

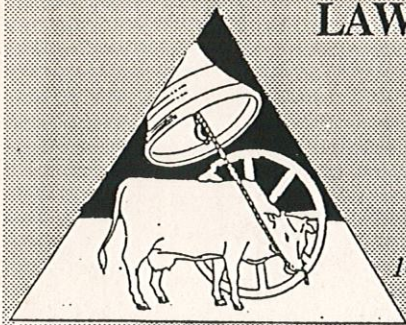
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OBJECTIVES

The Law and Society Trust Fortnightly Review keeps the wider Law and Society community informed about the activities of the Trust, and about important events of legal interest and personalities associated with the Trust.

Our lead article examines aspects of conflict resolution seen from both historical and multi-cultural perspectives for a deeper understanding of our problems and our obligations in this sphere. We also bring our readers a critical account of the elections held in Cambodia in May, and an appraisal of the prospects for peace they bring after so many years of seemingly endless war.

Sri Lanka / Cambodia

Conflict Resolution

Free and Fair Elections ?

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ASPECTS OF CONFLICT RESOLUTION

by

Justice (Dr.) A. R. B. Amerasinghe

[Convocation address delivered at the Open University
of Sri Lanka, March 12, 1993.]

Particular aspects of the numerous, varied and sometimes extremely complex causes of conflict, the several methods of avoiding conflict, the criteria for decision making in contentious situations, and the many procedural strategies and institutional arrangements for the resolution of various categories of dispute, deserve and require much more detailed treatment than one is capable of even attempting, if it were appropriate at all, on an occasion such as this. Nevertheless I hope this overview may be of some use to you to conceptualize conflict and the dispute resolution process and to frame a draft agenda for further inquiry.

I have chosen this subject because in a varied audience such as this it is a point of congruous interest. The unpleasant phenomenon of conflict is something all of us, whatever our special fields of endeavour may be, experience from our earliest moments to our last. Conflict is neither esoteric nor unfamiliar.

We struggle within ourselves, tackling the perplexities of conscience in which duties and desires compete with each other. We have differences of opinion with those dear to us, we disagree with our neighbours and colleagues at work. We come into collision with each other on who should govern, who should legislate and what the criteria of good government and the manner of their application should be. We come into conflict with other nations in deciding what is just and equitable with regard to the terms of trade and commerce and the use and transfer of technology. We question the use and allocation of resources. We are immersed in a world of disputes – personal, interpersonal, intergovernmental and international.

The recorded chronicles of humankind are full of accounts of conflict. In fact, as a young student, I had the wholly mistaken impression that the history of humankind was essentially a record of battles and wars and that the progress of humankind was not due to the triumphs and achievements of its philosophers, law-givers, men of letters, artists, inventors and scientists, but rather to the victories of its admirals and generals!

In the past, since information came to us in small, infrequent dribbles, spread over a long period of time, our minds could quietly absorb and analyse conflict-related information without alarm.

Modern communication systems have changed all that. We are more quickly and better informed than our ancestors: We not only have almost immediate access to information from all over the world, but very nearly participate in the events ourselves as we watch them transmitted into our homes via satellites, or hear on-site reports broadcast on the radio, or see pictures and read vividly descriptive eye-witness accounts printed in the newspapers in a matter of hours after the event.

One does not need to be a bleeding heart to realize that our interest in the agonies of the victims of conflict has become real and personal. And so, the horror, the revulsion, the sense of surprise we feel is infinitely greater than anything experienced by our ancestors, or by even some of us not very long ago.

Unaccustomed and unprepared to receive without fear and painful feelings of intense displeasure and aversion, the quantitatively and qualitatively superior information we receive of violent collisions between disputants, as a result of the great advances in technology, we might be overwhelmed.

Alvin Tofler's disturbing and challenging books *Future Shock* and *The Third Wave* as well as Louis B. Lundborg's disarmingly sensible and optimistic response in *Future Without Shock* in some ways might help us grasp the significance of the emerging crises caused by the phenomenon of accelerated change, though none of them is deeply philosophical.

If we are overcome, we might then become hysterical, irrational and violent in our response and add to the confusion, or worse still cause an escalation of a conflict, by actively sponsoring or joining the one side or the other and meeting violence with violence.

On the other hand, we might be so overpowered by a sense of hopelessness that we might adopt a stoic indifference and insensitivity to the feelings and suffering of fellow humans; and by permitting ourselves to become sluggish of mind or numb and indolent in relation to the issues that confront us, we may let injustice prevail.

However, we need to keep things in perspective. We ought to be ever alert, not permitting ourselves to slide into violence or apathy, much less make a virtue of either of those unsatisfactory responses.

Conflicts have been resolved in the past, many a reconciliation has taken place, and hatreds, even in the most unlikely situations, have ceased, as Jacques-Louis David's wonderful painting *Les Sabines* reminds us with such power.

That picture represents the moment when, a few years after the legendary abduction of the Sabine women by the Romans, the contented wives and mothers halt a battle between their Roman husbands and the Sabine men who have come on what has become an unwanted rescue mission. The lovely Hersilia stands in the middle of the melee, appealing with her graceful arms, the one towards the Roman Romulus and the other towards the bearded Sabine, Taitius.

Nicknamed 'the Robespierre of the brush', David preached moral and aesthetic sermons to the National Convention, of which he had become a member shortly before it voted to execute Louis XVI. Guided no doubt by 'the torch of reason', which he once said should be 'no other guide' for an artist, he won acclaim for his effort through this work to preach conciliation after a decade of bloodletting during the French Revolution.

Some of you no doubt have seen that work in the Louvre. And others will, I hope, avail themselves of an opportunity of seeing it.

Until then, if the flood of conflict-information threatens to get you down, go to the Kelaniya Temple, and look at Solius Mendis' painting of the Buddha's visit to our land to resolve with success the dispute between

warring groups. The seemingly intractable, and perhaps, not symbolically irrelevant, question was the ownership of the throne.

The event is referred in the *Mahavamsa*.

Since this was the first recorded instance in our history of successful conflict resolution, we had a copy of it made for the Superior Courts Complex at Hulftsdorp.

The copy is a remarkably faithful one. The only significant difference is this: the Chinese artist who made the copy substituted his own face for one of the characters in Mendis' picture.

Unfortunately, not all conflicts are permanently extinguished and have the happily – ever–after sort of endings immortalized in the inspiring paintings of David and Mendis.

Sometimes, although a conflagration may, for the time being, be brought under control, and a modus vivendi reached, the conflict is not extinguished, and later, the smouldering, ancient, embers of hatred are rekindled.

For instance, when one tries to understand the crisis in former Yugoslavia, one is offered the explanation that this is, at least in part, an attempt to settle old scores, going back through the days of the second world war when some Croats, it is said, allied with Nazi Germany to massacre Serbs; through the ethnic barbarities of the first world war; and all the way back to the 15th Century when the Ottoman Turks seized this area and converted some inhabitants to Islam. It would seem that, in the feverish imagination of some Serbs, the muslim hordes must be wiped out because they are poised today to take Christian Europe!

And are we not well acquainted with family feuds, sometimes resulting in bloodshed, going on from generation to generation, even though the original dispute was supposed to have been 'settled' by a Court or tribunal at some long forgotten date in the distant past?

The lack of the admirable quality of durability is often, at least in part, due to the way in which a settlement is brought about.

There are several strategies for dispute resolution; but the one that is most frequently used, and undoubtedly the best, is negotiation. In that process, the disputants arrive at a mutually acceptable compromise, giving each some, but not all of what is sought. The parties have the advantage of an informal atmosphere, unlike the unfamiliar and sometimes intimidatory atmosphere of a Court of law; they communicate in their own language and are not mystified by legal jargon, and best of all it is their own decision and not one imposed on them. The process may be accomplished either by the parties themselves or with the assistance of a mediator. The third party is a mere facilitator and not a decision maker. He may help to reduce tensions, identify and clarify the real issues which may be entangled in a web of irrelevancies or obscured by prejudices or concealed from view by the dust raised by the controversy. There is no winner or loser. And so, the parties leave without bitterness, and on-going relationships between them are saved.

In arbitration (although the atmosphere is less formal than in a Court of law and the proceedings are usually somewhat more comprehensible), the decision is not that of the parties but one that is imposed, as it is in a Court of law. One is a winner and the other is a loser and that is not a wholly desirable thing, considering the fact that even in the field of sport today, regrettably, people do not always take a loss too well.

Negotiation is the preferable strategy for conflict resolution, if the option is available.

Unfortunately negotiation is not always feasible, and its techniques cannot be satisfactorily applied to certain situations.

For instance, where a man is accused of having done or omitted to do something which involves or places in jeopardy, his personal liberty, safety, integrity and standing in the community, in his own interests and that of the community, his guilt or innocence, should be decided in a Court of law in accordance with the carefully formulated rules of procedure and evidence applicable to the formal adversarial process laid down by the legislature, and not by reference to criteria invented casually on an ad hoc basis.

That is not the occasion for bargaining and compromise, but rather for verification, for the discovery of facts, the relevance and purport of which must be determined by reference to definite, predetermined criteria established by law.

Nor is negotiation possible where one of the disputants is intransigent and uncompromising. This may happen in disputes at a personal level, as well as at community levels. For instance, all over the world today, as in the past, there are situations when

so-called 'freedom fighters', driven recklessly by the narcotic effects of their mystical dedication to activism and a thirst for power, insist on employing violent tactics without moral concern for their victims, searching after receding horizons and impossible dreams, rather than reasonable solutions. They go on wanting not only what they cannot have, but also what they no longer really want.

In such a situation the law of the land must be enforced. To do otherwise would be to encourage barbarity and anarchy and subjugation. We must remain rigorous in our reasoning and steadfast and loyal to the cardinal principle on which our State, and every civilized society is founded, namely, that the will of the People shall prevail.

While every effort must be made to settle disputes by peaceful means, where such measures are necessary to safeguard our independence, our sovereignty, our liberal values and precious freedoms, which our People cherish, then, we are left with no option but to employ such coercive machinery as we may have at our disposal. President Clinton at his inauguration ceremony promised his countrymen:

"When our vital interests are challenged, or the will and conscience of the international community is defied, we will act with peaceful diplomacy when possible, with force when necessary".

The President was referring to international affairs, but the underlying principle, that when peaceful means fail, then the interests of the People must be defended with force, when it is necessary, is of general applicability.

Admittedly, armed conflict is a terrible thing when we consider the suffering and misery imposed on thousands of innocent men, women and children. It is an undesirable thing when we consider the fact that the human and economic resources involved could have been spent on development rather than on destruction. And then, in the end, there are the deplorable effects on the combatants on both sides. Countless memoirs of men at war from the *Gesta Francorum*, through John Keegan's reconstruction of Agincourt, to Hugh McManner's recent work *The Scars of War* give graphic accounts of post traumatic

stress disorders prevalent among the victors no less than vanquished.

Except those who profit from war by the sale of weapons and so on, we all want to avoid what Hubert Beuve-Mery, the founder of *Le Monde*, fifty-nine years ago referred to as "the appalling stupidity of war". We all desire peace and we may hopefully say with Cicero in *De Officiis*, *Cedant arma togae, concedant laurea laudi* – let wars yield to peace, laurels to paeans... But one must hesitate to share Lamartine's preference, expressed in *Méditations poétiques* for *La paix a tout prix* – peace at any price. There have been many other great thinkers too who have taken this extreme, pacifist view. For instance, Erasmus in *Adagia* said that 'the most disadvantageous peace is better than the most just war'. And Fuller in *Gomologia* said: 'Better a lean peace than a fat war'. And there were many in England, like Bertrand Russell, for instance, who insisted that going to war with Hitler was undesirable. Cicero suggested in *Ad Atticum*, that 'an unjust peace is better than the most just war.' Yet, in the *Phillipics*, he was constrained to observe that: 'The name of peace is sweet and the thing itself is good, but between peace and slavery there is the greatest difference'.

Admittedly, where a dispute is resolved by an imposed decision backed up by coercive machinery, and this applies to adjudicated Court decisions too, a party may comply, but with aversion, and a sense of resignation and frustration. Given a chance to do so with impunity the party who comes off second best sometimes resiles.

The smouldering embers may then flare up once again. And perhaps, fuelled by long-standing, suppressed hatreds, the second may become a worse conflagration than the one before, with no long term benefits of the supposed 'resolution' of the conflict to either party, unless the will of the People in a dispute at a community level, or the adjudicated rights of the winner in any arbitration or adjudication at a personal level, are exercised with the consideration, tolerance, and educated sympathy that befits us as democrats, and with the caring, compassion, and forbearance that becomes us as humans.

But assuming that old conflagrations are brought under control under the threat of coercion and that they are eventually doused by the cooling waters of accommodation, there will be new fires caused by the debris that flew into areas lying in the realms of the future. And there will be new contentions arising from the application of established criteria to changing social and economic circumstances, and altogether novel and unexpected conflict situations will emerge from the progress of science and technology.

For instance, given the usual process of conception, what will happen to the babies born to the raped women of Bosnia? Should they be adopted? What criteria will be applied to prevent a repetition of the exploitation of baby trade in Romanian orphans that took place in the turmoil of the post revolutionary period? What decision should be taken if a mother does not want her child to be adopted by a Christian family?

As a criterion, equality is a cherished principle, about the universal acceptance of which there are confident, and almost boastful, claims by certain organizations and countries.

Yet, there are enormously difficult questions relating to the practical application of the vaunted principle of equality in relation to nations, races, linguistic and other groups and gender. Should women be ordained? Should homosexuals and lesbians be treated as classes apart? Is it right and fair that so much of the world's resources should be consumed by the affluent nations? What are the obligations of those nations who have plenty while others die of starvation?

Since the Rio de Janeiro Earth Summit of 1992, issues relating to the environment have assumed new dimensions. Do trees, rivers, animals, birds, insects and other species, and indeed ecological systems as a

whole, have intrinsic value, independent of the instrumental value they may have for humans? How are the competing interests to be reconciled?

The emerging conflict situations from scientific progress are numerous. For instance, the phenomenal advances in medicine and the biological sciences have raised a number of disputes, particularly clustering at each end of our life spans, relating to abortion, euthanasia and the value of human life. How are the difficult questions of bioethics to be solved? Is the quality of a human life to be taken into account in deciding whether to extend it? On what basis are exotic, expensive life saving techniques to be distributed? On what basis, for instance, are scarce dialysis machines to be made available? What are the principles that should guide us in the complex legal issues raised by vitro fertilization? For instance, should a woman rent her womb to the highest bidder? Should a surrogate who changes her mind be entitled to keep the child?

And having regard to the advances in genetic engineering, if I might use the title of Jonathan Glover's probing book, we must have the criteria to answer what must surely be the most basic, yet the most contentious, question of all : *What sort of people should there be?*

If, as scholars like K. Lorenz (*On Aggression*) and E.O. Wilson (*On Human Nature*) have pointed out, conflict is deeply internalized, instinctual and a very part of our nature as *homo sapiens*, and if as Kevin Avruch and Peter W. Black (*Ideas of Human Nature in Contemporary Conflict Resolution Theory*) suggest that since Darwin, conflict has been the major biogenetic explanation of human behaviour, should the response to the question posed by Glover in the title of his book be that we should have people who are free of the tendency to be contentious? For, after all, would this not save us from wars and death and destruction in the future?

If our answer an unqualified 'Yes', the progress of humankind must surely cease, for the improvement of our condition, our advancement, has always been the result of questioning the validity of existing beliefs, and critically examining the sufficiency and relevance of existing criteria and challenging the appropriateness and efficacy of institutional arrangements. No social change will be possible unless there is conflict between rival groups. It is competition that stimulates the introduction and diffusion of innovations.

If the kind of people we want will, in contentious situations, invariably use the technique of dispute resolution by the strategy of conflict-avoidance, because it will be a part of their newly acquired good-naturedness to do so, the dream of every despot would be realised; but no injustice will ever redressed.

Conflict then has both a positive and a negative side. It is not something intrinsically bad and undesirable and to be avoided at all cost for its own sake. Our progress and safety, our values and cherished freedom presuppose the possibility of conflict.

Before we embark upon speculations on what kind of people there *should be*, and until, if ever, radical changes supervene, I think it is profitable for us to reflect for a moment on what *we are*.

We need to recognize the fact, even though it may ruffle those who complacently entertain immodest notions of themselves as being endowed with an absolute power to insist that all other forms of life are subservient to and merely exist to serve them, simply because they are humans, that we too bleed if we are scratched. If we are irritated, our instincts lead us to manifest reactions recognizably similar to those displayed by those we somewhat arrogantly and contemptuously label as 'mere brutes'.

In this regard Desmond Morris' *The Naked Ape, The Human Zoo, Intimate Behavior* and *Body Language* may help you to see yourselves and those with whom you associate, in a somewhat different light. One may, quite understandably, have serious reservations about some of his propositions, yet these works are illuminating. In any event they provide quite enjoyable reading. They are not filled with the incomprehensible jargon used these days by some writers and speakers whose purpose seems to be to impress or baffle and compound problems of conflict rather than to communicate, and unravel and solve problems.

Incidentally, although the relation of language and meaning and truth is a difficult one, I do wonder whether at least acquainting students with the basic issues involved, as for instance by encouraging them to read works like Wilson's *Language and the Pursuit of Truth* might not go some way towards understanding each other's problems?

Morris, and others, in what might be described as more 'scientific works', have emphasised the fact that we are essentially animal in nature.

Is Isaiah's dream that 'the wolf also shall dwell with the lamb', necessarily Utopian, at the present time having regard to how we are put together? In Tennyson's words, 'That which we are, we are'.

We are contentious and animal but not violent in nature. Happily, there is no cause for pessimism. *The Seville Statement* drawn up in 1986 by a team of eminent international scientists shows that violence is a biological possibility but not an *inevitable necessity*. Violent behaviour is not genetically programmed into our human nature, and in the course of human evolution there has been no preferential selection for aggressive behaviour. There is nothing in our neurophysiology that compels us to react violently, our higher neural processes filtering stimuli before they can be acted upon. How we act is shaped by how we have been nurtured, conditioned and socialized. In a word, biology does not condemn humanity to violence. War is a social invention created by the use of our mental faculties. For the same reason, we have the capacity to invent peace.

As humans, we are endowed with extraordinary mental capabilities. This may by no means be what is the distinctive quality of the human species; but it is surely the best of our capabilities? And can there be any doubt that the highest and most satisfying form of human existence is that in which man exercises his rational facilities to the fullest extent?

Why do we have these extraordinary mental capabilities?

Well, I do have my *beliefs*, but I do not *know*.

There are various explanations for our superior intelligence, each one more or less probable than the other. But Plato's explanation in *Protagoras*, I find the most interesting, even though it may be flawed and implausible.

Plato suggests that we owe our intellectual capabilities to nothing other than an act of generosity. He relates how Zeus, taking pity on humans, living in small groups, with inadequate teeth, weak claws, and lack of speed which were no match for fellow beasts, gave them a moral sense and the capacity for law and justice, so that they could live in larger communities and cooperate with each other.

A moral sense and a capacity for justice may not be exclusively human traits.

Non-human animals, or if you prefer that description, infra human beings, too seem to have some rudimentary 'moral sense'; and certain constraints on behavior, and kin altruism and reciprocity are characteristic qualities among some animals.

Like us, other animals too usually refrain from no-holds-barred attacks on one another. They only go for the submissive. Gibbons and chimpanzees share their food. Wolves and wild dogs bring meat to those who did not participate in the kill. And Dolphins support sick and injured fellow members of their social groups, swimming under them for hours at a time and pushing them to the surface so they can breathe.

The limited capacity of beasts to act occasionally in limited, specific circumstances, in what would seem like obliging, kind and benevolent ways, of course, does not make them *humans*.

Equally, we should be cautious in yielding to the temptation of explaining behaviour that does not befit us who belong to humankind simply by reference to our physical impulses and brutal nature, as Shakespeare makes Mark Antony, after the assassination of Julius Caesar.

"O judgement, thou are fled to brutish beasts and men have lost their reason".

Whether our intellectual capacities were bestowed on us to enable us to simply survive in a hostile environment or not, the fact is that we have found it, for reasons of self interest, to be safer, more economical and convenient and desirable, given certain conditions, to live in larger and larger cooperating communities, in widening social networks.

As social beings, we are, in Aristotle's phrase, "political animals", and since we have structured ourselves into an organized society, we must eliminate violence as being an imperative necessity of the social order. This can be done, as Sami Nair (*The Political Solution, Courier*, February 1993) points out, by regarding politics as an antidote to violence. Politics in the sense of the art and science of constitutional government as distinguished from despotic rule, is, as Nair points out 'incompatible with force; it is the realm of shared decision making through collective communication'. Outbreaks of violence are but straws in the wind, invitations to the social order to turn inwards and take stock of itself to find out what has made violence possible, and then to provide solutions that satisfy the minimum aspirations of each member of the community. Violence does not end by decrees or the force of arms, but through discussion, in the sense of genuine communication between individual wills, and not, as he points out, through manipulated debate of the sort practised by the Athenian demagogue Cleisthenes.

Where are we heading as social beings? There are both centrifugal and centripetal tendencies simultaneously at work and one cannot with confidence venture to hazard a guess as to what arguments will prevail. The European Community and SAARC on the one hand are expressions of a revival of the old desire for greater cohesion and universality. On the other hand the dismantling of the USSR and the turmoil in Eastern Europe and other parts of the world, as people clamour for smaller autonomous units of government, represent the opposite tendency towards the particular and the parochial, and the desire to preserve national, tribal, ethnic, linguistic, cultural identities and to emphasize the differences.

Accepting the empirical divergencies, contradictions, interests and conflicts as well as the infinite range of

passions that underlie them, we ought to endeavour to integrate, rather than exclude.

Fredrico Mayor, Director General of UNESCO, recently said:

"The major challenge that faces us today is how to manage and promote diversity as a positive force, so that the recently released energies of ethnic, linguistic and spiritual solidarity serve as catalysts for creativity, rather than destruction, for concord rather than division. If the fading away of the cold war has brought an era of ideological conflict to an end, the hatreds it generated have already given way to ethnic antagonisms deeply rooted in memory. This has happened in Europe. It is happening in Africa. It is beginning to happen in Asia.

Humanity seems to be entering – or, more precisely to be re-entering – an extremely dangerous era of ethnic and racial tension. Since the hostility of one tribe towards another is among the most instinctive human reactions, these resurgent forces need to be more vigorously combated than ever before. We must harness all our energies to promoting a culture of peace among and between human communities at all levels – a culture of mutual respect and tolerance, a culture of public liberty, a culture of ethnic coexistence that fosters pluralistic and open societies within which human rights, fundamental freedoms and democracy can flourish....

The only way to meet these challenges is to follow the peaceful path of empathy and tolerance".

Whatever the preferred forms of government and inter-governmental co-operation may be, since the 18th Century, under the new theories of the rights of man, the People have come to be regarded as the centre of a nation. A state is the People's state. The People are, generally, acknowledged to be supreme.

Article 3 of the Constitution of 1972 stated, and article 3 of the present Constitution states, that 'In the Republic of Sri Lanka Sovereignty is in the People and is inalienable'.

What form of government is appropriate is a matter for the People to decide. It is a right that has been recognised by esteemed persons. Jefferson, for instance, wrote:

"... it is the Right of the People to alter or to abolish it (Government), and to institute new Government, laying its Foundation on such Principles, and organising its powers in such Form, as to them shall seem most likely to effect their Safety and Happiness..."

How can practical effect be given to the principle that the will of the People must prevail?

When a state's total population rarely exceeded 10,000 persons, and since women and slaves were then denied political rights it was possible in the ancient Greek city states to have direct, people (*demos*)rule (*kratos*). Decisions were made by the majority of the whole body of citizens. There was no separation of legislative, executive and judicial powers. Officials elected or selected by lot performed functions for which they were directly responsible to the popular assembly.

However desirable such a system of democracy may have been, the size and complexity of social organisations that had emerged by about the 18th Century required that the political rights of the People had to be exercised in other ways. Various arrangements emerged.

When 45 years ago our nation regained its Independence, our People chose to be governed by a system of constitutional democracy under which the representatives of the majority of the People exercise the powers of the People, but who do so within a framework of constitutional restraints designed to guarantee all citizens the enjoyment of certain individual or collective rights.

Speaking on the occasion of regaining our independence, our first Prime Minister, Mr. D.S. Senanayake, said:

"We have learned to value the rights and privileges of democracy. We value the right of individual liberty, to protection of person and property, to freedom of speech, to the free exercise of religion. We value the privilege of equality before the law, of trial by one's peers, of equality of opportunity to fulfil one's personality".

Disputes that arise must find their solutions at appropriate levels; but in the last analysis, democratically. This was emphasised a few weeks ago by the five Law Lords who adjudicated upon the case of Tony Bland.

Bland was a Liverpool fan whose brain was damaged in the Hillsborough riots during the FA Cup semi-final in 1989. Unlike 95 others who died, he survived in a persistent vegetative state, with his higher brain functions destroyed, unaware of his surroundings. His father applied to court to permit the Doctors to stop feeding his son so that he could die in dignity. The Official Solicitor opposed the application to allow the Courts to hear both sides of the argument. Nine judges in the High Court, Court of Appeal and the House of Lords unanimously ruled that feeding could be discontinued since Bland had no prospect of recovery. They agreed that stopping the feeding would not amount to murder, although, however irrational it may sound, the administration of a lethal injection would be. Lord Mustill observed that an adversarial proceeding was not the right vehicle for these decisions. "*Nor do I believe*", he said "*that Judges are best fitted to carry it out*". Expressing "*profound misgivings about almost every aspect of this case*", Lord Mustill said that the courts could not create a new exception to the offence of murder. His Lordship said that "*the formulation of the necessary broad social and moral policy... can only be achieved by democratic process through Parliament*".

Following the observation of Justice Scalia in the U.S. Supreme Court Decision in the Nancy Cruzon case that "*These are problems properly decided by the citizens through their elected representatives, not by the courts*", Lord Mustill added that

"The whole matter cries out for exploration in depth by Parliament and for the establishment by legislation not only of a new set of ethically and intellectually consistent rules distinct from the general criminal law, but also of a sound procedural framework within which the rules can be applied to individual cases.

The rapid advance of medical technology makes this an ever more urgent task, and I venture to hope that Parliament will take it in hand".

Naturally, many opinions on the several, complex aspects of a problem will have to be taken into account in prescribing the relevant criteria. The answer may not be as obvious as it may seem, and there will always be those who have other views. For instance, those who oppose euthanasia disagree with the decision in the Bland case, believing it to be 'the beginning of going down the slippery slope to the wider use of euthanasia. Differences of opinion will always divide people in a Democracy. That is one of its problems.

We share the difficulties of all representative democratic governments in giving effect to the will of the People. I want to stress the fact that these are not peculiarly Sri Lankan problems but that they do exist, more or less, in one form or another, in all systems similar to our own.

The Constitution in Chapter XIV and other laws make provision to ensure that elections are free and fair. There are procedures to challenge the validity of elections that are believed to be a sham or burlesque. Sometimes challenges have been valid, and people have been unseated. At other times the person challenging an election has been found, according to the relevant legal criteria, by tribunals appointed to determine such matters on behalf of the People, to have been mistaken. Unfortunately, sometimes the decisions of tribunals are not accepted with equanimity.

In any event the people in power at any time are chosen by a majority. They do not have the support of a large number of people. Further, on a given issue, the majority may well have views other than those of their chosen representative majority, and there may be no legal requirement that the decision will have to be made by the electors, as it is sometimes exceptionally the case.

A large number of persons who are an integral part of the People, have no voice because they are disqualified on account of insufficient age. It is a problem that has not been solved anywhere.

And what about those unborn, who will nevertheless be governed by laws determined by people, albeit majorities, before their time? Is democracy in Burke's phrase 'the vulgar practice of the hour' or is it, as he envisaged, rather to be a partnership '... between those who are living, those who are dead and those who are to be born'?

Moreover, some qualified voters do not exercise their right of franchise. In certain countries the problem of apathy is so acute that it has been found to be necessary to compel people by law to exercise their right of franchise so as to better reflect the will of the People.

Whatever the reason may be – supposed mental incapacity, apathy, coercion, fraud and so on – some of the people in any democracy really have no representative, sometimes not even one who may be regarded as a nominal representative, in the decision-making process.

Another problem is this : The interests of individual citizens and groups of citizens will be more or less in conflict with the views of the majority. This is a fundamental fact in any society. Where the composition of a nation is essentially homogenous in ethnic, linguistic and religious terms, as for instance in Japan, it may nevertheless be divisive in political terms. Where in addition to political divisions, there are ethnic, linguistic, religious and other groups, as for instance in our own country, giving effect to the will of the People becomes infinitely more problematical.

But whether in a pluralistic society or in a relatively homogenous society, for every majority that succeeds in having its will implemented, there will be a minority, however great or small, that fails to do so.

This we must recognize: The potentialities for tyranny are latent in every democracy. We must frankly acknowledge the possibility of majorities bludgeoning minorities. The fear of being oppressed by being subject to the uncontrolled will of a merciless majority can be very real and genuine.

In fact when democratic rule as we know it was first proposed, the great French Diplomat, Benjamin

Constant, who lived from 1767 to 1830, expressed a general concern at the time when he observed that from the point of view of the individual it makes no difference whether he is tyrannized by a single despot or by the totality of individuals composing his society; he is oppressed just the same. Indeed the latter could well be worse: tyrannicide might rescue him from an individual oppressor and, in any event, others would commiserate with him, whereas if oppressed by a large majority, he would have no comparable recourse or comfort.

Certain mitigatory measures have therefore had to be adopted by democracies. As far as the individual is concerned, we in Sri Lanka have recognized his autonomy and integrity. We have recognized the fact that he is not only a citizen of Sri Lanka who shares a social compact with his fellows, but that he is also a person who possesses rights that the State may not violate. Article 11 of the Constitution assures all persons that they shall not be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Article 13 of the Constitution guarantees freedom from arbitrary arrest and detention or punishment, and it guarantees the presumption of innocence and prohibits retroactive penal legislation.

There are other private rights which are protected. Article 12 of the Constitution declares all persons to be equal before the law and entitled to equal protection and that no Sri Lankan shall be discriminated against on the grounds of race, religion, language, caste, sex or that on any one of such grounds, be subjected to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels, places of public entertainment and places of public worship of his own religion.

Additionally, persons are guaranteed other private rights: the freedom either by himself or in association with others (1) to manifest his religion or belief in worship, observance or practice [Article 14 (1)(e); and (2) to enjoy his own culture and to use his own language. A person is also assured the freedom by himself or in association with others to engage in any lawful occupation, profession, trade, business or enterprise [Article 14 (1)(g); the freedom of movement and of choosing the residence within Sri Lanka (Article 14 (1)(h); and the freedom to return to Sri Lanka [Article 14 (1)(i)].

Besides personal and private rights, there are also those rights people have as citizens, as enfranchised members of a state, which are equally fundamental and must be respected in order to make democracy – the rule of the majority – workable.

Majorities do not form in a vacuum. Nor is the verdict of a majority accidental or fortuitous. There are no miraculous coincidences or spontaneous mergers of individual judgements. Majority opinions are formed by the dissemination of information, by argument and persuasion. Surely, no person or group of persons, unless extraordinarily stupid or inclined to anarchy, should claim to have a monopoly of good ideas? And how else can one's own ideas and thoughts be refined and perhaps corrected and improved except by listening to what others have to say? How can voters, as they are expected to in a democracy, make *informed decisions*? People must be able, within the framework of the laws enacted to keep criticism within the bounds of fairness and decency, to formulate and express and place their views for the consideration of others, without hindrance, harassment, victimization or reprisal. And so Article 14 (1)(a) of the Constitution declares that every citizen is entitled to 'the freedom of speech and expression including publication'.

That right is supplemented by other rights assured by the Constitution: The right to freedom of peaceful assembly (Article 14 (1)(b); the right to freedom of association (Article 14 (1)(c); the freedom to form and join a trade union [(Article 14 (1)(d); the right to manifest his religion or belief in teaching (Article 14

(1)(e); the freedom to protect his own culture (Article 14 (1)(f)).

Quite apart from its necessity for the purpose of organizing majorities, how else could one acquire the necessary *educated* understanding and sympathy for the rights of others so as to make democracy tolerable unless there is communication and the exchange of ideas and information? How are the essential attitudinal changes, which must supplement the law, to be brought about unless there is freedom of expression?

Are these empty, hollow, theoretical rights derived from and confined to academic discussion? They are certainly not.

The Supreme Court, which has been Constitutionally empowered with the sole and exclusive jurisdiction of adjudicating upon matters relating to the alleged violation of fundamental rights, spends a very substantial part of its time on the determination of questions relating to fundamental rights.

There are also a wide variety of other devices for giving redress and ensuring that the majority, acting through the machinery of government, does not act oppressively and unfairly, including special bodies appointed to deal with human rights problems arising from revolts against established authority.

This was done in connection with the insurrection of 1971.

And similarly, at the present time a Committee assists the Secretary to the Ministry of Defence to consider the cases of those detained during the more recent insurgencies.

There is also the Human Rights Task Force which was appointed in August 1991 to monitor the observance of the human rights of those held in custody otherwise than by judicial order. In addition, this Committee has assisted a large number of detainees to obtain release and to bring their grievances before the Supreme Court.

Another Committee appointed in January 1991 inquires into complaints of persons who have been involuntarily removed from their residences and whose whereabouts are unknown.

I should also like to refer to the Commission for the Elimination of Discrimination and Monitoring of Fundamental Rights, which was set up in 1986 in terms of the Sri Lanka Foundation Law. Hundreds of complaints have been received and grievances redressed by this committee on a conciliatory basis.

There are other, and perhaps better known, institutions such as the office of the Parliamentary Commissioner for Administration (Ombudsman) appointed in terms of Article 156 of the Constitution which is charged with the duty of 'investigating and reporting upon complaints or allegations of the infringement of fundamental rights and other injustices by public officers and officers of public corporations, local authorities and other like institutions'.

The courts of law, through the use of writs of *habeas corpus*, *certiorari*, prohibition, *procedendo*, *mandamus* and *quo warranto*, as well as by injunctions and the making of other orders, prevent and mitigate abuses of authority. There are numerous tribunals, boards of review and similar bodies statutorily empowered to inquire into disputes. And there are other processes for inquiring into disputes and complaints and giving redress.

For all that, admittedly, there are abuses and unredressed grievances. All that can be done is to honestly admit this, ensure that access to justice is available, grant the necessary reliefs, punish those responsible for the transgressions, where that is legally permissible, and seek ways and means of reducing or mitigating the consequences of future failures.

For all our great mental capacities, humankind has devised no perfect system yet, anywhere, regardless of arrogant and strident claims we hear from time to time. There is no perfect model we can import. There are no values we can transplant willy-nilly, nolens volens.

We must grope our way, moving forward, step by step cautiously, having regard to our own cultural backgrounds, despite pressure from some quarters to transplant criteria and institutions that may have been found suitable elsewhere and, therefore, mistakenly supposed to be universally appropriate.

The notion of the rule of law and of the rights of the individual which are regarded as so obvious and fundamental in Western civilizations are not recognized in the same way by those societies that, faithful to the principle of conciliation and concerned primarily with harmony within the group, do not favour Western-style individualism or the modern Western ideal of legal supremacy. It must be recognized that in some societies the upright citizen never crosses the threshold of the courtroom and acknowledges no subjective rights. Instead, his behaviour is governed by ancient rites handed down by his ancestors, ensuring him the approval of the community. Curiously, in recent times, the most advanced Western countries, like the United States, have been moving away from their own traditional techniques of dispute resolution and attempting to emulate those we have followed in our societies for thousands of years. The enthusiastic and growing preference over the last two decades for the technique known as Alternative Dispute Resolution over the adversarial system is a case in point.

It must also be recognized that large numbers of people sincerely and faithfully follow the rules of conduct prescribed by their venerated religious teachers and that these rules create obligations and not rights; they create duties that rank above all worldly matters; and that these rules ought not be confused with laws and regulations made by the State. Indeed, disenchantment has sometimes driven people to supplant more familiar forms of government altogether with others.

Let me give you an example. It has been alleged that in Somalia during the regime of Siad Barre, attempts were made to introduce Western principles at the expense of the Islamic traditions of the people. Whatever differences of opinion there may be on that matter, it is not in dispute that the unresolved conflicts dragged the nation into two years of clan warfare and one of the modern world's worst famines. Whether, as the American envoy Robert Oakley said the other day, the 'overwhelming majority' of Somalis will reject the armed extremist group known as Ittihad, is left to be seen. But the fact remains that they have all but eliminated wholesale looting of relief food which earlier deprived the starving millions of the country of essential rations. In terms of the law they apply, looters have their hands amputated. To those who do not agree with this kind of justice, Abdulkader Abdulle, a leader of the group, says this: "We want to establish an Islamic State based on Islam. We want people to obey the sharia. The whole society wants Islam as a way of life. We have tried capitalism. It failed. We have tried communism. It failed. We know no other solution but Islam. That is why the west is intervening because they see Islam coming into power in Somalia".

And even Rakiya Omar, the noted human rights activist who once presided over the human rights organization known as Africa Watch, while admitting that Ittihad's methods are 'harsh', justifies it by

reference to the inefficiency of the earlier systems and the fact that 'people are sick and tired of war'.

Having lived and worked in both Western and several South Pacific, Asian and African countries for many years, I stand deeply impressed by the fact, that although there are undoubtedly some shared values and ethical principles, large numbers of people look upon the concept of a just and social order with thoughts and feelings far, very far, removed from those of Western man.

Each nation must be free to evolve its own institutions and standards. I have no doubt in that regard. Nor have I any doubt that any attempts to compel them by economic or other pressures to conform to alien values and adopt strange institutions, are likely to have regrettable consequences. Bearers of begging bowls ought to be watchful, wide awake, and alert.

Lee Kuan Yew, recently made some interesting comments in that regard in an interview with Reuter. That great elder statesman of Asia, said:

"The strong push for democracy and human rights by the incoming Clinton administration would be a big mistake and hurt the United States than help it. I would put that as the greatest error that could be made. You're not going to change either China or Indonesia or any of these old countries overnight.... (President Clinton) will have to decide what his priorities are. Is it economics or politics? If it is economics, then he should not muddy the situation by bringing in the politics of democracy and human rights and pressing it too hard. Because that would upset the economic growth that's on its way in East Asia....Of course you can't divorce politics and economics altogether. But if you press the politics of human rights, the returns are negligible.... You can't change a Chinese civilization of 4000 years by an Act of Congress or cancelling Most Favoured Nation status... They're going to fight. And they'll fight back by stopping to buy from America and also making problems for America in the Asia-Pacific, in the Middle East and other trouble spots, selling arms' increasing political tensions and security problems. Which means the Pentagon will have to spend more money...."

And Frederico Mayor said :

"Maintaining cultural diversity requires us to work together to strengthen newly gained freedoms and openness while protecting each people against the pitfalls of hastily transferred alien models. The achievement of such a balance is important, whatever the tasks nations must shoulder, whether in the context of managing the transition to a market economy, raising the citizens' standard of living, modernizing society without destroying the ancestral values upon which it rests, or protecting cultural identity in the face of the homogenizing forces of modern technological civilization. The aim must be to contribute to the pluralism of the entire planet as well as to the persistence of plural societies in each nation-state..."

While we should be cautious and selective and wait for the arrival of the appropriate time for the introduction of new concepts, we should not be unresponsive. We have never been so. The foreign inspiration of most of our legal rules and institutions is evidence enough of that. Indeed the process has been so all-embracing in certain spheres, that we speak of the 'reception' of certain legal systems.

And of course having adopted representative democracy tempered by liberal values as a way of life, even though it was not our traditional system of government, we have endeavored to make it more effective by

constantly borrowing ideas, or adapting them to suit our needs.

A wholly new Constitution came into operation on 22nd May 1972.

Another Constitution came into operation on 7 September 1978.

The two changes might be regarded as 'revolutions', in that they ushered in altogether new legal orders by changing what, in Kelsen's word, is called the *Grundnorm* – the fundamental factor from which the will of the people might be said to be ascertained. That is why it was necessary to expressly state in Article 12 of the 1972 Constitution and in Articles 16 and 168 of the 1978 Constitution that existing laws would, unless repealed, 'continue in force'. Be that as it may, the point to be stressed is that in our quest for a more just and orderly society we have successfully brought about fundamental and radical changes peacefully.

The Constitution of 1978 has been amended sixteen times. The search for improvement continues, and arguments about what is best go on, as indeed they must in a democracy, where the contending parties seek to form public opinion. For in the end it is the People who must decide.

In ancient Greece and Rome it was believed that the three Goddesses, Clotho, Lachesis and Atropos, unalterably predetermined our lives. I emphatically reject the gravely mischievous notion that we are creatures of fate. Our destiny is in our own hands. We must endeavour, in Tennyson's phrase, 'to strive, to seek, to find and not to yield'.

CAMBODIAN ELECTIONS: THE FACTS, THE MYTHS AND THE FUTURE

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(Interim Draft)

by

Sasanka Perera

Cambodian elections were held between 23rd and 28th of May this year, and were the first real elections held in this country in nearly two decades. Political games that were played out in the aftermath of the elections such as the secessionist movement, and the ruling party's refusal to accept the results are now historical footnotes which I shall not concern myself with too much. In the descriptive account that follows I would primarily attempt to place in perspective some aspects of the electoral process itself as seen through the eyes of an international observer. Secondly I would discuss the serious failures of the UN operation, especially in the field of human rights which would ultimately impact negatively on the future of that traumatized country.

A consistent question that was raised around the world was whether the elections in Cambodia were free and fair. Ideally speaking they were not. Clearly by definition, the elections were held under abnormal conditions where a general atmosphere of fear prevailed in the shadow of an omnipotent gun culture, and in certain areas under Khmer Rouge control eligible voters could not be registered or elections held. Equally as clearly, given the country's traumatic immediate past, and the precarious present, the elections that were held were as free and fair as they were ever going to get. Besides, free and fair are relative concepts, and in the Cambodian context that any kind of election took place at all was a significant achievement.

Elections in a Society Devoid of an Election Culture

The voter turnout exceeded 80% in many of the polling stations I visited in the provinces of Kandal, Kompong Chhnang and the capital Phnom Penh. On the average this is higher than the voter turn out in

the United States, and on par with that of Sri Lanka both of which have traditions of electioneering. This high turnout was achieved despite threats by the Khmer Rouge and an extensive dis-information campaign launched by the ruling party. For example agents of the State of Cambodia (SOC)¹ intimidated voters by stating that the secrecy of the actual voting process would not be guaranteed as SOC would be monitoring it through satellite and hidden cameras. The message of course was that the people should vote for CPP or face dire consequences. Both UNTAC² and the nascent Cambodian human rights organizations had to launch special educational programs to counter such dis-information, and in retrospect those efforts seem to have paid off. The most chaotic scenes were at the commencement of elections on the 23rd of May, the first day of the six day election. We arrived at a rural polling station in Kandal Province one and a half hours out of Phnom Penh. It was situated near an abandoned high school which had been used as a torture chamber and execution centre by the Khmer Rouge. Here the large majority of the enthusiastic voters were women, a scene we witnessed elsewhere and reported from other provinces as well. (According to UNTAC electoral workers women constituted the majority among those who initially streamed in for voter registration too). Some had walked over 15 KM carrying children. As a result of the genocidal politics of the Khmer Rouge significant demographic changes have taken place in Cambodia. Women constitute a majority in the Cambodian population, and they perform a significant role in the nation's shaky economy and social organization. It would seem that their interest in the elections was a natural extension of this new identity and socio-economic role even though they are politically still marginalized.

Both men and women interviewed in Phnom Penh, Kandal and Kompong Chhnang claimed that they were motivated to vote in an attempt to usher in a "lasting peace" or "to end the war". But beyond these statements they were not willing to elaborate what they meant. Given the general atmosphere of intimidation this was not surprising. It seemed people were more afraid to condemn the CPP than the Khmer Rouge. No one we met (including party agents) was willing to comment on the outcome of the elections, and on one occasion a 64 year old man answered my question with the following observation: "It is like trying to decide the sex of a child before the mother has given birth".

In most polling stations the procedures were apparently well organized. But there was a visible difference in the organization patterns between the Provinces of Kandal and Kompong Chhnang. In the first schools were widely used as polling stations, and in many cases their windows were closed for "security reasons", creating a dark, claustrophobic environment. In the latter most polling stations were in the open and airy dining rooms of the wats (temples) scattered around the country. Moreover, in most of the polling stations in Kompong Chhnang cloth screens and bamboo fences separated the actual voting areas from inspection areas meant for identification and other procedural purposes. Posters of voting procedures were also prominently and strategically displayed. As such in the latter case the secrecy and the integrity of the ballot was more visibly believable except when foreign journalists snapped photos and filmed the voting process in clear violation of UNTAC election regulations. But then, in Phnom Penh UNTAC itself organized photo opportunities violating its own regulations.

Cambodia does not have an election culture. In general, the memories of elections in the distant past are vague. Many people interviewed had never voted before. Thus election procedures and behaviour are not

¹ For practical purposes, the SOC and the Cambodian Peoples Party (CPP) are synonymous.

² UNTAC stands for United Nations Transitional Authority in Cambodia.

part of the general political socialization of the nation. As such, despite the extensive election education programme launched by UNTAC certain "natural irregularities" were bound to take place. But then minor irregularities were more the norm than the exception in the election. Under relatively normal election procedures such incidents may have caused concern. But for the moment in irregular Cambodia such incidents were of marginal if any significance. Sometimes, in the confusion and chaos of the initial early morning rush to vote there were more than five or six voters crowded into a single voting booth chatting and comparing marked ballot papers. Such behaviour however, did not proceed beyond the morning session of the first day of voting. There were also instances when the invisible ink used for voter identification confused the voters who thought they were to mark the ballots with their fingers dipped in invisible ink. Others scratched the ballot paper with their finger nails. How wide-spread such behaviour was could only be determined after detailed statistics of spoilt votes are available.

On numerous occasions voters deposited the marked ballot papers in a cavity on the cardboard boxes used as a counter-top for marking ballots instead of in the ballot boxes provided. On a number of occasions the international observers pointed out the problem to the electoral workers, and in many cases they had already discovered the problem. In a polling station in Phnom Penh one woman actually asked an electoral officer to mark the ballot as he thought proper because she could not read or understand picture symbols.

If these were "irregularities" resulting from lack of political socialization in election behaviour, there were other deliberate and orchestrated activities which showed a high level of planning and access to resources. In all polling stations in both provinces we visited we witnessed a well organized voter transportation programme. Trucks belonging to the SOC were used to cater people from distant villages to the polling stations. In most cases the vehicles belonged to the military, Ministry of Transportation and the Ministry of Hydrology. Strictly legally speaking this does not constitute any violation of UNTAC election laws as pointed out to us when this matter was brought to their notice. On the other hand given the long distances people have to walk to reach certain polling stations, this is a useful service. However, this activity has the ability to influence the voters in favour of the ruling party, especially when the vehicles are plastered with CPP posters and the drivers were wearing CPP T-shirts. However, *Sok An* the Chief of Cabinet of SOC denied that the CPP had organized such activity.

Another visible activity was organized group voting. On our way to many polling stations it was clear that groups of people were being led to polling stations. Of course in anticipation of violence it would have been safer to travel in a group. On the other hand this may have resulted from CPP intimidation. In most cases the leaders of such groups were identified as village or commune leaders who invariably constitute components of the CPP/SOC organizational structure. In Kandal a group of students led by their teacher informed us that their teacher had instructed them to vote for CPP. In both provinces there were also incidents of vote-buying where people were paid between 2000 - 3000 Riel to vote for CPP. On one occasion armed soldiers of SOC rode in to a polling area and simply maintained a presence. On many occasions other soldiers were distributing CPP literature in the vicinity of party offices invariably located close to polling stations.

On the 23rd of May we heard rumours that SOC officials had been advising people to vote for CPP in the polling station (#302) located at Wat Khasam in Commune Sankat in Kompong Chhnang. The incident was investigated and confirmed the next day. As far as we could establish high ranking SOC officials from the province arrived at the polling station in the morning soon after the station was opened. They were accompanied by other party supporters. The group actively canvassed votes for the CPP, and the International Polling Station Officer was unaware of the exercise until noon. The opposition party agents

were too afraid to complain, and the International officers could not speak the language to understand what was going on. Finally, when the International staff did intervene, the culprits were persuaded to leave. UNTAC is not known to have complained to SOC about the incident.

While other political parties are also known to have engaged in activities such as described above, as occasionally reported in the press, the CPP had more funds, more resources and better organizational network to impact upon the voting populace more intensely and in greater scale. All the activities described above must be placed and understood in the context of the pre-election intimidation campaign launched by the CPP/SOC.

On the second day of the election *Sok An*, the Chief of Cabinet of SOC and an aide complained to us that a ballot box had fallen off an UNTAC military truck, and the plastic lock and seal were broken dispersing marked ballot papers. The box was returned to the local CPP office by peasants, and was later retrieved by UNTAC. Some confirmed incidents of this nature did actually happen, even though they were not publicized. Such incidents are however, not surprising given the fact that UNTAC failed to consider the state of Cambodian roads when importing Western election technology (including flimsy plastic locks and seals on ballot boxes) into Cambodia. Even though the CPP made a complaint about the fly-away ballot box, and that UNTAC did not appreciate their help in recovering it, they did not mention that the pencil-marked ballots could have been easily tampered with while they were in their possession. In retrospect, it would seem that CPP's claims of electoral fraud by the opposition and UNTAC emerged after sensing that the royalist FUNCINPEC party had gained a marginal lead in the polls. Their allegations were based on real or perceived irregularities on the part of the opposition, the kind of irregularities, the CPP itself was engaged in with much vigour.

Elections and Security Conditions

Security was an important pre-condition for the successful completion of elections. It seems that there exists an enduring myth both among some Sri Lankans and observers from other countries I have talked to that the elections were possible greatly due to UNTAC military presence. While the UNTAC military and civilian police did help in various law and order activities, transportation and logistical support for the elections, the elections proceeded mostly due to the courage of the Cambodian people for daring to vote despite Khmer Rouge threats and more importantly due to the conscious decision taken by the Khmer Rouge leadership not to disrupt the elections. In that sense, however distasteful it may be, some of the credit for the success of the election goes to the Khmer Rouge. Despite a few sporadic attacks on UNTAC military and civilian personnel and short-term disruption of electoral activities in a few polling stations, Khmer Rouge activities were at a bare minimum. Clearly, they had the expertise and the network to carry out a series of attacks which would have seriously disrupted the entire electoral process regardless of the ineffectual presence of the UNTAC military and unarmed civilian police. However, until the very last moment UNTAC was not sure of Khmer Rouge moves. For example, electoral voters in certain parts of Kompong Chhnang Province were advised by the UNTAC military to avoid being in the polling stations at 8.00 AM when they were due to open. Instead they were asked to await until 10.00 AM in case missiles were fired.

Clearly, UNTAC military presence has not seriously hampered Khmer Rouge mobility or strike capability. In fact it has aided it. According to UNTAC intelligence itself in Phnom Penh there are estimated 60 to

100 Khmer Rouge activists who could have easily carried out a bombing campaign. They also maintain a significant presence in Kandal and Kompong Chhnang Provinces where they were not active a year ago. Before the arrival of UNTAC the SOC military used to arrest suspected Khmer Rouge activists or engage them in combat. Such activity is not permitted or difficult in areas where the UNTAC military operates.

Intelligence reports suggest that the Khmer Rouge are receiving new weapons with Chinese markings. However, the Chinese have stated that they are not providing any new assistance to the Khmer Rouge since the adoption of the Paris Accord. Diplomats and UNTAC officials in Phnom Penh consider that the Chinese position is believable. The new weapons are probably those delivered before the Paris Accord which enter Cambodia over the Thai border with the help of Thai provincial authorities. In any case, according to intelligence reports the Khmer Rouge has allegedly stashed away adequate weapons and ammunition to last for several years of guerrilla activity even if all overseas supplies are halted³.

Thus it is clear that the Khmer Rouge did have the capability to disrupt the elections, but decided not to do so. Two main theories current in Cambodia attempt to come to terms with this apparent inaction of the Khmer Rouge. According to the first theory Prince Sihanouk came to an agreement with the Khmer Rouge that they should not disrupt the elections, and in return they would be absorbed into the government in the event the FUNCINPEC party emerged victorious. Though the speeches of the official leader of FUNCINPEC, Prince Ranridhh seemed to negate this idea, the political record and the pronouncements of Sihanouk, the main attraction of FUNCINPEC (despite his official non-affiliation to any political party) seemed to suggest that this was possible. The Khmer Rouge itself was also known to have been interested in some foothold in the future government. But Cambodians did not aspire for a Khmer Rouge government, and had no illusions about the memories of terror from the past. However, many Cambodians I talked to were not hostile to the idea of a Khmer Rouge presence in the future government as they took the pragmatic view that such an inclusion would help end the war. Many Cambodians subscribed to this theory.

The second theory, favoured by UNTAC military, holds that Khmer Rouge did not launch any major attacks because it was not keen to get involved in skirmishes at this stage in anticipation of launching intermediate or large scale attacks after the elections. Military involvement at this stage would cause logistical, organizational and man-power problems for any future operations.

Alternatively, the Khmer Rouge was simply being cautious as they were witnessing an unusual exercise from which it could have gauged the public mood. In this event they had room to agitate for some political representation on the grounds that they allowed the elections to continue while they had the ability to disrupt it.

Human Rights in Cambodia: Mistakes of UNTAC and Prospects for the Future

³ There should also be no illusions that in terms of current logistical conditions the Khmer Rouge can never launch a full scale attack on Phnom Penh. In areas currently not under their control the Khmer Rouge can attack and occupy some provincial towns only for a maximum of a few hours or one day. This equation should not change with the withdrawal of UNTAC military as already pointed out UNTAC military activity has not seriously restricted Khmer Rouge activity.

It was mostly Cambodia's atrocious human rights record in the Pol Pot years and after that finally prompted an apathetic international community to convene the Paris Meeting in 1991 (after a series of earlier meetings) in an attempt to resolve some of Cambodia's problems. It was on the basis of this meeting that the Paris Agreements were drafted providing provisions for UNTAC to be created and for the holding of elections and the drafting of a new constitution. Yet, despite the collective memory of a bloody past, and the presence of UNTAC which was supposed to improve law and order and human rights environment, the human rights record in Cambodia remains dismal. Activities of SOC and other political parties as well as the dubious behaviour of UNTAC itself are directly responsible for this sorry state of affairs. In addition to the UNTAC Human Rights Component, there are four Cambodian NGOs working full time to improve the human rights situation in the country. Despite the support these groups receive from International organizations their task is an arduous and dangerous one. For example CPP/SOC officials have reportedly threatened human rights NGOs that they will be dealt with once the international presence in the country is withdrawn. All local human rights NGOs aspire for a continued presence of international human rights observers to gain expertise, and funding. They also believe that such a presence would guarantee their safety to some extent. Already a number of human rights workers have been killed or abducted by Khmer Rouge activists or SOC agents. Besides, there is nothing to suggest that the new government would take the issue of human rights any more seriously than SOC has done hitherto. At the moment the principal task of Cambodian human rights NGOs is to educate the people about their rights and investigate and prosecute human rights violations. However, given the absence of an independent judiciary in the country, the prosecution of culprits is a non-event.

Allegedly to combat this situation the UN Special Prosecutor's Office was established with the explicit idea of prosecuting human right violators. But hitherto the Special Prosecutor has not prosecuted a single culprit mostly due to UNTAC's disinterest in prosecution. Many UNTAC bureaucrats claim that the new office have no valid legal basis for existence. One idea expressed by frustrated officials and accepted by the human rights community was that "UNTAC is running a public relations enterprise aimed at pacifying SOC and other political entities, and as a result justice has been compromised for order". It is clear that despite the interest of people in the UNTAC Human Rights Component and the Special Prosecutor's Office. UNTAC in general had no interest in directly addressing the human rights situation in Cambodia. As a result absurdities occurred. For instance a jail was built at a cost of US\$ 87,000.00 to hold those arrested for human rights violations. In a country where such violations are commonplace the UNTAC jail could hold merely 14 prisoners. A monthly rent of US\$ 3,500.00 is paid for the premises and it has never been opened as no one adequately qualified could be located to operate it.

The danger of the situation is that UNTAC moved into the country when the human rights record was atrocious, and as things are, they will be leaving without having laid any foundation for a culture or legal framework for prosecution to emerge. Let me highlight some of the more serious reasons for this failure.

- 1) There is no independent or competent judiciary, and as such it is pointless initiating any legal procedures within the existing system. Judges take orders from the Minister of Justice and other high-ranking politicians. In two cases the Special Prosecutor arrested two culprits (one a self-confessed Khmer Rouge guerrilla who had massacred a group of Vietnamese civilians, and the other a SOC policeman who had murdered an opposition political activist), and tried to prosecute them. In both cases the Chief Judge refused to hear the cases or set court dates. The Minister of Justice had threatened all judges that they would be severely dealt with if they cooperated with the Special Prosecutor. However, the special Prosecutor's office drew up a plan to bring in foreign judges and

identified a group of judges who were willing to operate in Cambodia. Nevertheless, UNTAC refused on the basis that this would violate Cambodia's sovereignty. If so, it had already been done with the arrival of the 15,000 strong UN military!

- 2) The inability or disinterest of UNTAC to assure that all police and other law enforcement apparatus functioned under UNTAC as envisaged. This effectively offered SOC police and military ample avenues to hamper investigations. This failure and UNTAC's non-existent prosecution and arrest record assured that police, military and other SOC/ CPP agents could act without restraint, or fearing any legal consequences.
- 3) Fear, disinterest, lack of Khmer language proficiency, and lack of proper police experience hampers investigations by the unarmed UNTAC civilian police. For instance at 3.25 PM on the 25th of May outside the polling station located at the Kompong Luong Primary School in Punyang Lou District villagers complained of gunfire. Two members of the international observer team went to investigate and established that an automatic weapon was fired at the ground (six bullet holes were identified) and recovered one M-16 spent shell. The culprits who turned out to be SOC militia had manhandled a supporter of the Buddhist Liberal Democratic Party before the shooting commenced. The UNTAC police (from India and the Philippines) were not keen to investigate on the basis that the incident did not occur in their "jurisdiction" and that the victim was drunk. They also could not take down a statement in Khmer, and were not interested in translators. They wanted to report the incident to the local police who were affiliated with the militia. Members of the Bulgarian Military unit present at the polling station were completely unaware of the incident. As far as I know the matter did not proceed beyond the two UNTAC policemen.
- 4) Weakness of legal procedures adopted by UNTAC hampers many attempts to prosecute as do they frustrate officers who must operate within these procedures. For instance, suspects of murders and human rights violations committed before the 29th of September 1992 cannot be prosecuted, which effectively retards any effort to prosecute people responsible for genocide. In the same manner if injuries sustained as a result of human rights violations heal within six months, the culprits cannot be prosecuted. This effectively means that prosecutors have to hang around for the specified period to ascertain if a victim's wounds heal by which time the culprits would have disappeared.
- 5) Direct intervention by UNTAC through its so called Action Cell. The Action Cell was supposed to decide whether to prosecute cases or not thereby subverting and duplicating the roles of the special prosecutor and UNTAC police. The real function of the Action Cell seems to be to assure that no prosecutions or investigations that would upset the SOC takes place. This essentially blocks all prosecution activities. Consider the following case. A Khmer Rouge guerrilla was captured, tortured and murdered by SOC military. Despite the confessions of the soldiers and officers concerned obtained by the Special Prosecutor's Office, the Action Cell ordered the special protection not to prosecute on the grounds that such action may be construed as supporting the Khmer Rouge against the SOC. Instead the Action Cell wrote to the Minister of Justice asking him to advise the commanding officer. There are also reports that many important case files were never forwarded to the Special Prosecutor's Office.

Concluding Comments:

The Cambodian elections are simply the first phase in the possible direction for a better future. However,

the road to that hitherto elusive goal lies at the end of a bumpy and dangerous road. The elections have merely satisfied some fundamental needs of Cambodians. They offered them a symbolic means of indicating their wishes for political change, and the opportunity to elect a Parliament where no single party has an absolute majority. Many Cambodians (especially those involved in human rights activities) I spoke to believed that such a legislature would guarantee some checks and balances against corruption and abuse of power.

However, despite international euphoria over the successful completion of the elections, the Cambodians themselves do not have any illusions about their own future and destiny. But regardless of the trauma of the past they are hopeful, and are willing to try solutions they think might work best for themselves. In such a context it is not up to the judgmental over-righteous international community to dictate terms to Cambodians on the basis of Western models of democracy that may not work in Cambodia. However, from this point onwards, it is up to the international community to support all reasonable efforts emanating from Cambodians themselves to steer their country in the potential direction of a better future and political stability even though they may not fulfil Western visions of democracy. It must not be forgotten that mistakes on the part of the West in particular and the international community in general have much to do with the yet to be healed wounds of Cambodia. Such wounds will only heal once, and if the culprits are punished in a manner deemed appropriate by the Cambodian people.

The Khmer Rouge are still at large. They will remain at large and be a continual irritant unless they are militarily eliminated, made financially impotent or absorbed into the new government. Ultimately the Cambodians themselves must decide which course of action they should take. The former has proved to be difficult. The two latter options have not been tried. Funds for Khmer Rouge activity mostly come from the lucrative trade in gems and logs with Thailand. On behalf of the people of Cambodia the international community must bring pressure upon the Thai government to prohibit its provincial military and government agents as well as business elements trading with the Khmer Rouge thereby giving them a steady supply of cash to finance its war effort. In the final analysis, a financially strapped Khmer Rouge means a militarily incompetent military machine. Under such circumstances if the Cambodian people are willing to incorporate them within the government structure, that is an experiment the international community should respect. With misplaced notions of justice and righteousness the international community may want to impose its own values on the Cambodian polity, and erroneously believe that only such impositions will result in seeing the light at the end of the tunnel. However, if they are not cautious that light may turn out to be the train coming towards them which would ultimately destroy Cambodia's only fragile hope for peace.

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