin Ahmed and Hassan Ariff respectively.

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[1] p. xiii.

[2] p. xiv.

The second key aspect of the book is an examination of the bases and justifications for PIL in South Asia. Many chapters touch on this issue but Justice Desai attempts to deal directly with it in his chapter *The Jurisprudential Basis of Public Interest Litigation.*

Thirdly, there are chapters which review the development and existing status of PIL in South Asian jurisdictions, which focus on the present and potential avenues for PIL in South Asian Constitutions, statutes and case law. These chapters pay some consideration to the problems and issues which PIL has confronted as well as to those which it appears to have created. They include Soli Sorabjee's *Protection of Fundamental Rights by Public Interest Litigation*, *A Review of Public Interest Litigation Experiences in South Asia* by M. Amirul Islam and Justice A.M. Mahmudur Rahman's chapter on *Existing Avenues for Public Interest Litigation in Bangladesh.*

Finally, two chapters discuss areas in which PIL has arguably a particular role to play. Justice Umesh C. Banerji discusses environmental protection through Public Interest Litigation and *Public Interest Litigation: A Women's Agenda* is authored by Sultana Kamal.

Before picking out the most crucial points and glaring gaps which emerged from a reading of these four facets, I should mention that the book itself structures its chapters differently. Thus, for example, the editors have categorised the two chapters dealing with preventive detention in Bangladesh alongside the chapters on the environment and on women, under the general heading of "ISSUES AND CHALLENGES" constituting Part IV of the volume. These two chapters overlapped heavily and, therefore, perhaps only one chapter warranted inclusion in the publication. Moreover, however, neither chapter made any reference whatsoever to issues of Public Interest Litigation or to standing in general. In fact, I admit that this is one reason why I felt compelled to infer their relevance must be one of 'context', with due respect to those authors who actually grappled with contextual issues.

These two authors could have at least referred to a nexus between the subject-matter of their chapters and interpretations of the law on standing. In the absence of such references, I would speculate that two connections are possible. The first is that the chapters may have been attempting to give an example of progressive judicial interpretation in cases of illegal detention, as has apparently occurred in Bangladesh, in order to encourage similarly

forward-thinking approaches in respect to Public Interest Litigation. If this is indeed the basis of inclusion, it could have been made more evident although, again it probably would not call for the inclusion of both chapters. The second, less plausible, connection between the chapters and the subject-matter of the book as a whole is that preventive detention is generally challenged, and the writ of *habeas corpus* sought, by a person **on behalf of** the corpus detained. Hence, it could be argued as an instance of Representative Standing. However, this is a fairly remote connection, especially as though Public Interest Litigation is also a species of Representative Standing, its nature and development is far more controversial than the historically more established right to apply on behalf of a particular detainee.

As an aside, I could state at this point that the book could have included some consideration of the different types of Representative Standing and the problems of defining and distinguishing between their subsets. This appears to be an area of confusion within the book as well as in the broader arena of public law discourse. Many authors of the publication treat 'Public Interest Litigation' and 'Social Action Litigation' (SAL) as being synonymous, whereas Sorabjee argues that SAL petitions are instituted on behalf of a **determinate** group of people who have suffered direct injury and in contrast, PIL vindicates the collective rights of an indeterminate or general group who may not be directly injured.

However, despite the issues I have raised in regard to the two chapters on Preventive Detention in Bangladesh, I found the other chapters which focus on the contextual aspects of Public Interest Litigation to be among the strongest analyses in the volume, with content which was relevant and informative. Rajeev Dhavan provides an insightful critique of the political and judicial wrangling behind India's failure to provide adequate legal aid programmes, a failure which may jeopardise the strides made in Indian public interest case-law. One argument that perhaps could have been touched on is the role that PIL may have played in actually contributing to the apathetic stance of government towards legal aid. Is a government **less** likely to help people vindicate their own rights when it knows that their fellow citizens can do this for them?

Turning to the second aspect of the book, it is commendable that one chapter is devoted to examining the underlying bases for Public Interest Litigation.

However, isolated observations on this issue by other authors in the book tended to be more incisive than those by Justice Desai in his chapter *The Jurisprudential Basis of Public Interest Litigation*. That chapter reiterated that PIL was based on providing justice to those who are too impoverished and disadvantaged to approach the courts to uphold their rights. While the urgency of providing rights-based assistance to this large segment of the South Asian population cannot be disputed, neither Justice Desai nor other authors in the volume discussed the implications of this perspective vis-à-vis the liberal view that each individual knows what is best for him or herself. The recognition of this view as the foundation of the traditional rules of *locus standi* and the adversarial system itself may not seem appropriate for a South Asian analysis. But given that colonial legal structures such as the adversarial system remain embedded in South Asian jurisdictions, there is a need to consider the implications of the challenge to liberal conceptions of justice within frameworks which are still largely based on those conceptions. The practice of appointing Commissions to look into Public Interest petitions, for example, allows for either party to submit affidavits rejecting the evidence contained in the Commission's Report. How do judges contend with the possibly manifold relative capacities and weaknesses within the group on whose behalf the complaint is lodged, which may allow some to exert and consolidate their **intra**-group influence before the court?

This is especially an issue since, as Justice Desai acknowledges and Soli Sorabjee points out, the reality of poverty and deprivation does not constitute the **only** basis for PIL and SAL, so that the group may comprise a mixture of the relatively disadvantaged and the considerably advantaged. This may occur, for example, in a PIL case relating to an environmental concern in a particular geographical zone, or a non-fundamental rights PIL case challenging an illegal action - which could be justified on the promotion of the rule of law rather than on it affecting any particular person or on the disadvantaged nature of those affected.

In more direct legal terms, many authors deal with the constitutional bases of Public Interest Litigation in South Asian jurisdictions. Sorabjee points to judicially empowering provisions in the Indian Constitution in refuting the argument that PIL allows the judiciary to usurp the functions of the legislature and the executive. However, he does not delve into controversial issues of interpretation of relevant constitutional provisions. This would also have been useful in evaluating the judicial role in non-Indian jurisdictions. Further, he

himself refers to Indian decisions which imposed very costly (in terms of financial and other resources) directions on the State, such as the construction of roads and buildings. Again, there could have been more attention paid to the issue of reforming a still largely adversarial judicial system which may be inadequate to handle the type of polycentric concerns which emerge from PIL and its associated remedies. Sorabjee identifies the problem of regarding the State as just another respondent in the system, when discussing the reluctance of (even) Indian judges to use the power of contempt on governments which default on their remedies.

With regard to the third facet of the book - the development and status of PIL in South Asian jurisdictions - I have only two brief observations to make. The first is the practically-oriented nature of Justice Rahman's review of the *Existing Avenues for Public Interest Litigation in Bangladesh*. I am not a practitioner myself but Justice Rahman has produced a seemingly very useful summary of the scope for PIL in Bangladesh, which importantly, does not confine itself to fundamental rights and constitutional jurisdiction but also considers avenues for PIL under the Environmental Pollution Control Ordinance in Bangaladesh and several of its Codes and Acts. A similar summary of existing avenues of PIL in other South Asian jurisdictions, especially Sri Lanka, Pakistan and Nepal, would have been welcome in the publication. I mention these countries in particular (and this leads to my second observation) because these are the jurisdictions which are most neglected in a volume which, despite its promising title, nevertheless focuses largely on Indian laws, cases and conditions. In one sense this is understandable in the light of the sheer volume of the Indian experience of PIL and SAL. However, in a few sections of the book, there is a tendency and dare I say, perhaps hidden desire to regard Indian developments as representative of South Asian experiences as a whole - despite contrasting realities. As an example, I will refer briefly to Amir-ul Islam's *Review of Public Interest Litigation Experiences in South Asia*, one of the few chapters which makes specific, albeit relatively brief, mention of Sri Lanka. Subsequent to a review of Indian cases in a very positive tone, the author finds it seemingly difficult to accept the far more subdued experiences of PIL in other jurisdictions, apparent by statements typical of his commentary on Sri Lanka. He introduces the Sri Lankan experience with "[i]n Sri Lanka, the courts have adopted a liberal rule of standing"[3] and concludes that the

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[3] p. 64.

political dialogue which followed the decision in *Somawathie v Weerasinghe* (1990)[4] "is indicative of a highly responsive judicial and political system at work in Sri Lanka"[5] - an impression which Dr Neelan Tiruchelvam in his chapter emphatically negates. While commentators may understandably find it difficult to contain their enthusiasm for Indian developments, this ought not to spill over into drawing false parallels of PIL elsewhere in South Asia. Such an attitude can only hinder an honest and rigorous assessment of the regional (including Indian) histories and potentialities of Public Interest Litigation.

Finally, I will just make mention of that part of the volume covering the environment and women, as areas in which PIL arguably has a special role to play. The chapter on women and PIL was of particular interest, especially as environmental concerns are discussed throughout the book and a great deal in PIL discourse generally. The author of *Public Interest Litigation: A Women's Agenda* implicitly raised some of the most important issues confronting PIL by considering the prospect of Public Interest suits on behalf of perhaps the most diverse group in need of vindication of collective rights. However, while she theoretically argued for the potential of Public Interest Litigation in respect to issues such as sexual harassment and domestic violence, she did not address the practical difficulties of how PIL would deal with the diversity of women's situations and attitudes in respect to such violations. The case-law on which she based her optimism dealt with women in situations of enormous socio-economic disadvantage, which would not always be representative of the women in situations of sexual harassment or domestic violence, for example.

I conclude this review with concerns of having been too critical of the volume, at the expense of neglecting its positive aspects - of which there are several. The diffuse nature of the subject matter and the audiences to which it potentially caters are certainly strengths which should not be ignored. Potential readers who are attracted by the title and subject-matter of the publication may not find all the chapters to be useful or of interest but are bound to find at least some which are.

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[4] 1990 2 SLR p.227. It was held in this case that even a wife had no standing to file action for the enforcement of the fundamental rights of her husband.

[5] p. 65.

Workshop on "Aging Population"

The Trust in collaboration with the UNFPA has organised a workshop on Thursday 3rd September, 1998 at the Marga Institute, No. 93/10, Dutugemunu Street, Kirulapone, Colombo 06 from 9 am - 5 pm, involving representatives from the Ministries, NGOs and Welfare Organisations.

For further details, please contact I.K. Zanofer at the Trust on 691228/684845.