LAW & SOCIETY TRUST

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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.

In this issue we re-publish Dr Nihal Jayawickrama's lecture on Constitutional Reforms, as promised by us. We also carry the paper presented by Dr Clarence Dias at the regional consultation organised by the LST on the theme, *Copenhagen and Beyond: Asserting the Primacy of Rights* in which he points out that the challenge for human rights NGOs is to assist in the effective assertion and enforcement of all human rights: economic, social, cultural, civil and political. He identifies as urgent priorities, the application of human rights standards to national and transnational corporations; prevention of the outbreak of internal conflicts through equitable and non-discriminatory social development; articulation of the right not to be displaced due to development activities and pre and post displacement rights; and finally, the articulation of human rights issues relating to refugees, displaced persons, minorities, indigenous peoples and migrant workers. In conclusion, he calls upon human rights NGOs in South Asia to rethink their relationship with the State.

COPENHAGEN AND BEYOND

THE GATT AND SOUTH ASIA

IN THIS ISSUE

THE LST APOLOGISES TO DR NIHAL JAYAWICKRAMA

The Trust wishes to apologise to Dr Nihal Jayawickrama who pointed out that the 1995 Felix Dias Bandaranaike Memorial Lecture delivered by him which was published in the May issue of the ***Fortnightly Review*** *was not published in the correct sequence. The Trust re-produced his lecture from the Ceylon Daily News and reiterates that no deliberate attempt was made to convolute his lecture. We re-publish his lecture at his request, hopefully, in the correct sequence this time! The Trust would like to apologise to Dr Jayawickrama and to our readers for any inconvenience caused.*

The Felix R. Dias Bandaranaike Memorial Lecture 1995

THE MAKING OF A CONSTITUTION: REACHING OUT TO NEW FRONTIERS*

Dr Nihal Jayawickrama

I

I am very honoured to have been invited to deliver this, the third public lecture dedicated to the memory of the life and times of Felix Reginald Dias Bandaranaike. I particularly treasure the invitation because it gives me the opportunity to pay tribute to a man of extraordinary courage and ability who straddled the political stage of this country for 17 years and dignified it with his presence, and who offered this country a quality of leadership that was comparable to the best anywhere in the world. I am also honoured by the presence this evening of the Prime Minister, Mrs. Bandaranaike, who delivered the first in this series of memorial lectures. It is her ability to identify strength where it lies, and to attract the loyalty and support of diverse elements, that drew Felix out of the musty law library at Hulftsdorp into the broad open invigorating political arena outside.

Early in his political career, Felix was described by a very perceptive journalist as a grandfather

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* The Felix R. Dias Bandaranaike Memorial Lecture 1995, third in the series, was delivered by former Secretary to the Ministry of Justice Dr Nihal Jayawickrama on 26 June 1995.

clock pretending to be a wristwatch. I recall very vividly the oversized schoolboy on a battered bicycle, cycling down the lane where I lived. He was my brother's friend then, not mine. Again, I recall meeting him, over a decade later, on the night following the SLFP election victory in July 1960, when he came down the same lane, on this occasion in his Isabella Borgward, to ask my uncle, in whose home I spent most of my childhood, adolescence and early adult years, to be the Minister of Justice in the first government of Mrs. Bandaranaike. Years later, Felix would tell me that had he succeeded that night in persuading the judge to leave the Court as he did the Bar, the history of the ethnic problem in Sri Lanka might have taken a completely different direction. And then a few months later, I had the privilege of welcoming Felix and Lakshmi to the sprawling campus at Peradeniya of what was then the University of Ceylon, to speak to the undergraduate community, of which they were the pioneers, on the subject of "The New Lanka." In 1965, with the SLFP voted out of office, my association with Felix which was to extend over the next two decades began, when a Kandy proctor with a sense of humour retained Felix, with me as his junior, to establish title to, and regain possession of, an elephant.

There are present today many who knew Felix longer and better than I did. And I am sure they will agree with me when I say that the most striking aspect of his personality was the consummate ease with which he was able to take and exercise control over any situation, however overwhelming it might have seemed to others. The long night of January 27th, 1962 was perhaps Felix's finest hour when, almost single handedly, he saved not only a great many lives, but also the social and political fabric of our society. When, barely two weeks later, he wrapped up an investigation which he had personally conducted and presented to Parliament a detailed account of the first ever attempt to overthrow the lawfully established government of this country, Felix demonstrated what a brilliant incisive intellect he had brought with him into the political life of this country. In 1971, when the police confessed their inability to interrogate the thousands of idealistic, ideologically committed youth who attempted to capture political power by the simple Leninist device of attacking all the police stations in the country in a single night, it was Felix who assembled a team of special investigators comprising the brightest and the best in public administration and the law to perform that unenviable task.

There is a popular perception that Felix heard only the sound of his own voice. Nothing could be further from the truth. Baku Mahadeva will recall the standing arrangement which Felix had with the Cabinet Office for all cabinet memoranda to be delivered every Monday evening, not to him, but to Baku and to me. We were free, indeed expected, to make our own comments, criticisms, suggestions and proposals on any matter, whether they related to our respective ministries or not. Unlike most politicians, Felix had the patience and the ability to listen to others, and the capacity to shift the relevant from the irrelevant and to assimilate and absorb what was of value. But having done that, Felix would rarely, if ever, agree to express thoughts other than his own. How many national leaders addressing the United Nations General Assembly for the first time would, as Felix did in 1962, improvise on his feet and edit and interpolate the Foreign Ministry script to respond at length to the previous speaker, the British Foreign Secretary?

Felix was not the easiest person to work with. He was demanding; often unreasonably demanding. His consultations, particularly during the series of election petitions that followed the 1965 general election, often extended from 3 o'clock in the afternoon until 3 o'clock in the

morning; something for which my wife never quite forgave him, considering that we had been married barely three weeks. Felix's solution was to co-opt her into the team of four lawyers: Felix, Lakshmi, me and his uncle Berty, the instructing Solicitor. In the Ministry of Justice, the deadline for any assignment, whether for himself or for others, was always the same evening, not the following morning.

I did not necessarily agree with everything Felix said or did. The Prime Minister may recall an occasion when I was reported to her for refusing to carry out his instructions, and Lakshmi may recall the letters of resignation. But Felix possessed four unique characteristics that made working with him a stimulating and satisfying experience. The first was his absolute loyalty to those who worked with and for him. His loyalty to his Prime Minister and party leader, and to his party, was unquestioned, even at times when he felt and sensed a lack of reciprocity. The second was his absolute integrity, grounded upon a strong spiritual commitment. This was exemplified when his erstwhile antagonist, Rohana Wijeweera, chose to retain him as his counsel to challenge the conduct of the infamous referendum of 1983. The third, and perhaps his greatest strength, was his absolute incorruptibility. But above all, Felix was a very human person who enjoyed the simple pleasures of family life. Lakshmi was for him a friend, partner, guide, and a restraining force, through the best of times and the worst of times. And when little Christine Malkanthi entered their home and their lives, his sense of fulfillment became increasingly evident.

Felix gave of his best to his country, and I know it pained him deeply when first his party and then Parliament pushed him out of the mainstream of political life. We shared with each other and with the Prime Minister the humiliation and indignity and, above all, the ingratitude that was inherent in the deprivation of our civic rights. But to the end, no one, not any of his adversaries, succeeded in crushing his spirit, and Felix remained, as he had always been, the master strategist, a man for all seasons.

Felix was an innovator who constantly and unceasingly questioned the *status quo*. When we were drafting the Administration of Justice Laws in the mid-1970s, he challenged many scared cows, and if his successors soon repealed those laws, it was probably because he had projected himself beyond his own times and they lacked the vision to comprehend the image he had created. With restless exuberance he looked for solutions beyond the traditional framework, and I know that if in his lifetime he had been called upon to draft a constitution for this country, he would have reached out to new frontiers. Therefore, to the memory of the best Minister of Constitutional Affairs this country never had, I dedicate my own thoughts on the subject, with respect and with affection.

II

In 513 BC the Greek Philosopher Heraclitus observed that a person cannot step into the same river twice. His contemporary, the Buddha developed that idea with his observation that the same person cannot step into the same river twice. They were both articulating the essential impermanence of things animate and inanimate. Everything is in a constant state of flux. And so it is with laws which need to be reviewed and amended, not only to respond to the changing needs of society, but also to give new direction. And so it is with the constitution of a country, the supreme and fundamental law of the state.

A constitution is, theoretically, a social contract whereby the people agree to submit themselves to the power of the state, and agree to the manner of distribution, exercise and limitation of that power among the organs of state. In the 18th century, Thomas Paine stressed that:

> *A constitution is a thing antecedent to a government, and a government is only a creature of a constitution ... A constitution is not the act of a government, but of a people constituting a government.*

But in practical terms, the people rarely participate in the drafting of a constitution. Its form and content are often determined by his government in office, and reflects the philosophy or the imperatives of its principal author. For instance, Dr. Colvin R. de Silva's ideological commitment to the supremacy of the legislature was given expression in the 1972 Constitution by removing the power which the courts previously possessed of examining and pronouncing upon the legality of legislative action. This meant that the National State Assembly, which that Constitution created, was to be sole judge of whether the laws it made or the resolutions it passed were in accord with the Constitution or not. That decision would be reached not by a judicial scrutiny of the law or resolution by reference to the empowering provisions of the Constitution, but by a majority vote of legislators. Mr. J.R. Jayewardene, on the other hand, desired to enthrone the executive, of which he was head, and this was manifested in the 1978 Constitution not only in the office of executive president but also in other ingenious devices calculated to devalue the respective roles of legislator and judge.

In the final analysis, a constitution that is drafted and adopted by Parliament may reflect only the consensus among the majority. But the experience in Nazi Germany in the mid 1930s when the majority will propelled Adolf Hitler into power should remind us not only of the inherent flaw but also the intrinsic danger of simply giving effect to majority opinion. Even a referendum, where the decision is reached by a majority vote, appears to be similarly flawed. For example, in Canada in the autumn of 1992, the Charlottetown Accord, a package of very significant constitutional amendments designed to recognize and give effect to the multicultural character of that country, agreed upon by all the First Ministers and territorial and aboriginal leaders, was rejected at a national referendum by a plurality comprising numerous groups voting against it for widely divergent reasons, one of which at least, namely, the widespread unpopularity of then Prime Minister Mulrooney, had no relevance whatsoever to the question at issue.

Therefore, if a constitution is to truly encapsulate the aspirations of all the people of the country, and not merely of the majority, it must also contain what I would describe as the "normative element." By that I mean the universally accepted principles of contemporary international law that are designed both to protect the fundamental human rights of the individual wherever he or she may reside within the territory of a state, and to help realize the collective aspirations of those individuals who, by reason of ethnic, linguistic or religious distinction, constitute a minority within a state. When a constitution responds to that challenge in a positive manner, it can lay claim to be in fact a social contract. If it fails or neglects to do so, as the two republican constitutions of Sri Lanka unfortunately failed and neglected, the constitution soon becomes irrelevant. The government is then necessarily compelled to invoke other forms of social control, as we have observed and experienced in the past several decades.

The requirement to include the normative element in a constitution is not only a matter of sound commonsense and prudent governance, it is also a binding obligation of contemporary international law. Until the mid-twentieth century, how a state treated its nationals was a matter entirely and exclusively within its own concern. For instance, it was possible for an Adolf Hitler to conceive of an Aryan Germany freed of semitic influence. It was also possible for him to proceed, with very little obstruction and consequently with remarkable success, to implement his policy of physically liquidating persons of Jewish origin, not only in Germany but also in those European countries which he rapidly brought under German domination. He had found the final solution to an ethnic problem, and he had been able to implement it to his satisfaction. But from the revulsion which grew when the world regained its sanity, there emerged certain norms and standards which were designed to ensure that there would never be another Auschwitz, a Belsen, or a Sachsenhausen. These norms and standards now form part of the body of international human rights law - a set of superior standards to which all national law must conform - for the enforcement of which the international community has assumed responsibility. A government's treatment of its own nationals is now regulated by international treaties and is no longer its own exclusive concern.

Sri Lanka is a party to the principal treaties that prescribe the new morality. These include the Charter of the United Nations, which has to be read along with the Universal Declaration of Human Rights, and the two human rights treaties - the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights - which were adopted by the United Nations General Assembly in 1966 and became operative in 1976. In 1955, the Government of Ceylon, by signing the Charter, pledged itself to promote respect for an observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. In the view of the International Court of Justice, that pledge when made by a state bound that state to observe and respect human rights within its territorial jurisdiction. In 1981, the Government of Sri Lanka went further and subscribed to and ratified the two human rights covenants. By that voluntary act, the government made a solemn commitment to the international community that it would regard itself as bound by the provisions of those two multilateral treaties, and thereby submitted itself to the emerging human rights regime with its own monitoring bodies such as the UN Human Rights Committee.

In the context of contemporary Sri Lanka, there were two domestic obligations that immediately arose. The first was to give constitutional force to the rights recognised in the two covenants, and to provide an effective constitutional remedy in the event that a guaranteed right is infringed. In other words, the government undertook to include in the constitution a justiciable Bill of Rights based on the covenants that would regulate legislative, executive and judicial action.

The second was to recognise the collective rights of the different "peoples" that constitute this multicultural republic. In other words, to give effect to the freely expressed wishes of ethnic, religious and linguistic minorities in respect of their political status and their economic, social and cultural development. Both undertakings remain unfulfilled.

A BILL OF RIGHTS

The 1946 Constitution did not contain a Bill of Rights primarily because its principal draftsman, Sir Ivor Jennings, Principal of the Ceylon University College at the time, had quite definite views on the subject. In fact, the Ceylon National Congress had recommended to the Board of Ministers a draft constitution prepared by one of its joint secretaries, Mr. J.A.L. Cooray, which embodied a comprehensive Bill of Rights with procedural remedies for its enforcement. But Sir Ivor Jennings remained unconvinced. "In Britain we have no Bill of Rights," he said; "we merely have liberty according to law, and we think - truly I believe - that we do the job better than any country which has a Bill of Rights." In later years Sir Ivor had reason to change his views on the subject. In 1961, in a talk over the BBC, he admitted that a comprehensive chapter on fundamental rights was very desirable in Ceylon's constitution. "If I knew then as much about the problems of Ceylon as I do now," he said, "some of the provisions [of the constitution] would have been different."

In 1958, Prime Minister S.W.R.D. Bandaranaike caused a select committee of Parliament to be appointed to prepare amendments to the constitution that would incorporate, inter alia, a Bill of Rights. It was a truly representative select committee of both Houses of Parliament in which were represented all the political parties in Parliament, the four major communities (and within the Sinhalese community, the four major caste groups and the two divisions of Kandyan and Low-country Sinhalese); and the four major religious groups (including the different Christian denominations). Of its 18 members only seven belonged to the ruling party and only six to the dominant Sinhalese-Buddhist-Govigama group. It was clear, therefore, that in this exercise in constitutional revision, what was intended was not that the pre-conceived views of any political party or interest group should prevail, but that a general consensus should be achieved; a fact which would have more than compensated for the government's lack of a two-third majority in Parliament.

Within an year, the select committee had, with the assistance of legal experts, including Justice T.S. Fernando and Mr. J.A.L. Cooray, reached agreement on a draft Bill of Rights based on the Indian model. Then, as it often happens in this country when it stands poised for greatness, a crisis intervened. Bandaranaike attempted to resolve a confrontation between the right and left wings of his Cabinet and, in the process, lost his Minister of Justice and Vice-Chairman of the select committee, Mr. M.W.H. de Silva. Soon the government was to lose its vitality and its spiritual base became questionable; and Bandaranaike himself was very much a prisoner of the right-wing. Finally, his assassination later that year aborted that pioneering reformist effort.

In 1972, Dr. Colvin R. de Silva grappled within himself to reconcile the judicial protection of human rights with a legislature which was to be the "supreme instrument of state power." In fact, he could not conceive of human rights being enshrined in a constitution. To use his own words expressed at a symposium which I had the privilege of organising under the auspices of the United Nations Association of Ceylon:

> *Constitutions are made in terms of the stage of development at which any given society or country has arrived. In terms of that stage of development it looks upon things, and for any generation of people to imagine that it can so completely project itself into the*

infinity of the future so as to be able to decide in its own generation that it will constrain a future generation or generations for ever within the confines of its own postulates is to make the mistake of thinking that any human collectivity is the equivalent of the divinity. It is not.

Nor could he agree to the judicial review of legislative action:

If you place a declaration as being fundamental, then you have to accept an authority outside the makers of laws with the task of deciding whether the law is in fact a law. Whether we have faith in the Supreme Court is not the issue. Do we want a legislature that is sovereign or do we not? That is the true question. If you say that the validity of a law has to be determined by anybody outside the law-making body, then you are to that extent saying that your law-making body is not completely the law making body.

The logic was impeccable. The eloquence was unparalleled but the substance was out of date. The world was moving forward, and Dr. de Silva, the Marxist ideologue, was refusing to move with it. But in the constituent assembly where his powerful personality overshadowed nearly everyone else, he carried the day. In the constitution which bore his mark, the rights he considered relevant were sandwiched into one paragraph of one article. The second paragraph contained a wide exclusion clause which authorized the legislature to restrict the exercise and operation of those rights to protect or achieve a wide variety of interests or objectives, and the third paragraph provided that inconsistent existing law would nevertheless continue in force. There was no special enforcement procedure either, and in the six years that that constitution remained in force, this caricature of a Bill of Rights had no impact at all on Sri Lankan life.

In 1978, when Mr. J.R. Jayewardene set out to draft a constitution that met his own imperatives, he expanded that single article into a chapter on fundamental rights, but with uncanny foresight omitted recognising the right to life. He narrowed the scope of permissible limitations in the knowledge, no doubt, that no constitutional barrier could withstand his five-sixths majority in Parliament. And he too insisted that the entire body of existing law, to which he himself had already contributed some hurriedly enacted, particularly bizarre, statutes, shall remain untouched by the constitutional guarantee of human rights.

Mr. S. Nadesan QC, ruminated on this kind of constitution-making by governments through Parliament and its select committees. He projected himself back in time some 700 years to those broad fields in Windsor where a document of great constitutional significance was made. He wondered what course events would have taken had the Sri Lankan examples been followed there. It was as if at Runnymede, he said, the barons had invited King John to draft the *Magna Carta*. A Cabinet of Ministers and a Parliament were determining what limitations ought to be placed on the exercise by them of their unlimited power.

The purpose of a Bill of Rights is to introduce contemporary norms and standards into the governance of a country. In the development of every legal system there has been an endeavour to devise a standard of values against which the performance of the government can be measured; a higher standard to which it must confirm. At first it was the divine law. Indeed, even today, in certain parts of the world, legislation is measured by reference to the revelations in the Holy Quaran. Later, standards founded upon theories of "natural law" began to be

applied. The 1776 Virginia Declaration of Rights, the 1789 French Declaration of the Rights of Man and of the Citizen, and the 1791 amendments to the Constitution of the United States, were the earliest attempts to formulate a comprehensive national statement of natural rights. Each was the work of a political assembly, the product of the tumultuous events that preceded it, and was designed to respond to the particular grievances, and the needs and aspirations, of those revolutionary years. Today, the accepted standard is the body of international human rights law which was articulated in the form of general principles in the Universal Declaration of Human Rights, and then expressed in precise legal language in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

There is no prescribed framework for a Bill of Rights. Its provisions may be as diverse and as numerous as one's imagination allows. Or they may be as narrow and as restricted as the need for power and control. The strength of a Bill of Rights will, therefore, range from one end of the spectrum to the other, depending on the depth of commitment of those in power to the concept of human rights. Since Sri Lanka has now ratified both international human rights covenants and secured re-election to the principal functional organ of the United Nations concerned with human rights, the Commission on Human Rights, the Constitution ought to reflect this professed commitment to at least the minimum standards recognized under international law. They may be improved upon, but there is no justification for derogating from their content. The covenants have served as the model for hundreds of constitutional Bills of Rights, the most recent being on the African continent and in Eastern Europe. There is an enormous body of case law to help interpret the provisions of the covenants, a rich jurisprudence which give life and meaning to what were once abstract principles. To ignore the covenants and to attempt to construct a new set of fundamental principles, as Dr. Colvin R. de Silva, and Mr J.R Jayewardene did, is no less impractical than attempting to reinvent the wheel or to find a substitute for the metric measure. To justify the exercise by arguing the necessity to give an Asian flavour or a Sri Lankan dimension to the universally accepted rights by modifying their scope and application is to suggest that, for some inexplicable reason, Asians or Sri Lankans are less human, or have lesser attributes of humanity, than the rest of the human population.

Since a Bill of Rights is primarily intended to regulate the exercise of state power, its provisions must apply to all three organs of government. In other words, the law-making process, the administrative process and the judicial process, must be subjected to the Bill of Rights. This requirement is well expressed in the recent Constitution of Namibia in the following terms:

> *5. The fundamental rights and freedoms enshrined in this chapter shall be respected and upheld by the Executive, Legislature and the Judiciary, and all organs of the government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the courts in the manner hereinafter provided.*

Since a constitution is the supreme law of the country, a Bill of Rights entrenched in the constitution will have the effect of overriding all existing law. For instance, the Constitution of India states:

> *13(1). All laws in force in the territory of India immediately before the commencement*

of this constitution, in so far as they are inconsistent with the provisions of this part, shall, to the extent of such inconsistency, be void.

One of the most recent constitutions, that of Seychelles, which was drafted by a former Sri Lankan legal draftsman, contains a similar article:

5. This constitution is the supreme law of Seychelles and any other law found to be inconsistent with this constitution is, to the extent of the inconsistency, void.

In Sri Lanka, on the other hand, the present constitution states that:

16 (I). All existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the proceeding provisions of this chapter (i.e. with the guaranteed fundamental rights and freedoms).

This means that the guaranteed rights are subject to the entire body of laws, written and unwritten, that exist in the country, however profoundly they infringe the guaranteed rights. This also means that the government will enjoy virtual immunity from the Bill of Rights because its authority will continue to be derived from that entire body of existing law enacted in the past 193 years - a veritable armoury of archaic powers supplemented in the past two decades by more sophisticated intrusions into human dignity - which remains unaffected by the constitutional guarantee of fundamental rights. This could well be described as a massive hoax perpetrated on the population in 1972 and in 1988, and one hopes it will not be repeated in 1995.

In this connection, it is interesting to recall what the Prime Minister, Mrs Bandaranaike, wrote to her Minister of Constitutional Affairs on 9 December 1970 in a hitherto unpublished letter, and which, she said represented not only her thinking but also that of her party:

The resolution adopted by the Constituent Assembly contemplates the establishing of a Constitution which will be the fundamental law of Sri Lanka. To give effect and meaning to this resolution, the new Constitution should provide that even the Legislature should be bound by this fundamental law. There appears to be no better way of securing this result than by giving power to an independent body like an established court to examine whether any piece of legislation is contrary to such fundamental law. The arrangements contemplated for this purpose in the basic resolutions proposed by you do not appear to be satisfactory. To give the power of judicial review to the court is not to establish the superiority of the courts over the legislature. It only proceeds on the assumption that the power of the people is superior to both the judiciary and the legislature; it means that where a law conflicts with the will of the people as enshrined in the Constitution, the courts ought to give effect to the Constitution rather than to the law which is in breach of it.

If, however, the will of the people contained in the Constitution subsequently undergoes a change, the provisions for amendment of the constitution should be sufficient to meet such a situation.

The liberal optimism of the prime minister remained unfulfilled.

> *Those who fear that if the Bill of Rights is made applicable to existing law, the courts will be inundated with cases and the government paralysed by laws being struck down with rapid regularity, will do well to remember that a Bill of Rights is rarely invoked to question the validity of a law per se. It is not until a person's right has been infringed that a justiciable issue arises for determination. A law is challenged only indirectly. What is challenged in the first instance is the executive act. And the effect of a declaration by court that an existing law is inconsistent with a protected right and is, therefore, void, is to render that law inoperative from the date of the judgement of court. If anyone is still sceptical about it, I would say to him: go to Hong Kong and see for yourself how the system works. The Hong Kong Bill of Rights is a mirror image of the International Covenant on Civil and Political Rights. It was enacted in June 1991 and it expressly provided that every existing law inconsistent with it was repealed. Today, four years later, a process of law revision combined with judicial scrutiny of existing law has cleared the statute book of much of the offensive material gathered over 150 years of British colonial rule, and neither the administration nor the judiciary has collapsed under the strain.*

The outlawing of murder has not eradicated killing. So, too, a Bill of Rights will not prevent the violation of human rights. But if the Criminal Code has succeeded in establishing norms which most people of good sense and conscience now strive to observe, a Bill of Rights must surely, in due course, create a consciousness among men and women, whether their role in society be that of making, applying or enforcing the law, or of simply living their own lives, that there are higher standards and more exalted values to which all people, be they meek or mighty, must eventually conform. In this country, in recent decades, the human body has been brutalised and the human spirit degraded. We need to focus on a new frontier, and to find the means to reach it. An entrenched, comprehensive, effective, justiciable Bill of Rights is a tried and tested vehicle which is serving well the needs of others and is unlikely to fail us.

THE RECOGNITION OF MULTICULTURALISM

It is quite evident from the post-independence history of Sri Lanka that many of our political leaders have either failed or refused to recognize the fact - the unalterable, immutable and enduring fact - that we are a multicultural state. Had they recognized that Sri Lanka was multicultural, they would have appreciated that in the contemporary multicultural state, minority communities no longer have to depend upon the "tolerance" or the "goodwill" of the majority for their existence or livelihood. They do not have to wait expectantly for "concessions." They are "peoples" who have rights in common with, and no less than, everyone else. Indeed, because of the need to protect the distinctive character and identity of minority communities, which is after all what constitute the cultural mosaic of the world in which each of us spends his or her predetermined span of life, they even enjoy additional rights.

Contemporary international law protects the physical existence of members of minority groups by prohibiting genocide, and by recognising their right to seek asylum abroad in two treaties

to which Sri Lanka is a party, the Convention on Genocide and the Convention on the Status of Refugees. Equality between minority and majority communities is secured in both international human rights covenants by prohibiting discrimination on grounds such as race, colour, language or religion. The identity of a minority group is preserved, in Article 27 of the International Covenant on Civil and Political Rights, by guaranteeing to persons belonging to such a group the right to enjoy their own culture, to profess and practise their own religion, and to use their own language. The mounting tragedy of Sri Lanka appears to lie in the fact that, while successive governments have been willing, in varying measure, to recognize the rights of members of minority groups as individuals, and have in fact done so in recent years, they have tenaciously resisted the rights of minority as a collectivity.

International law today demands the recognition of the right of a minority to determine its political status and to freely pursue its economic, social and cultural development. Article I of both human rights covenants, which Sri Lanka has agreed to implement, guarantees that right. "Political status" is not necessarily the creation of a separate state. It includes free association with an existing state, integration with an existing state, or indeed emergence into any other political status. The essence of self-determination is choice; a free, genuine, informed, voluntary choice in securing the continuing restructuring of human communities in accordance with the evolving aspirations of the members of such communities.

Before I am accused of wearing blinkers, I would hasten to add that Sri Lanka is not alone in failing to recognize the right of self-determination. Today, in nearly 50 countries conflicts relating to self-determination are currently taking place. In our region alone, the Tibetans, the Sikhs, the Nagas, the Chittagong Hill Tribes, and the Karens immediately come to mind. But the violence that accompanies these conflicts, the xenophobia and racism that results, the ethnic cleansings, genocides and assassinations that follow, and the internal displacements and external refugee flows that invariably occur, are, as Rodolfo Stavenhagen has observed, not generated by the drive for self-determination, but by its negation. The denial of self-determination, not its pursuit, is what leads to upheavals and conflicts.

There are some who still argue that minorities are not entitled to self-determination. A recent statement issued by a very distinguished group of Sri Lankans claimed that neither the Sinhalese, Tamils, Muslims, Malays or Burghers constitute separate "nations." That may or may not be an accurate statement, but it is irrelevant to the question of self-determination. The international human rights covenants guarantee the right of self-determination to all "peoples." A memorandum prepared by the Secretariat of the San Francisco Conference at which the Charter of the United Nations was drafted in 1945 explained that the word "state" indicates a definite political entity; the word "nation" includes political entities such as colonies, mandates, protectorates and quasi-states as well as states; and that the word "people" conveys the idea of "all mankind" or "all human beings," and therefore means all groups of human beings who may, or may not, comprise states or nations. It appears to me, therefore, that the fundamental premise upon which those distinguished men and women argued the case against federalism or regional autonomy is seriously flawed.

In 1990, a meeting of experts convened by UNESCO identified the following criteria as being commonly taken into account in deciding that a group of individuals is a "people:"

1. A group of individual human beings who enjoy some or all of the following features:

   (a) a common historical tradition;
   (b) racial or ethnic identity;
   (c) cultural homogeneity;
   (d) linguistic unity;
   (e) religious or ideological affinity;
   (f) territorial connection;
   (g) common economic life.

2. The group must be of a certain number who need not be large, but must be more than a mere association of individuals within a state.

3. The group as a whole must have the will to be identified as a people or the consciousness of being a people - allowing that groups or some members of such groups, though sharing these characteristics, may not have the will or consciousness; and

4. Possibly, the group must have institutions or other means of expressing its common characteristics and will for identity.

Therefore, the term "peoples" includes indigenous peoples as well as ethnic, religious and linguistic minorities within a state. Whether in any given context a group constitutes a "people" for the purpose of self-determination will depend on the extent to which that group shares ethnic, linguistic, religious or cultural bonds and possesses a collective desire to live together. This is essentially a process of self-definition.

Ceylon emerged into independence in 1948 with a constitution that was described by one commentator as having "had entrenched in it all the protective provisions for minorities that the wit of man could devise." The constitutional settlement in consideration of which independence was granted consisted of institutions and devices such as multi-member constituencies, nominated members, a second chamber, an independent public service commission, a prohibition on discriminatory legislation, and the recognition of parity of status for Sinhala and Tamil. But this package contemplated neither a high degree of autonomy for the minorities, nor power sharing on the basis of balanced representation. What it contained were essentially paternalistic protective measures accorded to minority groups who were being condemned, in a political sense, to a state of permanent subservience to the dominant ethnic, religious and linguistic group in the country. The heterogeneous character of the country, its multiculturalism was glossed over.

It is interesting to recall that the All Ceylon Tamil Congress led by the articulate state councillor and lawyer, G.G. Ponnambalam, proposed an alternative constitutional scheme, incorporating the concept of "balanced representation." It was designed to prevent the domination in the legislature of any one community over another. It advocated that the island be divided into 100 territorial constituencies for an assembly of 100 members, and that of these constituencies 50 should be reserved for the Sinhalese, while the other 50 should be allocated to members of the

minority communities (25 to the Ceylon and Indian Tamils, and 25 to the other communities). This proposal was, in a sense, a logical evolution of the form of communal representation which had existed from 1833 until 1931, during which period, apparently with mutual acceptance, the minorities and Sinhalese sat in successive legislatures in the proportion of 1:2. The Soulbury Commission was not willing to countenance communal representation, and felt instead that it was essential that Ceylon should develop an "unquestioning sense of nationhood."

But nationhood requires more than protective mechanisms in a constitution. It requires mutual trust and mutual respect, and a willingness to acknowledge each other's worth. Mr D.S. Senanayake's attempt to forge nationhood by including in his 14-member Cabinet two elected Ceylon Tamils representing northern province electorates and one elected Muslim from Colombo, ran aground when his government pushed through Parliament a package of citizenship laws to disfranchise a large majority of Indian Tamils, and initiated a programme of state-funded Sinhalese colonization in the sparsely populated dry zone in the eastern and northern provinces, the traditional homelands of Sri Lanka's minorities.

The rupture occurred when the two principal Sinhalese-led political parties united to breach the 1944 decision of the State Council that Sinhala and Tamil be declared the official languages of Ceylon within a reasonable number of years, later fixed for 1 January 1957. The rupture was perpetuated when Sinhalese politicians discovered that the constituency to be targeted for the purpose of winning general elections was essentially Sinhalese. It was often possible for one of the principal political parties to secure a majority in the legislature by concentrating on the seven provinces which were overwhelmingly Sinhalese and ignoring the other two, even to the extent of not fielding any candidates at all. On those rare occasions when the mood of the electorate showed itself to be indecisive, it was not impossible for one of the parties to reach pre-election or post-election accords with the Tamil political leadership, which conveniently happened to be not only largely non-Hindu, but also affluent, professional and Colombo-based. Often the political situation stabilized itself quite soon, making it unnecessary for such accords even to be honoured. It is not entirely without significance that during the past 40 years, no elected representative of the Tamil community from the north has, as such, served as a member of the Sri Lankan government.

The Tamil response surfaced quite early. In 1949, one year after independence, the Federal Party was formed with the declared aim of "attaining freedom for the Tamil speaking people of Ceylon by the establishment of an autonomous Tamil state on a linguistic basis within the framework of a federal union of Ceylon." Despite the fragile philosophical base on which it was founded, and the scepticism with which it was initially received by its core constituency; the relatively unsophisticated Hindu farming communities of north Ceylon, the Federal Party, was by 1956, the dominant Tamil political organization in the northern and eastern provinces. It maintained its dominance as its strength increased at every successive general election.

In 1970, the Federal Party responded to the Prime Minister's invitation to participate in a constituent assembly to draft, adopt and operate a republican constitution which would, in her words, "serve to build a nation even more strongly conscious of its oneness amidst the diversity imposed on it by history." If the government was so inclined, an opportunity was about to present itself to respond to minority aspirations. But very early in the proceedings, a Federal Party proposal to discuss the subject of federalism was summarily rejected without discussion.

The Tamil Language Regulations made in 1966 were "deemed to be subordinate legislation," and the Tamil language was referred to generally as the language of "translation." The Federal Party withdrew, and the constituent assembly then proceeded to humiliate the Tamil community even further by asserting in the new constitution the superior position of both Buddhism and the Sinhala language, neither of which was really necessary considering that Buddhism had survived 450 years of colonial rule without a constitutional dictat and Sinhala had for 16 years been the official language of the country.

The constitution of a country must respond to the evolving aspirations of the people, and provide a framework through which those aspirations may be realized. But when successive governments respond to this overwhelming expression of support for federalism not by restructuring the political framework to accommodate the freely expressed wishes of an integral component of the country, but by pretending that their voices cannot be heard, and then by rousing primeval fears among the Sinhalese in order to better cultivate the southern electorate, political organizations in the north are sufficiently induced to resort to extra-parliamentary action. Agitation that began with civil disobedience and *satyagraha* campaigns soon raised Tamil nationalism to a level that appeared to be beyond the reach of the Federal Party and no longer capable of being fulfilled through regional autonomy within a federal union of Sri Lanka. At the general election of 1977, the Tamil United Liberation Front which called for a separate state in which Tamils would rule themselves as a nation distinct and separate from the Sinhalese, won all 14 seats in the northern province.

Perhaps the last opportunity to avoid the imminent civil war presented itself in 1977 when J.R. Jayawardene's government was elected on a promise to convene a round table conference to deal with Tamil grievances. But Jayawardene had other things in mind, and solving the ethnic problem was not one of them. In fact, the ethnic problem was for him an excellent diversion while he set out to break the mould of Sri Lankan politics and consolidate himself in an office which he appeared to want to hold in perpetuity. In 1979, when he directed his army commander to proceed to the north, with absolute authority to eliminate by any means whatsoever all forms of terrorism the army might encounter, with the final solution to be achieved by Christmas of that year, he gave a military dimension to what was essentially a political problem. Before the 12-year term of office he had secured for himself came to an end, he caused to be enacted the emotionally-charged, unquestionably myopic, Sixth Amendment to the Constitution and, unwittingly perhaps, drove out of Parliament the traditional Colombo-based Tamil political leadership. In the vacuum they created there emerged a new generation of marginalized, militant young men and women, born and bred in the north in the frustrating environment of unremitting conflict with the Sinhalese government.

Constitution-making becomes a meaningless exercise if it does not respond to the evolving aspirations of the people of the country. The voice of the minority communities in the north and east has been loud and clear in its support for genuine autonomy. They ask for space; space which they are entitled to as of right in this multicultural state of which they are an integral part; space in which to preserve their unique identities because identity is the central issue of being; space in which to keep alive their languages and their history, their legends and their stories. The identity of a community is inviolable. It is not enough to be who we are; we must also be seen and heard and respected for who we are. When that basic right is denied, by force or otherwise, people will struggle and fight to regain it. The space that a minority

community seeks is not negotiable, and therefore ought not to be conditional upon, or indeed to await, a referendum or national consensus or even a ceasefire. The initiative rests with the government, and no all-party conferences or peace talks are required to do that which the law and commonsense demand.

Regional autonomy is not an end in itself. It seems to me that the greater the degree of autonomy enjoyed by a region, the stronger should the bond be between the autonomous region and the centre. There must be genuine participation by any regional entity in government at the centre. In other words, the Tamil and the Muslim communities of the north and the east will need to be assured constitutionally of not token or fortuitous but genuine representation, both in the national legislature and in the central government. The fact of multiculturalism must be accepted and recognized as a reality, not brushed under the carpet as the Donoughmore and Soulbury Commissions did by denigrating it as a canker on the body politic. That this is already partially recognized is evident from the presence in the government today of the two leaders of the Muslim community and the two leaders of the Indian Tamil community. Their participation ought to be constitutionally mandated, irrespective of their party affiliations.

There are many constitutional precedents from other countries that can be drawn upon. Singapore, which has recognized multiculturalism and actively promotes it, has adopted several constitutional devices to institutionalise the growing and mutually productive relationship between the different groups who inhabit that island state. Kiribati and Fiji are two other countries in the Pacific region that have attempted to use the constitution to mandate power-sharing. The 1960 Constitution of Cyprus provided for proportional representation for the majority Greek and minority Turkish communities, not only in the House of Representatives but also in the Cabinet. Similarly, the Constitution of Belgium requires proportional representation in the Senate for the Dutch, Flemish, French and Germanophone communities and mandates that the Council of Ministers shall, with the possible exception of the Prime Minister, consist of as many French-speaking as Dutch-speaking ministers. The Canadian constitution recognizes the special character of the province of Quebec as well as the treaty rights of the "first nation" peoples.

For many years, public discussion of this subject has been clouded by fear, real or imaginary, that autonomy could lead to independence, or that federalism is only a precursor to a separate state. Those who experience such nightmares ought to open their eyes to the fact that reality is the converse; that in attempting to resist autonomy or federalism, successive governments have lost control over substantial portions of territory. The writ of the Sri Lanka government does not run beyond fairly easily identifiable territorial limits. There is a *de facto* government in place beyond those limits. Therefore, notwithstanding these fears, any re-distribution of state power will necessarily have to recognize the reality of the situation on the ground.

On the other hand, if successive governments had recognised the legitimate aspirations of the minority communities, the focus would immediately have shifted from the rancorous assertion of rights to the far more productive exercise of formulating the terms and conditions of co-existence. A minority group conscious that its right even to secede is recognized, would have been compelled to examine the viability of secession in political, social and, most importantly, economic terms. These considerations would probably have compelled such a group to remain within the existing state, but on mutually acceptable negotiated terms. The recent events in

Europe demonstrate the futility of resisting the resurgence of ethnicity. Parallel to the fragmentation of existing states under the pressure of resurgent ethnicity, the sovereign states of Europe, both old and new, are abandoning traditional notions of sovereignty and seeking new unions and relationships with each other, motivated primarily by the need for economic co-operation.

Perhaps the thought I can leave with you as I return to Hong Kong is the example of Hong Kong itself. On 1 July 1997, the Crown Colony of Hong Kong will become a special administrative region of China. Under arrangements agreed upon between Britain and China and now incorporated in a basic law of the Chinese legislature, Hong Kong will enjoy a degree of autonomy that no component unit of a federal state has ever enjoyed anywhere in the world. Apart from having its own legislature, executive and judiciary, including its own court of final appeal, Hong Kong will have its own laws, its own flag and emblem, its own judges and civil servants, its own permanent residents, and its own passport and immigration controls. Hong Kong will have its own currency and the ability to use its financial resources exclusively for its own purposes, its own customs, territory and its own certificates of origin for its products, its own educational system and the right to use English as one of its official languages. Defence and foreign affairs will be the responsibility of the Chinese government, but Hong Kong will have the right to participate in international organisations and conferences not limited to states, be a party to international agreements, using the name "Hong Kong, China," and establish economic and trade missions abroad. Yet, Hong Kong will not be a separate state. It will not even be a province in a federal system because China is not a federal state. It will be a tiny capitalist pimple on the enormous communist face of China. It is a relationship that has been created sensibly and dispassionately, without reference to terms such as "unitary" or "federal" which are, in any event, almost obsolete in the contemporary constitutional lawyer's lexicon. The right of the people of Hong Kong to maintain their own accustomed way of life, and their own political, economic and social systems has been reconciled in a pragmatic manner with the sovereignty of China.

REACHING THE NEW FRONTIER

Constitution making has been a regularly recurring exercise in Sri Lanka during the past 50 years. Any substantive change has invariably had a negative impact, such as authoritarianism flowing from the executive presidency, and arbitrariness resulting from the abolition of the judicial review of legislation. Even inconsequential changes, such as the inclusion of reference to the national flag, the national anthem and the national day, have been counter-productive. Indeed, the question may well be asked what decades of tinkering with the constitution has achieved for this country and its peoples.

Those of us who are old enough to recall the early halcyon years of independence remember a relatively prosperous country with the highest per capita income in Asia, one of the smallest military budgets, and one of the most extensive social welfare programmes. Today, the outcome of the annual aid meeting in Paris determines in a significant way the quality of life of our people. In fact, with one doctor for every 6,162 people, Sri Lanka is behind at least 20 other countries of this region, many of whom offer a doctor for less than 1000 persons. In calorie intake, Sri Lanka is again at the bottom of the scale, only marginally better than Bangladesh, Vietnam, Cambodia, Nepal and Bhutan.

This country was once rich in human resources, with a remarkably high standard of literacy, a vibrant urban middle class, and a solid rural base. Today, our literacy rate ranks below that of 11 other countries in this region, including Mongolia, Thailand, the Philippines and the Maldives. We often hear of local politicians predicting that by the year 2002 Sri Lanka would have reached NIC status. I am sure we all hope it would, but it seems to me that with only one telephone for every 88 people, compared with one for every 1.5 in Hong Kong, 2 in Singapore, 2.3 in South Korea, 2.4 in Taiwan, 2.5 in Macau, 3.8 in Brunei, 6.8 in Malaysia, 24.4 in Thailand, and 44 in the Philippines, we would find ourselves quite handicapped as we journey towards that illusory goal. In fact, in many of those countries, telephones now compete with electronic mail, and the postal service has been virtually replaced by the fax machine.

There was a time when Sri Lanka possessed an enviable international identity. Its initiatives in furtherance of non-alignment, the settlement of the Sino-Indian border dispute, opposition to apartheid, the Indian Ocean Peace Zone proposal, and the formulation of the law of the sea, earned not only for the government but also for ordinary Sri Lankans venturing abroad respect and recognition. Today, the Sri Lankan passport is a devalued document, more a liability than a facilitator, which is handled with intense suspicion in consulates and airline counters alike. The recent decision of the government to barter a two-year term on the United Nations Security Council for a few thousand menial jobs in a south-east Asian country will only strengthen the international image this country is beginning to have as a nation that exports domestic helpers and semi-skilled cheap labour to help sustain its economy, an image which the Philippines is struggling to retrieve itself from.

We have to reach new frontiers. We have wounds to heal, prejudices to overcome and barriers to cross, and bridges to build, to reach those new frontiers. A new constitution can be a catalyst, giving us the opportunity to infuse a new sense of dignity into our lives by recognising our inherent worth, and by creating new forms of relationship with each other, so that on this fertile land which nature has bestowed on us we may yet be able, in the words of the Prime Minister, "to build a nation more strongly conscious of its oneness amidst the diversity imposed on it by history."

NEWS OF THE TRUST

November was a busy month for the Trust in which three conferences/workshops were organized: regional workshop on preparing State of Human Rights Reports which was co-ordinated by the Trust; consultation of the SAARC Working Group on Economic, Social and Cultural Rights on the theme *Copenhagen and Beyond: Asserting the Primacy of Rights*; and the National Law and Economy Conference 1995.

1. REGIONAL WORKSHOP ON HUMAN RIGHTS MONITORING AND ANNUAL REPORTING BY NATIONAL GROUPS

The Trust co-ordinated a workshop which was organised by Forum-Asia on formulating state of human rights reports for the region on 8-10 November. The group shared the experiences of the participants who were already involved in preparing national human rights reports and discussed how best other groups should set about in formulating their own reports given the political situation and other constraints in their countries.

The following people participated at the workshop: Mr A. Rahman Khan from Bangladesh; Ms Eva Galabru from Cambodia; Mr D.J. Ravindran, Dr V Suresh, Mr D. Gnanapragasam and Ms Rita Panicker from India; Mr Benny K. Harman from Indonesia; Ms Tan Wan Yean from Malaysia; Mr Subodh Raj Pyakurel and Mr Naranath Luitel from Nepal; Mr Hussain Naqi from Pakistan; Mr Auxillium T. Olayer from the Philippines; Mr Sarawut Pratoomraj, Ms Wanida Karunan and Mr Shan Lay from Thailand; Mr Richard Carver from U.K; and Ms Jeannie Guthri from the U.S.A. The Trust was represented by Ms Damaris Wickremasekera and Dr Sumudu Atapattu. Dr Deepika Udagama from the Centre for the Study of Human Rights, Colombo also participated.

2. COPENHAGEN AND BEYOND: ASSERTING THE PRIMACY OF RIGHTS

Law & Society Trust organised a regional consultation on the theme *Copenhagen and Beyond: Asserting the Primacy of Rights* from 27-29 November at the Sri Lanka Foundation Institute in Colombo. The main aim of the consultation was to discuss the Copenhagen Declaration and the Plan of Action adopted therein.

The following people participated at the Consultation: Sarah Zaii of the Centre for Economic and Social Rights of New York; Zaved Hasan Mahmood of Law & Mediation Centre in Dhaka; Shiva Hari Dahal of Group for International Solidarity (GRINSO) of Nepal; Clarence Dias of the International Centre for Law in Development of New York; Sunila Abeysekera of INFORM; Nicky Bastian of Colombo; Sunil Bastian of the International Centre for Ethnic Studies, Colombo; Shanthi Sachchithanandam of Colombo; and Kayoko Tatsumi of the Sasakawa Peace Foundation of Japan. Mario Gomez of the Trust co-ordinated the conference.

The Consultation was divided into three broad areas: The Copenhagen Declaration and the Plan of Action; NGO Perspectives on Development and Human Rights; and Globalisation, Development and Human Rights. Finally, action strategies were discussed in relation to

international actors, UN processes, the private sector, Asian governments and the protection of vulnerable groups (women, workers, children and communities at risk).

We publish in this issue Dr Clarence Dias' paper presented at this Consultation which critiques the official Declaration adopted at the World Summit on Social Development in March 1995.

3. NATIONAL LAW AND ECONOMY CONFERENCE 1995

This year's National Law and Economy Conference, which was held on the 24th and 25th November at the SLFI, focused on issues pertaining to Legal and Policy Issues Relating to Infrastructure Development. Paper writers were drawn from the public and the private sector and academia.

In his keynote address, Dr Lal Jayawardena, the economic advisor to the President, having detailed the economic and social background in Sri Lanka, highlighted the vital role played by infrastructure development in the national economy. Ms Malathy Knight-John of the Institute of Policy Studies, spoke on private sector participation in public utilities and focused on the need for private sector participation. She also identified certain problem areas. Mr Gunendra Sellahewa of Crosby Securities, in his presentation on financial techniques for private infrastructure development, provided an overview of the project financing structure necessary for infrastructure projects.

In Session II, Dr Roberto Bentjerodt, World Bank Resident Representative, focused on the need and the functions of a fund for infrastructure development projects and the experience of the World Bank. Mr Ranjan Srikantha, former legal consultant to SIDI, dealt with legal techniques for private infrastructure development and outlined the provisions in contracts between the government, the investor and the lending institution.

Mr Leel Wickramarachchi, Project Consultant of USAID, focused on the role of insurance and risk mitigation in relation to infrastructure projects and pointed out that there must be an equitable allocation of risks and the risk should be allocated to the party who is best able to bear the risk. Dr Sumudu Atapattu dealt with the environmental impact of infrastructure development projects and stressed the need to evaluate the environmental, social and economic impacts of infrastructure development projects at the planning stage.

The next session was devoted to power and energy issues. Dr Sarath Amunugama MP, focused on the need to increase our energy generation capabilities in order to meet future demands. The experience of India in relation to energy development projects was dealt with by Professor Bibek Debroy of the National Law School of Bangalore. He also presented a case study on the ENRON project in India. Mr Chanaka de Silva, State Counsel, presented a paper on the salient features of Power Purchase Agreements, focusing on the legal provisions that regulate such contracts.

Session IV dealt with the role of transport and ports infrastructure. Ms Geetha Karandawela, Advisor to the Minister of Ports and Shipping, outlined the legal and policy issues in relation to port development projects in Sri Lanka. Professor Prianka Seneviratne of State University of Utah stressed the need for an integrated national transportation policy.

Outcome of the conference

The Trust is preparing the papers presented at the conference for publication which the Trust hopes would fill the void in relation to material on infrastructure development. In addition to these papers, the following papers will be included in the publication: Infrastructure Development and the Devolution of Power which will be authored by Professor Shirani Bandaranayake, Dean of the Faculty of Law; and Tender Boards and Procurement Procedures relating to Infrastructure Development by Ms Manjula Soysa, Project Co-ordinator of the Trust. The Trust hopes that this publication will provide a multi-disciplinary perspective on issues relating to infrastructure development which would assist policy-makers, economists, lawyers, investors and law students in their respective fields of work. The Trust hopes to publish the book by the end of February, 1996.

RE-VIEWING FROM BELOW, THE VIEW FROM THE SUMMIT

Dr Clarence J. Dias[*]

I

Summit of Hope, Amidst a Season of Despair

The World Summit on Social Development (WSSD) was the brainchild of Juan Somavia - one of Latin America's leading intellectual activists. By the time the Summit actually took place in March, 1995 at Copenhagen, Juan Somavia, as Chile's Ambassador to the UN and Chair of the Summit, was stressing that this was a "Summit of Hope." It may well have been that, but few would deny that the Summit of Hope was taking place (if not amidst a season of despair) surely during the "winter of our discontent." With diplomatic understatement, the Copenhagen Declaration in its section entitled, "Current social situation and reasons for convening the Summit," rosters several reasons for our discontent with the current global situation:

1. "More than one billion people in the world live in abject poverty, most of whom go hungry every day"....."the majority of whom are women."

2. "Over 120 million people worldwide are officially unemployed and many more are underemployed. Too many young people, including those with formal education, have little hope of finding productive work."

3. "One of the world's largest minorities, more than 1 in 10, are people with disabilities, who are too often forced into poverty, unemployment and social isolation."

4. "Millions of people worldwide are refugees or internally displaced persons. The tragic social consequences have a critical effect on the social stability and development of their home country, their host country and the respective regions."

5. "More women than men live in absolute poverty and the imbalance continues to grow, with serious consequences for women and their children."

6. "The major cause of the deterioration of the global environment is the unsustainable patterns of consumption and production, particularly in industrialised countries, which is a matter of grave concern, aggravating poverty and imbalances."

The official WSSD Declaration clearly recognises that there is much cause for discontent. Non-governmental analysis however would be much more frank, forthright and pessimistic, if not despairing, in reviewing the meanest of **Mean Seasons** that represents both the current global

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[*] Presented at the Regional Consultation, *Copenhagen and Beyond: Asserting the Primacy Rights* organised by Law & Society Trust which took place from 27-29 November, in Colombo.

order as well as present-day South Asian realities:-

1. On the **economic front** we in South Asia are facing a multitude of global Shylocks, demanding their pound of flesh, for the profligacy of our leaders who have led our countries into penury. The indifference (bordering on cruelty) of the IMF and the World Bank gives us SAP's - Structural Adjustment Programmes - which are a misnomer for Systematically Administered Pauperisation, with extremely unsafe "safety nets" and, the all too often purposeless, pursuit of privatisation producing pervasive unemployment and loss of livelihood. To compound matters along comes Dunkel to bring us GATT - greed, aggression and theft through trade. Economic liberalisation, deregulation and market - opening strategies are the order of the day. Indeed there is unabashed talk from Washington about a shift in development from a paradigm of "development through aid" to a paradigm of "development through trade and investment." Human rights NGOs would do well to address the human rights implications of such a paradigm shift. Development through trade and investment means that development will no longer be **directed** by natural concerns and priorities. Instead it will be **driven** by market forces and their exigencies. Development through trade is, by definition, **unsustainable** and indeed can only be **sustained** by being consumption-driven. Such consumptive development requires the active promotion of over-consumption, where greed and selfishness become the required policy objective. This is what APEC (the Asia Pacific Economic Cooperation Forum) is all about - converting the Asia Pacific region into the world's largest and most voracious community of **homo consumeris** (to use the phrase of Upendra Baxi). It is important to note that both APEC (which has mercifully, as yet, not sought to extend its grasp to South Asia) and GATT (which does have South Asia in its firm stranglehold) require, in the name of "free trade" and "market opening", a level of deregulation and dismantling of national regulatory laws of a historically unprecedented nature. This erosion of national law can be achieved only by our governments' abdicating of their human rights obligation to "**protect**" their peoples against human rights denials and abuses.

2. On the **political front** we are witnessing a resurgence of right-wing politics, spiced as usual in South Asia with lethal doses of cronysm and corruption. More recently, we face disturbing trends of both the communalisation as well as the criminalisation of electoral politics. Governance by gangsters and their goondas is the most recent innovation that India, the so-called "worlds largest functioning democracy," has to offer to its neighbours in South Asia. Our elections give us hung Parliaments, in which feudal, despotic, fundamentalist or reactionary minority parties determine and hold the balance of power. Today in South Asia, politics does indeed make strange bedfellows - and all in the name of democracy, and transitions to democracy. We have the Executives which is acting, de facto, in an increasingly authoritarian and unaccountable manner. Deregulation and the erosion of law has meant that "rule of law" in South Asia today, is increasingly degenerating into the phenomenon of "the law of the ruler." And all this presided over by a Judiciary (with all too infrequent exceptions) whose timidity is too often matched only by its temerity and by judges (as in the Bhopal travesty) who truly believe that not only must justice be blind, it must be seen to be blind! What price then "good governance" in South Asia?

3. On the **socio-cultural front** in South Asia, we are witnessing a concurrent (and not unconnected) resurgence of both communalism and fundamentalism on the one hand and of patriarchy on the other. For the women of South Asia, Beijing has come to mean little more than a less than memorable whistlestop on a frenetic itinerary of globalization masquerading as UN global conferencing. Family, community and religion are being forged, by yet another strange and opportunistic fraternity of bed-fellows into the detention centres, prisons and Star Chambers for the women of South Asia.

Meanwhile, globalization gallops on in South Asia, as indeed elsewhere, and it is a matter of great concern how the WSSD Declaration views globalization. In the analysis of the Copenhagen Declaration, globalization "is a consequence of increased human mobility, enhanced communications, greatly increased trade and capitals flows and technological developments." Predictably, the analysis fails to ask "increased human mobility" for whom? For Asian migrant workers to rush headlong into exploitation and physical and sexual abuse like Sarah Baligbagan of the Philippines? For the refugees fleeing the crossfire of bloody armed conflicts or repression by abusive regimes all around the north-eastern and north-western borders of the sub-continent and the north of isle of Serendib? "Enhanced communications" between whom? Various elements of national security forces in the SAARC countries? While threats to the human security of the peoples of SAARC remain hidden behind a plethora of official secrecy and national security laws? These covert, clandestine actions of officials make mockery of concepts of "transparency," "freedom of information," and "right to know." "Increased trade and capital flows" indeed, but who **directs** and **benefits** from such flows? Only transnational elites, their national accomplices and cohorts? "Technological developments" indeed, but they are the protected property of the holders of patents which will dictate the terms and price of access.

Globalization, the Copenhagen Declaration goes on to say, "opens new opportunities for sustained economic growth and development of the world economy, particularly in developing countries". One cannot help but wonder, does such perception belong to the realm of illusion, or delusion, or both? The Declaration goes on to state, "globalization also permits countries to share experiences and to learn from one another's achievements" (in exploitation of the poor and degradation of the environment?) "and difficulties" (in repressing social movements and popular struggles?) as well as facilitating a cross-fertilization of ideas" (forged in schools of business administration and management) "cultural values" of Coca-Colonization?) "and aspirations" (a mobile phone in every other human hand, three years old and above, by the year 2000?). "At the same time, the rapid processes of change and adjustment have been "accompanied by" (innocent fellow-travellers?) "intensified poverty, unemployment and social disintegration" (surprise, surprise!). "Threats to human well-being, such as environmental risks have been globalized." Risks may be global, environmental disasters however are another matter. They just happen to happen, in the countries of the developing world. "Furthermore, the global transformations of the world economy are profoundly changing the parameters of social development in all countries" (for better or worse?). This pronouncement must bring much solace and comfort to the sugar workers of Negros, the barbasco cultivators in Mexico and the subsistence fisherfolk of Asia. The Summit Declaration concludes its analysis of globalization by offering this pearl of wisdom: "the challenge is how to manage these processes and threats so as to enhance their benefits and mitigate their negative effects upon people." But who, in the Programme of Action of the Summit, are to be the managers of such processes

The challenge for human rights NGOs is to assist in the effective **assertion and enforcement** of all human rights: economic, social, cultural, civil and political, thus making the above principles justiciable in the national courts, and subject to scrutiny and monitoring at the level of the regional, and international human rights mechanisms. A related task will be to assert these principles against practices which run counter to or which disregard these principles. A third task will be to ensure and guard against interpretation, at national level, of these principles in any manner that derogates from or contradicts international human rights standards.

A similar set of tasks relate to ten commitments (even if not quite commandments) set out in the Copenhagen Declaration. It is important to stress with regard to these commitments that they have been "made in a spirit consensus" by "heads of state and governments" "in full conformity with the purposes and principles of the UN Charter and with all human rights and fundamental freedoms" and must be implemented with "full respect for all human rights and fundamental freedoms."

Commitment 1 "to create an economic, political, social, cultural and **legal** environment that will enable people to achieve social development," is of particular significance to human rights NGOs, especially the commitment at national level to:

> "**provide a stable legal framework**, in accordance with our constitutions, laws and procedures and consistent with international law and obligations, which includes and promotes:
>
> -- equality and equity between women and men,
> -- full respect for all human rights and fundamental freedoms and the rule of law,
> -- access to justice,
> -- elimination of all forms of discrimination,
> -- transparent and accountable governance and administration,
> -- the encouragement of partnership with free and representative organisations of civil society."

Each of the above indentations can form the basis (and focus) of a national NGO campaign. Moreover there are also several other relevant items under this commitment:-

(i) Reinforcement of "the means and capacities for people to participate in formulating and implementing social and economic policies and programmes" through (a) "decentralisation," (b) "open management of public institutions, (c) strengthening the abilities and opportunities of civil society" and (d) "strengthening local communities to develop their own organisations and activities."

(ii) "Reinforcing peace by promoting tolerance, non-violence and respect for diversity." NGOs could use this commitment to secure better recognition and protection for its failure to prevent or control communal violence.

(iii) Creating "comprehensive conditions" for the repatriation of refugees and internally displaced persons. NGOs could use this commitment in order to

develop the rights and protections of internally displaced persons - especially those displaced by development.

(iv) Promoting "dynamic, open, free markets while recognising the need to intervene in markets, to the extent necessary." For this age of almost pathologically obsessive deregulation, this provision prevents the extinction of the state's power to intervene in markets.

(v) Commitment to "reaffirm, promote and strive to ensure the realisation of the rights set out in relevant international instruments and declarations such as the Universal Declaration of Human Rights, the Covenant on Economic, Social and Cultural Rights and the Declaration on the Rights to Development, including those relating to education, food, shelter, employment, health and information, particularly in order to assist people living in poverty." This is indeed welcome prioritisation of long-neglected economic, social and cultural rights and the right to development and of the even longer-neglected human rights of those living in poverty.

(vi) Commitment to "reaffirm amd promote" "the rights to development as" a universal, inalienable right and an integral part of fundamental human rights."

(vii) Ensuring "that international agreement relating to trade and investment, technology, debt and official development assistance, **are implemented in a manner that promotes social development**" (emphasis added).

Commitment 2 on the eradication of poverty also contains specific commitment of relevance to human rights NGOs such as the commitment to:-

(i) "ensure that people living in poverty have access to productive resources, including credit, land, education ..... and to public services." This commitment could be invoked in campaigns for comprehensive and meaningful land reform or by women, in their struggles for equal access to resources and public services.

(ii) "develop and implement policies to ensure that all people have adequate economic and social protection during unemployment, ill health, maternity, childbearing, widowhood, disability and old age." This commitment could be invoked by NGOs in campaigns for genuine and effective and not merely cosmetic, "safety-nets."

Commitment 3 "to promote the goal of full employment as a basic priority" is to be undertaken "in full respect for workers' rights." There is also the commitment to "take due account of the importance of the informal sector in our employment development strategies." There are two other important commitments as well, to:-

(i) "pursue the goal of ensuring quality jobs and safeguard the basic rights and interests of workers, and to this end, freely promote respect for relevant ILO

Conventions, including those pertaining to:

- forced labour
- child labour
- the freedom of association
- the right to organize and bargain collectively, and
- the principle of non-discrimination;"

(ii) "ensure that migrant workers benefit from the protections provided by relevant national and international instruments, take concrete and effective measures against the exploitation of migrant workers and encourage all countries to consider the ratification and full implementation of the relevant international instruments on migrant workers."

Together these commitments can be used to support NGO campaigns on workers' rights and the rights to work and enable much needed new initiatives relating to migrant workers.

Commitment 4 "to promoting social integration by fostering societies that are stable, safe and just, and based on the promotion and protection of all human rights, and on non-discrimination, tolerance, respect for diversity, equality of opportunity, solidarity, security and participation of all people, including disadvantaged and vulnerable groups and persons." There are specific commitments as well to:-

(i) "promote respect for democracy, the rule of law, pluralism and diversity;"

(ii) "formulate or strengthen policies and strategies geared to the elimination of discrimination in all its forms;"

(iii) "ensure the protection and full integration into the economy and society of disadvantaged and vulnerable groups and persons;"

(iv) "formulate or strengthen measures to ensure respect for, and protection of the human rights of migrants, migrant workers and their families, to eliminate the increasing acts of racism and xenophobia;"

(v) "recognize and respect the right of indigenous people to maintain and develop their identity, culture and interests, and support their aspirations for social justice;"

(vi) "recognize and respect cultural, ethnic and religious diversity and promote and protect the rights of persons belonging to national or ethnic, religious or linguistic minorities;"

(vii) "strengthen the ability of local communities and groups with common concerns to develop their own organizations and resources and to propose policies relating to social development, including through the activities of non-governmental organizations;"

(viii) "encourage the ratification, the avoidance as far as possible of the resort to reservations, and the implementation of international instruments and adherence to internationally recognized declarations relevant to the elimination of discrimination and the promotion and protection of all human rights."

The above commitments, in twin challenge South Asian human rights NGOs to commit themselves to place protection and promotion of diversity and pluralism high on their agenda of cultural rights and the rights of minorities.

Commitment 5 "to achieving equity and equality between women and men" is far from comprehensive but does include specific commitments to:-

(i) "remove the remaining restrictions on women's rights to own land, inherit property or borrow money, and ensure women's equal rights to work" and

(ii) "promote and protect the full and equal enjoyment by women of all human rights and fundamental freedoms."

Commitment 6 "to promoting and attaining the goals of universal and equitable access to quality education, the highest attainable standard of physical and mental health and the access of all to primary health care, and to strengthen the role of culture in development" is the most elaborate and detailed of the commitments. Of particular interest to human rights NGOs are specific commitments to:-

(i) "the eradication of illiteracy and universalization of basic education;"

(ii) "recognize and support the right of indigenous people to education in a manner that is responsive to their specific needs, aspirations and cultures," and

(iii) "develop broad-based education programmes that promote and strengthen respect for all human rights and fundamental freedoms, including the right to development, promote the values of tolerance, responsibility and respect for the diversity and rights of others."

Commitment 7 is "to accelerating the economic, social and human resource development of Africa and the least developed countries."

Commitment 8 is about "ensuring that when structural adjustment programmes are agreed to, they include social development goals, in particular eradicating poverty, promoting full and productive employment and enhancing social integration." Of special interest here are commitments to:-

(i) "ensure that women do not bear a disproportionate burden of the transitional costs of such processes;"

(ii) "promote basic social programmes and expenditures, in particular those affecting the poor and vulnerable segments of society and protect then from budget

reductions while increasingly the quality and effectiveness of social expenditures;" and

(iii) "review the impact of structural adjustment programmes on social development, where appropriate, by means of gender - sensitive and social impact assessments and other relevant methods, in order to develop policies to reduce their negative effects and improve their positive impacts."

Commitment 9 "to increase significantly and/or utilize more efficiently the resources allocated to social development." Specific commitments of relevance are to:-

(i) "strike for the fulfillment of the agreed target of 0.7 percent of gross national product for overall official development assistance as soon as possible, and increase the share of funding for social development programmes;"

(ii) "monitor the impact of trade liberalization on the progress made in developing countries to meet basic human needs, giving particular attention to new initiatives to expand their access to international markets;"

(iii) "ensure transparency and accountability in the use of public resources" in the budgetary process," "and give priority to providing and improving basic social services;"

(iv) "utilize and develop fully the potential and the contribution of co-operatives for the attainment of social development goals;" and

(v) "promote increased access to credit for small and micro-enterprises, including those in the informal sector, with particular emphasis on the disadvantaged sectors of society."

Commitment 10 is "to an improved and strengthened framework for international, regional and sub-regional co-operation for social development" and specifically to:-

(i) "adopt the appropriate measures and mechanisms for implementing and monitoring the outcome of the World Summit for Social Development, with assistance upon request, of the agencies, programmes and regional commissions of the UN system, with broad participation of all sectors of civil society," and

(ii) have ECOSOC "review and assess, on the basis of reports of national Governments, regional commissions, relevant functional commissions and UN specialized agencies, progress made by the international community towards implementing the outcome of the WSSD" and "report to the General Assembly, accordingly, for its appropriate consideration and action."

The paucity of commitment to monitor the Programme of Action of WSSD was one of the major disappointments of WSSD. Absence of political consensus resulted in ambiguous, inconclusive and inadequate "commitments" with respect to such monitoring. But in the absence

of such effective monitoring the WSSD deserves no more than a passing footnote if that, in the history of human rights and development. Only the NGO community can save WSSD from rapidly becoming little more than a piece of non-renewable garbage in "the dust bin of history". Are South Asian NGOs interested in such a **salvage** operation? Why should they be? If so, what can they do to mount such a salvage operation? What role must human rights play therein? What alliances will need to be forged, how, and on what terms? These are questions for collective consideration and collective deliberation among those who take economic, social and cultural rights seriously, among those who take people, there organizations and communities seriously, and most of all among those who take suffering seriously.

III

Monitoring Social Development and the Programme of Action of WSSD : Some Thoughts in Progress and Process

Human rights groups, worldwide, have long appreciated the importance of monitoring and enforcement. Indeed it precisely to deal with the gaps and inadequacies in the intergovernmental human rights system with regard to monitoring and enforcement that the human rights system with regard to monitoring and enforcement that the human rights NGO community emerged at international, regional, national and local levels. The work of these NGOs, over the years, has resulted in the development of methodologies and strategies to monitor human rights violations especially in respect of certain civil and political rights. Thus, there are standard formats for documenting violations, practices and procedures for reporting such violations and strategies at UN level in Geneva and in New York, at bilateral level (in Washington DC and Brussels), at development assistance agency level (in, for example Tokyo and Canberra), and at national level using media, courts and popular pressure for "the generation of shame" which along with occasionally imposed from monitoring violations of human rights, progress has been slow. Monitoring the "progressive realization" of economic, social and cultural rights for example, has attracted NGO attention only during this decade. Indicators are being developed for this purpose within the UN (eg: UNDP) and in respect of sustainable development, indicators are being developed by the CSD (the Commission on Sustainable Development). But such work is yet in its infancy.

Efforts at monitoring social development using human rights standards will need to draw upon all existing methods, indicators and mechanisms. But there is a clear need for fresh thinking and new approaches as well:-

Monitoring what? Many distinct aspects need monitoring regarding the WSSD Programme of Action - These include at a minimum:-

(i) Monitoring Progressive realization of specific social development commitments and targets.

(ii) Monitoring discrimination and/or exclusion in respect of social development programmes.

(iii) Monitoring human rights impacts of specific social development policies (eg:- structural adjustment) and programmes (eg:- privatization, industrialization).

(iv) Monitoring the human rights impacts of trade and investment policies and practices.

(v) Monitoring human rights violations that occur in the process of development (eg:- forced resettlement).

Monitoring How?

A variety of monitoring tools and mechanisms need to be utilised. These could include for example:-

(1) **PRINCIPLES** which **must** be adhered to monitoring adherence or non-adherence). These principles could be drawn from international human rights law, the international law on development, international environmental law, UN World Conference Documents including the Copenhagen Declaration (whose relevant principles have been set out above) as well as principles drawn from national constitutions and laws. During the preparatory process of the WSSD, the Australian delegation offered a draft of such principles for "national action" which are appended to this paper.

(2) **STANDARDS** which **must** be complied with (monitoring compliance or non-compliance) such as non-discrimination, meeting minimal basis needs etc.

(3) **COMMITMENTS** which must be met (monitoring fulfillment or non-fulfillment of commitments). Several commitments contained in the Copenhagen Declaration have been set out above. A comprehensive listing of international commitments agreed to at a large number of UN Conferences is contained in a very useful document prepared by the UN Secretariat for the Prep Coms of the WSSD (**Review of existing international commitments relevant to poverty, employment and social integration**, A/conf. 166/pc/16, August 16, 1994).

(4) **TARGETS** which **must** be achieved (monitoring achievement or non-achievement). Several such targets are referred to in the Copenhagen Declaration in for example, commitments (encourage ratification of CEDAW by year 2000) and in the **international commitments** document entered above.

(5) **RIGHTS** which **must** be respected, protected, promoted and realised.

(6) **DUTIES AND OBLIGATIONS** which have been agreed to by consensus at the WSSD and which are contained in the Copenhagen Declaration and set out above (eg:- the obligation set out in commitments in respect of structural adjustment programmes "to develop policies to reduce their negative impacts."

Monitoring by whom and why?

Monitoring social development and the WSSD Programme of Action needs to be undertaken by a variety of actors:-

(i) **National Governments** to asses progress, identify obstacles, seek technical and financial assistance **AND** to meet international reporting obligations under treaties (eg:- the international covenants on economic, social and cultural rights, the convention on the rights of the child) or under UN declarations (example the Redeclaration).

(ii) **Development Assistance Agencies** both multicultural and bilateral in performance of their oversight function and to ensure that their own policies (example World Bank Operation Directive on Resettlement) are being compiled with. The agency will need to find its own optimal mix between renewing the monitoring materials produced by others and understanding its own monitoring in certain key areas. But unless it does so, oversight will quickly degenerate into the practice of overlook.

(iii) **By Treaty Bodies and other UN specialised Agencies and organs** specifically charged with monitoring (eg:- the commission on Sustainable Development regarding Agenda 21; ECOSOC and the General Assembly regarding WSSD). The mandates and functions of these bodies are usually set out in UN Conference documents themselves.

(iv) **Local and National NGOs, POs and CBOs** in developing countries need to be the primary monitors since they are best situated to report on progress or lack thereof and because they are in closest contact with both the benefits and burdens resulting from such progress or lack thereof.

(v) **National Regional and International NGOs** with either a specialised interest in a specific aspect of social development (Habitat International, Asian Workers Solidarity links) or with a general but regional focus (Asia Pacific Forum on Women, Law and Development). Such organisations are well placed to undertake indepth monitoring on specific issues, to develop better monitoring tools and methods, to pursue enforcement strategies and to initiate standard - setting (or revision) efforts where necessary.

Monitoring For whom?

One of the most conspicuous failures of the WSSD was its utter inability to reach agreement on follow-up mechanisms. The Copenhagen Report makes vague mention of "reports of National Governments" and others, to ECOSOC which in turn would "report to the General Assembly, accordingly, for it appropriate consideration and action." There is also to be a "special session" of the General Assembly in the year 2000 "for an overall review and appraisal of the implementation of the outcome of the Summit" and to "consider further actions and initiations."

Clearly this is not enough. Unless some follow-up mechanisms are created, the commitments of the WSSD ring hollow. The chair of the summit is clearly looking to NGOs and civil society to make the commitments real and meaningful, by forging follow up strategies and mechanisms. The NGOs in turn will need to use not only national institutions but also the 69 odd Special Mechanisms and the Treaty Bodies that constitute the UN human rights mechanisms headed by the UN High Commissioner for Human Rights and the UN Human Rights Centre. Perhaps one of the follow up proposals to this meeting will involve an effort to take a closer look at these special mechanisms and treaty bodies and come together to strategies as to their more effective use by South Asian NGOs in monitoring **from human rights perspectives**, progress on social development. Similar use will need to be made of the UN development mechanisms such as the Commission on Sustainable Development (which does offer NGOs an opportunity to participate in annual meetings) and UNDP as well as other UN specialised Agencies such as WHO, FAO, UNESCO and in particular ILO. South Asian NGOs will also need to strategise about regional efforts directed at ESCAP, SAARC and ASEAN. The task will not be easy. After all, the governments of the region and the world have found the task too daunting for themselves. But NGOs are not governments, and the creativity and resistance of peoples organisations and movements far surpass the imagination of their governments. As Asma Jahangir (speaking at Bangkok during the regional Prep Com for the Vienna World Conference on Human Rights) put it. "In South Asia, so far as human rights are concerned, the people are running. Its their governments that are crawling."

IV

Some Human Rights Priorities Post Copenhagen

Copenhagen represents but one step for the Global Express on its headlong rush to deregulation, privatisation, free trade and free markets -- free for national and multinational corporations! Shakespeare warned "There is something rotten in the state of Denmark." That could will be the World Summits Programme of Action if human rights strategies are not involved to deodorize, sanitize and reinvigorate such Programme of Action. Four priority areas seem obvious:-

1. Corporations and Human Rights

National and transnational corporations are to be the new vehicles of development. Their expanded role will inevitably result in increased impacts. The large multinationals are emerging as the new global superpowers. It is an urgent priority therefore that human rights standards be applied to corporations and this involves both conceptual issues and tactical issues which will need to be addressed. Two types of approaches will need to be developed:-

(i) holding corporations accountable for human rights violations;

(ii) persuading and pressurising corporations to do more by way of promoting progressive realisation of human rights for example, through negotiating "good neighbour agreements," through requiring their participation in "transparency international" Programmes. But care must be taken to ensure that such corporate efforts at promoting human rights are more than token public relations exercises.

Aside from dealing with the activities of individual corporations, human rights strategies will also need to address the paradigm - shift from **development through to development through trade and investment.** The implications of such shift for human rights and environmental sustainability are dire as described earlier. With consumption the priority, human and environmental sustainability become subordinated and subjected to profitability. Values of resource conservation and worker health and safety are sacrificed at the alter of global profiteering. The tried and true formula of "wealth through growth with jobs" is being replaced, today by a formula of "wealth without growth" and "wealth without jobs." (example through corporate raiding, currency speculation etc.) The impact of this trend could well prove devastating given the comprehensive dismantling of laws and policies that could hinder investment, trade or market - opening activities, which initiatives such as APEC unabashedly profound. The issue of trade conditionalities in the form of social clauses (supposedly incorporating minimum labour standards) in multilateral trade agreements will need to be addressed to ensure that non-tariff barriers do not masquerade as efforts to protect the human rights of workers. Those concerned about human rights will need to expose the economic and social Darwinism that has at the core of current APEC and WTO philosophy and policy.

2. The Continuum and Reverse Continuum

Several South Asian countries have experienced bloody (and in some cases long drawn out) internal armed conflicts. In such situations, as former Under-Secretary Eliasson stresses, there is need for "a Continuum from relief through rehabilitation to reconstruction and development." There has been potential for human rights abuse at each of these points in the continuum. Relief has been used by combatants as a weapon. Food aid has been administered in a manner that has destroyed subsistence farming and subsistence farmers. Rehabilitation and Reconstruction have provided opportunities for patronage, corruption, discrimination and exclusion. Development too, has at times been undertaken in a manner that has further traumatised the victims of internal armed conflict. Human Rights groups have obvious and important roles to play in the "continuum."

But there is also the "reserve continuum" where situations of historic neglect and deprivation are exacerbated by discrimination and exclusion in development, resulting spirals of violence and counter-violence culminating in secessionist struggles, internal armed conflicts, refugees and displacement and humanitarian emergencies. Social development can play a crucial role in such "reverse continuum" to **prevent** the outbreak of internal conflicts. Human Rights NGOs have a crucial role to play in facilitating and ensuring such equitable and non-discriminatory social development.

3. Development-Displaced Persons (DDPs) and Internally Displaced Persons (IDPs)

The Copenhagen Declaration does contain commitments regarding internally displaced persons and their right to return to their homes. The IDPs they envisage are displaced by internal conflict. So far as persons displaced by development projects and activities are concerned, their right to return becomes moot - resettlement rights become crucial. A recent World Bank study projects the extremely large number of development displaced persons that will result from projects undertaken by the World Bank alone. South Asian NGOs will clearly need to build on their work undertaken, as a result of the earlier meeting here in Colombo on development,

Democracy and Displacement.. The right not to be displaced, pre-displacement rights, right in the displacement process and post-displacement rights will need to be articulated and asserted both at national level and in the policies and operational directives of the development agencies. Issues of ethnic, gender and other differences amongst displaced persons are also important.

4. Culture, Diversity and Ethnic Coexistence in South Asia

The inter-relationships between social development, cultural diversity and ethnic harmony are of clear importance in the South Asian region, Human Rights issues relating to refugees and displaced persons, minorities, indigenous peoples and migrant workers all assume priority in the region. Additionally the resurgence of communalism and religious fundamentalism and the escalation of oppression of women (including an increase in the incidence of violence against women) assume urgency and challenge human rights NGOs in South Asia to adopt timely and effective strategies.

V

Rethinking Human Rights strategies to confront present South Asian Realities : Beyond Vienna, Cairo, Copenhagen and Beijing

Conventional human rights strategies are far from irrelevant or inappropriate to the Post-Copenhagen situation in South Asia. Many of these strategies were developed in respect of civil and political rights and these rights are of undoubted importance to good governance and accountability. But strategies will also need to be developed regarding economic, social and cultural rights especially since these rights are so crucial for social development. Priority tasks presently facing South Asian human rights NGOs in the current situation include:-

(i) extending the reach of human rights to deal with non-state violators especially national and multinational corporations and the international institutions of trade, investment and finance;

(ii) reaching both acts of commission and acts of omission since many of the problems regarding social development are likely to result from inactions (or failure to act) by the state. In the present laissez-faire atmosphere we are witnessing "absentee governance" and dereliction of the duties and obligations that governments owe their peoples;

(iii) developing more effective, anticipating and preventive strategies so that for example, unemployment resulting from privatisation can be minimised or prevented;

(iv) taking economic, social and cultural rights seriously - **as rights, rather than as entitlements lesser than rights**. The human rights homicide resulting from Cold War paranoia regarding economic and social rights must not be allowed to spill

over into an era where neoliberalism poses a far more dangerous threat to human rights than socialism and communism;

(v) taking minority and other collective rights seriously so that cultural diversity and pluralism do not become the first casualties of globalization, racism and xenophobia;

(vi) taking women's human rights seriously to ensure against an unholy alliance between patriarchy, religious fundamentalism and national chauvinism on the other hand and authoritarian politics of right wing majority on the other hand;

(vii) improving redress and justice for victims of human rights abuses or denials;

(viii) overcoming the indifference of the human rights bystander whose numbers will soon become legion, as selfishness and self centred consumerism becomes the new ethic of neoliberalism and globalization.

Human rights NGOs in South Asia also need to rethink their relationship with the State. Traditionally human rights are bestowed, protected and enforced **by the State** and **against** the acts of officials of the State. Historically, human rights NGOs in Asia have been working towards the empowerment of the people and this has meant disempowerment of the State (or at least devolution of power from State to people). Today, States are losing their sovereignty and power to the international institutions of trade and finance and to multinational corporations and we are virtually witnessing the "absentee State" in terms of the States's ability to protect its people against human rights violations emanating outside of the State. Bhopal provides a tragic example of this trend. As a result, as one Asian activist put it, the State is still too big to handle the small problems and yet it has become too small to handle the big problems. Perhaps the need of the hour is to continue to work to disempower the State vis-a-vis its peoples but to simultaneously empower the State against international and transnational actors to enable the State to successfully discharge its responsibilities regarding protection of the human rights of its peoples. The issue is much less abstract and hypothetical than it seems as first-blush.

But if NGOs in south Asia are to have any chance at developing such strategies, they will need to confront several challenges that they themselves face of overcoming competition, fragmentation and division; establishing their institutional sustainability and defending against co-option, control and repression. They will need to strengthen links at the grassroots. They will need to forge new allies and alliances, develop new linkages, experiment with new organizational structures to pursue new tactics needed to deal with the problems resulting from increasingly rapid globalization. They will need to defend and expand national spaces and develop more effective regional solidarity to do so. The challenges are indeed daunting.

The preambular Paragraph 15 of the Vienna Declaration invokes "the spirit of our age and the realities of our time." As Upendra Baxi states, the spirit of our age is clearly in danger of being betrayed by the realities of our time. All too often man reaches for the stars, but perishes at his roots. That would indeed doom us to an unending season of despair. Instead, in the words of Antonio Gramsei let us summon "optimism of the will" to overcome "the pessimism of intellect."

2. The World Trade Organization should evolve an appropriate and transparent consultative mechanism with NGOs and enable Southern NGOs to participate so as to ensure adequate North-South balance.

TO GOVERNMENTS:

1. (a) While opposing the accord on Trade Related Intellectual Property Rights (TRIPS), we demand that governments should consult and brief public interest groups at every legislative changes in the intellectual property rights matters.

   (b) Commission and publish research into the linkages of IPR protection and the level of investment in research and development.

   (c) Monitor the distributional effects of increased international intellectual property rights and publish results for wider dissemination.

   (d) Commission and publish a rolling programme of independent studies into the costs and benefits to the economy and consumers due to enhanced IPR provisions in specific product sectors like seeds and pharmaceuticals.

   (e) Strengthen the competition legislation to deal with monopolistic situations arising out of exclusive marketing rights.

   (f) Refuse patents to goods banned in South Asia or other countries, and to goods relating to life forms, naturally occurring organisms and plants.

ART COMPETITION - DEFENDING HUMAN RIGHTS

The Trust organised an islandwide art competition and an exihibition on the theme *Defending human rights*. This competition was open to all school children over the age of 15. The response from school children was heartening and many innovative ideas were presented in art form depicting various themes of human rights protection: freedom of speech, religion, cruel and degrading treatment or punishment, peaceful co-existence etc.

The paintings were judged by renowned artist, Mr Senaka Senanayake and the chief guest at the art exihibition was the Honourable Minister of Media, Tourism and Aviation, Mr Dharmasiri Senanayke. B. Nisansala Anne Shivanthi Mendis of Christ King College, Tudaella, Jaela was adjudged the winner while Anne Nadeeka Perera of the same school and Y.A. Nirasha Deepthi Sureshini of Kegalle Balika Maha Vidyalaya were adjudged second and third winners respectively. Ten consolation prices were also awarded.

The competition/exihibition was sponsored by Air Lanka, CIC, Deutsche Bank, Ceylon Theatres and Galadari Hotel while the prizes of books were donated by Vijitha Yapa Bookshop to the school libraries of the winners. Individual prizes were provided by the Trust.

The Trust hopes to use the winning painting on the cover of the 1995 State of Human Rights Report which will be published later this year.

VISITORS TO THE TRUST

Mr Richard Carver of the United Kingdom visited the Trust on 7th November. He works on refugee issues and also teaches human rights at the Oxford University. He met Dr Tiruchelvam and Dr Atapattu and discussed at length issues of mutual interest, including the situation in the North, the impact of the devolution package, the plight of Sri Lankan refugees in the U.K. and the British Government's new policy on refugees, the lessons to be learnt from the ceasefire in Northern Ireland and about the work of the Trust. Mr Carver was in Sri Lanka to attend the Regional Workshop on Human Rights Monitoring and Annual Reporting by National Groups at which he functioned as the facilitator.

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