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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 and legal personalities associated with the Trust. Our publication is aimed at raising public awareness on all issues concerning the legal rights of citizens, and at gaining wider recognition of law as society's instrument for peaceful change.

We apologize to our readers for publication delays. In our first issue of Volume V of the Fortnightly Review we publish Mario Gomez' comments on a recent judgement by the Court of Appeal in a divorce case which will have important consequences on the struggle to secure women's rights in Sri Lanka. In our next article Stig Toft Madsen argues that there is no case for secession as a solution to Sri Lanka's ethnic problems. An official report on the material conditions of the Sri Lankan refugees by the British Refugee Council is followed by personal accounts by the refugees themselves, presented in Rohini Hensman's Journey Without a Destination, reviewed in this issue. We conclude with a study by Kanaga Dharmananda on legal aspects of participatory development in Sri Lanka.

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AN EMERGING FEMINIST JURISPRUDENCE ?

by

Mario Gomez

From a male dominated profession - ideologically and numerically - comes news of a recent judgement on the question of gender. Against the backdrop of legal culture which has for long supported patriarchy, the judgement has importance consequences for the rights of Sri Lankan women.

The case in question is the Court of Appeal judgement in *Kandasamy v Asokan*, delivered on 19 January 1994.

The judgement is important for its rejection of the concept of common domicile - a concept that for long has submerged the identity of the married woman.

The case revolved around an action for divorce filed by a wife in Sri Lanka. The wife alleged malicious desertion (which is one of the recognized grounds of divorce in Sri Lanka) and also sought the custody of the children of the marriage. The husband was residing in Madras and Madras had been the *situs* of the family home. The wife had been forced to leave because of the matrimonial misconduct of the husband and in 1990 had returned to her parental home in Colombo.

In the District Court the action was dismissed on the ground that the District Court had no jurisdiction to entertain the application.

The District Court appears to have dismissed the action of the wife on the grounds that

- desertion (constructive) occurred Madras;
- the matrimonial home was not in Sri Lanka;
- the marriage was contracted in Madras (and therefore the procedural law relating to the Court's jurisdiction was not applicable);
- the marriage was contracted outside Sri Lanka;
- it is the Court of the husband's domicile that can grant the divorce; and

- that wife was not able to prove that she was not subject to the law applicable to the husband.

This decision was reversed by the Court of Appeal. Justice Ananda Grero, with whom Justice Palakidnar agreed, held that there was nothing in the applicable law which prevented the Court from dissolving marriages contracted outside Sri Lanka. The Court had jurisdiction irrespective of where the marriage was contracted.

The Court also found that the procedural law applicable (Section 597 of the Civil Procedure Code) did not prevent a Court from dissolving a marriage where desertion had occurred outside Sri Lanka. Thus the court accepted the position that even where the marriage had taken place outside Sri Lanka and the act giving rise to divorce had occurred outside Sri Lanka, it was yet possible for the Sri Lankan courts to grant a divorce.

This decision rolls back a long judicial tradition which had upheld the domicile of the husband as determining the wife's. [See Savitri Goonesekere, '*Some Policies on Nationality, Domicile and Personal Status in the South Asian Region and International Standards*'. Paper presented at the LawAsia Meeting held in Colombo in September 1993.]

In *Le Mesurier v Le Mesurier* [1 NLR 160] the Privy Council held that the District Court of Matara did not have the jurisdiction to dissolve a marriage contracted in England by British subjects, who though resident in Ceylon still retained their English domicile. However it was not expressly stated that the domicile of the wife was that of the husband.

The Court did concede though that other matrimonial remedies such as maintenance and judicial separation may be granted irrespective of the domicile of the parties.

So although their matrimonial domicile was Ceylon both parties still, retained their English domicile and the Sri Lankan courts lacked jurisdiction to dissolve the marriage.

Marriage has traditionally been looked at as a legal method of fusing the wife's identity with that of her husband. In most aspects of the relationship this has gone beyond fusion and resulted in a submergence of the wife's personality.

One way in which this has been achieved has been through the use of the concept of 'domicile'. The husband's choice of domicile determined the wife's and their children's.

Thus the wife is subject to the laws of her husband's domicile even if she was separated from him.

In some areas of the law, even now, the husband's marital power over his wife is enormous. This is particularly true under the Tesavalamai where upon marriage the wife loses the ability to deal with some of her property without the approval of the husband. She also loses the capacity to initiate litigation without his approval. [Ibrahim v Annamma [1982] 2, Sri L.R. 633].

The family has been one of the major objects of attack of the feminist movement. Millet for example argues that 'patriarchy's chief institution is the family' [K Millet, Sexual Politics: London, Virago, 1985, p 33]. Feminists have argued the family is not a 'natural' institution, which supplies the emotional, sexual and domestic needs of adult partners. Rather it is used as a method of exploiting women's labour, and provides a vehicle through which male power may be expressed violently. It has been viewed as one of the worst forms of sexual oppression.

While the judgement raises a whole host of issues related to the conflict of laws, it clearly increases a woman's choice. It gives her a greater degree of control (over her own life!) than she would have had, under the concept of 'common domicile.

However where the judgement fails is in its reasoning process. The process of reasoning sustaining the conclusion is weak, a vital factor if the case is to be a 'successful' precedent for the future. The Court merely reasons that the earlier case of *Le Mesurier* is not applicable and that the Sri Lankan law on the point has evolved beyond the position articulated in that case.

Litigation in Sri Lanka has not been a centre of the women's struggle - a struggle characterized by a surprising lack of aggression. Perhaps the sensitivity expressed in judgements of this nature may create greater faith in the litigation game.

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SELF-DETERMINATION IN SOUTH ASIA

by

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The Charter of the United Nations and the two Covenants of the Bill of Human Rights (but not the Universal Declaration of Human Rights) state that "All peoples have the right to self-determination". What does this mean, and in whom or in what does this right reside? According to Alfreddson, there are at last five forms of self-determination residing in either a state, a people, a state population, or a minority. Thus, self-determination is:

"1) The right of a people to determine its international status, including the right to independence, sometimes referred to as external self-determination;

2) The right of a state population to determine the form of government and to participate in government, sometimes extended to include democratization or majority rule and is [sic] sometimes called internal self-determination;

3) The right of a state to territorial integrity and non-violation of its boundaries, and to govern its internal affairs without external interference[1];

4) The right of a minority within or even across state boundaries to special rights - not only protection and non-discrimination, but possibly the right to cultural, educational, social and economic autonomy for the preservation of group

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[1] John Stuart Mills discussed self-determination in this sense arguing that all states, whether democratic or not, are self-determining communities responsible for their own future. No other powers have the right to intervene in the internal affairs of a state as self-determination provides people the opportunity "to become free by their own efforts" (from Walzer 1992: 87). This strict non-interventionist stance has been softened by later liberal philosophers. Michael Walzer, for example, argues that military intervention aimed at bringing down a tyranny is justified when a people cannot exercise its right to self-determination (Walzer 1992).

identities. Indigenous peoples might want to have the right to their land added to this list of special rights; and

5) The right of a state, especially claimed by developing countries, to cultural, social and economic development".

(Alfreddson 1982 quoted by Ortiz 1984:114 quoted by Kushner 1988:27).

This paper focusses on the first meaning of self-determination, i.e. on the right of a people to form a state. The United Nations has sought to limit this right to overseas Western colonies. Logically and morally, however, the right to external self-determination should be looked upon not as a right limited to a particular historically defined set of people, but as a right any people may enjoy under certain circumstances. The question arises under which conditions a people may rightfully claim the right to form a state by seceding from an existing state whether this state happens to be a Western colonial power or not.

Allen Buchanan has recently subjected this question to a liberal philosophical analysis. Buchanan (1991) identifies and discusses twelve grounds on which secession has been justified. I will present each of these arguments as well as Buchanan's stand on them. Further, I will match each argument with arguments current in or relevant to South Asia. The purpose of this exercise is to sound out how Buchanan's analysis resonates in a South Asian context. No attempt is made to deal with all possible regional ramifications of Buchanan's analysis.

Grounds of secession

1. **Protecting liberty**: This argument posits that demands for secession should be honored as prohibiting secession would be anti-liberal. The argument, according to Buchanan, is not sound as there has to be a limit to secessions. If all or many groups were to secede on this ground, it would be harmful to both those seceding and those not wanting to secede. However, according to Buchanan, it is up to those resisting secession to specify why secession would be harmful.

In South Asia, the argument that demands for secession should be heeded simply because it would be illiberal to do otherwise, is seldom heard. On the contrary, it is often argued that

secession should be resisted if it is not in the interest of those who lay claim to it. In India, the argument that Khalistan would be harmful to Sikhs and that an independent Kashmir would return to medieval anarchy as seems to be the lesson of Akbar's book on Kashmir Akbar 1991) are attempts to justify resistance to secession by postulating harmful consequences to those supposed to benefit from secession. Even human rights activists such as V.M. Tarkunde have argued that the demand for Khalistan should not be supported as a future Sikh theocratic state would bring harm to the Sikhs[2]. The argument smacks of paternalism, but it is, nevertheless, widely used, officially and unofficially, while formulating a policy toward "misguided youth" and others.

A variant of the argument against secession on the grounds of protecting liberty stresses the harm Punjabi Hindus and Kashmiri Pandits in Indian Punjab and Kashmir would suffer were these states to secede. If the properties of these Hindus were to be appropriated without compensation, the case against secession would be strengthened. Though this is a likely scenario, and one which has already to some extent unfolded, it is hard, as Buchanan requires, to demonstrate that property will not be compensated in case of a negotiated secession.

Following a similar argument, secession may be opposed by arguing that the state's loss of investment de-legitimizes secession. A seceding state would be able to meet that objection by promising to pay a fair compensation.

2. If diversity is good, the more the better: Secession to **further diversity** would therefore seem justified. However, according to Buchanan, diversity to be enjoyed must be experienced. If each state aims at homogeneity, the purpose of diversity is lost as each person only experiences a particular type of society. Strong borders between diverse states seriously weakens the argument based on diversity.

In South Asia, the argument for furthering diversity through secession is rarely voiced. Those who value diversity generally want to further pluralism within existing state boundaries. Those who demand secession generally seek to safeguard and isolate one specific culture which they claim is threatened. As the demand for secession and attempts to limit diversity often go hand in hand, the argument that secession is just as it furthers

[2] Interview with V.M. Tarkunde, February 1992.

diversity carries little weight in South Asia.

3. Secession to **preserve liberal purity**: Where illiberal or fundamentalist groups thriving on the tolerance of a liberal state pose a threat to that state, secession of these illiberal groups would be a prudent solution for the liberal state as the illiberal groups would cease to be a threat, and the liberal state would be able to preserve its purity. The argument may be stretched to the point of arguing that illiberal groups have a duty to secede. According to Buchanan, this argument has some merits, but not enough to constitute a ground of secession.

This argument also does not command much credence in South Asia. A widespread presumption in South Asia holds that secession aimed at getting rid of illiberal groups would lead to further secession as the establishment of one illiberal state gives rise to demands for another. The experiment of preserving liberal purity by creating purely liberal states would risk defeating its purpose by furthering all-round illiberalism. The fact that the division of British India into a liberal India and a not-so-liberal Pakistan has not lead to a stable peace between India and Pakistan or between Hindus and Muslims is often seen to bear out this apprehension. It is sometimes argued, however, that while partition did not lead to a stable peace, Pakistan has served as a negative model for Indians, the vagaries of Pakistani politics reinforcing liberal convictions in India. In that sense, the gamble of partition has paid off allowing India's liberal regime to feed on the fears of India going the way of Pakistan.

4. **The limited goals of political association** argument posits that secession is just if a union were voluntarily contracted with some specific aim in mind, and if it were understood that once its purpose was achieved, it would be permissible for the constituent parts to withdraw. According to Buchanan it is relevant whether the units were bound together before the constituent units entered into such a pact, and whether the pact specified that they would stay together henceforth.

It would be possible to argue that several of the present South Asian states are the creations of British colonialism and that they have no other historical justification. However, in some parts of South Asia independence was won by nationalist movements which were both anti-colonial and adverse to princely rule. At the time of independence most political leaders and most people certainly did not visualize that the states they inherited would revert to a pre-colonial **status quo ante** once the goal of evicting the colonizers was achieved. This

conviction was incorporated into the constitutions. In the Indian constitution, for example, the different parts of the union have no rights to secede or even to exist. State boundaries have be redrawn several times, but the Union is regarded as indestructible (Hannum 1990:153).

In the case of Kashmir, it could be argued that the Kashmir ruler Hari Singh acceded to the Indian union only for the particular purpose of securing assistance in fighting off the Pakistani army and Pathan irregulars who were invading Kashmir, and that Kashmir could, therefore, rightly detach itself from India once that danger subsided. However, what matters, according to Buchanan, are the actual terms of the contract, not the subjective purpose of entering into the contract.

5. **Making entry easier:** In order to make a union more attractive for prospective members, the right to secede from the union could be guaranteed. Buchanan does not accept this argument stating that the right to secede is not relevant provided a territory is guaranteed the right of veto or the right of nullification.

None of the constitutions in South Asia provide for a right to secede. Kashmir, again, is a special case: Though not guaranteeing the right to secede, Jawaharlal Nehru promised that its accession to India would be subject to confirmation by a referendum. This referendum has not been held and no territory in contemporary South Asia has, thus, enjoyed the option of seceding.

Buchanan suggests that the right of veto or nullification may substitute for the right to secede by widening the scope of self-determination in the fourth sense above. In India and Pakistan, political competence is divided between the federal union and the states or provinces, some powers being shared or "concurrent". State or provincial governments may be dismissed by the federal government under certain conditions. In India, this has happened at least seventy times since independence (Hannum 1990:154). It is widely felt that secessionist claims would decrease were the states to be guaranteed against this abrogation of their right to self-determination. Other countries in the region, notably Sri Lanka, have a more unitary structure and, hence, the demand for autonomy and secession carries greater weight than in India or Pakistan.

Some smaller territories in South Asia enjoy constitutionally guaranteed autonomy. The

Federally Administered Tribal Areas (FATA) in the North-West Frontier Province of Pakistan is an extreme case. Many laws, including criminal laws, do not extend to FATA, neither does representative democracy in the full sense. The case of FATA shows how accession becomes possible by granting considerable guarantees and immunities to a tribal society. It also shows the high costs of such a loose union to both parties. Buchanan does not discuss at which point autonomy becomes virtual independence.

6. **Secession to escape discriminatory redistribution** is a frequently cited ground of secession. Taxation schemes, regulatory policies or economic programs that "systematically work to the disadvantage of some groups, while benefiting others, in morally arbitrary ways" (Buchanan:40) constitute discriminatory redistribution. According to Buchanan such discrimination is a valid ground of secession.

As Buchanan notes, charges of discriminatory redistribution abound. This also applies to South Asia where politics has revolved and still, to a large extent, revolves around how the powers-that-be allocate resources, favors and entitlements to a number of distinct, competing groups in return for their support and loyalty. In such a polity there is inevitably a strong tendency to defend old privileges as well as newly acquired group entitlements with righteousness and zeal, and to claim neglect and discrimination when privileges and entitlements are withdrawn. Though it is clear that redistributive discrimination is a valid ground of secession, it is difficult for the state a well as the observer to determine which groups are subject to a severe form of discriminatory redistribution and which groups are defending privileges.

Buchanan would accept secession by better off groups even though this means that they in future will not contribute to their worse off former fellow citizens. If a group has become rich by virtue of positive discriminatory redistribution secession would not be justified unless the seceding group pays an appropriate compensation to the worse-off group it leaves behind (Buchanan:120).

In the case of Punjab it is perhaps impossible to determine whether this part of India has become relatively well-off due to pampering or due to the entrepreneurial spirit of the Punjabi Sikhs and Hindus. However, insofar as positive discrimination has contributed to a condition of economic well-being the case for secession is weakened.

Secessionist movements in the region are of two types:

1) Larger tribal groups, especially in the peripheral areas, such as Nagas, Manipuris, Mizos, Baluchis, the "Jumma" tribes in Chittagong Hill Tracts, and the tribes in the Jharkhand area, and

2) Non-tribal centrally placed groups, such as Sikhs in Indian Punjab, Tamils in Sri Lanka, Sindhis in Pakistan and Muslims in British India.

While the tribal groups often stress that they were cheated of their erstwhile autonomy at the time of de-colonization, the non-tribal groups often stress systematic discrimination in a number of areas: lack of large state-owned industries (in Punjab and Kashmir), unavailability of sufficient water for irrigation due to unfair distribution policies (for Punjab see Jafar 1988, chapter III), discrimination in higher education and discriminatory language policies (Sri Lanka) etc. Some such claims are thinly disguised attempts to retain privileges. Thus, the policy to reduce the proportion of Sikhs in the Indian army in which the Sikhs were and still are over-represented, was one of the factors which sparked off the Khalistan movement around 1980. It is doubtful that reaction can be considered morally just[3].

The movement for Pakistan combined arguments of discriminatory redistribution with arguments in favor of safeguarding group privileges. While the case for protection of the Muslims was often made with reference to the suppressed and backward Bengali and Punjabi Muslims, the Muslim League also openly demanded positive discrimination and privileges for the Muslim aristocracy and the Muslim middle classes in Northern India.

In contrast, the movement for Bangladesh was more persuasively argued on the basis of discriminatory redistribution by West Pakistan against a weak and poor East Pakistan. The fact that the establishment in West Pakistan refused to accept the electoral verdict bringing an East Pakistani party into power, showed that the East Pakistanis were politically discriminated against.

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3 See Brass (1991: 198-99) for a discussion of whether the Sikhs have been discriminated against by the Indian State.

7. Secession to **enhance efficiency** is a popular argument of no-nonsense economists who claim that smaller territorial units are better than larger ones, but Buchanan does not judge the argument to carry much weight. He distinguishes three scenarios of secession: an outcome where both secessionists and the remainders are better off than before, a scenario in which the secessionists reap an improvement whereas the remainders are unaffected, and a third scenario in which the secessionists are better off while the remainders are worse off than before. Not even in the first scenario do the secessionists have a moral right to secede. Non-secessionist groups having property in the seceding areas have a right to remain in possession of that property, if they so desire, according to Buchanan.

Though many people feel that smaller states, like Haryana in India, are better administered than bigger states like Uttar Pradesh, arguments along these lines have not been of much importance in South Asia. Some may despair that India is too big and populous, but arguments for efficiency are rarely turned into arguments for secession. An exception is the argument, apparently current in parts of North-East India, that secession would be an economic advantage as it would enable the seceding state to gain access to international development aid.

It is often doubtful whether seceding states would, in fact, be better off: Would Indian Kashmir be better off in Pakistan? Would Khalistan or Eelam be better off as independent states? If not, that would further weaken the efficiency argument.

8. The **pure self-determination or nationalist argument** for secession posits that all "peoples" are inherently entitled to a state in the first sense of self-determination above. Buchanan does not find this argument convincing due to the high human costs of creating a world solely consisting of a large number of ethnically homogeneous nations. In fact, he finds the argument dangerously vague (Buchanan:50).

Buchanan's reservations to the pure nationalist argument that secession, so to speak, is the highest stage of nationalism, has relevance to South Asia where sorting out innumerable highly interwoven groups in order to create a state for each seems impossible. There are at least 63 historic centers of power in the region (Lyon 1992:26 following Schwartzberg's Historical Atlas of South Asia) as well as thousands of castes and other ethnic, sectarian and

linguistic groups. The problems of identifying illegal immigrants in Assam or "Indian" Tamils in Sri Lanka are small in comparison to the problems of identifying all groups entitled to a state. In practice, might rather than right would be the determining factor in deciding who would obtain a state and who would have to be satisfied with "moth-eaten" alternatives.

Under the telling title "The Evils of Self-Determination", Etzioni has argued that the United States of America should discontinue support to movements leading to fragmentation and tribalism and support democratic pluralism within economically viable states instead (Etzioni 1992-93). Etzioni agrees to granting statehood to a few countries such as Tibet, Inner Mongolia and, possibly, to some or all Kurds, but explicitly argues against secession in cases such as Indian Kashmir or Indian Punjab. The restricted liberal view on the pure right to self-determination followed by Buchanan and Etzioni, obviously, goes against the grain of much contemporary social thought which has generated wide support for national liberation movements in the Third World over the last decades. On this point Buchanan's analysis is not likely to be accepted by those who put a higher value on liberation and self-determination than on political and international stability.

9. The argument in favour of secession **to preserve a culture** has some merit according to Buchanan, but it must be qualified. First, not all cultures have a right to exist: some are inhuman. Secondly, the culture to be preserved should have a chance of actually surviving and thirdly: to be entitled to independence it must be shown that full control over a territory is necessary for a culture to survive. According to Buchanan the need to preserve a culture rarely justifies secession as there are other, less drastic, means of preserving a culture. These include the ordinary liberal laws of property enabling groups to buy land, as well as special group property rights which enable a group to own a particular area. Some would argue that this is not enough as the threat to a culture may stem not from threats to its territory, but from other competing life-styles. But these threats may also be legislated against (e.g. by banning pornographic literature in an area). Fourthly, if the seceding state will establish an illiberal state from which its citizens are not allowed to emigrate, secession is not morally acceptable. And fifth, secession solely on grounds of the need to preserve culture is justified only if the state from which it wants to secede has no valid claim to the territory and no one else has. As Buchanan admits while discussing the case for secession of Quebec, these criteria are not easy to apply in practice.

In South Asia, preservation of culture forms a very important part of arguments for secession. The argument, however, often fails to pass Buchanan's tests. The argument for Khalistan, for example, at times posits that the Sikh identity is threatened if Sikhs live close to Hindus: Male Sikhs in Delhi or in Punjab may cut their hair and discard their turban thereby being "re-absorbed" by Hinduism. Thus, to get a better chance of realizing their own identity, the Sikhs should secede. The argument is unconvincing as the threat is not so serious as to warrant secession. All cultures must face some exposure, and it is not feasible to plan for the preservation of all cultures in perpetuity. To allow secession on these grounds could also mean supporting severe restrictions on individual freedom. The order issued by Khalistan proponents to schools in Punjab that all school-children should wear Punjabi dress on pain of death is a typical example of illiberal methods of preserving culture. Other illiberal dress-code orders have been issued by the Zia government in Pakistan and by the royal government of Bhutan.

A group, of course, may claim a right to exercise its culture, e.g. to sport a turban, but that does not imply a right to secession. The right to carry swords in airplanes is probably not an extension of a right to preserve culture, and may be restricted on grounds of security.

Buchanan posits that for secession on grounds of culture to be just, the seceding state should allow emigration. In South Asia, this has not been a problem: The idea of not allowing exit, whether to dissidents or not, has not taken roots in the region.

Buchanan's last condition is quite tough. According to him secessions based on the need to preserve Sikh or Tamil culture are not just because not Sikhs <u>alone</u> have a valid claim on Punjab and not Tamils <u>alone</u> have a valid claim to north and east Sri Lanka. Other criteria, such as discriminatory redistribution, would have to be proposed to make the claim for secession stick.

10. Secession on grounds of **self-defense** is a valid ground of secession if the threat to survival is unprovoked and deadly. The right to secede may even include the right to create a state within a state to protect oneself against an attack by a third state. Thus, Jews in Poland had a right to carve out a piece of Poland as a defensive measure against Nazi Germany during the second world war.

Allegations of consistent discriminatory violations of political and civil rights including genocide are recurrently made in South Asia. However, while short repeated attacks on various groups frequently occur, few groups in the region remain under attack. Probably, the groups which have been most subject to unprovoked, deadly attacks have been the Tibetans, and perhaps some groups in Burma and in the Chittagong Hill Tracts in Bangladesh (Report of the Chittagong Hill Tracts Commission 1991).

The argument for secession on grounds of self-defense may be turned into an argument against secession. A state may resist secession arguing that to allow secession would threaten its viability. The threat could be economical if a rich part of a country would be allowed to secede, or political if secession would encourage a third state to launch a damaging attack. According to Buchanan, only when there is a high probability that secession will lead to a lethal attack can a state claim the right to resist secession. Even in such a case Buchanan would not accept that a state has a right to forcibly resist secession, if secession is just on other grounds.

In South Asia, India would probably argue that to allow Punjab and/or Kashmir to secede would invite economic decline and political anarchy as well as Pakistani aggression, just as Sri Lanka would argue that Eelam would pave the way for the eventual absorption of Sri Lanka by (South) India. The main question, according to Buchanan, is whether the probability of these events is high or not. However, Buchanan also allows a state which resists secession in the name of a moral principle like democracy a higher right than a state defending itself on lower principles. One wonders where this sliding scale leads: Is it more just for India and Sri Lanka to resist secession of Khalistan and Eelam in the name of defending democracy, while it is less just for Pakistan to resist secession in Sindh as the democratic credentials of Pakistan are poorer? Is it more just for India to resist secession of Kashmir on grounds of upholding secularism than to resist secession with reference to, for example, military considerations?

11. The argument of **rectifying past injustices** "contends that a region has a right to secede if it was unjustly incorporated into the larger unit from which its members wish to separate" (Buchanan:67). Buchanan distinguishes two cases: Either the region was unjustly incorporated into the state from which it wants to secede, or it wants to secede from a state which itself was based on conquest. The Baltic states exemplify the first case while Bangladesh

exemplifies the second. Buchanan apparently judges secession valid in both cases, but balks at a full discussion of the Bangladesh case[4]. Secession on the grounds that the seceding group has an undisputed claim on a territory is the most compelling reason for secession ccording to Buchanan. The fact that all states, including states in South Asia, have a record of conquest and annexation, makes possible territorial claims multiply. Older forms and notions of sovereignty and subordination cloud the issue of territorial control as the controversial case of China's overlordship over Tibet shows[5]. Buchanan acknowledges that there must be a time limit. The United Nations would like the date of its own creation to be the cutting point, but as Buchanan notes, some states accept much older land right claims.

In South Asia the chief case for secession to rectify past injustice is the claim of Indian Kashmir for secession. The dispute dates back only to 1947 and the UN has been involved in the case. The case is complicated as both Pakistan and Kashmiri nationalists claim the territory, and by the fact that the circumstances surrounding Kashmir's accession to India remain disputed. The case for secession of Kashmir seems stronger than the case for Khalistan or Eelam. Eelamists and Khalistanis hark further back to establish hazier claims which would probably not satisfy Buchanan's criteria.

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4 The case for secession of East Pakistan can be made on grounds of discriminatory redistribution or perhaps even with reference to inefficiency caused by the geographic separation of the Western and Eastern wing of undivided Pakistan. The immediate cause was the refusal of West Pakistan to accept an election verdict. The secession of Bangladesh is one of the few successful secessions in recent history and a rare case of a majority seceding from a minority (Noman 1990:47). Though motivated by other than humanitarian considerations, such as the desire to stop the flow of refugees, India's intervention in East Pakistan is now often considered permissible under international law. India's action was widely condemned in the UN at the time (Bazyler 1987:589). One of the few other lawful humanitarian interventions in recent times was Tanzania's intervention in Uganda. Vietnam's intervention in Kampuchea cannot be justified though warranted by the mass killings of its own citizens ("auto-genocide") committed by the **Khmer Rouge**. According to Bazyler, a humanitarian intervention should satisfy the following criteria: 1) Atrocities must be on a large scale, 2) the motives for intervention should be predominantly humanitarian, 3) joint action should be attempted, 4) the intervention should be limited and the invading forces should withdraw and 5) other remedies should be tried before the military option (ibid: 598-607).

5 According to Hannum, Tibet and Sikkim are among the few states which have lost sovereignty after 1945. Both states enjoyed a limited independence before they were incorporated. The incorporation of Tibet was clearly against the will of most Tibetans (Hannum 1990:22).

12. Consent is the last basis for secession, the argument being that for a legitimate state to exist the relevant groups have to consent. This implies that they also have a **right to dissent**, i.e. a right to secede. Buchanan does not consider consent a sufficient condition for political obligations, nor the withdrawal of consent (through a refusal to enjoy state benefits) as sufficient ground for secession. Even if consent were a condition for an obligation, it would not imply a right to secede. A valid claim to territory must also be established (Buchanan:72). Whether a group consents to receive political benefits or not is a matter of the state's authority, not of whether the state has a right to territory.

According to this argument the fact that Khalistani Sikhs created parallel structures of government refusing to enjoy state benefits does not imply that they thereby established a right to rule. Neither can it be inferred from the fact that Kashmiris have consented to participate in a number of elections in India that they thereby agreed to be a part of India.

Rights and change

An important problem in Buchanan's analysis is how to account for change of rights. Buchanan does recognize that rights may be invalidated and generated (ibid., pp. 65 and 155).

In South Asia and elsewhere, secession is justified not only with reference to an initial situation, but with reference to events occurring after the conflict escalates. As Hannum has noted:

> "...state repression of legitimate struggles against discrimination and human rights violations rapidly escalates the physical side of the conflict, until the return to the status quo ante - even after redressing prior discrimination and human rights violations - no longer suffices" (Hannum 1990:11).

Hannum's observation applies to situations in which concessions become too small if they come too late. This raises the question whether concessions may also be justly reduced by the state if the seceding group uses unreasonable violence to achieve its ends. To answer this questions would require an expanded theory to establish when rights are generated or invalidated by state repression and by secessionist violence during periods of confrontation.

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UNHCR/NGO CONSULTATION ON SRI LANKA GENEVA, 22 JUNE 1994

Briefing issued by the British Refugee Council

1) Representatives of over ten European refugee NGOs gathered in Geneva on 22 June 1994, for the third in a series of special meetings on Sri Lanka called by United Nations refugee agency UNHCR.

2) The meeting was chaired by Mr. Werner Blatter, director, Asia Oceania Bureau, UNHCR and attended by other UNHCR staff including Mr. Bo Schack, senior legal officer Asia Oceania Bureau, Mr. Patrick de Souza, Sri Lanka desk, and Ms. Lucy de Lophem, Switzerland desk.

3) Mr. Blatter welcomed participants drawing attention to wide-ranging documentation tabled by UNHCR including status reports from UNHCR's Sri Lanka office on recent repatriation movements from South India in February 1994, an overview of micro-project development assistance and an appeal to the international donor community for $ 13 million for UNHCR's programme in Sri Lanka for the next 18 months. Also tabled was the text of an agreement for UNHCR to provide passive monitoring of a programme of forcible repatriation of Sri Lankans refused asylum in Switzerland and an exchange of letters between UNHCR and the respective countries.

4) Among the NGO documents tabled were the British Refugee Council's "Sri Lanka Monitor", "Focus", a new bulletin from the NGO Forum on Sri Lanka deploring the projected deportation of Sri Lanka asylum-seekers from Europe and a report on deteriorating conditions in South Indian refugee camps from ProTEG, a Sri Lankan human rights organisation based in Madras.

5) Mr. Blatter gave a brief overview of UNHCR activities involving Sri Lanka or Sri Lankan asylum-seekers:

- facilitating the repatriation of Sri Lankan refugees from South India and monitoring the voluntary nature of their return

- providing reintegration assistance to returnees and infrastructural support to returnee areas of Sri Lanka

- to provide passive monitoring to a bilateral government programme of forcible repatriation that will return Sri Lankans refused asylum in Switzerland to Colombo.

6) Mr. Blatter reported back on the development of the Swiss programme, highlighting the changing social and political climate regarding asylum-seekers in Europe. It was equally important, said Mr. Blatter that UNHCR involvement should not be seen as influencing the refugee status determination procedure i.e. encouraging or legitimating the refusal of refugee status to Sri Lankan asylum-seekers.

7) In reply, representatives of Refugee Councils from Switzerland, France, Denmark and Britain expressed concern over rising rates of refusal of asylum for Sri Lankans in

their countries. They confirmed that many European governments interpreted UNHCR's position statement of 16 June 1993 as endorsing southern Sri Lanka as safe for the return of rejected cases and referred positively to UNHCR's position and programmes in many refusal notices to asylum applicants. Clearly, UNHCR involvement was used as a "green light" or legitimating factor.

8) Swiss officials such as Police Justice minister Mr. Arnold Koller frequently used UNHCR involvement to deflect NGO criticism of the return programme. The Swiss public were not aware of the passive nature of UNHCR monitoring and its inability to report comprehensively on the security situation in Sri Lanka. A UNHCR public statement on the issues and the nature of its involvement would improve the situation in Switzerland said Mr. Marcus Loosli, Secretary General of the Swiss Refugee Council (OSAR). Mr. Blatter said a public statement by UNHCR would be difficult and more likely to feed xenophobic responses some of which were created by the press.

9) Mr. Blatter said the Swiss programme was designed to send a signal to asylum-seekers in Colombo, returning no more than 300 a year for two years on a "last-in-first-out" basis. Mr. Loosli said Swiss Federal Office actions were more difficult to interpret. Over 1,500 cases would be examined this year, and over 90 recent refusals were from cases registered in 1991. Such individuals then lost their work permits and were given a date by which they had to leave Switzerland. NGOs reaffirmed that there was a need for an agreed plan of action and a clear set of procedures.

10) There was a wide-ranging discussion on the question of UNHCR's passive monitoring of returnees on the Swiss programme. NGOs again expressed doubt, as they did in meetings with UNHCR in February and September 1993, that returnees detained by security forces in Colombo would be permitted to contact UNHCR who would then intervene. Swiss Refugee Council representatives said a more active monitoring profile was clearly required and that they were now examining proposals to place one of their representatives in Colombo. Mr. Blatter welcomed the development saying the restriction of UNHCR's mandate with regard to rejected cases offered clear potential for NGO involvement.

11) A Danish Refugee Council representative raised the question of comments by UNHCR's resident representative to a Scandinavian government delegation in

Colombo in March 1994, saying that Tamils returning from Western Europe could take up residence wherever they preferred. This was clearly contrary to UNHCR's June 1993 position statement where "UNHCR insists that return should only be to areas not directly affected by the armed conflict". Mr. Blatter reaffirmed that UNHCR's position remained as outlined in the June 1993 statement.

12) French Refugee Council staff expressed concern over a report entitled "Les tamouls de Sri Lanka" circulated by the French Refugee Appeals Commission to government departments, NGOs and lawyers in France. The document originating from UNHCR Colombo, used an OSAR questionnaire and the alleged opinions of a senior member of the Swiss Appeals Commission (ARK) to promote a relatively positive view of returns to Sri Lanka.

13) Mr. Walter Stockli of ARK had written to UNHCR expressing concern. UNHCR staff at the meeting said the draft of the document had been withdrawn and replaced and was the result of a misunderstanding.

14) A representative of Medecins Sans Frontieres (MSF) Colombo, reported that in the run-up to general and presidential elections in Sri Lanka in the next six months, Colombo remained very unsettled and recommended that forcible returns should be postponed until the elections were over.

15) Representatives of the British Refugee Council referred to the report tabled at the meeting from ProTEG a Sri Lankan refugee human rights organisation based in Madras, South India.

16) The report expresses concern over deteriorating social and material conditions for over 70,000 Sri Lankan refugees in government-run camps in South India and questions the role of UNHCR in facilitating repatriation to what is effectively a war zone in northern Sri Lanka. Letters of complaint to UNHCR from refugees coerced to return by camp officials remained unanswered and their concerns ignored, says ProTEG.

17) The British Refugee Council expressed concern that after two years of involvement, UNHCR still had no access to the 132 refugee camps in South India and its ability to monitor the voluntary nature of return was limited to cursory interviews at the

point of departure, where returnees feared reprisals like detention in "special camps" or withdrawal of rations if they refused to return. During visits by British Refugee Council staff to UNHCR camps for returnees in South Vavuniya, Sri Lanka, in March and April 1994, more than half of those interviewed said secondary or primary coercion was used by camp officials in India to convince them to repatriate.

18) Mr. Blatter admitted that there might be cases of primary or secondary coercion but that UNHCR monitoring at the point of departure offered adequate safeguards. If people wished to return home voluntarily it was UNHCR's job to assist them. UNHCR was still seeking regular admission to the camps from Indian authorities. NGOs like OFERR, ProTEG's sister agency, had access to the camps and were in a position to keep UNHCR informed. From a half-day visit to one of the largest South Indian camps, Mandapam, by UNHCR staff in early February, conditions were in the circumstances, adequate.

19) Refugee Council representatives concluded many NGOs saw UNHCR as, in effect promoting repatriation to Sri Lanka from South India largely because of continuing concern over two areas:

a) UNHCR's public information policy - how it portrays the programme

b) its inability to perform its information dissemination responsibility - informing prospective returnees on conditions in their country of origin.

20) Articles such those appearing in the August 1993 edition of UNHCR's "Refugees" magazine maintained that "refugees knew they were returning to a less than ideal situation and have weighed the risks involved". Reports from South Indian NGOs and interviews with returnees in Sri Lanka did not bear out such facile and optimistic conclusions.

21) British Refugee Council representatives referred positively to the recent Parinac sessions on UNHCR/NGO cooperation in Oslo in early June 1994, and suggested that one of the Parinac conclusions that joint UNHCR/NGO committees at both ends of repatriation programmes would address operational and protection concerns more effectively.

22) Mr. Blatter thanked participants and closed the meeting, suggesting that there were clearly emerging possibilities for NGO cooperation or complementarity in both repatriation from South India and Switzerland and they should be further explored.

CONCLUSIONS AND RECOMMENDATIONS

23) The two primary concerns outlined above in point 19, UNHCR's unilaterally positive portrayal of repatriation from South India and its inability to inform returnees of conditions in their country of origin leaves the initiative with NGOs to activate concern. International NGOs must be more proactive in monitoring such programmes and supporting local NGOs to promote solutions to operational or protection concerns.

VOICES OF THE DISPLACED

(Book Review by Mario Gomez)

Title : Journey without a Destination

Author : Rohini Hensman

Published by : The British Refugee Council, 1993

It seems almost banal to say that when you set out on a journey, it is with a destination in mind: why would you set out otherwise? Yet millions of people embark on a desperate journey without any destination, impelled only by the desire to escape from the horror behind them ....

Rohini Hensman has produced a remarkable and unusual book. The book deals with a theme little written about, and from a perspective often ignored. The theme is Sri Lankan refugees and displaced persons, and the perspective is that of the displaced themselves.

The question of refugees and displaced persons is a complex one. It defies generalities and quick solutions. It is easy to stereotype all refugees into 'economic migrants' seeking more

fertile pastures overseas. It is also easy to classify them as freeloaders, exploiting sympathetic legal regimes in the West. Similar generalisations are easy to attach to those displaced within the country and existing on state dispensed food rations. Yet pigeonholing of this nature hides the different histories and complex experiences of each individual refugee and displaced person.

Rohini Hensman attempts to dismantle some of these stereotypes in her book. And she ventures to do this through a series of interviews with the refugees and displaced persons themselves. She contends that the first step towards understanding the refugee problem is to 'listen to them'. This she lays down as the principal objective of the book.

Britain she chooses as an example of a country of flight. Sri Lanka, an example of the *situs* from which they have fled. Her interviewees are 53 Tamil refugees in Britain, interviewed in 1989. These have been supplemented with interviews with those displaced within Sri Lanka; Sinhalese, Tamil and Muslim, conducted in 1990 and 1991.

Hensman argues in her introduction

> *... that is possible to learn more about the fate and treatment of refugees in general from an in depth study of this kind than from a more cursory examination of a variety of situations - although such studies are useful in their own way.* [p 4]

She then sets about dealing with the issues relating to the conflict, the refugees it has spawned and possible solutions. These issues are dealt with through responses elicited from the displaced.

Viewed from a purely statistical perspective the question of displaced persons is a frightening one. Over a million Sri Lankans were displaced not so long ago. This figure is now slightly lower but still hovers around 800,000 we are told. Despite the enormity of the numbers, public discussion and debate on the subject is limited. Even the responses have been limited, ad hoc and sometimes very condescending. As Hensman argues it is easy to view refugees as 'objects' and ignore their humanity.

Her task has obviously been painstaking and tedious. And the book is an eloquent testament to her commitment to relevant social research.

Hensman explores in her book a range of sub themes and issues. These include origin, the cause of flight and possible solutions.

Where do the roots of the conflict lie? This question evoked a diversity of responses from her interviewees; the responses highlighting the complexity of the problem. A fairly large segment of those interviewed blamed politicians, on both sides of the ethnic fence. State policies on land and education were also criticized as having alienated the Tamils. Only one of those thought of and traced the historical origin of the conflict to pre colonial times.

Hensman also highlights the difficulties of considering applications for asylum status. She argues that often applications for asylum status are considered by officials only faintly familiar with the political situation from which the refugees have fled. They have almost never experienced a single day of hardship in their lives and lack the imagination to put themselves in the place of those whose cases they are judging. [p 26] She points out that there is no way asylum claims can be processed efficiently unless such applications are handled by people familiar with the historical background to the conflict as well as current day to day developments. [Ibid.]

It was perhaps to remedy this situation that a Scandinavian delegation visited Sri Lanka recently. The delegation consisted of some officials involved in determining refugee and asylum status. One of their objectives was to obtain a more thorough understanding of the human rights and political situation in Sri Lanka.

Hensman seeks to demolish the myth that exile is a comfortable and cozy experience. Her interviewees display an unequivocal desire to return. They also paint a picture of tension and racial harassment in their host countries (in this case Britain). Hensman sarcastically queries whether harsher asylum laws would pull Britain (in this case) out of recession, create full employment, house the homeless and eliminate poverty. [p 39]

While the perspective of the refugee herself (most often these days) is vitally important for an understanding of the issue, the book would have benefitted from an analysis of the social and political context, including a consideration of some recent trends in refugee policy. It would also have benefitted from an analysis of the developments that have occurred in 1992 and 1993.

World refugee policy is going through a process of change. There is an increasing emphasis on keeping refugees in their countries of origin. Some of the major actors in determining global refugee policy are now resorting to the easiest and cheapest option, preventing refugee flows on the ground that they would create a burden on the international community. The focus of this policy is on the host country and not on the victim. As the U S Committee for Refugees observes in its 1994 World Refugee Survey

Support for the concept of asylum is clearly - and tragically - waning.

In the absence of any serious and sustained effort at de fusing the conflict, the country will have to live with the dislocation of large numbers of people. Against this backdrop then we would need to devise responses in a programmed and systematic way. It would need better coordinating at the level of the government and the more active involvement of NGOs. The responses would also need to be guided by certain basic principles like non discrimination, participation and the non use of any coercion, subtle or obvious.

Hensman argues that resettlement cannot be viewed as a permanent solution to the problem of refugees and displaced persons. The ideal solution is the creation of conditions that would enable them to 'live in peace in their own homes'. She thus reasons that the responsibility of the international community is not limited to providing decent conditions of asylum. It is also bound to do 'whatever is possible' to end the crisis and help them rebuild their lives in their original places of residence.

Hensman's 'Journey without Destination' is a remarkable and imaginative contribution to Sri Lanka's meager collection of material on refugee studies. It is the result of a period of intensive, dedicated and demanding research, in an area in which little has been written. It has the potential to be expanded, updated and reproduced in a more appropriate format and hopefully, Hensman will not stop here. More than anything it is a testament to a lone researcher's commitment and to a vision of society bereft of violence.

LEGAL ASPECTS OF PARTICIPATORY DEVELOPMENT POVERTY ALLEVIATION STRATEGIES: THEMES AND PROSPECTS

by

Kanaga Dharmananda

The image of the hour glass is apt for an appreciation of the endemic problem of poverty in the South Asian region. The hour glass, with its shifting sands descending inevitably from one chamber to the other, brings home at least three facets of the enormous task of poverty alleviation. First, and perhaps, tangentially, it captures the reality of the shifting debate and diverse image of views as to the most effective poverty alleviation strategies; in this respect, the ground is shifting with consideration of both conventional and unconventional development strategies[1]. Second, the image of the hour glass reminds us of the significance of sand and earth to any poverty alleviation strategy; as, according to estimates[2], nearly 360 million poor live in rural areas, the importance of measures affecting agricultural development is immense. Third, the hour glass is a powerful symbol of the grim fact that time is running out; the imperative for an effective response is self-evident.

The purpose of this paper is to discuss, as generally[3] and as briefly[4] as possible, the legal framework for the institution and operation of the participatory development poverty strategy adopted by the Janasaviya Trust Fund ("JTF"). The JTF, intended as an apex bank of the poor, has four divisions: Community Projects, Nutrition, Human Resource Development and Credit. It is beyond the scope of this paper to comment specifically on the operation of each division. The paper will focus on the framework for the

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[1] See the Report of the Independent South Asian Commission on Poverty Alleviation "Meeting the Challenge", November 1992, especially at pp 25-29 for a consideration of some of the strategies.

[2] See ibid at p 1.

[3] The author was part of Tiruchelvam Associates' consultant group by the World Bank to examine and prepare a report on the contractual agreements and arrangements of the Janasaviya Trust Fund. That report is confidential and, accordingly, comments in this paper are general, not specific.

[4] The topic is a vast one and the enormous literature (see, for example, "The Poverty Law and Policy Symposium", (1993) 81 Geo LI at pp 1697-2072) cannot be easily summarised.

global operations of the JTF and comment, generally, on the translation of the philosophy underpinning the JTF to action and practical implementation.

The Ideals and Incorporation of the JTF

The instrument of trust constituting the JTF was formed after serious and considered debate[5] as to the nature and structure of the JTF, with particular attention focused on the model of poverty alleviation to be adopted by the JTF The recitals to the instrument of trust clearly indicate the JTF's raison d'etre and essential nature is to engage in participatory development poverty alleviation, which views the poor as "subjects" not "objects" and proceeds on the premise that locally rooted, participatory micro-development organisations are most able to determine and realize measures to alleviate poverty at the grassroots[6]. A key concept of participatory development is social mobilization. That concept is not easy to define but is taken to be a complicated, dynamic idea involving self-governing communities, with socio-political resources, in the generation and implementation of programs for their own poverty alleviation[7].

The JTF's incorporation may be said to adopt the new development paradigm. The old development paradigm was dominated by the notion that the growth of the overall economy would lead mechanically to wealth "trickling down" to the poor. The old paradigm has been criticized[8] and there has been a shift in thinking towards a new development paradigm, the objective of which is broadbased participatory and environmentally sustainable growth based on poverty alleviation. The new paradigm conceives of poverty alleviation not merely as an instrument to get the poor to cross a given threshold of income or consumption, but as a sustained increase in productivity and an integration of the poor into the process of growth[9].

It may be seen that the new development paradigm centres on work at the grass roots. The

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[5] This view was formed by the author after meetings with some of the Trustees of the JTF in January of this year.

[6] See supra No.1 at Chapter 3.

[7] Ibid at Chapters 2 and 3.

[8] See I. Jazairy, M. Alamgir and T. Panuccio **The State of World Rural Poverty - An Inquiry into its Cause and Consequences** at Chapter 2.

[9] Ibid at p 20.

clear significance of the very process of reform and its incidental effects on the poor marks the new paradigm as concerned with a continuing program of integration and alleviation rather than a schedule or timetable for the attainment of specific results. The emphasis has shifted from the ends to the means.

The World Bank and the Government of Sri Lanka

It is in light of the ideals of the JTF and its philosophical derivation that an assessment of its operations must be undertaken. It is essential to an understanding of the JTF to realize that unlike other World Bank projects, the JTF is not concerned with the achievement of a specific, tangible objective, such as dam construction or road building. The JTF is not a conventional project financing. The JTF represents a commitment to the participatory development model of poverty alleviation by the World Bank. It is no accident that the JTF is a trust; the organisation is intended to be an apex body applying discretionary and catalystic powers to engender and sustain strategies for poverty alleviation from the grass roots; that is, from bottom up.

It is too early to tell what success the JTF will achieve towards the realization of its ultimate goal but it is to be remembered that the World Bank, in association with the Government of Sri Lanka, has sought to involve non-governmental organisations ("NGOs"), community based organizations ("CBOs") and bodies at the grass roots level in the preparation and implementation of projects. This emerges from a consideration of the intended structure and constituent documents of the JTF. The crucial issue is, of course, whether such lofty intent has been incorporated in the work and contractual arrangements of the JTF.

The JTF's Contract: A Prima Facie View

If you glance at the most recent annual report of the JTF, you will see that the JTF conducts the operations for which it was established by contracting with the partner Organizations in each of its four divisions. Partner Organisations can be NGOs, government departments, companies, cooperatives or unincorporated associations. The Partner Organisations are given responsibility for the achievement of an objective; they work, on the particular project, in some cases with CBO's For example, a Partner Organisation may be required, when working in the Community Projects division of the JTF, to complete the construction of a well with the assistance of a CBO.

It is difficult, without particularizing the specific provisions of each type of contract the JTF enters into with Partner Organizations, to comment on the consistency of the contractual terms with the philosophy explaining and leading to the JTF's incorporation.

The JTF does however, utilize standard form contracts, which, it may be fairly said, is not the result of a heavy negotiation process. Standard form contracts, prevalent in many areas, such as hire-purchase arrangements, are not, by their very nature, the result of a dialogue or a consultative process between the parties.

Certain features appear to be common to the various types of standard form contracts that the JTF enters into with Partner Organizations. Some trends from these features may be observed:

(a) a tendency to use a language (English) not understood by sections of the community in respect of which the Partner Organisation's, work is to be done;

(b) a tendency to use legalistic terminology;

(c) a tendency to invest discretionary power in the JTF with respect to determining the adequacy of the Partner Organisation's performance;

(d) a tendency to utilise dispute resolution procedures which are far removed from the locality of the dispute;

(e) a tendency to gloss over the concept of social mobilization; and

(f) a tendency to set out obligations in terms of the achievement of broad results rather than specific tasks.

These features represent an attitudinal approach to the process of contract formation which is not necessarily consistent with the central values of participatory development poverty alleviation strategies. It is incontrovertible that recognition of the poor as subjects involves endowing them with power. The expression of the power is rendered nugatory if the process of contract formation does not allow for their input. The empowerment of the poor is a matter of vital importance to the success of the participatory development poverty alleviation model. It is envisaged by the proponents of that model that the fostering of independence and

strength at the grass roots will lead to a spirit of resilience and self reliance, vital to long term gains in the battle against poverty.

Quite apart from the enormous significance of the process by which a contract is made to the attainment of the goals of the JTF, it is clear that the tendencies in the JTF's contracts are not entirely compatible with the explicit objectives of the JTF. The tendencies represent a theme which informs the general approach to contract formation apparently, but perhaps unconsciously, adopted by the JTF. That theme may be regarded as taking its genesis in formalistic traditional contract theory.

Classical Contract Theories and Theoretic Operational Procedures

There are many theories of contract, ranging from the liberal theory, elegantly espoused by Professor Charles Fried in **Contract as Promise; A Theory of Contractual obligation** (1981) to the post modernist critical legal theory expounded by professor Duncan Kennedy[10]. The theory, known as classical contract theory, which had its origins in the eighteenth century and was pre-eminent in the nineteenth century stressed the centrality of the bargain. Classical contract law as dominated by a tacit paradigm case and a set of tacit premises. The tacit paradigm case was that of strangers transacting in a perfect market with perfect knowledge by both actors. The tacit premises were that contract law could be developed by deduction, like some species of geometry from axiomatic rules and that standardized rules were preferable to individualized rules[11].

The astonishing power of the classical contract model was felt, in most common law jurisdictions including the United Kingdom, the United States and Australia well into the beginning of this century. The classical model elevated the supposed intentions of the parties to the position of sacred law; the contractual document was beyond question. The enforcement of contracts, under the classical theory, was seen as important primarily for its deterrent or hortatory purpose. The classical conception of contract also presupposed the existence of one model, despite the reality that most contracts fall into particular categories

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[10] Kennedy "Distributive and Paternalist Motives in Contract and Tort with Special Reference to Compulsory Terms and Unequal Bargaining Power" (1982) 41 **Maryland L. Rev 563.**

[11] See Eisenberg "The Duty to Negotiate in Good Faith in American Law" a paper presented in Perth, Western Australia on 22 July 1994, at pp 1-4, as part of a seminar on **The Action for Misleading and Deceptive Conduct.**

which have their own rules and qualification derogating from the general body of law and the model[12].

It does not take much consideration to conclude that the JTF, much in the same way as the World Bank, has been much influenced by the classical theory of contract. Four points merit making.

First there is an assumption, evidenced by the widespread use of standard form contracts, made by the JTF as to equal bargaining power between it and its Partner Organisations. Even to a disinterested bystander this would appear incongruous with reality. Indeed, there has been a recognition in common law jurisdictions of the power wielded by those who utilise standard form contracts. Lord Diplock in Schroeder Muric Publishing Co. ltd. v Macaulay (1974) 3 ALL ER 616 at 624 said "The terms of this kind of standard form contract have not been the subject of negotiation between the parties to it, or approved by any organisation representing the interests of the weaker party. They have been dictated by that party whose bargaining power, either exercised alone or in conjunction with others providing similar goods or services enables him to say: "If you want these goods or services at all, these are the only forms in which they are obtainable. Take it or leave it". These comments, with minor variations, may, some would argue, apply with full vigour to the JTF.

Secondly, the JTF's concern with penalties and enforcement is consistent with the classical theory of contract. It would be intellectually dishonest to deny the importance of sanction to the creation of responsibility in the context of contractual performance. However, it is surely disingenuous to suggest that the JTF reasonably requires the same artillery of remedial power that say, a commercial banker requires against a sophisticated international borrower. A balance must be struck between the rational needs of the JTF to act or react to a default situation and the true capacities and capabilities of the Partner Organizations. In this regard, the ultimate objective of the JTF's program ought to temper and colour its approach to remedial powers and the exercise of those powers; essentially an element of circumspection is required. The JTF's contracts, as they stand, do not appear to exhibit such circumspection.

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[12] See Attlyala "Contracts, Promises and the Law of Obligations" in Attlyala Essays in Contract (1986) at pp 10-17.

Thirdly, the JTF's use of standard form contracts is suggestive of a view that there ie one contractual model. While it is clearly acceptable for certain boiler plate clauses to exist in each type of contract, it is perhaps fatuous to presume that there is but one model of contract which has relevance to all categories of work, regardless of the purpose of the work or the sophistication of the worker.

Fourthly, the JTF assumes, as classical theorists did, that standardized rules are preferable to individualized rules. This has the necessary consequence that standard form contracts are used in preference to a process of guided or consultative contract formation.

Classical contract theory has, of course, been challenged. Some such as Grant Gilmour in **The Death of Contract** say it is dead. The rise of the doctrines of unconscionability, undue influence, economic duress, promissory estoppel, relief against forfeiture and the nascent notions as to duties of good faith are symptomatic of an appreciation of the illusory (and, perhaps, deluded) nature of classical contract theory's presuppositions. Developments in the United States and the Commonwealth demarcate a disenchantment with the strictures of classical contract theory. While the duty to negotiate in good faith may be a relatively new concept in contract law[13], it is tolerably clear that elements of paternalism have instigated and influenced developments in the common law.

It is, therefore, puzzling to discover the JTF, (and, perhaps, the World Bank), inspired by ostensibly paternalistic ideals concerning poverty alleviation, apparently clinging to the outdated and largely displaced classical theory of contract in its operational procedures. It is, of course, not that a decision has been made by the JTF to embrace the classical contract theory as the foundation for its attitudes and its approach to the task of contract formation. But there is some evidence to suggest that, at this stage, the JTF's structural arrangements reflect a theme or strategy more attuned to classical contract theory than the same paternalistic theory holding sway in many jurisdictions, such as United States, Australia and New Zealand.

Recognition of the development in the law, especially as it relates to unconscionability, undue influence and economic duress, may exhort the JTF to adopt a different theme in its operational procedures. This may yield significant change to the benefit of the ultimate beneficiaries of the JTF - the poor - and towards the realisation of the JTF's goals.

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[13] See Eisenberg supra No.11.

Applying the Doctrines: Prospects

It takes little ingenuity to apply the principles, largely obtaining in the Commonwealth and usually deriving from the courts of equity, as to unconscionability, economic duress and relief against penalties or forfeiture so as to suggest reform of the tendencies observed in the JTF's contracts. A primary and essential reform must be made to the process of contract formation, if headway is to be made in treating the poor (or, the Partner Organisations) as subjects, not objects. The shaping and negotiation of the task to be done, and the assigning of responsibility in relation to that task, achieves two worthwhile objectives: first, the isolation of projects the poor themselves wish to see completed and, second, more subtly, the development of a maturity of spirit and self reliance in the party negotiating the contract.

More specifically, if we apply the doctrines and principles prevalent in other common law jurisdictions and renounce the classical contract theory, it may be seen that:

(a) the contract must be in the language spoken by the members of the Partner Organizations and the people in the community to be affected by the work of the particular Partner Organisation;

(b) the contract must be expressed in plain language. The maps and schedules must be reduced to a level of simplicity so that, if possible,every worker involved in the project has a basic understanding of the work to be completed

(c) the determination of the adequacy of performance by a Partner Organization must be made referential to objective criteria, rather than the JTF's discretion;

(d) dispute resolution procedures should involve consultative mechanisms and should be available for use at the specific local level of the dispute (for example, the village where the work is to be done);

(e) the key features of the concept of social mobilization should be defined in and inform the operation of each contract;

(f) obligations cast on Partner Organisations should, as in commercial contracts, be set out specifically by reference to identified tasks rather than the achievement of general goals.

The reforms suggested do not all flow from an application of the developments in the law reflective of a discarding of the classical theory of contract law. The reforms suggested should not, of course, be incorporated without reference to the actual intentions of the JTF and the Partner Organizations as identified through the process of negotiation. However, the reforms do, it is suggested, more closely conform with the perceptible philosophical base of the JTF in that they foster the independence, strength and vitality of the Partner Organizations.

The World Bank has recognised the importance of the role of NGOs and the work of NGOs to its projects[14]. Some have noted that the World Bank has improved its interactions with the NGOs[15]. Effective and equitable development can proceed only with interactive and participatory strategies pursued in a spirit of mutual trust. It is in aspiration of realization of this ideal that the JTF must, following the World Bank's lead, actively seek a dialogue with Partner Organizations both as to contract formation and as to contract implementation.

Conclusion

There is no panacea to the problem of poverty. The key attributes of a successful program to combat poverty, appears to be empowering the poor, sensitive support mechanisms for the catalysis of the process of social mobilization and human development which guarantees the right of the poor to participate in decisions that affect their lives[16]. It would be foolish to suppose that the text of a contractual document can achieve all these ends. It would, however, be a greater mistake to take no action to alter the substance of the arrangements between the JTF and Partner Organizations on the basis that those arrangements are now perfect. They are not.

The World Bank has indicated[17] it is concerned to maintain its adaptability, in the face of a changing world, where 50 years after its creation, there is much opposition to its existence,

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[14] See Ibrahim F.I. Shihata "The World Bank and Non-Governmental Organizations" in (1992) 25 **Cornell International Law Journal** at pp 623-641.

[15] See Zygmunt JB Plater "Damming the Third World : Multilateral Development Banks, Environmental Discoveries, and International Reform Pressure on the Lending Process" (1980) **17 Den. J. Int'l Law and Policy** 121, 142.

[16] See supra n.1 at pp 49-60 and pp 130-137.

[17] **Shihata The World Bank in a Changing World. Selected Essays** (1991).

despite World Bank President Preston's recent commitment to "human" development[18]. The JTF is undoubtedly not the World Bank but the Bank does hold some sway in determining the practice and operations of the JTF. The issue is whether the JTF, in light of the World Bank's pronouncements, can also adapt and answer the critical questions raised by the desperate puzzles of poverty.

The complex question to be addressed is how best to translate the philosophy behind the JTF into action. There is no easy answer. The law, which proceeds not only from logic but experience, can only go so far. The cultivation of an ethos appropriate to cooperation and a spirit encouraging participatory interaction can be assisted by legal provisions but not produced by such provisions. The first step is to perceive the themes inherent in the extant operational procedures of the JTF and to reconsider those themes in light of the ideals of the participatory development poverty alleviation strategy. The sooner this is done, the better. The sand in the hour glass does not stop running.

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[18] See reports of Mr Preston's speech in **The Australian Financial Review** Tuesday, July 26, 1994 at p 30.

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