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In this issue we publish the Overview of the *Sri Lanka: State of Human Rights 1997*, the fourth report in the series. The report evaluates the human rights situation during 1996 and discusses both negative and positive developments. In addition to the topics covered in the previous reports (integrity of the person, emergency rule, freedom of the media, and judicial protection of human rights), this year's report discusses violence against women, environmental rights, nationality and citizenship laws, and the Office of the Ombudsman. It commends the Government for its pledge to accede to the Optional Protocol to the ICCPR which allows for individuals to petition the Human Rights Committee in Geneva. It expresses grave concern over the on-going armed conflict in the North-East and the human rights violations perpetrated by both sides to the conflict. It calls upon the parties to ensure that they conform to the minimum humanitarian standards in the relevant international instruments.

We also publish a review by Rangita de Silva of Ms Radhika Coomaraswamy's book on *Ideology and the Constitution: Essays on Constitutional Jurisprudence* and the text of a lecture delivered at the Trust on Political Corruption in the U.K. by Professor Phil Thomas. This issue also carries the text of the speech delivered by Justice A.R.B. Amerasinghe at the launching of Dr Rohan Perera's book on *International Terrorism*.

SRI LANKA: STATE OF HUMAN RIGHTS 1997

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SRI LANKA: STATE OF HUMAN RIGHTS 1997

OVERVIEW

1. Introduction

Sri Lanka: State of Human Rights 1997, examines the situation with regard to human rights in Sri Lanka during 1996, looking at both the actual and legal state of human rights. Nineteen Ninety Six was, once again, a year characterised by contradiction and conflict between Sri Lanka's human rights policy and its practice. The armed conflict in the North and East continued to dominate the sphere of Sri Lanka's concern with human rights. Although improvements were made from a policy perspective, the actual human rights situation in Sri Lanka continued to deteriorate.

The state of human rights in Sri Lanka in 1996 reflected, in significant measure, the state of a nation engaged in armed conflict within its own territory and among its own people. The hostilities between the Government and the Liberation Tigers of Tamil Eelam ("LTTE") provided both the impetus and the backdrop for much of the conduct and activity which raised human rights concerns.

The armed conflict in the North and East intensified in 1996, greatly affecting the state of human rights in Sri Lanka. Not only did this intensification add to the already large number of internally displaced persons, but it contributed to a worsening human rights situation, particularly with regard to Sri Lanka's Tamil population. Although situations of armed conflict must be judged by standards distinct from those applicable in times of peace, both the Government and the LTTE failed to comply with human rights and humanitarian law.

In particular - as highlighted late in 1996 by the gang-rape and murder of Krishanthi Kumaraswamy, and the subsequent murder of her mother, brother and neighbour allegedly by members of the security forces - disappearances, arbitrary arrests and detentions, torture, and extra-judicial killings increased despite repeated assurances of heightened protection for human rights by the Government.

Krishanthi Kumaraswamy's case was one of a number of reported cases of rape and murder allegedly committed by security forces and thus, in many respects, it was not unique. However, unlike other cases, the Krishanthi Kumaraswamy case aroused widespread condemnation, resulting in national and international attention and mobilisation. The Government responded swiftly to the public pressure, thereby highlighting the importance and potential impact of both public mobilisation and an informed media. Nonetheless, although the Government has articulated a commitment to prosecute such violations of human rights, the lack of effective State remedial mechanisms frustrates any attempt to provide legal redress, thereby engendering a continuing atmosphere of impunity.

Nineteen Ninety Six also witnessed a marked rise in the number of disappearances reported, particularly in the Jaffna peninsula. The Government Agent in Jaffna was reported to have submitted a list of 500 people who had "disappeared" there. However, the US State Department Report on Sri Lanka for 1996, released a figure of 300 "disappearances" in the Jaffna peninsula in the second half of the year alone.

For almost 15 years, the armed conflict in the North and East has given rise to a large but fluctuating internally displaced population. At the end of 1996, according to the statistics of the Ministry of Rehabilitation and Reconstruction, there were close to 770,000 internally displaced persons in Sri Lanka. However, such statistics have been contested by some NGO and humanitarian aid officials who claim the Government's figures are under-representative, by at least 70,000 individuals.

In 1996, the standard of living for Sri Lanka's internally displaced population failed to improve substantially from that of the earlier years. Life in the camps for the internally displaced was characterised by overcrowded living quarters, the separation of families, a segregation of sexes, poor sanitation, restrictions on mobility, and little to no access to education and health services.

The violence of the armed conflict extended in 1996 beyond the borders of the conflict zones; Colombo was again a target of attacks by the LTTE. In January the Central Bank in Colombo was bombed, killing more than 90 people and injuring many more. In June, nearly 70 people were killed and many more injured when a bomb exploded in a crowded commuter train in one of Colombo's southern suburbs. Such attacks on civilian populations are in clear violation of international humanitarian law.

Access to reliable information on the situation in the North and East was impeded by Government restriction on the media. In 1996, Government-imposed formal censorship for almost half of the year, restriction on the media's access to conflict areas, and the intimidation and harassment of media personnel by State actors and agents characterised what appears to have been an overt and consistent campaign by the Government against the freedom of the media. The Supreme Court dealt a further blow to the freedom of expression in the *SLBC Case*¹ by holding that although freedom of expression should not be narrowly interpreted, it does not guarantee, *per se*, the freedom of, or right to, information. The Court opined that the right to obtain information would be more appropriate under the Article relating to the freedom of thought. This case had nothing to do with the armed conflict in the North and the East, but it does have implications for the ascertainment of truth in respect of the conflict.

Emergency rule, which was formerly restricted to the North, East, border areas of conflict and Colombo, was extended to the entire country in 1996. Numerous new emergency regulations were adopted, including a ban on May Day processions. Throughout the year, emergency regulations were consistently used to justify acts that would otherwise have been illegal. The

¹ SC Application No. 81/95 SC Minutes 30.5.1996.

regulations themselves continue to authorise detentions without the legally prescribed minimum standards governing conditions, thereby providing a situation ripe for human rights violations.

In the landmark case of *Wimalenthiran*,² however, the Supreme Court had occasion to consider the impact and scope of the emergency regulations. The Court held that emergency regulations: (1) must be published in the Gazette before obtaining legal force; (2) cannot be used as justification for illegal activities; (3) do not allow for the derogation of certain legal safeguards, even in situations where a state of emergency has been declared; and (4) cannot be used as grounds for an arresting officer to act on anything less than a reasonable grounds of suspicion. The Court's ruling was particularly significant because of its apparent call for transparency in the application of emergency regulations, a call that is extremely timely, given the operation of the security forces in the context of the conflict.

Human rights violations did not occur solely within the context of the armed conflict, although that conflict must be understood as diverting resources from the understanding and resolution of problems in other areas. Headlines such as "Assault on Women Detainees," "Man Murders His Wife," "Child Raped by Nine Drivers," and "Returnee from Saudi Commits Suicide" are indicative of the pervasive violence perpetrated against women in Sri Lanka. Despite increasing coverage of such violence by the media, however, there is a dearth of reliable information on the incidence of violence against women in Sri Lanka. The lack of information, compounded by general ignorance among policy makers and the general public about the cause and nature of violence against women, as well as a generally insensitive criminal justice system, impede effective action by a State engaged in a difficult and prolonged internal armed conflict.

Despite the 1995 amendments to the Penal Code, in which laws on rape were strengthened and laws on sexual harassment, trafficking and incest were introduced, effective implementation and enforcement have not followed. Sri Lanka's failure to provide adequate mechanisms of prevention and redress for female victims of violence contravenes its international human rights obligations.

Children's rights have, likewise, been accorded few effective mechanisms of protection, despite recent amendments to the Penal Code introducing tighter provisions on incest, sexual exploitation of children and pornography. Although numerous cases of sexual exploitation of children and child labour were highlighted in 1996, few were prosecuted.

In respect of the national legal protection and promotion of human rights, a vital function is performed by the Supreme Court in distilling, and giving full meaning to, the justiciable human rights encoded in the fundamental rights chapter of the 1978 Constitution. Yet, despite the importance of the function and the embryonic judicial activism that has begun to permeate reported decisions of the Supreme Court, several problems remain.

² SC Application 26/94, *Appathuray Vinayagamoorthy, Attorney-at-law, on behalf of Vijayam Wimalenthiran v Army Commander and others*. Judgement of Amerasinghe J, 20 December 1996, p 15.

First, and most importantly, there is no conceptualisation or implementation of the methodology available to translate the high ideals of constitutionally mandated protection of fundamental rights into action. The focus of the Government has been on the enactment of legislation and not on the empowerment of institutions. For example, after much debate, the Government enacted the Sri Lanka Human Rights Commission Act No. 21 of 1996. Although concern over a possible conflict of jurisdiction between the new Human Rights Commission and the Supreme Court, in relation to the adjudication of fundamental rights claims, was resolved in the final statute, at the end of the year, issues remained as to the exact relationship between the Human Rights Task Force ("HRTF") and the newly formed Commission. It was not clear whether the HRTF, which has acquired experience and expertise in its work with detainees, would be absorbed by the Commission. By the end of the year, despite enacting legislation, the Commission had not yet become fully functional.

Second, although there were a number of important judgments on Articles 12 and 13 of the 1978 Constitution, dealing with discrimination and detention respectively, there is little in the nature of exhortative conduct rules that emerge from the Court's judgments. Additionally there was a lamentable lack of action in respect of gender or racial discrimination.

In 1996, the Government did, however, adopt a statute recognising the rights of disabled persons. Protection of the Rights of Persons with Disabilities Act No. 28 of 1996 provides that no person shall be discriminated against on the grounds of physical or mental disability and that disabled persons shall have access to education, employment and other social and economic rights.

Additionally, there appears to be a growing recognition of the human right to a clean environment. While the scope of such a right is controversial, countries throughout the world are increasingly recognising the right to a clean environment and are encoding this right in their constitutions.

The legal text of the devolution proposals was released in January 1996 as the political counterpart to the Government's military offensive. The devolution package, which will devolve power from the centre to the regions, carried both substantive and procedural significance. Although the release of the text engendered widespread public debate, by the end of the year, no further action had been taken. This is of grave concern, given the manner in which the armed conflict both informs and throws into sharp relief almost every aspect of the human rights situation in Sri Lanka. The devolution proposals were, in some respects, the most important development of 1996. Progress on the devolution exercise requires a sense of urgency and purpose.

Another important development in relation to human rights in Sri Lanka was the Government's commitment, in September 1996, to accede to the First Optional Protocol to the International Covenant on Civil and Political Rights, ("ICCPR") which would allow individuals to petition directly the UN Human Rights Committee after the exhaustion of all national remedies. Unfortunately, by the year's end, the Government had not yet deposited the instrument of accession and the thus the Optional Protocol had not entered into force.

Transparency is one of the fundamental objectives of human rights work. It is only when a government, its laws and practices are transparent - open to challenge, criticism and debate - that progress can be made to remedy a situation in which the rule of law has disintegrated and in which the rights of citizens suffer. Thus, it is hoped that this publication will contribute to a climate in which transparency, rather than impunity reigns. This report attempts to provide, as comprehensible as possible, a picture of the actual and theoretical situation of human rights in Sri Lanka in 1996. In doing so it is hoped that a contribution would be made to an ongoing dialogue within and between the State and civil society, with the ultimate aim of stimulating change.

The Trust commends the Government for acceding to the First Optional Protocol to the International Covenant on Civil and Political Rights recently. This honours one of the pledges made by the Government when it assumed office in 1994 and is an important milestone in the history of human rights in Sri Lanka.

SOME THOUGHTS ON IDEOLOGY AND THE CONSTITUTION*

Rangita de Silva

Challenging traditional assumptions on constitutionalism and the judicial process, *Ideology and the Constitution* takes a progressive critical approach to understanding the nature and functioning of constitutional ideology in contemporary Sri Lankan society. In this collection of provocative essays, one of the most innovative legal thinkers in Sri Lanka analyses the major constitutional issues which have impacted on our political and social life. This perceptive and critical study has set law in a social and historical context.

In popular perception law is seen as separate from and "above" politics, economics, culture and the values of judges. Repudiating this idealised model Coomaraswamy shows that the law shapes and is shaped by social forces and people made decisions.

Rarely has Sri Lankan Constitutional Law and Theory been subjected to a multi-disciplinary analysis. This set of essays looks at constitutional ideology from a political, social, economic and feminist standpoint. The writer believes that an ahistorical appreciation of Sri Lanka's constitutional issues would bring about a legal fundamentalism in the law. Coomaraswamy looks at constitutional making in 1948, 1972 and 1978 from a historical standpoint to show the reader not just what was included in the text but the gaps and erasures in the text.¹

Coomaraswamy argues that the Supreme Court has acted as a brake on overly quick political change and has been a largely conservative force in society and that when it comes to advancing progressive reforms it is a "reluctant dragon" and in the end courts have been a reflex of politics.

Fear of becoming counter-majoritarian have made Sri Lankan courts historically eschew protection of minorities and other kinds of activism. But as Coomaraswamy shows the worries about a counter-majoritarian difficulty posed by an activist judiciary as a threat to democracy are misplaced. This is most important because the preconditions for participatory democracy demand judicial vigilance. Coomaraswamy also argues that women's issues should become part of the constitutional discourse in pursuit of a better participation-oriented model of government. In a way *Ideology and the Constitution* seems to argue for a social relation approach to judicial decision-making.

* Some Thoughts on Ideology and the Constitution: Essays on Constitutional Jurisprudence by Radhika Coomaraswamy, ICES, Colombo, 1996.

¹ Coomaraswamy argues that Bandaranaike had suggested to the Soulbury Commission that federalism might be a solution for the pluralist nature of the Sri Lankan community. The Kandyan chiefs too had made a call for Federalism though for other reasons.

I believe that the role of the reader is central to determining the meaning through the experience of reading a text. And each reader supplies his standpoint or brings his predictions to determine the meaning of the text as well as supplies a realm of consciousness to come to different possible meanings. With this in mind I do not attempt here a conventional book review but look at what I feel is central to the book and explore some insights I have gained from it.

1. Pluralism and Courts

Coomaraswamy argues with considerable subtlety and power that Supreme Court action as a force for basic reform, especially as regards minority protection, has been chimerical. The central concern in her book is the need for the Sri Lankan Supreme Court to take bold and imaginative measures in a situation of social and political crisis in the country especially in the protection of minority interests. Coomaraswamy traces the failures of the Supreme Court and argues that participatory democracy demands judicial vigilance.

Coomaraswamy's basic argument is that counter-majoritarianism is not undemocratic when it is justified in the protection of discrete and insular minorities who demand the protection of the judiciary. This argument can be supported by the much celebrated *Carolene Products Case* in the USA which suggests that although political processes should ordinarily be the forum in which a democratic society weighs its competing interests there are pressing circumstances in which the courts should interfere. According to Justice Stone when other branches of government restrict the political process judicial intervention seems justified. By "unblocking these blockages" courts attempt to make representative government more representative. In the USA courts have attempted to help minorities of differing discreteness and insularity to secure some measure of distributive or political justice.

The Sri Lankan Supreme Court, due to fear of being counter-majoritarian, has missed many opportunities to make representative government more representative or enhance participatory democracy. In cases which involved both the electoral process and the rights of a discrete and insular minority the courts missed out on judicial activism. Even when those "political processes ordinarily to be relied upon to protect minorities" were willing to bring about change the courts seem to hold back. This was especially so when the judiciary was faced with decision making involving changes of a very fundamental nature like in the *Thirteenth Amendment Case*.

For instance, Coomaraswamy points out that a thread running through the majority judgment in this case is the fear of being counter-majoritarian manifested by the argument that the 13th Amendment should be submitted to the people for approval. Coomaraswamy argues that this kind of populist view of politics which animates our political discourse does not augur well for minorities. Coomaraswamy commenting on this line of thinking writes:

This belief that majoritarianism is always democracy has been one of the major fallacies of Sri Lankan political thinking and one of the major causes of ethnic conflict. In fact to use such procedures to resolve the issues of minorities is actually anti democratic,

because it inevitably spells the tyranny of the majority... In fact the whole point of legislation to protect minorities is to protect them from the prejudices and practices of the majority.

Even though self-rule is the ideal that democracy strives for, conflict arises when power sharing as an essential criterion of democracy is juxtaposed with majority rule, a necessary outcome of self-rule. To achieve power sharing at certain moments in history majority rule would have to be suspended. At this point one may ask whether the end justifies the means or whether the processes of justice supersede substantive justice. The counter thesis to the Coomaraswamy argument is that passing legislation in the teeth of a hostile public is not going to solve the ethnic crisis in the long run. Granted that legislation can be norm setting and norm creating carrying with it great symbolic appeal, history has proven how futile this kind of legislation can become without public acceptance.²

Despite a plethora of US case law quoted, most of the judges seem to ignore the value of the *Carolene Products Case* which calls for a basis for reconciling judicial policy making through distributive justice or political justice with principles of representative government. In circumstances where political processes are restricted, judicial intervention is not a limitation on representative government. If the duty of the courts is to unplug the political process when there are impediments which prevent the full participation in government of any section of society, the decision in the *Thirteenth Amendment Case* would have been different. If the role of the court is to help discrete and insular minorities and redistribute justice, the Sri Lankan Supreme Court has failed in its task. It is the task of the court to communicate to the public and persuade the community that the policy making is warranted, only then does the act of litigation become an educative act. This case manifests that the judiciary cannot institute massive transformation or revolutionary changes, but changes only at the margins. The judiciary most often shuns being proactive and prefers to be reactive to what it senses to be the popular norm of the time. Even when change is necessary the judiciary prefers to retreat unless it is popularity demanded or accepted. Any degree of activism too is limited to what has been or will be validated by the community. In an instance when the Supreme Court was called upon to make a fundamental decision such as in the *Thirteenth Amendment Case* which sought to devolve power from the centre to the periphery, the judicial discourse found itself unable to grapple with the expediency of the situation. The Court was evenly divided and the dissenting judges articulated a discourse which Coomaraswamy refers to as one "filled with unusual recourse to tradition and nationalist symbols³ which are outside the liberal paradigm of human rights understanding."⁴

² Similarly, the civil rights legislation in the USA did not fulfil all of its promises. But at the same time isn't the country a better place with such legislation rather than without?

³ Justice Wanasundera referred to the Buddhist temples that were in the North and the East of the country which might get displaced if the devolution process was to be carried out.

⁴ At p 123.

But what does Coomaraswamy mean by a "liberal paradigm of human rights understanding?" Is there such a discourse? Or does she mean a western understanding of judicial interpretation which does not refer to religious symbolism or cultural icons?

Why is it that when the judiciary uses a discourse which would have resonance with the people we find it troubling that it does not fit into any formal paradigm? It is true that this kind of discourse could fan nationalist fervour and cause further trouble in an already fractured society. But then, in other words, are we asking the judiciary to stay aloof from the crisis and not enter the arena of politics? This is unrealistic for if we place a political question before the judiciary, it would be only understandable that the discourse the judiciary adopts too would be political.⁵ What is important is that judicial discourse should not privilege one culture or religion over another.

2. A new Agent

Reflecting upon the *Thirteenth Amendment Case* Coomaraswamy argues that a new agent might be better suited for issues concerning power distribution and centre-state relations. At several points Coomaraswamy argues that institutional fetishism should not prevent us from electing a new agent funded with the charge and necessary expertise of carrying out rights ensuring work with wide powers of intervention. Institutional experimentation like that of devolution would demand a different forum better able and having more legitimacy than the judiciary to achieve through political negotiation and bargaining some solution to the political questions that have arisen in a conflict ridden country.

Roberto Unger too, like Coomaraswamy, makes a plea for the revisioning of a new agent - another branch of government - designed expressly to carry out what he terms destabilisation and solidarity rights. Trying to allow the courts to enforce these rights would, he argues, mean rationalising legal analysis which would result in putting the best possible face on the existing institutions without challenging and changing them. In the same vein as Coomaraswamy, Unger argues that matters of complex enforcement demand an intensely involved adjudication with resources and legitimacy to look into the casual background of social life which a traditional court structure does not possess.

I would, however, argue that there is no guarantee that this new institution too would not inherit the same flaws of the judiciary as well as some peculiar to itself. Would not any other forum once again result in political impasse and possess the same flaws that impair the traditional judicial process? There is also the fear that the judiciary might use this new agent as an excuse to abdicate its responsibility. Rather than set up different *ad hoc* fora it would be of greater benefit if the judiciary itself were to strive to inform itself of relevant information when matters of grave political consequences come before it.

⁵ Coomaraswamy herself argues in the same paper that there are some "political and civil issues that cannot be resolved within the framework of positivist law. They are the products of the reality of the country and political and ethnic consciousness," at p 26.

In Sri Lanka a certain institutional fetishism inhibits us from imagining a court which can devote itself to protecting the public interest. I would rather transform them than, like Unger and Coomaraswamy, transcend them. I would prefer to explore ways in which the judiciary itself could be transformed to provide a more equitable forum rather than divert precious resources from one flawed forum to another equally imperfect forum.

3. Constitutionalism or Populism?

A running theme in Coomaraswamy's work is that, for constitutionalism to be meaningful, it has to be creatively used by the people. However, she cautions against populism which, Coomaraswamy argues, does not allow human rights to develop beyond shrill rhetoric. Nor should, she argues, majoritarianism hijack constitutionalism.

A traditional view of Constitutional Law which has gained immense popularity is that it is on a more elevated - "higher" status than ordinary law. However, this cannot take away from the fact that Constitutional Law in the ultimate analysis belongs to the people. Constitutional Law is not unremoved from ordinary political energy. A concept of a "higher" doctrine cannot make Constitutional Law the prerogative of a set of higher beings - the judges. In the altar of a "higher" doctrine the political energy of ordinary people cannot be sacrificed.

The concept that Constitutional Law is often described in the realm of higher law made by "better" law undermines the celebration of ordinary political energy.⁶ Insulation from and transcendence of ordinary political energy helps create an elitism in the judiciary and in Constitutional Law concepts which erodes the capacity of ordinary people to take part in it.⁷

Professor Richard Parker in his refreshingly innovative essay on a Constitutional Populist Manifesto *Here The People Rule* argues that the task of the courts should not be one of restraining popular impulse and containing the passions of the masses based on a higher theory of Constitutional Law but to act as a means of stimulating public participation in civic life. Any attempt to clothe Constitutional Law in elevated garbs can be seen as a means of curtailing popular passions and sentiment. Parker demolishes some fundamental orthodox theories on Constitutional Law. He opposes the definition of constitutional democracy as being contrary to populist democracy "that constitutional constraints on public power in a democracy are meant to contain or tame the exertion of popular political energy rather than to nurture, galvanize and release it," is a concept he challenges.

Parker finds the elitist conception of constitutionalism very troubling. "Disdain for the political energy of ordinary people" - and for the sorts of "ordinary" attributes supposedly brought out by political engagement with them - is envisioned as deeply problematic. It is a defective

⁶ The Indian Supreme Court has through the years transformed the rule of the Supreme Court to a people friendly rule.

⁷ Page 73.

attitude since it involves cutting oneself off from possibilities of political assertion and engagement and fosters passive withdrawal. What is worse, Parker argues, is that it can - if "disseminated widely and solidified in institutions affecting everyday life" - erode self-confidence among ordinary people and metastasise political passivity. And worse yet, it may embolden elites to claim transcendence, securing an elevated position from which to try to contain, control, or manipulate ordinary political energy.⁸

There is a point of reconciliation between Coomaraswamy's argument and Parker's thesis. The critical factor is not to have rights enumerated on paper but for the courts to interpret these rights so as to facilitate people's participation in the political process so that a participatory ethos rather than a populist constitutional ethos is built. The judiciary has a duty to reconstruct political and social organisations to accelerate the self-organisation of civil society and the political mobilisation of the citizenry. The effectiveness of rights such as the constitutional rights of political participation, the right to vote, to speak and to associate can be measured only as far as these opportunities are, in fact, available to the ordinary people.⁹ Thus, any judicial decision which in effect curbs the rights of people to speak, and to participate delegitimises the role of the court. The role of the courts should be to ask what opportunities are open to the common people to engage in political life. Are the channels being kept open for popular participation in government decision making?¹⁰

Coomaraswamy argues that unfortunately, the judiciary itself has curtailed free speech in matters relating to contempt of court as well as commentary on court decisions. This has resulted in not only suppressing dissent but has also limited the process of litigation being used as a vital means of public participation. Not only must courts see that the channels of representation are kept open but also critically examine whether access to courts have been blocked in any way. Widening access and democratising an expensive litigation process as well as facilitating public knowledge of court decisions and allowing public and academic debate on judicial decision making are some ways of achieving this.

Constitutions can be reconciled with the idea behind populism. They are, in fact, as Parker argues, "embedded" within it. Constitutionalism if it is to have any meaning must be interpreted as a populist activity¹¹ rather than a metaphysical exercise by elites.

⁸ Parker, pp 64 and 65.

⁹ Alessandro Pizzorno has written "political action can be seen as the only type of action capable of transforming society and therefore the only one through which the life of a nation can be improved to approximate a given deal. Political vocation as well as participation in politics are predicated as the highest of possible individual choices. "Politics Unbound" in Charles S. Maier (ed), *Changing Boundaries of the Political* (Cambridge University Press, Cambridge) (1987) p 27.

¹⁰ A breach of faith was broke in the *Referendum Case*.

¹¹ As long as the term populism is interpreted to mean compatible with minority interests.

In a way Coomaraswamy's thesis seems to be agreeing on this point. Her thesis points out ways in which public law litigation should not only arise out of the community but should also become a means of bringing people together over a shared concern. This kind of litigation often arises within a broader social context and often manifests a collective experience. Law then becomes an important social text which influences the construction of political and social reality. If we focus on the social contexts of the case rather than on the abstract right we would get a better glimpse of legal developments in various historical and substantive settings.

4. Is judicial activism counter-majoritarian in nature?

The 1990's saw the Sri Lankan Supreme Court undergoing a transformation. The aftermath of the civil war in the South had left the judiciary feeling that the time had come to loosen the shackles placed on them by the Executive. A feeling that something had to be done to stem the tide of unrest and a certain sense of guilt about earlier regressive judgments coupled with a desire to redeem the Court's credibility in the face of covert criticism of the legal academia, and ripples of dissatisfaction from the people prevailed upon the Court.

Similar trends could be drawn of the Indian Supreme Court's activism manifested by the explosion of social action litigation jurisprudence which began in the 1970s. The extended Emergency Rule in 1975 - 76 saw the Indian Supreme Court acquiescing with the Executive.¹² The aftermath of the emergency saw the judiciary doing its best to redeem its tarnished image by an explosion of judicial creativity and affirmative action. The traumas of the emergency forced the judges into the realisation that a duty lay with them as the guardians of law and justice to see that there would be no return of the days of the emergency. The over mighty Executive had to be subdued.

The Indian judiciary was not the only *dramatis personae* in an expiatory mood during this period. The media recovering from the shackles of the emergency were in an exuberant mood. For the first time since Indian independence the media felt the necessity to expose governmental lawlessness and human rights violations. The media found collaborators in social action groups reinvigorated after the emergency and reweakened to the fact that the Gandhian spirit of strong citizen organisations were the only protection against government tyranny. Together, the courts, the press and the citizens' groups formed a triumvirate in bringing about social change.

Just as the US courts could not realistically have invalidated racial segregation in public schools before the dramatic transformation in American racial attitudes, as well as prevention of gender discrimination have been difficult before the burgeoning of the women's movement, an ahistorical appreciation of Sri Lanka's constitutional issues would spawn a continuation of the belief in the counter-majoritarian nature of the court. Once this assumption is challenged the Sri Lankan courts would have no valid ground to be timorous in approach.

¹² See the case of *Kesvananda* where the Court allowed the Executive to amend the constitution as long as the basic structure of the Constitution is not tampered with.

The counter-majoritarian function of the court has a powerful hold over even US constitutional discourse and celebrated US cases such as *Brown and Roe* have become icons to such testimony. This assumption, however, can be challenged. I argue that only when the other branches of government collaborated as well as there was popular participation in the validation of such decisions were the courts able to protect minority rights and hasten social transformation. To ignore the deep seated political, social, historical, economic and ideological forces that have rendered possible a transformation would be unjust.

The significance of the US civil rights movement spawned by World War II cannot be undermined when discussing the momentous role of the judiciary.¹³ The stirring of a general war related civil rights consciousness among African Americans, the enactment of a number of northern anti-discrimination laws and the increase in southern black voter registration all contributed to propelling the Court towards the *Brown* decision.

Similarly, in gender discrimination which arose in another equal protection context, the Supreme Court did not challenge a single law on grounds of discrimination until 1971.¹⁴ The first real challenge was launched after an efflorescence of political support for the women's rights movement in the late 1960s. In 1981 when the Court encountered a classification that excluded women from military combat positions, the Court did not see fit to fly in the face of hostile public opinion.¹⁵

Roe v. Wade, another landmark case, is generally considered symbolic of the grand style of the court's counter-majoritarianism. This case would have been dramatic in its outcome only if the decision was given several years earlier. The explosion of women's rights activities in 1973 - the time *Roe* was decided - was a major influence on the judicial psyche. An ahistorical appreciation of constitutional issues would spawn a continuation of the belief that the judiciary is the Lone Ranger in the fight for social change. As regards free speech claims, while in the pre-World War era the courts were unwilling to allow such claims, forces in the background like the power of labour unions and the heightened antipathy against Makarthysism transformed American consciousness towards a tolerance of free speech. While the Nazi holocaust too brought in its wake an abiding revulsion of curbs on freedom and liberty, the twin disasters of Vietnam and Watergate caused a deep seated suspicion of Executive excesses.

What can be seen by these brief brush strokes is that judges have generally seized upon a national consensus to dismantle restrictions. When public opinion is antagonistic or hostile towards a certain issue the court is unwilling to act. The court identifies with minority rights at times only when the community has come close to validating those rights as worthy of

¹³ The World War along with the Watergate scandal made people lose faith in the Executive and look more and more towards the judiciary.

¹⁴ The Supreme Court for the first time found a gender based classification unconstitutional unless it served an important governmental objective. See *Reed v. Reed*.

¹⁵ *Rostker v. Goldberg*. 453 US 57 (1981).

approval. The court legalises this approval by putting its imprimatur. This judicial seal itself carries huge symbolic and substantial value. Without this imprimatur public consciousness would lack legitimacy. However, what is important to understand is that judicial review operates within the parameters of the social and ideological context.

This experience shows that in Sri Lanka too, "reshackling"¹⁶ the judiciary alone is not enough. Rarely does the judiciary set itself up against the Executive unless it has the support of other movements. In this context censorship of the press has to be lifted and NGOs given more freedom than under a regime of the Orwellian Big Brother like atmosphere of the last few years. The last decade saw a tight control of the media and an even tighter night watchmanship of NGO movements. Granted that a certain amount of vigilance is necessary to ensure that these organisations do not misuse power or money, too much could render these organs immobile and muffle important organs of dissent and critique.

As Coomaraswamy points out, not only are organisations outside the government important as critiques of government policy, but they also organise self government of society outside government. These non-governmental institutions are also better able to discover, question and revise governmental institutions if they are not inhibited by too much governmental control.

5. Limits of rights talk

Coomaraswamy argues that in South Asia today courts and constitutionalism have been located as the only means of non-violent excesses. The languages of Marxism and nationalism have given way to a rights consciousness as the legitimate language of protest against military regimes and authoritarian government. Coomaraswamy argues for a greater awareness of rights within the liberal paradigm while at the same time arguing that in Sri Lanka rights talk has, however, refused to engage in pressing concerns such as poverty or social or gender justice.

Rights rhetoric has its own limitations. It is granted that an appeal to constitutional rights can work quite effectively in the rhetoric of political discourse in the sense that an appeal to constitutional rights has at least a little greater initial force than an argument phrased solely in terms of what is a good thing for the society to do. However, where rights to food and shelter which are poverty issues are involved, appeals to individual and collective responsibility seem to work better than an appeal to rights *per se*. Rights analysis also serves those autonomous independent individuals rather than a person with any kind of differences. It presupposes a sameness between people which challenges special treatment given to women, children and the disabled.

Rights talk is a dialect that developed during a very special period of attention to civil and human rights in the wake of World War II and is set apart in its individualism, insularity and silence with regard to personal, civic and collective responsibility. "Rights talk" writes Mary

¹⁶ I borrow this phrase from the Minister of Constitutional Affairs, Prof. G.L. Peiris, who calls this era - the post 95 era - the reshackling of Lanka.

Ann Glendon "places the self at the centre of the moral universe. It promotes the short run over the long run, crisis intervention over preventive measures and particular interest over the common good. Saturated with rights, political language can no longer perform the important function of facilitating public discussion of the right ordering of our lives together."

An infatuation with individual rights in our law saturated society has prevented a searching public discussion of issues urgently in need of resolution. The limits of legalism makes one want to challenge rights based thinking especially when frustrated by the narrow and self-centered modes of political speech in Sri Lanka.

One solution to Coomaraswamy's argument that constitutional theory cannot rest on a simple majoritarian theory is to justify the courts' interference with traditional democratic theory on an appeal to moral rights which individuals possess against the majority.

In short, we should be careful not to redline moral dimensions of public questions which acknowledge that men and women are defined by more than rights. The priority of the right over the common good has been critiqued as that which brackets moral issues and incurs moral costs for society. The right based ethic has come to face a growing challenge from a view that argues for a deeper understanding of citizenship and community.

A social relations approach which pays attention to context and relationships between people could open out new strategies for judicial reasoning which could view rights in the context of relationships. A perspective which takes into account interconnections between knowledge, contexts and people can open out new avenues of judicial reasoning. Selfhood often depends on the ability to assume the role of the other and emerges through relationships with others.¹⁷

To frame the debate in terms of only individual rights autonomy or choice would mean that search for the common good is neglected. There are profound problems in basing our politics on the image of the self as free and independent, unencumbered by attachments it does not choose itself.¹⁸ The result then is a thin pluralism unable to address the confusion and sense of disempowerment that afflict our politics both in Sri Lanka or in the US. Modern liberalism, while emptying the national narrative of its civic resources, often juxtaposes itself against an intolerant populism. Neither has produced any solutions beyond a disillusionment with government.

6. In the interest of women

"Unless we begin to examine the laws approach to the family and to private space in greater detail, and understand the dynamics more fully with regard to ideological constructions which

¹⁷ See also Michael Sandel.

¹⁸ Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (Harvard University Press).

resist legal change, we will not be able to bring rights home to the family."¹⁹

Coomaraswamy, by bringing our attention to issues concerning women, has brought to the public discourse on constitutional theory issues hitherto submerged and rescued from the "shadowy interior of the household"²⁰ and brought to attention the political nature of these issues and the relevance of justice in personal life. Coomaraswamy shows ways in which what was once considered private can inform public discourse while conversely politicising what was considered personal.

Coomaraswamy through the lenses of three well known case studies - the Indian *Roop Kanwar*, *Sha Bano* and the Pakistani *Safia Bibi* - as well as the reform efforts in divorce law in Sri Lanka explores whether law can work to improve the lives of women.

Family law provides the basis for the other areas of the law²¹ and family social roles mediate between law and social experience by reinforcing social norms and providing a base for social practices and the rationale for social change. For sustained institutional change the micro politics of personal relations and the macro politics of institutional structures must converge. It is important to revise personal relations in order to reconstruct institutional arrangements. Neither can prosper without the other.

Coomaraswamy bemoans the fact that no case with regard to gender equality has been decided by the Supreme Court of Sri Lanka. One of the reasons may be that the law tries to exclude the speech of women from the legal process. The ritual of the court drama especially discounts the speech of women and others considered different. The majority of less privileged persons perceives litigation as power ridden and hostile especially to those who do not speak the language of law. This suggests that the court room be made more inclusive of those who speak in a different voice whether they be women, children, the less privileged or the disabled.

The feminist critique of the law has a worth apart from reforming the law in the interest of women but it can question the biases and exclusionary practices of law and, in turn, law can respond to what it learns by making concrete changes in perspectives, substance and methods. Coomaraswamy by engaging in both a feminist critique as well as using a critical scholarship have questioned the ability of the law in Sri Lanka to effectively affect social change. Both theories urge that law becomes self critical and more humble and urge those who hold power to do so with attentive care and nurturance, keeping in mind a sense of connectedness and dependence.

¹⁹ Coomaraswamy, *Ideology and the Constitution*.

²⁰ Hannah Arendt.

²¹ Minow, "Forming Underneath Everything that Grows: Toward a History of Family Law, *Wisconsin Law Review*.

POLITICAL CORRUPTION: UK STYLE

*Professor Phil Thomas**

Sir Winston Churchill, a former Prime Minister of the UK, claimed that parliamentary democracy is the worst form of government, until you consider all other alternative forms of government. Yet, we continue to believe in the authority and power of democracy despite its many faults and enemies. The enemies are not simply those easily identified foreign powers, such as the opponents in the 'cold war' nor the modern global corporate predators that stalk weak nations. We must also contend with the internal enemies: those politicians, associations and companies that talk democracy and behave anti-democratically. It is these internal enemies that pose a major challenge to our democratic societies.

Standard British accounts of political corruption usually locate it 'elsewhere' in economically weak, or developing or new nations, or even possibly within the political machinery of the USA. It is comforting to believe that the 'Mother of Parliaments' is to be found, in virginal state, in Westminster, London. This analysis is not only incorrect but also racist and xenophobic.

British constitutional history displays the depth of political corruption. In the eighteenth century parliamentary seats were bought, sold, gifted or inherited. Landlords told their tenants how to vote or were exchanged for food and drink. Honours and titles were bought from those in high political office and even today there is a close correlation between financial party support and the honours system.

Looking elsewhere we see that Japan, between 1955 and 1993, had nine of its fifteen Prime Ministers involved in some form of a corruption scandal. In Italy there is evidence of close links between the Christian Democratic Party and the Mafia. Indeed, the former Prime Minister, Bettino Craxi, fled into exile to Tunisia to avoid corruption charges. Today, there are allegations that Felipe Gonzalez, Prime Minister of Spain, is associated with the misuse of money to assassinate supporters of the Basque separatist movement in northern Spain. Last month the former Prime Minister of Ireland, Charles Haughey, admitted receiving one million three hundred thousand pounds from a cocaine using Irish businessman. The USA has a long and dishonourable history of corruption. Edward Kennedy and Gary Hart were irrevocably damaged by sexual scandals and improper financial dealings produced the resignation of Vice President Spiro Agnew. Colonel Oliver North was charged with accepting improper gifts and questions were asked about the relationship between President Richard Nixon and his rich friends. Today, the USA President Bill Clinton, and his wife Hilary, are being investigated for alleged improper financial activities known as the Whitewater scam. Sadly, the international list appears endless. What is clear is that being a politician in a rich, highly industrialised, mature democracy or being a rich and powerful politician neither reduces the temptation nor the practice of political corruption.

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Corruption UK

The following story reads more like a film script than an account of British political practice. This July several Conservative MPs were exposed and denounced for involvement in corrupt financial practices. This is a brief account of two of those parliamentarians: Johnathan Aitkin and Neil Hamilton. Aitkin is an aristocratic Tory grandee, an old Etonian and Oxford educated millionaire. For many years he was closely associated with members of the Saudi royal family. He managed some of their financial interests in the UK helping them to buy into television companies, purchase property, run health farms and even acquire the services of prostitutes. His business deals included organising commissions for major arms sales to Saudi Arabia. In 1992 he was made a government minister in charge of arms procurement. It must have felt like being given the keys to the safe. His close relationship with the Saudis continued and this included an all expenses paid trip to the Hotel Ritz in Paris to meet his arab friends.

Enter now the owner of the Paris Ritz and also of Harrods of London, the millionaire Egyptian Mohamed Al-Fayed, who had been persuaded to 'buy' some politicians in order to support his interests in Parliament. Ultimately he felt he was not getting value for money from his MPs, one of whom was Neil Hamilton whom he was paying to ask questions for him in Parliament and introduce him to influential political people. He called Hamilton 'a greedy bastard.'

Consequently, he went on both Hamilton and Aitkin and exposed their activities via a national British Newspaper, *The Guardian*. Aitkin argued that he was in Paris solely to meet his family and public and said that his wife paid the hotel bill. He produced false correspondence and arranged for his teenage daughter to perjure herself on his behalf. Fortunately, and by simple good luck, reporters traced plane tickets showing his family was in Switzerland on that weekend. His story collapsed during the actual trial in the most dramatic of ways. Aitken faces court costs of over one million pounds, his wife is divorcing him, he has lost his Parliamentary seat, he has been forced to resign as a Privy Councillor and he is being investigated by the police for perjury and attempting to pervert the course of justice.

Neil Hamilton, a man of modest background, had climbed his way up the slippery political ladder to a ministerial position in the Conservative government. He had struck up a business relationship with a parliamentary lobbyist seeking favours and opportunities for his business clients. The lobbyist advised Al-fayed that he should "rent an MP like you rent a London taxi." Hamilton was 'the taxi' and he took money, gifts and holidays in exchange for using his public position for his new patron. Hamilton also sued *The Guardian* newspaper but was obliged to withdraw mid way through the civil trial at great cost to himself. In addition, at the general election in May he lost the very safe Conservative seat of Tatton to an independent, anti-sleaze candidate, Martin Bell of the BBC newsteam. The Conservative majority of that constituency was disgusted by the exposed corruption and threw out Hamilton who is now a disgraced man.

Explaining Corruption

I have argued that corruption is not new, nor geographically restricted nor individualised. Under the political governance of Mrs. Thatcher and her successor John Major there emerged a spirit of rampant individualism, greed and opportunism, called "the enterprise culture." Though praised in the City of London, such activities have no place in the Palace of Westminster but the politics of the market place came to dominate and, indeed, lauded. One senior Conservative backbencher said that the motto was "enrich yourself" and "all they asked is that we returned to the Commons to vote at 10 pm." As private replaced public in terms of state functions and utilities so did the interface of the public and private sectors change. The dramatic deconstruction of the state, of its welfare and social responsibilities, and the passing of these into private hands resulted in new forms of management. Within such a rapidly changing structure the civil servants were lost as their training and codes of practice meant they were ill-prepared for "rule by the profit motive." For politicians the opportunity to become businessmen rather than public servants was irresistible. In 1995 some 30% of MPs held paid consultancies which related to their Parliamentary role while nearly 70% of all backbenchers had financial relationships with outside bodies such as company directorships.

The Consequences

The protection that MPs enjoy arises out of the Bill of Rights which recognises the supremacy of Parliament. This means that MPs are immune for acts undertaken *within* Parliament. For centuries they have enjoyed the privilege of self-regulation through their own disciplinary committees. The scandals surrounding Aitken, Hamilton and others were so great that the former Prime Minister, John Major, was obliged, though reluctantly, to appoint an external committee of enquiry, chaired by a senior judge, Lord Nolan. One of his recommendations was that a new post be created: a Parliamentary Commissioner. Sir Gordon Downey has been appointed and his first report in July destroyed the credibility of Hamilton, effectively calling him a liar and a cheat.

In addition, Parliament has introduced new rules banning MPs from holding lobbying consultancies and forcing them to disclose salary levels of company directorships and consultancies. Nor are they able to table Parliamentary questions, present Bills, speak in debates, move motions or change reports on behalf of 'clients.' They are also banned from initiating or attending meetings with ministers to press the case of their companies. The Parliamentary lobbying industry has received a severe set back and rightly so. The Labour Government will also ensure that all large financial donations to all parties are declared, registered and made public.

More generally, it is clear that politicians cannot be allowed to regulate themselves to the exclusion of other forms of safeguards and sanctions. For example, the brave position taken by the newspaper, *The Guardian*, was the trigger that blew the corrupt politicians out of the water. Without a strong investigative press it might have been wicked business as usual for the politicians. In addition, the voters at Tatton displayed their anger over corruption and their

commitment to democracy by throwing out a corrupt individual even though by doing so they voted against their favoured political party. A valuable lesson indeed for all voters both individually and collectively. It is also a victory for democracy by displaying the real power of the ballot box. Senior judges are beginning to look at the antics of politicians through judicial review and there is evidence of a more active and discriminatory role being undertaken by the judiciary.

Many questions, however, remain unresolved. For example, should parties receive election funding exclusively from the state and should MPs be truly 'full time' and paid an appropriate salary to undertake their public duties to the best of their ability? The definition of corruption remains problematic, particularly for lawyers, and its exposure offers major challenges for the law enforcement agencies. Nevertheless, democracy demands our total support and constant vigilance if it is to work for our collective benefit.

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International Terrorism: A Review*

Justice A.R.B. Amerasinghe

With increasing frequency during the last half a century, there have been groups of persons who, by acts of indiscriminate, violent and destructive atrocities, have attempted to shock, numb, weaken, demoralise and destabilise States in the hope that the Governments against whom such acts of terrorism are directed will, in despair, rather than on account of conviction or political accommodation and compromise, be coerced either into accepting their demands or handing over the reins of office to them. When such activities are conducted on foreign territories, they cease to be solely matters of domestic interest and become matters of international concern. With the phenomenal advances in international communications in every sphere, such activities have escalated to alarming levels.

From time to time, there have been complaints that certain States seem to be encouraging terrorism either actively or passively despite the fact that in 1970 the General Assembly of the United Nations in its Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the U.N.¹ stated that:

Every State has the duty to refrain from organising, instigating, assisting or participating in acts of civil strife or terrorist acts in another state or acquiescing in organised activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force;

and added that:

No state shall organise, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.

Dr Rohan Perera in his book of 330 pages on *International Terrorism* has, in a systematic and most comprehensive way, demonstrated the enormous difficulties of achieving international co-operation in general and in the development of a legal regime to combat international terrorism. It has reared its barbaric head in one incident after another and there has been an increasing recognition of the seriousness of the problem and the admission of the need for a response. UN General Assembly Resolution 2625 (xxv), Resolution 40/16, UN Resolution 42/159, the European Convention on the Suppression of Terrorism; the Organization of American States (OAS) Convention to Prevent and Punish Acts of Terrorism; the Regional Convention on the

* Text of the speech delivered at the launching of the book *International Terrorism* by Amrith Rohan Perera (1997) VI KAS Publishing House Pvt. Ltd., New Delhi. Edited for publication.

¹ Resolution 2625 (xxv).

Suppression of Terrorism adopted by members of the South Asian Association for Regional Cooperation (SAARC); the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft; the Hague Convention for the Suppression of the Unlawful Seizure of Aircraft; the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation; the New York Convention on Internationally Protected Persons; the New York Convention Against the Taking of Hostages; the United States - U.K. Supplementary Extradition Treaty and the Canada - India Extradition Treaty, despite limitations that must be expected when compromises have to be made in order to secure acceptance, have been notable achievements in the process of securing co-operation and in moving towards an international legal regime to combat terrorism. Significant advances have been made during the last quarter of this century, including some erosion of uncompromising adherence to strong beliefs that, in an earlier era, had made progress virtually impossible; it is, however, acknowledged that there is a great deal more that can and ought to be done if the potential threat to the security, independence and territorial integrity of states is to be removed, if good neighbourly relations are to be fostered, and if the world is to be a safer place. Although a comprehensive international legal regime is a distant dream, we must progress by continuing to employ the useful process of filling the lacunae in the existing framework.

In order to be able to move forward, we need to have a grasp of the concerns of each State and groups of States. Dr Rohan Perera's examination, marked always by attentive care of past initiatives in the light of the reasons for the failures and triumphs, deserves careful study by every person who may hope to contribute meaningfully to the search for securing co-operation. It is also helpful to those who may have the task of negotiating or drafting declarations, resolutions, and conventions and helping to evolve relevant principles that will gain universal acceptance and become a part of the customary law of nations. His observations in that regard are of special importance, for two reasons: they come from a person who has a deep and extensive knowledge of the historical and theoretical aspects of the problem as a result of his prodigious research. His well-documented book on International Terrorism sufficiently establishes that fact. Each of the nine Chapters of the book are followed by copious references that quote sources and supplement the text. There are 896 notes, a Table of Treaties, a Table of Cases and a Bibliography that provide anyone who wishes to pursue the study of any aspect of the subject with adequate and dependable guidance. Secondly, the observations are made by a person who has a sound appreciation of the practical realities, gained first-hand over many years in a long and distinguished career in the Ministry of Foreign Affairs as a legal advisor. The realities, as the experience of the past has shown, play such a vital role in any initiative designed to achieve co-operation in controlling the undoubted international menace that is terrorism.

Hugo Grotius in his famous treatise on War and Peace expounded the concept of *patientia* which carries with it the corollary that there is an obligation on the part of a State to take steps to thwart the designs of an individual in its territory to perpetrate a wrongful act against another State. And the International Court of Justice (ICJ) in the *Corfu Channel Case*² accepted as a

² (1949) ICJ Reports p 4.

"general and well recognised principle, every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States." That broadly stated proposition has been generally accepted by States. However, it is not always possible to persuade even those States that are prepared to accept the principle of 'non harmful use of territory' to bind themselves through a Convention in respect of that matter. For instance, the SAARC Regional Convention on the Suppression of Terrorism does not contain a specific provision on the matter, although its Preamble refers to the Bangalore Declaration by SAARC States and the UN Resolution 2625 which recognise the principle. Dr Rohan Perera explains that the omission was due to reservations based on "political compulsions," not because there was a dispute with regard to the validity of the principle of non harmful use of territory as a fundamental principle of international law. A State which has a politically influential segment of its population that shares ideological, religious or ethnic interests with a rebellious group in another State may be compelled, by political imperatives, at least, to turn a blind eye even if it does not go further and actively assist such a group.

The question arises as to whether turning a blind eye envisages the international responsibility of a State. The answer to that question is of vital importance if the use of the territory of one State to commit terrorist acts in another State must be prevented and safe havens for planning, or organising terrorist activities, fund-raising, propaganda, purchasing or negotiating the purchase of weapons, and escaping into, are to be regulated. The decision of the ICJ in 1986 in *Nicaragua v. The United States of America*³ seems to endorse the principle that no State shall organise, assist, foment, finance, incite, or tolerate subversive, terrorist, or armed activities directed towards the violent overthrow of another State or interfere in civil strife in another State.

On the other hand, leading modern jurists like Oppenheim maintain that there would be a breach of international law only when subversive activities emanate directly from the Government itself or indirectly from organisations receiving financial or other assistance from it or closely associated with it by virtue of the Constitution of the State concerned. Subversive activities against foreign States on the part of private persons do not, in principle, engage the international responsibility of the State. A State can hardly be expected to make a public confession of the fact that it is actively involved in terrorist activities in another State by initiating or organising such activities or by sponsoring or encouraging such activities by providing equipment, training, logistical support and so on and proof of active involvement must necessarily be a difficult matter. And if no international obligations are involved by permitting terrorists to carry on their activities because they are private individuals, assertions that a State ought not to tolerate such activities cease to be of much practical value.

However, before one rushes to condemn a State that harbours terrorists, one has to be mindful of the traditions, ideological accretions and political realities dictating its attitude. One recalls seeing on television Nelson Mandela's triumphant visit to the United Kingdom where, as he

³ *Case concerning Military and Paramilitary Activities in and Against Nicaragua (Merits)* (1986) ICJ Reports, p 14.

confessed, a welcome that surpassed even his wildest expectations awaited him. Sometime thereafter last year Her Majesty the Queen in her Christmas Broadcast to the Commonwealth referred to the shining example of that 'gracious' man. As we all know, he was also the recipient of the Nobel Prize for Peace. Yet, Mrs. Margaret Thatcher had described Mandela as a terrorist and there was time when Yasser Arafat was also described as a terrorist by the United States. Does terrorism, as Friedlander suggests, exist in the mind of the beholder? Are people fighting against oppression or for self-determination or liberation to be treated as ordinary criminals? That is, no doubt, a matter of perception.

The issue is further complicated by the insistence by some States that, rather than engaging in the search for a precise definition of 'terrorism,' which some regard as futile and in any event serving no operative legal purpose, attention should be paid instead to identifying the causes of violence and eliminating them. Faced with these difficulties, the international community in confronting the terrorist menace and seeking practical ways and means of preserving societal and world order, adopted "the common crime" approach in dealing with specific aspects of terrorism. Focusing attention on the elements of the act - *the actus reus* - of a crime such as murder, arson, kidnapping and serious bodily harm, made possible the Conventions against the hijacking of aircraft; the prevention of offences connected with aviation; the Convention to Prevent Unlawful Acts Against Internationally Protected Persons; and the Convention Against the Taking of Hostages. These initiatives have undoubtedly made gains for the principle of non-use of territory for terrorist acts against another State, but many gaps and unsolved problems remain.

The efforts to have universal jurisdiction recognised as a principle of law applicable to all States have also had a mixed reception. Maritime nations have, since time immemorial, acted on the principle of universal jurisdiction in dealing with pirates who committed crimes on the high seas and, therefore, not in the territory of the prosecuting State. Pirates were treated as *hostis humani generis* - the enemy of all mankind - and were regarded as persons who may, in the interests of all, be captured and punished by any nation. Extending the principle to other crimes, however, has not been an easy matter, for some States have always insisted on adhering to their well-established practice that criminal jurisdiction must be founded on the territorial or nationality principle and that a State has no competence to punish a foreigner for acts committed outside its jurisdiction. Dealing with pirates concerned as they are with private crimes is one thing. However, as the Achille Lauro episode illustrated, the application of the universality principle becomes difficult when criminal acts involve political elements.

There seems to be a willingness to recognise the principle of universality in relation to certain specific crimes such as drug trafficking, slavery, torture, counterfeiting, hijacking and "certain neutral forms of terrorism." The Conventions on the safety of aviation, and the protection of certain persons have led to a coherent body of treaty law. However, there has been a reluctance to go beyond that, for it has been pointed out that a liberal extension of the principle might encourage "chaotic enforcement efforts at best and vendettas at worst." With regard to terrorist acts linked to complex political factors, States seem to be left free to make their own judgments on a subjective case by case basis rather than be subject to obligations based on predetermined customary international law.

Nor is there a customary law that obliges a State to hand over someone within its territory who is alleged to have committed an offence in or against the State requesting the return of the fugitive. The refusal to extradite an offender may be a violation of the moral obligations which exist between civilised communities, nothing more. The grant of extradition depends on courtesy and reciprocity. Nor is there a general obligation on a State that declines to extradite an alleged offender to prosecute the fugitive. However, the principle *aut punire aut dedere* - extradite or prosecute - has found a place in multilateral and bilateral treaties dealing with specific acts of terrorism. The obligations depend on the limited, specific undertakings given in the relevant instrument. For instance, the SAARC Convention requires a Contracting State, if it does not extradite a person suspected of having committed one or more of the specified offences, to submit the case to its competent authorities "so that prosecution may be considered." This is a deviation from formulations in some other conventions which require that the case should be submitted for prosecution." Both in the formulation and application of treaties, we must be alive to the realities including the fact that, in general, there is a strong aversion in certain communities to surrendering people seeking asylum on political grounds. This was very evident during the debate in the U.S. Senate on the United States - United Kingdom Supplementary Extradition Treaty. In States like the U.K. there is a long tradition of jurisprudence to which is attached great value by which protection has been given to political refugees. Attempts to secure general agreement on excluding specific offences from the political exception have run into various difficulties: for instance, why should the assassination of a Head of State be treated differently from the assassination of a Prime Minister, a foreign Minister or other Minister? Why should not the murders of innocent civilians be also included in the exception? But then does a person who, by association with an unlawful course of action, for instance by living in occupied territory, cease to be 'innocent?'

In general, States have always regarded as axiomatic that in any arrangements dealing with extradition, persons implicated in political offences should not be extradited. Political offences are not defined, however. It is, therefore, left to the courts to decide whether the facts of a case constitute a "political offence." While acts directed against the State such as treason, espionage and sedition are generally classified as "pure political offences, there has been considerable difficulty in dealing with "relative political offences," that is acts that are common crimes but connected with a political act. Judges are expected to venture beyond the black letter word of law defined by the legislature into the unfamiliar and sensitive sphere where political imperatives and changing circumstances have to be taken into consideration in addition to precedents, practices and traditions - a sphere into which they are not supposed to enter. Yet, when jurisdiction has been conferred, judges must decide. The complicated inter-play of these factors has given rise to inconsistencies not only in different jurisdictions but also within the same State. Understandably, the judges have not fared very well and Cantrell describes their contribution in dealing with the concept of political offence as a "hodge-podge collection of principles."

The subject of International Terrorism is complex, but, our understanding has been significantly advanced by Dr Rohan Perera's scholarly work. It reflects a high level of excellence both in respect of substance and in its presentation. I offer him my warm congratulations.

Editor's note:

Ragging: A licence to torture?

The recent ragging incident which led to the death of an engineering student at the University of Peradeniya sent shock waves through the community, particularly, the academic community of the country. While everybody, including student groups (!!), was quick to condemn this dastardly act, it is no secret that ragging has been taking place in our universities and other institutes of higher education to varying degrees for decades with the relevant authorities often burning a blind eye. No university has so far succeeded in eliminating ragging. The present incident highlighted the gravity of the problem.

Needless to say that ragging amounts to cruel, inhuman and degrading treatment and, in some instances, torture, both of which constitute a violation of fundamental rights enshrined in the highest law of the land - the Constitution. It also constitutes a criminal offence. That anybody can derive 'pleasure' from torturing (this includes mental torture as well) another defies the imagination of a normal human being, but then, these torturers cannot be normal. We are not referring here to harmless acts of fun; on the contrary, we are referring to acts of torture such as the one which in this instance, led to the death of a student. Is this what free education, which everybody demands, is doing to our society? Is this what higher education, the dream of every student and parent, means? We, as teachers and leaders of society, are partly responsible for this tragedy. In a society plagued by violence, jealousy and anarchy, it is no surprise that such incidents take place.

This tragic incident yet again highlighted the reactive nature of our society. When NGOs drew attention of the authorities of the dangers of a zoo in Ahungalle for which a permit had been issued by the Minister in contravention of the provisions in the relevant statute, no action was taken until a poor innocent student paid the supreme sacrifice. The death of a university student made us realise that something has to be done to eliminate ragging. We fervently hope that concerted action would be taken by all concerned to ban any form of ragging altogether, before this incident too fades from our memory!! The question arises: *why do we need a tragedy to spur us into action?*

We urge our readers to lobby the relevant authorities to take urgent steps to ban any form of ragging altogether. We should also bear in mind that even if the law is put in place it would be ineffective unless civil society will refrain from participating in or condoning with any act that would amount to torture, cruel, inhuman and degrading treatment.

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