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• *Akal Bihari Vajpayee* •

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SRI LANKAN CONTRIBUTIONS

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REGION

S A A R C: YES OR NO?

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SAARC: YES OR NO?

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SAARC, Something Yes?

Mervyn de Silva

What was the event of the month? For the Sri Lankan and President Kumaratunga it was undoubtedly, the SAARC summit. But for the average Sri Lankan family – in the Sinhalese-dominated south or the Tamil north, it was no exciting event. Something SAARC, no? Certainly no small-scale NAM summit which Prime Minister Sirima Bandaranaike hosted in the last year of her term. That was not only global, at least tricontinental, but star-studded, a gathering of eminent figures. Names make news. In the age of Television, famous faces do. If there were any, it was the people of Bentota, the seaside resort packed with white skinned tourists, that attracted the foreign cameramen.

For the more serious political analyst however, and may be the Colombo-based diplomat, it was the Indo-Pakistani encounter that mattered. When the two major regional powers, and their leaders, Prime ministers Atul Bihari Vajpayee and Nawaz Sharif, met in a small friendly, neighbouring country, it was in the aftermath

of the so-called 'Hindu bomb'. And there is, let us not forget, an "Islamic Bomb", though this terminology is a creative contribution of an imaginative media looking for an attractive headline,... like the S.T. headline summing up mass opinion. "SAARC something no?"

Security was the prime concern – I don't mean at the strategic level but the physical. Thus the response of the Police Dept. It launched a massive recruitment announced the popular Sunday papers. Otherwise, Sri Lanka's role was largely "logistical".

"In addition to providing a physical forum for India and Pakistan to hold bilateral talks to ease tensions between them, Sri Lanka will also play a logistical role when both meet here" said Romesh Jayasinghe, foreign ministry spokesman. And that's smart diplomacy.

Only time will prove how much Colombo has contributed to regional cooperation, the SAARC ideal. Meanwhile a feather in President Chandrika's cap. But then, it goes with the post, right?

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Vajpayee on Culture

Address by His Excellency Atal Bihari Vajpayee, Prime Minister of India at the inauguration of the Indian Cultural Centre in Colombo on 30 July 1998. Hon. Lakshman Jayakody chaired the meeting

I am happy to be here today, and to have the opportunity to inaugurate the Indian Cultural Centre in Sri Lanka. We are happy to have with us Hon'ble Lakshman Jayakody, the Minister of Culture.

On August 15, 1997 during the commencement of the celebrations of our fiftieth year of Independence here in Colombo, Her Excellency President Chandrika Kumaratunge had stated "India has a glorious history which, in one way or another, all the countries of South Asia share, and in which we all take pride and pleasure. It is a history, I venture to say, which the whole world admires, studies and also celebrates. India in fact, is not just a country or state; it is an entire civilisation; one of the distinctive achievements of the human heritage".

I value these sentiments about shared legacies. The cultural links between Sri Lanka and India go back over millennia. Scholars may debate about the historicity and geographical location of the Lanka of our epics, but in the popular imagination ties between us had existed even then. The greatest legacy and bond that we inherit is of course that of Gautama, the Lord Buddha. History celebrates the voyage of Prince Mahindra and Princess Sanghamitra who, as emissaries of Emperor Ashoka, brought Buddhism to Sri Lanka. The mythologies and epics in both our countries' recorded histories and old architecture – all testify to the age-old spiritual and cultural links.

Coming to modern times, the cultural links between India and Sri Lanka have continued to be close, fruitful and mutually supportive. Gurudev Rabindranath Tagore made three important visits to Sri Lanka and left a lasting impression on the Sri Lankan intellectual and artistic scene. Tagore was captivated by the verdant lushness of Sri Lanka. During his last trip in 1934, opening an institution at Horana, not far from Colombo, Tagore said, "It reminds me of my own working in Bengal, this institution which you have

started". The beautiful name that he gave to this institution was "Sri Palee" translated as "where beauty reigns". Another interesting feature was the deep impression Tagore made on a young Sri Lankan who reviewed Tagore's play "SHAPMOCHAN" when it was staged in Colombo. This young reviewer was none other than Mr. S.W.R.D. Bandaranaike, later to become the Prime Minister. The enduring influence of Tagore is seen to this day in the melodies in Sri Lankan music. Other visits that one recalls are that of Swami Vivekananda, the centenary of which was celebrated last year both in Sri Lanka and India, and the visits by Pandit Nehru who was enthralled by the image of the Samadhi Buddha – Buddha in meditation – at Anuradhapura. From Sri Lanka, scholars like Ananda Coomaraswami and Anagarika Dharmapala made seminal contributions to the study of our common heritage.

In the contemporary period these cultural linkages and even affinities have continued to grow. Both classical schools of Indian music, Hindustani and Carnatic, have adherents and enthusiasts here. Bharat Natyam has many practitioners and the artists and architects in both our countries benefit from frequent interaction. I am glad that Hindi classes are popular. The adulation that the Hindi film stars enjoy in Sri Lanka can only be matched by the popularity of Sri Lankan cricketers in India. There is indeed much in common and shared between our countries.

* * *

My Government attaches particular importance to further strengthening and expanding its relations with Sri Lanka. Even as we work together within SAARC, as well as bilaterally, to add new dimensions to our cooperation, it is necessary to deepen our age-old cultural links.

I see the critical need for cultural cooperation among nations of the SAARC community today in the broader context of the cultural atlas of the world

in the 21st century. If Mother Nature has created rich geographical diversity on Planet Earth, how can there be cultural uniformity in the world of tomorrow? If communication between people is always a two-way exchange, how can global cultural communication be a one-way traffic, as it has become today?

As countries endowed with a rich and ancient cultural heritage, India, Sri Lanka and other members of the SAARC fraternity cannot only be recipients of the cultural flow from the developed nations of the world. Therefore, both our shared history and our common future needs enjoin on us the task of developing a strong South Asian cultural personality, with all its vibrant diversity.

The importance of culture as one of the main planks of global interaction is going to grow immeasurably in the coming century and millennium. In the unfolding of this new phase of human history, South Asia must make a contribution commensurate with its size, population and the worth of its cultural heritage. The close links that bind South Asia with West Asia on the one hand and South-East Asia on the other, suggest that the SAARC community can greatly aid the cultural revival of Asia as a whole.

I wish to view the establishment of the Indian Cultural Centre in Colombo as a small but significant initiative in this broader matrix of cultural cooperation in SAARC and in Asia. This is the first cultural centre established by the Indian Council of Cultural Relations in South Asia. The fact that it is being set up in a year when both India and Sri Lanka are celebrating their 50th independence anniversaries underlines the importance we attach to the Indo-Sri Lankan link in the emerging Asian design.

I have no doubt that the Indian Cultural Centre will act as one more forum and one more instrument to bring our two countries together. I wish the Centre all success.

New Frontiers of International Law

Neelan Tiruchelvam

Dr. Rohan Perera is to be congratulated for publishing a second book within a few months. The first book was based on his doctoral thesis and has been favourably reviewed by several persons including the Bombay based Constitutional lawyer and columnist Gafoor Noorani. It is not often that a Sri Lankan publishing house will publish a book on international law by an author who is based in Sri Lanka. It, therefore, presents us with an opportunity to review the contributions Sri Lankans have recently made to the development of contemporary international law.

The pride of place in any assessment of the contribution of Sri Lankans to international law must be given to Shirley Amerasinghe as President of the Law of the Sea Conference for steering one of the most complex and comprehensive international law conferences of the second half of the twentieth century. He was Conference President from 1970 until his death in 1980, and has been described as "a moderator par excellence" who was determined to search for consensus. It has been said that nonetheless, on occasion, he attempted to push decisions through rapidly, which earned him the nickname of "fastest gavel in the East". His interventions as President provided crucial sources of momentum at times when the negotiations were in difficulties. He evolved innovative and what some scholars have described as 'controversial', even 'desperate' procedural devices to enable delegates to overcome their differences and to produce an agreed single text. These 'active' consensus procedures resulted in a concentration of power in the hands of the chairman of the three

Committees and had a salutary impact by providing incentives to delegates to initiate compromises¹. This method of working which was considered unique to the United Nations Conference on the Law of the Sea (UNCLOS) was clearly attributable to the boldness and the imagination of Hamilton Shirley Amerasinghe whose untimely death in December 1980 prevented him from being at its successful conclusion.

Another Sri Lankan who rendered a significant contribution to the development of modern International law is Christopher Pinto who served as a member of the International Law Commission from 1973 to 1981 and became its chairman in 1980. He established the Legal Division at the Foreign Ministry. He has represented Sri Lanka at every session of the UN Committee on the Sea Bed from 1968 to 1972, and again represented Sri Lanka at every session of the Third UN Conference on the Law of the Sea from 1973 to 1977. Christopher Pinto's own role as a key negotiator and mediator has been commended by several scholars and he was seriously considered as a successor to Shirley Amerasinghe as a man of infinite patience, but his candidacy was apparently resisted by those who considered him to be "politically too left wing." Pinto, as Chairman of the Sea Bed Committee's 33 nation working group drew up the principles of a draft treaty and developed the international machinery for the exploitation of sea bed minerals. He also served as the chairman of a Special Working Group on Joint Ventures and was also the Secretary-General of the Iran-US Claims Tribunal.

Jayantha Dhanapala has also received high commendations for the diplomatic and negotiating skills he demonstrated

in negotiating the indefinite extension of the Nuclear Non-Proliferation Treaty which is the principal international instrument aimed at preventing the spread of Nuclear weapons.

Three other Sri Lankans have provided imaginative, legal and intellectual input into the work of international organisations. Lakshman Kadirgamar in respect of the World Intellectual Property Organisation (WIPO), Sinha Basnayake in respect of the United Nations Commission on International Trade Law (UNCITRAL), and M. Shanmuganathan in respect of the International Atomic Energy Agency (IAEA).

Two scholars who have contributed significantly to the development of public international law are my former law teachers, C.F. Amerasinghe and M. Sonnarajah. C.F. Amerasinghe has written extensively on international law issues and his most recent publications include *Local Remedies in International Law*, published by Cambridge University Press in 1990 and *Principles of Institutional law in International Organisations* also published by Cambridge University Press in 1994. Professor Sonnarajah, who presently teaches at the University of Singapore, published a book on the nationalisation of foreign property called *The Pursuit of Nationalised Property* in 1986 and a more widely read book on *International Commercial Arbitration* published by Orient Longman in 1990. His book on the *Law of Joint Ventures* was published by Orient Longman in 1992, and a book on *International Foreign Investment* was published by Cambridge University Press in 1994. Some reference also needs to be made to Christopher Weeramantry whose contribution to the development of international law as a member of the International Court

Dr. Amrith Rohan Perera's book *International Law-Changing Horizons* published by Sarvodaya Vishva Lekha Publishers, Ratmalana, Sri Lanka, 1997, Rs. 400/=.

of Justice (ICJ) has been referred to by the author who has quoted from his dissenting opinion in the *Lockerbie Case*, the *Case Relating to the Nuclear Tests in the Pacific* and the Advisory Opinion requested by WHO on the *Legality of the Use of Nuclear Weapons in Armed Conflict*.

This collection of selected essays on international law draws attention to some of the more important conceptual developments in international law as reflected in the decisions of the ICJ and other developments which he has characterised as "changing the horizons of international law". These have included important normative and institutional developments such as the Treaty on the Law of the Sea, the Maastricht Treaty and the effort to establish an International Criminal Court. An important concern of the author has been the peaceful settlement of disputes, including current trends relating to non-use of force and the role of the ICJ in advancing the frontiers of international law. These essays are, therefore, not only directed to the specialised reader but also enable the less specialised reader to examine some of the more important development in the international community such as the disputes over the French nuclear tests, the issues relating to the exploitation of the global commons, the Lockerbie dispute between the US and Libya and the campaign for the elimination of use of nuclear weapons in armed conflict. Even an average reader is able to examine these issues in the context of the interaction between competing interests and conflicting conceptions of international law. Dr. Rohan Perera has the advantage of a close familiarity with academic writings, the principal judicial decisions in the field of public international law, complemented by the practical insights that he has gained as the legal advisor to the Foreign Ministry in some of the more important multilateral negotiations.

One of the particular issues on which

Dr. Perera has focused on relates to what he describes as "the dismantling of the concept of the common heritage". He points out in this essay that the concept of common heritage was a revolutionary principle which implied a new order for the oceans based not on competition and conflict but on co-operation.²

In the early phase of the negotiations relating to the UNCLOS much emphasis was placed on the need for a strong regulatory authority for the equitable exploitation of the resources of the deep sea bed, particularly by developing countries whose claim was premised on a strong belief in the principle of the common heritage of mankind. However, the crucial features which were evolved at the protracted UNCLOS conferences were shaped by the changes taking place in the international political scenario, the most significant of which was the ushering in of the Reagan administration in the United States in 1980, just as the conference seemed to have broadly agreed upon the terms for the exploitation of the deep sea bed. The Reagan administration campaigned for the establishment of a sea bed regulatory regime which allowed the developed countries greater freedom to exploit the deep sea bed. This ultimately resulted in the Deep Sea Bed Authority being reduced to a mere licensing authority rather than the initially contemplated regulatory authority. The concomitant conceptual change was a substantial erosion of the principle of the common heritage or mankind as the premise for the mandate of the Deep Sea Bed Regulatory Authority. The author thereby has skillfully outlined the dominant ideas during the different phases of the negotiations and points out how the shifting nature of the balance of negotiating power impacted on the final outcome. He has pointed out that, in insisting on a mandatory transfer of technology, developing countries over-reached themselves and with the deletion of these provisions the joint venture mechanisms

assumed significance in facilitating the transfer of mining and processing technologies.³

Many of the essays are also centred on the ICJ, given its important role both in the development of public international law and in fulfilling its role as the principal judicial organ of the UN. He has examined the judgment of the Court arising out of the dispute between Libya and the US in relation to the aerial incident at Lockerbie i.e. the crash of a Pan Am flight over Lockerbie in Scotland. A Grand Jury in the US indicted two Libyan nationals charging them, *inter alia*, with having caused a bomb to be placed on board the plane which subsequently exploded. The Libyan government refused the UK and US governments' requests to extradite the suspects and opted, instead, to prosecute the suspects in its own courts. The matter was thereafter taken up in the Security Council which adopted Resolution 731 urging Libya to fully co-operate in establishing responsibility for the criminal acts committed against Pan Am flight 103. Libya instituted proceedings before the ICJ invoking the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation. Under this Convention, Libya claimed the right to either extradite or prosecute the offenders before its own courts and pointed out that US pressure to surrender its nationals was in breach of its international legal obligations. Three days after the close of hearings, the Security Council adopted Resolution 748 which called upon Libya to cease all forms of terrorist actions and to demonstrate its renunciation of terrorism⁴.

The Court, in a majority opinion, held that the obligations of the parties under the Charter to comply with Security Council Resolution 748 supersedes any other treaty obligations under the Montreal Convention. The Court also found that the circumstances of the case did not warrant the exercise of its power to grant provisional relief to Libya. Dr.

Perera is rightly critical of the majority decision pointing out that the Court "wilted under the weight" of the political issues surrounding the case and sought refuge in a strict and technical interpretation of the Charter provisions. He has further critiqued the Court for its failure to discharge its obligations to prevent the escalation of disputes and to facilitate peaceful settlement of disputes⁵.

Similarly, the ICJ declined to give an advisory opinion sought by the WHO on the legality of the use by a state of nuclear weapons in armed conflict. The court came to the conclusion that the WHO Constitution could not be interpreted to confer competence on the organisation to address the legality of the use of nuclear weapons. The Court further reasoned that international organisations are governed by the principle of "speciality" in that their powers are limited to only the promotion of those common interests which states entrust to them. Accordingly, the regulation of armaments and disarmament was outside the competence of specialised agencies. Here again, the author is critical of the majority for its rigid and formalistic application of the "speciality" principle. He has rightly argued that the rigid compartmentalisation of the UN system will be prejudicial to the humanitarian objectives of the Charter⁶.

On 21 August 1995, New Zealand sought to invoke the jurisdiction of the ICJ in view of the announcement by the President of France that France would conduct a series of eight nuclear weapons tests in the South Pacific commencing from September 1995. The Prime Minister of New Zealand pointed out that the objective was to bring as much moral and political pressure as possible on France in relation to the decision to resume testing. The Court on a divided vote of 12 to 3 dismissed the request by New Zealand for an examination of the situation on what the author has critiqued as a retreat into judicial formalism. The Court reached

the conclusion that its judgment of 1974 dealt exclusively with atmospheric tests and consequently it was not possible for the Court to now take into consideration questions relating to underground nuclear tests⁷.

The author has not limited his analysis to judicial doctrine; he has also examined several policy recommendations to strengthen the role of the ICJ in relation to the peaceful settlement of disputes. Firstly, he has supported the view that the scope of the advisory jurisdiction of the Court should be widened to enable entities other than the UN and its specialised agencies to seek advisory opinions from the Court. These could include the UN Secretary-General, regional organisations and other international organisations charged with the protection of the global commons. He also favours the proposal that other international judicial institutions and even national courts should submit, through the General Assembly, requests for advisory opinions with a view to promoting the uniform application of international law. Secondly, he concurs with the view that the consensual character of the Court's jurisdiction needs to be re-examined and that all states should be required to accept the unconditional compulsory jurisdiction of the Court with regard to disputes involving human rights, genocide and the protection and immunities of diplomats⁸.

Although the different essays in this volume deal with distinct themes, the author has endeavoured to locate them within a wider framework which he has described as the changing structure of international law. Implicitly he has sought to address issues relating to the nature and function of international law. There are two competing view points. The first view point is that international law is about rules. It consists of a system of neutral rules and all that international lawyers have to do is to identify and apply them. The classical formulation of this view was made by judges Fitzmauri-

ce and Spender in the *South West Africa Cases* in 1962 where they stated as follows

We are not unmindful of, nor are we insensible to, the various considerations of a non-judicial character, social, humanitarian and other..... But these are matters for the political rather than for the legal arena. They cannot be allowed to deflect us from our duty of reaching a conclusion strictly on the basis of what we believe to be the correct legal view. This formulation reflects the assumption that the "correct" legal view can be discerned by applying "rules" that is to say "the accumulated trend of past decisions regardless of context or circumstances". This view further seeks to distance international law from social policy. The ICJ pointed out in 1966 that "Law exists, it is said, to serve a social need, but precisely for that reason it can do so, only through and within the limits of its own discipline"⁹.

The opposing view that has been advanced by scholars such as Rosalyn Higgins, presently a member of the ICJ, is that international law is not a system of rules but a normative system that is harnessed to the achievement of certain common values. They argue that "without international laws, safe aviation could not be agreed, resources could not be allocated, people could not safely choose to live in foreign lands". The proponents of this view argue that, while rules play a part in law, they do not form the only part and international law is more appropriately described as a process rather than as "rules". Rosalyn Higgins points out that "international law is a continuing process of authoritative decisions it is not just a trend of past decisions which are termed rules where the trend of past decisions is not overwhelmingly clear there is ... (a concern inevitably) with policy alternatives for the future". They contend that only such a view of international

law would enable it to contribute to and cope with a changing political world¹⁰.

A third approach to international law has been advanced by the Critical Legal Studies school. They take as the starting point the view that law is deeply rooted in social theory and legal processes are located in social contexts in which the place of values is quite explicit. A Critical Legal Scholar rejects the notion of law as rules and as exceptions. He sees law as "contradictions" or as "essentially indeterminate at its core" rather than as complementary norms between which choices have to be made in particular circumstances. A Critical Legal Scholar believes that the "contradictions are either historically contingent or inherent in the human experience". Critics of this approach argue that this leads to the pessimistic conclusion that "what international law can do is to point out the problems but not assist in the achievement of goals"¹¹.

Professor David Kennedy contrasts the writings of the 'primitive' scholars with the 'traditional' international legal scholarship of the post-Westphalia period and the 'modernists' of the twentieth century. In his reading the traditional scholars emphasise state sovereignty and make a sharp distinction between international and national law, while 'modernists' attempt in various ways to overcome this, without returning to the naive universalism of the 'primitives'¹².

Professor Sol Picciotti argues that the central limitation of international law lies in the personification of the state, which draws a veil over the very real contradictions and changes that have been taking place in the nature of the state and the international system¹³. The conceptualisation of international law, according to him, requires a rethinking of the relationship between law and power. Usually this leads the students of international law either to collapse law into a simplified and absolute notion of power and assert that international

law merely legitimises the interests of the powerful; or to idealise law as the expression of popular needs or the embodiment of justice which is flouted by the powerful states¹⁴. He points out that the new wave of debate in the 1980s, as writers from various perspectives sought to rethink the nature and role of law in international affairs, pre-dated the major changes in inter-state relations which occurred in the 1990s. Much of the writing on international law in the 1970s had taken a functionalist and even instrumentalist view of law, arguing for an adaptation of law to the changed 'realities' of international society, especially the creation of many new states by decolonisation. The current international scholarship in this area reflects, he opines, the ferment of intellectual debates about the possibility and limits of reason, order and justice in society. In earlier periods dissatisfaction with traditional perspectives and explanations led either to projects for a new world order, or at least to critiques of the existing bases of social power, aiming to empower the oppressed. In relation to the central issue of the changing nature of the state and of the global system, the limitations of some of the critical and theoretical approaches which are confined to the conceptual framework of international law have become apparent¹⁵. He also opines that in general, there seems to be a large gulf between the debates within theory and any engagement with or attempt to understand the changes taking place in international society¹⁶. Dr. Rohan Perera does not seek to explicitly locate himself within this debate. It is, however, clear that he would not associate himself with the ultra-classicist position of Fitzmaurice that international law is about "rules". He has argued that the international community must harness international law in a positive and creative manner to regulate the conduct of states in such areas as the peaceful use of outer space, disarmament, and in developing the principles of environmental law relating to the global commons. Unlike the Critical Legal Scholars, Dr. Perera

is animated by an almost passionate faith in the normative power of international law and the potential of international institutions to respond to the challenges of a changing political world.

Finally, the question remains as to whether international law is really a universal system. Historically, socialist and developing countries had a different view of its nature and content. However, in the last three years there has been a radical shift in the approach of international legal scholars based in the former socialist states. The emphasis now is on international law as the articulation of a universal interest in the common threat to human survival. International law is thus conceived by these scholars as a vehicle for achieving universal human values.

Developing countries have, on the other hand, consistently pointed out that they played little or no part in shaping much of customary international law. The author has correctly observed that, until recently, it was little more than the public law of Europe. The early jurists who profoundly influenced the nature and content of international law from the sixteenth century to the nineteenth century were almost entirely based in European centres of learning. Pre-eminent amongst them was the Dutch scholar, jurist and diplomat Grotius (1583-1645) whose systematic treatise on the Law of War and Peace first appeared in 1625. He thus created the first comprehensive framework for the modern science of international law.

Rosalyn Higgins has argued that, while developing countries have questioned the substance and content of international law, they have not questioned its universality or refused to be bound by its detailed provisions¹⁷. This does not, however, appear to be entirely accurate. In the field of human rights the challenge of maintaining a consensus amongst nations has remained formidable. One significant development has contributed towards the increasing trend to question

the universality of human rights law in particular. The economic success of East and South-East Asia is the central strategic fact of the nineties. For the first time since the adoption of the Universal Declaration of Human Rights, countries which are outside the Judo-Christian intellectual traditions are in the first rank. These countries are becoming increasingly conscious of their own civilisations, traditions and institutions. It is, however, disturbing that even the consensus achieved in framing the Universal Declaration of Human Rights is now being questioned and its continuing validity disputed. Bilabhari Kaushikan has argued that "many of its 30 articles are still subject to debate over interpretation and application. It is not only pretentious but wrong to insist that everything has been settled"¹⁸. In South Asia where there is a legal and ideological commitment to multi-party democracy, fundamental rights, the rule of law, and the independence of the judiciary, this thesis cannot be accepted. Certainly, South Asian civil society is extremely sceptical of any effort to question human rights in the guise of protecting Asian values or a model of developmental authoritarianism. On the contrary, we believe that the discourse on human rights should not be appropriated by the West, and that South Asia should draw on its own traditions and experiences to further advance the frontiers of international human rights law.

Aung San Suu Kyi has effectively refuted the challenge to the universality of the Universal Declaration. She has argued "it is a puzzle to the Burmese how concepts which recognise the inherent dignity and the equal and inalienable nature of human rights, which accept that all men are endowed with reason and conscience and which recommend a universal spirit of brotherhood can be inimical to indigenous values. It is also difficult for them to understand how many of the rights contained in the thirty articles of the Universal Declaration of Human Rights can be seen as anything but wholesome and good".

I do, however, agree with the author that the developing world cannot once again be left behind in the formulation of international norms and principles which would govern the international community in the years to come. The question remains, are we adequately equipped to respond to the challenge? In the Colombo Law Faculty, international law is still an optional subject. The revisions to the curriculum adopted recently have made international law a compulsory subject in the third year of study. Even the Law Faculty's collection on international law has significantly declined and it is barely able to acquire the basic text books. It is almost impossible to gain access to the more important journals or the decisions of international judicial organs or those of arbitral tribunals. There were private libraries such as that of the late S. Ambalavanar which had an excellent collection of journals on public international law, or specialised aspects of international trade, investment and tax law. But these libraries are no longer intact and are unable to sustain the collection. The lack of access to books is further compounded when we confront the problems of teaching in Sinhala and Tamil.

The author has made a significant contribution to our understanding of the contemporary challenges faced by international law. The author presents his arguments clearly, lucidly and elegantly. It is his fervent wish that the publication would stimulate renewed interest in the serious study of international law. Vishva Lekha Press must be commended for the high quality of the printing and the boldness of its commitment to serious publications in the law.

Rosalyn Higgins has pointed out that "we must expect in the international system an endless kaleidoscope of problems. Major changes in the international system will change the pattern of the problems, but not eliminate the phenomenon. International law is a process for resolving problems. And it is a great and exciting adventure"¹⁹.

Notes:

1. Barry Buzan, "Negotiating by Consensus: Developments in Technique at the United Nations Law of the Sea Conference," *AJIL* vol. 75 (1981), p.324 at p.334.
2. Amrith Rohan Perera, *International Law – Changing Horizons: A Collection of Selected Essays on International Law* (Sarvodaya Vishva Lekha Publishers, Ratmalana) (1997), p.136-145.
3. *Ibid.*
4. *Supra* n.3, pp.55-56.
5. *Ibid.*
6. *Ibid* at pp.167-176.
7. *Ibid* at pp.149-165.
8. *Ibid* at pp.37-52.
9. Rosalyn Higgins, *Problems and Process; International Law and How We Use It* (Clarendon Press, Oxford, 1994), p.4.
10. *Ibid.*, p.1.
11. *Ibid.*, p.9.
12. Professor Sol Picciotti, "International Law in a Changing World" in Geoffrey P. Wilson (ed.) *Frontiers of Legal Scholarship* (John Wiley & Sons, Chichester) (1995), p.154.
13. *Ibid.*, at p.202.
14. *Ibid.*, at p.189.
15. *Ibid.*, at p.191.
16. *Ibid.*, at p.192.
17. *Ibid.*, p.12.
18. B. Kaushikan, "Asia's Different Standards" in Steiner and Alston (eds), *International Human Rights in Context – Law Politics Morals: Texts and Materials* (Clarendon Press, Oxford, 1996), p.230.
19. Rosalyn Higgins, *supra* n.9 at p.267.

Remembering Coomaraswamy, the Perennial Philosopher

Wagish Shukla

Ananda K. Coomaraswamy (1877-1947) was born when his ancestral land was firmly under the British crown and died shortly after it became free. He was born of a Tamil (Srilankan) father and an English mother and when he died, there was as if in symbolic harmony a (Greek Orthodox) Christian service, a cremation and an immersion of the ashes in the Ganges. It is an "accident", he had said, "whether we refer to Him as Jehovah or to Him as Agni". Life, and its extinction, are also accidents but not many are destined to experience or exhibit how accidental it all is.

It would be easy, and totally misleading, to find a 'mismatch' between what he said and what he did. He advocated 'villagism' but lived like a pucca sahib. He affirmed that the Western marriage does not "secure a permanent unity of spiritual and physical passion", but never married a woman from the East, and the average American cannot beat his record of separations, divorces and intimate relationships.

Yet nobody saw a 'mismatch' because it so obviously was not there. Indeed, as Joseph Epes Brown wrote to Mrs Coomaraswamy on hearing of AKC's death while living with the Oglala Sioux Indians in North Dakota in the course of his anthropological fieldwork, her husband "is in the hearts of many of these venerable men (ie, the Sioux Indians) – men whom I love to be with, for in every way they remind me so much of your husband". AKC was an Indian, whether the word is taken to mean an Indian from India or one from America. He recognised a common thread running through the ancient and medieval wisdom, and was a stubborn anti-modernist.

This common thread, as perceived by him, was more than a common denominator; it was a permeating mind-state,

and he was, with the help of his vast erudition able to find substantiation for this from cultural expressions varying over time and space. Very few are the scholars who had the learning and the observation power to present ancient Greece and India, Japan and Central Asia, Amerindians and the Vedic sages, Sufi poets and the folk art as one synergic dynamic system. It is thrilling, to say the least, to find him using a passage of the New Testament to explain a verse from the Vedas.

AKC believed in the fundamental 'one-ness' of religious experience if not exactly religion and he never thought that cultural practices were anything other than an expressionmode of this experience. One should not be misled by his description of the Mughal painting for example, as 'secular'. One should examine the semantics of this word in its correct, Western usage, and not in its political deployment in contemporary India.

But this 'one-ness' has a distinct Indian exegetical edge. A sentence like "..... in this Indian type the iconography is specifically and minutely Indian and has a strictly Indian mythological reference" is in fact an axiom of his scholarship and sensitivity, not merely a derivative. This axiom had political corollaries when he was a distinct, if distant, participator in the nationalist mood of India at the beginning of this century, projecting *swaraj* and *swadeshi* in a Gandhian manner before the Mahatma came on the Indian political scene. He came from a family which had gone 'too far' in its orientation towards the West, and Coomaraswamy was turning to his roots in his own refined manner.

He was to find virtue in everything that the West, and the Westernized Easterner, is not sympathetic to. Nothing illustrates this better than the fact that he chose to publish in translation, in

collaboration with an Iranian scholar, a narrative poem on the real life story of a young woman who committed sati, written in Persian by the explicit command of Akbar. The tragic reverence for the misunderstood India is a dominant if not a directive principle in his vision of culture.

It is, however, not correct to think of this as romanticism. The respect that he commanded from the academic community originated from the database that he built and the analytical insights that he could communicate. But communication is no easy matter, and AKC knew it more than many others. "There is little or nothing in a modern American education", he wrote sometime later than 1944, "to qualify a man to converse with a Tibetan or Indian peasant – not to mention a scholar". He therefore opted for what he called the Highest Common Denominator, the Self, as the optimistics for communication but when it came to saying something that needed to be said, he spoke like a mystic: "Only the dead can know what it means to be dead".

'Death' is not the word, however, he uses when he translates *mṛtyu* from a Vedic passage, he uses the word 'He' so that the English-speaker can understand what is being said.

This basic schism between the West and the East – the inability of the West to understand that Death is He and He is death, despite AKC's best efforts, has not been overcome. It is not easy, therefore, to understand AKC when he says. "The Hindu of any caste or even a barbarian, can become a Nobody".

But unless one tries to perceive how he tried to communicate the secret of "dementation" (= a - manib hava) one has no way of understanding what it means to be a Hindu. For unfortunately, there is little or nothing in a modern Indian education as well, to qualify a man to converse with an Indian peasant.

Sri Lanka: Delhi's New Thinking

M R Narayan Swamy

After years of a virtual hands-off policy on Sri Lanka, there appears to be a subtle change in the making in New Delhi vis-a-vis Colombo. The coming to power of the BJP had greatly alarmed the Sri Lankan establishment. There was fear that the BJP may throw aside New Delhi's pro-Colombo attitude while dealing with the ethnic conflict – a policy that came into being after the withdrawal of the IPKF from Sri Lanka in March 1990 and got reinforced by the assassination of Rajiv Gandhi by the LTTE suicide bomber in May 1991.

Most Tamil groups/parties in Sri Lanka are eager to build fences with the new regime in New Delhi. A few of them have had sporadic contacts with the BJP leaders in recent years. Those who have already interacted with the BJP leaders since they took power have been made to understand that on two issues there will be no change in the government thinking: one, ensuring the territorial integrity of Sri Lanka; and, two, not encouraging the LTTE directly or indirectly. However, the Gujral doctrine of completely keeping away from Sri Lanka's ethnic conflict (which the Tamil groups were opposed to) shall be jettisoned. "There will be involvement but no intervention", a BJP stalwart recently told a visiting Sri Lankan.

Sections of the Indian establishment have been worried over the manner in which New Delhi almost insulated itself from the island nation from about 1990. Initially it was thought to be a good lesson to the then regime of Ranasinghe Premadasa, perceived as a traitor who packed off the IPKF unceremoniously and even armed the LTTE against Indian soldiers. But the LTTE's subsequent growing military clout, including the takeover of the entire Jaffna peninsula (until late 1995), was a matter of concern for New Delhi. Although the Indian security establishment continued collaborating with its Sri Lankan counterpart during this period, mainly to thwart the LTTE movements by sea from Tamil Nadu, New Delhi ceased to be a diplomatic player of any importance in Sri Lankan affairs. Colombo was, of course, greatly happy.

* * *

But this hands-off policy unexpectedly resulted in, according to some analysts,

the Indian Government distancing itself from even pro-India Tamil groups. It was probably thought by the Indian policy-planners that maintaining close links with these groups (some of which are represented in the Sri Lankan Parliament and some not) would not be to the liking of Colombo. That many of these groups had risked everything by embarrassing Colombo and the LTTE at different times because of their closeness to India (and in the process got branded as Indian stooges) was lost on New Delhi. Some Tamil militants-turned-politicians became disgusted with India, muttering that New Delhi only deserved the LTTE. For their own political survival and existence they moved closer to Colombo. Simultaneously, the Indian intelligence virtually stopped funding the former militant groups. Things became so bad that when one Tamil group (which has been targeted by the LTTE) sought Indian assistance to hold a conference in 1993 in a secure place in India (in Andhra Pradesh, Kerala or Karnataka), it was rebuffed; the group members eventually held their conclave inside a Sri Lankan refugee camp in Tamil Nadu (without the knowledge of the Tamil Nadu police) after paying off the camp officials!

About a year ago Colombo was taken aback when two members of the Eelam National Democratic Liberation Front (ENDLF), another pro-India group which has no presence in Colombo but maintains offices in Tamil Nadu, travelled to LTTE-controlled areas in Sri Lanka's north and established contacts with the Tigers. Sri Lankan officials were convinced that the visit could not have been possible without the approval of the Indian intelligence, although the motive behind the trip remained unclear. If the LTTE was surprised, it hid its feeling well.

A reading of LTTE journals indicates the Tigers probably had hopes that the coming to power of a non-Congress government in New Delhi might force a radical change in Indian policy to their advantage. This seems unlikely. The new government may, however, publicly press Colombo to go ahead with its devolution package, in the process killing two (three?) birds with one stone. One, show that India is interested in the goings-on in Sri Lanka (in contrast to

New Delhi's earlier we-care-a-damn attitude); two, it will please the non-LTTE Tamil groups (which recently appealed to the Indian Government to take an active interest in Sri Lankan affairs) while Colombo will have no ground to complain since it is also publicly for the package; and, three, give a clear message to the LTTE that New Delhi, like before, remains firmly opposed to any break-up of Sri Lanka.

* * *

But certain crucial questions need to be answered here: Can the Sri Lankan Government implement the devolution package in the absence of a consensus within the Sinhalese society? What happens if the devolution package is sabotaged by the Sri Lankan Opposition? And can the LTTE be ignored completely even if one doesn't like the group? The LTTE, it needs to be emphasised, remains a powerful military machine and still in control of large chunks of Sri Lankan territory.

However, the thinking in the BJP Government cannot be music to the LTTE's ears. Already the group is at the receiving end of an international backlash over its reliance on deadly suicide attacks and refusal to give up its Eelam demand. It also seems clear that the (earlier) pro-LTTE noises by some of the BJP's allies will have no bearing on the new government. Indeed, the worry in Colombo after the BJP's election victory was based largely on the likely role to be played by Defence Minister George Fernandes, who recently organised a meeting on Sri Lanka which was attended by pro-LTTE politicians from Tamil Nadu (and given wide coverage in the LTTE journals), PMK leader S. Ramados, who has never hid his pro-LTTE views, MDMK leader Vaiko (V. Gopalswamy) and even the Shiv Sena, whose supremo Bal Thackeray some years ago came out openly in favour of the LTTE by calling it a Hindu group. The BJP, a party official said, did not consider the ethnic strife in Sri Lanka as a Hindu-Buddhist conflict. According to him, the Sri Lankan problem was a Tamil-Sinhalese dispute and it would do good if the two communities came together. Strangely, that is an assessment shared by the Congress party too.

The Tamil Nadu Connection

Radhika Coomaraswamy

Another aspect of Tamil nationalism that is explored in detail is the relationship between Tamil Nadu and the Sri Lankan Tamils. Central to earlier Indian notions of security in the region is that there is a "deeply felt sentiment" between Indian Tamils and Sri Lankan Tamils and the centre must intervene to protect those sentiments. Also central to Sinhalese perception is that Indian Tamil nationalism and Sri Lankan Tamil nationalism are intertwined and in fact in most Sinhala discourse there is very little differentiation between the two – hence the lament "we Sinhalese have no where to go" ie – the Tamils have Tamil Nadu. Sankaran Krishnan in his article "Divergent Narratives – Dravidian and Eelamist Tamil Nationalism" contests these perceptions. He argues that until 1983, Tamil Nadu was utterly uninterested in Sri Lankan Tamils and that Tamil Nadu nationalism and Sri Lankan Tamil nationalism are completely different. While Tamil Nadu nationalism was anti-Brahman and anti-castist, Sri Lankan Tamil nationalism in its early phase under Arumugha Nawalar was very castist ensuring Vellalar domination. He says Tamil Nadu nationalism was radical while Sri Lankan Tamil nationalism was conservative. He also argues that the trajectories were different. While Tamil Nadu nationalism went from separation to accommodation, Sri Lankan Tamil nationalism went the opposite way-from accommodation to separation. He argues that Indian and Sinhala misperceptions of the link between the two nationalism led to their own downfall and the creation of their own nightmares. While what Krishnan says about Sri Lankan Tamil nationalism is true under the early Tamil leadership how true is it of the vernacular educated, non – Vellalar dominated LTTE? Aren't they also nationalist, secular and anti-castist like the DMK? Krishnan unfortunately does not reflect on the differences in the nuances of Sri Lankan Tamil nationalism and their variations depending on the leadership.

Krishnan also introduces us to another aspect which is not properly explored in this volume – the Indian nexus and Indian policy in conditioning our responses to the ethnic conflict. For both Krishnan and Arasaratnam, the creation of Bangladesh was an important turning point for Tamil nationalism in Sri Lanka. Indian intervention for the creation of a separate state was seen as a signal for Tamil nationalists and it may not be a coincidence that Chelvanayagam resigned his seat and contested on a separate state platform soon after the creation of Bangladesh. Krishnan also argued that Indian policy in Bangladesh conditioned the foreign policy of Mrs Gandhi in Sri Lanka – what he calls the "dual track" policy – putting overt DPL pressure on the government on the one hand and the intelligence agencies supporting dissident groups to destabilise the state on the other. The relationship, or perceived relationship, of the Sri Lankan Tamils with India is an important area of research which, except for Krishnan and a few others, remains under researched.

However, it is Gunatilleke who questions whether Tamil nationalism has not been radically transformed since leadership passed into the hands of militant youth. Is Tamil nationalism of today the same nationalism we had under Arumugha Nawalar, the conservative Hindu translator of the bible? He points to the experience of Tamil youth as conditioning a different response. They are vernacular educated and unlike the earlier set of Colombo based leaders, they look more to Tamil Nadu than Colombo. The violence of 1983 has left an indelible mark on their psyche creating a feeling of victimhood tinged with violence. They are supported by a Tamil diaspora many of whom are also victims of violence. The four principles they put forward including the recognition of a distinct Tamil national identity, a Tamil homeland, and the right to self-determination are what may be termed "bottom

line principles" leaving very little room for discussion and dialogue. He argues that they have a militaristic, authoritarian ideology which glorifies violence and suicidal death. They leave very little space for rational inquiry and accommodation. Most importantly, there is no common discourse for multi party democracy and human rights as we know it. Without a common discourse can there be a common settlement? The question vexes all of us and is appropriately raised by Gunatilleke as the postface of the volume. Tamil nationalism, in its militaristic and authoritarian form may never make peace with the current Sinhala dominated polity. This is accentuated by Gunatilleke's description of the devolution debate clearly pointing out how both Sinhala and Tamil nationalist ideology has destroyed material considerations and the power of rational discourse.

The pessimistic future put forward by political scientists and historians is made worse by the work on violence in our society by our youthful anthropologists. Pradeep Jeganathan in a brilliant piece entitled "All the Lord's Men? Ethnicity and Inequality in the Space of a Riot", describes the 1983 riots from the point of view of the perpetrator. Having befriended the notorious thugs of his area, especially a man named Gunadasa, he is taken by the thugs during the 1993 Floods to the marsh where they hid all the loot from the riot. And they tell their story. When the riots broke out, they went to the "Walauiwa Mahathaya" who was having a problem with a Tamil tenant. The Mahathaya gave them the nod and told them to "do what you can". So the thugs went and threw out the Tamil occupants and burnt their belongings. They went further, they began destroying the house until a voice from the outside reminded them that this was a Sinhala house. The thugs control their class anger and stop the destruction. Property then becomes central to the dos and don'ts of riots as for a moment there is class complicity between Guna

dasa and the Mahathaya in an evocation of what Jeganathan calls "Sinhalaness".

At the same time "Tamilness" is constructed by these thugs in a manner that justifies their actions. They say that the Josephs, the Tamil family who was thrown out were aloof, haughty, not mixing not sharing and accusing one of its members of theft. Again property impinges as an important focus of conflict. They make the Josephs the "agents of their own misfortune", and as Jeganathan points out this is a broader problem when societies become unable to acknowledge the atrocities of collective violence. The thugs are not immune. Horrendous violence is justified so that it can be assimilated without destroying ideological constructs and feelings of self-righteousness.

It is not only the Tamils who are subject to violence. Jani de Silva's "Praxis, Language and Silences" gives us an insight into the revenge politics of the JVP. The emphasis on physical elimination which became the hallmark of the JVP in the 1980s, the arming of the lumpen elements in society by both the JVP and the State, the protection rackets, the activities of the DJV filled with the ranks of army deserters, the forced demonstrations, the humiliating public punishments etc..... are all recounted and analysed. The ideologies that posit violence as an acceptable means of achieving social justice have a certain pathos and hypocrisy that is extremely frightening.

But of all the writings on violence in the volume, it is Patricia Lawrence that deals with the truly innocent – those caught between the forces of militancy and the security forces of the state. In her article "Grief on the Body, the work of the Oracles in Eastern Sri Lanka", Lawrence explores the role of oracles in helping civilians come to terms with violence in their midst. She says, the war has resulted in the silencing of the population out of fear and the erasure of history. However, in local temples the oracles break that silence. They reveal fate of the "disappeared", they re-enact the torture of sons and daughters and they vivify the experience of undescr

ible pain. In electrifying detail she describes an oracle going through the contortions of someone experiencing torture. Yet, even in this world of violence and conflict there are stories that go against the grain and raise the hope of ethnic harmony. There is the story of a Sinhalese soldier who has become an oracle to the Goddess Pattini, living in the Tamil areas, helping them cope with their dead and the disappeared.

Another major area where the Michael Roberts volume has original and new information is on the confluence of class caste and ethnic factors. The essay by Mick Moor on "Ethnicity, Caste and the Legitimacy of Capital" is extremely informative on the social composition of the capitalist caste. His rather startling revelation that "the Sri Lankan Tamils, the Sri Lankan Muslims and the Indian Tamils are neither markedly over or under-represented in positions" in the capitalist sector should go a long way in dispelling myths about the exploitative nature of these minorities. He accentuates the fact that Sri Lankan Tamils went into the professions and are really not present in the corporate sector in large numbers. He claims that it is the minority castes, the Karavas, Salagamas and Duravas that are over represented and that the Wahumpura caste is under represented along with the Goigama. It is the under representation of the majority Sinhala Goigama caste over a long period of time that has led to the sense that the capitalist sector is dominated by foreigners and aliens. The strong presence of foreign western capital and small Indian trading communities – as distinct from Sri Lankan Tamils and Muslims – that is really the basis of this perception.

Mick Moore, drawing from the work of Tara Coomaraswamy, argues that the Goigama belief that they were losing out in the capitalist sector led to a reliance on the state to even the opportunities. The post-colonial history then witnessed the Sinhala Buddhist Goigamisation of capital. The first to be eliminated were the Nattukottai Chettiars, an Indian money lending community who after the

British legislated on debt collection soon left the country. The Plantations were the next to be nationalised and this according to Moore adversely affected foreigners and the Karava elite. The creation of the Gem Corporation also took away Muslim monopoly of the Gem trade. In addition political patronage in the 70s and 80s allowed for the growth of a Sinhala Buddhist Goigama business elite who have now become responsive to free market policies. Moore suggests that post 1977 developments require a more in depth analysis. He says the growth of the stock market is something that should be highlighted and the ethnic analysis of the public quoted companies again show an imbalance this time dominated by minority castes and Sri Lankan Tamils. The Sri Lanka Tamil community finds the ethnic blind public quoted company a better form for the investment of capital. Their experience in the professions gives them a special place in these companies. It may be necessary to try and nip the problem in the bud by encouraging Sinhalese Goigama family owned companies to go public so as to remedy the imbalance. Mick Moore's work is very exciting though some discussion of the methodology used to discover the background of those involved in business would have been useful.

With regard to the women's question, Neloufer De Mel's "Agency or victim? The Sri Lankan Women Militant in the Interregnum" is a seminal work that incisively discusses the problem of women's agency among women who are involved in the LTTE and the JVP. Though she notes that there are differences between the movements with JVP women being far less militarised, there are similarities of commitment that beg analysis. Adele Balasingham has claimed in her book that the LTTE women are "breaking new ground" for women in Jaffna. Women are no longer contained by traditional notions of femininity and are now involved in manly, public activities. Neloufer de Mel convincingly outlines the nuances that make this position less tenable. She shows how the new regime of the LTTE is as

containing of women as the old regime. It contains female sexuality, it privileges discipline and chastity over all other values, it celebrates death over life and it is after all a Male supremo who is "the midwife of their agency". This reliance on male hierarchy and the regulation of women in such a strict and controlled manner cannot be seen as total liberation. In addition as Jeganathan points out masculinity today is increasingly a culture of violence. Women should develop masculine qualities but what about men developing some feminine values – why can't we ask the male supremo and his colleagues to think about a little more about compassion, tolerance and nurturance?

There are also some comic moments in the volume when it comes to the Volume at least from a feminist point of view. There is Henry Candidus in the nineteenth century lamenting the fate of elite Sri Lankan men who have to

resist "bewitching creatures, innocent idols of the English heart" in favour of "silly creatures..... who divide their time between chewing beetle, making clumsy and unwieldy jewelry".... poor Candidus what a dilemma!! But think of the problem that us silly creatures must experience, having to put up with men such as him. And then there is Charles Sarvan who fantasises about the thoughts in Dhanu's mind the day before she kills Rajiv Gandhi. He imagines that she thinks of it as her wedding day and Rajiv as her husband... Only a man will fantasize about a woman wanting to marry the man she kills. Besides, given all the male killers we have, do they fantasize about weddings on the eve of murder? This is truly ridiculous though one must add Sarvan's English is reminiscent of Joyce's Ulysses.

Except for these strange pieces, the Volume is an excellent collection of articles from Sri Lanka's leading scholars

on problems that are more than of intellectual interest. It is a montage of diversity, inquiry and analysis and is a welcome addition to the literature. Though much of it is about despair, there are moments of human triumph such as the poetry quoted in Neloufer De Mel's piece on women's agency.

"Dreams
their meaning
is lost to me
who is uncertain
that the sun will rise
tomorrow

Now
the beautiful night
shaped by the day
is only a dream

In 1991, according to Neloufer de Mel, Sivaramani, took all her poems and set her room a fire, committing suicide. Another suicide... another wasted life.

E. U. AND ASIA:

Challenges in the 21st Century

Dr. Hans Christoph Rieger

(University of Heidelberg, South Asia Institute)

On the 9th of May, we celebrated Europe day, which is equivalent to a national day of the European Union. That date was chosen because on May 9, 1950, the first move was made towards the creation of what is now known as the European Union. In Paris on that day, against the background of the devastating Second World War which had destroyed large parts of Europe, and amidst fears of the threat of a Third World War, the French Foreign Minister, Mr. Robert Schuman read the following declaration.

A lecture delivered at the Bandaranaike Centre for International Studies.

Mr. Mervyn de Silva, BCIS committee member chaired the meeting.

"World Peace cannot be safeguarded without creative efforts equal to the dangers which exist to world peace. By the pooling together of basic production processes and the setting-up of a new High Authority whose decisions will link France, Germany and the other countries which will accede, this proposal will bring to pass the first concrete steps of a European Federation which is indispensable to the preservation of peace".

What he in practice proposed was the creation of a supranational European institution, charged with the management of the coal and steel industry, the very sector which was, at that time, the basis of all military power. The countries, which he called upon, had almost destroyed one another in a dreadful conflict, which

had left after it a sense of material and moral desolation.

The Schuman declaration led into the forming of the European Coal and Steel Community in 1951. In addition to France and Germany, Belgium, Luxembourg, the Netherlands and Italy also joined. These six countries formed the core group of the European integration for the years to come. The United Kingdom, which at that time did not accept the principle of the supranational and autonomous High Authority, chose to stay out of the Community, perhaps in the mistaken belief that this kind of a continental approach to a united Europe would not work out anyhow.

The European Coal and Steel Com-

munity was intended to be the first step in a rapid process of political integration in Europe. The next step was planned to be the European Defence Community. This plan, however, though the treaty had already been signed between the six countries, was killed off in 1954, when the French National Assembly refused to ratify it.

After this failure the attention was then concentrated on economic co-operation and trade. After two years of preparations the second community, the European Economic Community (EEC) and the third, the European Atomic Energy Community (Euratom), came into being with the signing of the two Rome Treaties on March 25, 1957. Again, the United Kingdom, which briefly had participated as an observer in the preparatory discussions on the Rome Treaties, opted to stay out. At this stage the British possibly could not foresee that when they in the beginning of 60ies had changed their mind and wanted to join, they would be refused and would need to wait till 1973. That year marked the first enlargement of the European Communities with the entry of Denmark, Ireland and the United Kingdom.

The EEC was the most important of the three communities. It set up institutions and decision-making mechanisms through which both national interests and a Community view could find their expression. From that time on the EEC was the major axis round which the movement for a united Europe turned. Between 1958 and 1970, the abolition of customs duties had spectacular effects; trade within the Community increased six fold while EEC trade with the rest of the world went up by a factor of three. Average gross national product in the EEC went up by 70% over the same period. Following the pattern set by the major markets operating on a continental scale, such as that of the United States, economic interests in Europe took advantage of the invigorating effects of opening up Europe's frontiers. Consumers became used to seeing an ever-increasing variety of imported goods in the shops. The European dimension had become a reality.

The Treaty of Rome's objective of

building a common market was partly achieved in the 1960s when customs duties and quantitative limits on trade were abolished. But the authors of the Treaty had underestimated a whole range of other technical obstacles to trade, a set of complicated obstructions camouflaged as rules and regulations which it was often impossible to get around. The European Commission therefore took a bold initiative, which culminated in the signing of the Single European Act in 1986. This set the first of January 1993, as the date by which a full internal market was to be established, and, by extending the practice of majority voting, gave the Community institutions the means of adopting the 300 directives required. The Single Act links the objective of the great internal market closely to another equally vital target, the achievement of economic and social cohesion. Europe has introduced structural policies to help regions where development is lagging behind or which have been hard-hit by technological or industrial change. It promotes cooperation in research and development. It also takes account of the social dimension of the internal market. The proper functioning of the internal market and healthy competition between businesses are inseparable from the ongoing objective of improving the living and working conditions of Europe's citizens. The Single Act also provided a legal basis for European political cooperation, which had been developing since 1970. Cooperation in home affairs and justice was introduced.

When the Treaty on European Union, signed in Maastricht on 7 February 1992, came into force in November 1993, it gave European integration a whole new dimension. The European Community, which was essentially economic in aspiration and content, was transformed into a European Union, which now stands on three pillars: the Community pillar, Common Foreign and Security Policy pillar and the Home Affairs and Justice pillar.

The Community pillar is run according to the traditional institutional procedures and governs the operations of the Commission, Parliament, Council and the Court of Justice; basically it involves

managing the internal market and the common policies. The other two pillars involve the Member States in areas hitherto regarded as being matters over which the national governments alone had power: on the one hand foreign and security policy and, on the other, home affairs, covering matters such as immigration and asylum policy, the police and justice. This is an important step forward in that the Member States regard it as being in their interest to cooperate more closely in these areas, thus affirming Europe's identity in the world and making sure their citizens are better protected against organized crime and drug trafficking.

The Maastricht Treaty also constitutes the legal basis for the European Monetary Union and the single currency. It defined the creation of the EMU in three stages and the conditions for participation in the final stage of EMU, which is set to start on January 1, 1999.

The latest treaty was the Amsterdam Treaty from 1997, which disappointed many by failing to introduce major structural changes in the Union's institutions and decision-making procedures. However, it paved the way for further enlargement of the European Union. Since the first enlargement in 1973, there had been further enlargements bringing the number of Member States to fifteen: Greece joined in 1981, Portugal and Spain in 1986 and Austria, Finland and Sweden in 1995.

The unique feature of the European integration – which separates it from other multinational organizations – is that it has an independent system of law administered by a supranational Court of Justice and the European Commission. When national interests are subordinated to the collective, there has to be an autonomous supranational element in the structure to make sure that the member states respect the commitments into which they have entered. Member States' acceptance of the binding nature of the European Law, and the fact that it takes precedence over national laws, is fundamental to the functioning and existence of the European Union.

(To be Continued)

A Dalit Challenge to the Nuclear Brahmins

Dr. John Gooneratne*

India does not want to be treated as a Dalit Nuclear Weapon State. She is demanding acceptance by the Brahmin Nuclear Club of Five. This is an aspect that does not get highlighted enough in the din of congratulations and denunciations following India's nuclear tests on 11 and 13 May and Pakistan's "reactive tests" on 28 and 30 May. In fact, there is certain shyness among the smaller South Asian countries in facing up to the long-term security implications of these tests, and the drastic changes in the South Asian security environment the nuclear tests have wrought.

Sri Lanka's two responses are a good indication of the dilemmas faced by the smaller countries. The nuclear non-proliferation theologians of the Ministry of Foreign Affairs gave what one can call an institutional response. It managed to put out a statement that didn't mention the word 'India'. Into the same statement it brought in missile testing, presumably Pakistan's, without mentioning the word 'Pakistan'. Contrary to what the official statement said, Sri Lanka has never previously commented on any of the Indian and Pakistan missile testing that have been taking place over the years. "Sri Lanka notes with deep concern the missile and nuclear testings which have occurred recently in the South Asian region. Sri Lanka continues to reiterate the position it has maintained on previous occasions on such testings...." Basically Sri Lanka took a wishy-washy position. There's nothing wrong with it, if that was the intention. Considering the politically (and, literally, as well) earthshaking impact of the nuclear tests that took place in one's own neighbourhood, the long time taken to issue a statement was noted by political observers. Sri Lanka's reactions were issued on 14

May. Various sinister interpretations have been sought to be given for this delay. But one has to only remember that 11 and 12 May were Wesak public holidays in Sri Lanka.

Obviously, the message of the Foreign Ministry statement was not clear enough. So at a meeting of the Foreign Correspondents Association on 15 May, the Sri Lankan Foreign Minister speaking of the Indian tests said: "We are certainly not opposed to India becoming a nuclear power". On the possibility of Pakistan following suit with its own tests, the Minister said: "We are not opposed to anybody becoming a nuclear power. I don't think the nuclear club should be closed to only five members". On the application of sanctions against India, the Minister replied: "The application of sanctions includes a very judgmental decision, a punishment. World affairs cannot be conducted on that basis because very, very few countries can afford to take a high moral ground on anything at all" (*'The Island'*, Saturday, 16 May 1998). Well, that was Sri Lanka's second response.

In an interview given to two Indian journalists, President Kumaratunga framed the different elements of Sri Lanka's position on India's nuclear tests in the following words: "That (India's nuclear tests) may be a problem between India and Pakistan and the world as a whole, but it does not have any special significance for Indo-Sri Lankan relations". (*'The Hindu'*, 2 August 1998).

As Sri Lanka's reactions show, the smaller countries of South Asia viewed the nuclear tests in the South Asian regional 'power' framework. Hence their muted reactions. And as far as Sri Lanka was concerned, it had also learnt its lesson from the eighties on how relations with India were to be managed.

The US, a few countries of the West, Japan, China and some others were critical of India's nuclear tests. Some Western countries like UK and France remained pragmatically quiet. The US as the only world hegemon feels a responsibility to police the prevailing nuclear non-proliferation regime, whatever its shortcomings be.

Apart from the nuclear non-proliferation angle, there are other angles from which to view the Indian nuclear tests and Pakistan's "reactive tests". There are deeper issues that have to be dealt with. It relates to power, the distribution of power, and the attempts to cartelize it.

India has said that it went ahead with the tests because it "was deeply concerned, as were previous Government, about the nuclear environment in India's neighbourhood". China hasn't taken kindly to the Indian Defence Minister's references, and to Prime Minister Vajpayee's 11 May 1998 secret letter to President Bill Clinton, that India's nuclear tests had China in mind. Those who disagree with the reasons given by the Indian government point out that the security environment in India's vicinity had, in fact, improved over the years. Improved relations with China had enabled India to reduce its forces along that border. Relations with Pakistan were contained within a framework of negotiations, though not always fruitful.

Then, were there other 'unstated' reasons for India coming out of the nuclear closet with these tests, and which could also at the same time explain the discrepancies between the officially stated reasons and actual conditions on the ground? There were. India has for some time now always taken great pains to maintain and publicize a "great power box-score". Here is a sampling of what

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the Indian national media and official statements proudly highlighted at that time:

– India had joined a “select club”, comprising hitherto of only the US, USSR, UK, France and China with the induction on February 3, 1988 of the nuclear-powered submarine INS Chakra into the Navy.

– On February 25, 1988 India successfully test-fired its first surface-to-surface missile “Prithvi”. The missile has a range-capability of 250km. It had the best “warhead-to-weight ratio” among the missiles of its class. It was pointed out that hitherto only the US, the Soviet Union, France and China have this class of missile, implying India had now joined the “select club”.

– On May 22, 1989 India successfully carried out the first test of its long-range missile programme, the missile Agni. India with its Agni launch had joined the “select Intermediate Range Ballistic Missile (IRBM) club”, hitherto confined to US, USSR, France, China and Israel.

To the smaller countries of the region the message was easily decoded, especially when this increase in military strength was accompanied by invasive political doctrines like the Indira Doctrine. India's big-power ambitions were explicitly stated by one of India's Strategic Studies gurus, K. Subrahmanyam: “While the neighbours are prepared to recognise China as a great power, they insist on treating India as their equal though India may be ten times or more their size and they find it intolerably pretentious for India to think of equality with China which is only slightly bigger than India. In other words, they can accept a real foreigner – white or yellow nation – being a great power but cannot stomach the thought of one of their brown brethren being considered that” (*Indian and Foreign Review*, Vol. 18, No.22, 1-14 Sept. 1981).

This is an important aspect of the present situation that has to be addressed

by those wanting to reduce the tensions that have been raised. It is a question of big power status-seeking. This aspect of the problem surfaced once again in the aftermath of the recent nuclear tests. Addressing Parliament on 27 May 1998 Prime Minister Vajpayee had this to say: “India is now a Nuclear Weapon State. This is a reality that cannot be denied. It is not a conferment that we seek; nor is it a status for others to grant..... It is India's due, the right of one-sixth of human kind”.

In contrast, the US State Department spokesman Mr. James Rubin was quoted (*The Hindu*, 5 June 1998) as saying that under international law India could not claim the status of Nuclear Weapon State. Only a state, which had tested its nuclear weapon devices before 1968, would be entitled to the claim. US Secretary of State, Madeline Albright was quoted as saying that India cannot expect to blast its way into the Security Council. Japan had reportedly (*The Hindu*, 4 June 1998) sent an ‘urgent message’ to the UN Security Council urging it not to recognize India and Pakistan as nuclear powers. Quoting articles from the NPT, a Russian Foreign Ministry spokesman said (*The Hindu*, 5 June 1998), Russia does not consider India and Pakistan as Nuclear Powers despite the recent tests carried out by the two countries.

India has, however, very clearly indicated she does not want to be treated as a Dalit Nuclear Weapon State. She is demanding acceptance by the Brahmin Nuclear Club of Five. But there is a lot of opposition to it. So will we have a Dalit challenge, and what form will it take?

India's attitude towards the other South Asian countries is often referred to as ‘hegemonical’. This word encompasses a wide spectrum of meanings. It is used in a technical sense, where a country plays a leadership role within its area of influence, and the countries in that sphere of influence enjoy certain benefits from the particular hegemon. At the other

extreme is where a country is hegemonical in the sense that it wants to dominate the area and the countries within it, with no benefits being extended in return. In the case of India often it is a case of the latter meaning.

In non-nuclear times, Sri Lanka and other smaller countries of the region have faced varying policies from New Delhi. Sometimes policies are associated with the personality of the leader e.g. the invasive hard-line policy during Mrs. Indira Gandhi's incumbency (Indira Doctrine). At other times, regional-party-led coalitions have been frequently forming the government, and their policies have tended to be more neighbourhood-friendly (Gujral Doctrine). These wild swings in policy impart a sense of uncertainty to what India's intentions are, and make it an “unreliable hegemon”. This trend is accentuated by the prevailing trends in Indian politics – the emergence of regional parties in coalition, and the waning of national parties. Coalition national governments tend to be held hostage by small regional parties e.g. DMK, AIADMK and smaller parties. This helps smaller parties to push their separate agenda at national levels e.g. support for the LTTE.

The question now for the smaller countries is how nuclear India will translate its newfound nuclear power in its foreign policies. The immediate reactions from the Indian government were not encouraging. Mr. Advani, the Home Minister and a very senior BJP member threatened to “nuke” Pakistan over the Kashmir issue. Such rhetoric has been significantly reduced especially after Pakistan's “reactive tests”. But the fact remains such threats were made from very high levels of the BJP government.

The questions that the countries of South Asia will be asking themselves are – What will be the new “doctrine” of nuclear India towards its neighbours? Will the Dalit nuclear state be accepted into the Brahmin nuclear club, and what difference will it make for the region either way?

Women, Law and Colonialism

Nair, Janaki (1996) *Women and Law in Colonial India*, Kali for Women Press, New Delhi, India.

Presented at the ICES Auditorium for the Law & Society Trust (LST).

Reviewed by Yolanda Foster

Janaki Nair's book is heir to three turns in social theory. The first is a concern with writing women into history thereby challenging traditional historiography (we can think here of writers like Sheila Rowbotham, Kumari Jayawardena, Kum Kum Sangari etc). The second is an awareness of the ambiguity of the project of modernity – modernity here being perceived as a rational project for social and economic change having its roots in the Enlightenment philosophy of the seventeenth century (and here we can think of theorists as diverse as Weber who wrote about his disenchantment with modernity; Adorno and Horkheimer of the Frankfurt School and a range of post-colonial scholars). Thirdly, Nair echoes the concerns of feminists aiming to challenge a homogenising sisterhood in favour of one which respects context and difference (here the wealth of writers is huge so I shall only mention Audre Lourde, Gayatri Spivak, Trinh T Minh Ha and Sandra Harding).

Underscoring these three themes is a recognition of the inter-relatedness of things – reality is complex and stratified. One element of Nair's text which I found appealing though problematic is that she holds on to the idea that there remains the possibility of freer modes to being even if the path towards this requires deeper self-reflexivity and questioning the conditions under which things can be changed.

This takes us neatly back to the area of law – its construction during colonialism, its impact on women and the interests surrounding its evolution. A major strength of Nair's narrative is that

she recognises that justice and truth are values which do not exist independently of this world. This is why she promotes an understanding of the sociology of law.

This book contains such a wealth of detail that I decided to select one particular example of legislative change that Nair documents – the changes to matrilineal law in Malabar (p.149). The reason for this apparently idiosyncratic choice is that this case echoes the themes I mentioned at the beginning and also highlights the importance of genealogy as a method of research.

One of Nair's critiques of law in India is law as a colonial institution. Colonial law helped construct the bureaucratic and political space to which nation states have been giving their form since the seventeenth century. In this sense law helps to produce and transform social space. This is evident if we return to the fate of matrilineal law as practised mainly by the Nayers of Malabar. The system was marked by matrilineal descent and exogamy. Prior to colonialism all members of a *tarawad*, as the matrilineal clan was called, were co-heirs to property. However in 1814 a British Court at Sadr decided to make the eldest male of the group the head of the household. This decision was informed by colonial notions of appropriate 'family' and helped to construct these notions through legal reform. This highlights "the dissolution of earlier forms of power and authority, along with their decline as economic institutions, and the emergence of new forms of bureaucratised authority" (p.148).

The deployment of utilitarian discourse on the law and 'rights' was also a legitimating factor for the colonial project. Rhetoric about social reform helped to mask the desire to control and exploit. The introduction of colonial rule into Malabar at the turn of the century

wrought serious changes in the material base of the matrilineal family (p.152). For one, the agrarian structure was changed. Traditionally a three-tiered hierarchy of castes namely the Nambudiris, Nayers and lower castes enjoyed a hierarchy of rights over land as *janmis*, landlords, *kannakars* (tenants) and sub-tenants respectively. They were each entitled to a third of the produce of the land.

The law changed drastically when *janmis* were declared the absolute owners. The expansion of the cash economy also speeded the process of change. The colonial agrarian system enabled concentration of land in the hands of a class of rent-paying and rent receiving intermediaries. By the beginning of the twentieth centuries, Nayers were appropriating a large share of the net produce.

Secondly, the British employed a disproportionately large number of educated Nayar men, who through services outside the *tarawad*, managed to accumulate a certain amount of property. Large numbers of Nayers rose within the administrative machinery to become village officials and judges. Yet the self-earned income reverted to the joint property of the man's *tarawad*. The expanding middle class, cherished new aspirations for the education of their children yet this could not be realised within the structure of the *tarawad*. It was this class, with an increasing exposure to the English language, who were most susceptible to Victorian missionary notions of appropriate family.

These changes intersected with colonial ideologies of marriage and family and were behind the reform of Nayar matrilineal law. So here we can recognise that law reform enabled the imperial state's real and contemplated control over a physical space otherwise hard to unify.

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The plea for marriage reform for example is linked to the extraordinary changes effected by colonial rule throughout the nineteenth century which made the material foundations of conventional and rather unconventional familial relationships unstable.

In this sense law was an institution of colonial power, part of the classifying mind of the colonial state, going hand in hand with the collecting of information for censuses and Orientalist writings on religion and architecture.

One problem with Nair's emphasis on the instrumental rationality of the colonial state is that it underestimates the ambivalence surrounding the project of modernity. Those who are anti-Enlightenment figures will critique a discourse imbued with implicit assumptions about the world and themes such as progress. Nonetheless we must acknowledge that modernity also ushered in a political discourse about rights which shook up feudal prejudices and challenged existing hierarchies. It had discursive as well as institutional aspects which sometimes had contradictory effects.

Both tradition and modernity have been carriers of patriarchal ideologies. The ideologies of women as carriers of tradition often disguise or mitigate actual changes taking place. As Indian nationalism became articulated it was fraught with various patriarchal assumptions which re-cast women as essentially mothers, even if it also offered them advantages. As Partha Chatterjee argues in an essay on "The Nation and its Women", the spirituality embodied in 'virtues' such as 'self-sacrifice, benevolence, devotion and religiosity' did not impede the chances for women moving out of the physical confines of the home; on the contrary it facilitated it, making it possible for her to go into the world under conditions that would not threaten her femininity" (Chatterjee: 1993: 135-157).

The problem though lies with the construction of identity which sets up specific subject-positions for women. This is why Nair's method of discourse analysis is useful. It deconstructs how femininity became produced as a position of cultural marginality. One aim of deconstruction as Spivak notes, involves the overturning of implicit hierarchies established in the binary to "discover

the violence" (Spivak: 1990: 8). The construction of gender identity as materialised through specific practices of law and reform created constructs that dichotomize fields of power. These dichotomies, as Chatterjee convincingly establishes, of spiritual/material, home/world, feminine/masculine; "while enabling the production of a nationalist discourse which is different from that of colonialism, nonetheless remain trapped within its framework of false dualisms" (Chatterjee: 1993: *ibid*).

Nair highlights the fact that Indian nationalists were, in a sense, the colonial states legates. Local social reformers also used colonial enlightenment discourse to facilitate class and caste advantages.

Now I should turn to what the text forgets. This theme of absence seems most appropriate for the week in which Octavio Paz died. An area which the book fails to deal with in sufficient depth is the discrepancy between laws passed in theory and rights in practice.

Back in 1995, the theme of the Beijing Women's Conference was "Seeing the world through Women's Eyes". What emerges from Nair's book is that the law clearly fails to achieve this. So far social reform at the legislative level has failed to counteract the most extreme problems facing women – the feminization of poverty and continuing violence against women. The most shocking fact in this book is the continued inequality of the gender ratio in India, an inequality which has actually increased over time. The largest obstacle to improving women's status remains patriarchy – examples such as female infanticide and child marriages, which should appear as anomalies as we approach the millenia, persist. Nair notes on p 1 of the book that:

"The demographic disparity between the sexes speaks volumes about *systemic* rather than just episodic or occasional forms of discrimination against women".

Indian feminists like Nivedita Menon recognise that the law alone can not transform patriarchal power structures in society. This necessitates rethinking on the efficacy of the law and a wariness about vesting more power in the state enforcement machinery. Perhaps then a concern with law literacy rather than

legal reform should be top of feminists agendas.

The wider context of social relations remains the unexplored territory of this book. Despite a recognition of the inter-relatedness of power structures Nair remains faithful to a liberal perspective on social change. She takes the easy way out by saying that a "wholesale rejection of the legal juridical framework would only be counterproductive in the long run. It is more worthwhile to be conscious of the limits of the legal process and work within them" (p6). Although she acknowledges that legal changes must be given meaning through wider social movements her decision to promote gender justice through liberal means sidesteps some of the more messy debates.

In December last year I interviewed Chitra Bandari, a social activist with the Saheli women's group in Delhi. She noted that the discourse of rights as a tool for social change can be problematic. The championing of legal reform is often voiced by middle-class women and could squash out more direct action. She noted that "there is a tendency for people to get wrapped up in policy making and forget the world outside offices, university halls and courts". A world where the law often fails to go. Although the law has secured some important personal rights for women, it evades an understanding and inquiry into the deeper relationship between social and economic oppression and law.

This doesn't mean we should shelve legal reform but we do have a right to be suspicious. History serves as a useful witness for the problematic reliance on law. Hegel notes that the period between the time of Augustus and Alexander Severus (A. D. 235) was a period of the greatest legal proficiency but it was also a period of the greatest tyranny. To avoid this contradiction between justice and practice it remains essential to problematise who makes law and for what purpose. And why is it that like K in Kafka's *The Trial* many people keep ringing in for help and all they hear are the echos of paper rustling in faraway corridors.

Part of the problem lies in the fact that law is originally a spatial representation, a form which presupposed and embodied certain representational spaces – a system of bureaucratically

managed consumption. If we are suspicious of the law it is incumbent on social theorists to start to imagine new spaces, new ways of being-in-common which allow for better access to justice.

On a final note, I'd like to remind the audience that despite a flood of writing which tries to develop new ways of understanding our complex world, there is a sense in which we are still wrestling with key Weberian themes – themes raised in the nineteenth century – these are the liberal pursuit of a balance between might and right, power and the law. In the closing paragraphs of *The Protestant Ethic and the Spirit of Capitalism* (published in 1904) Weber comments on the dissolution of humanist

rationalism into pure utilitarianism (Weber: 1971: 181-3). What he calls for is a critical social science.

This is why, despite my criticism of legal reform as the best path towards challenging social inequality, I admire the spirit of Nair's book. She urges us to be aware of the inter-relatedness of power structures (political economy, law, religion and culture) and the social impact of the law. Modernity will remain in crisis. "The death-of-the-subject" being a regular funereal cry. I think we need to tread more softly, respecting some of the more emancipatory dreams of the Enlightenment. It is too easy to bracket off concepts like rationality as monolithic Western discourses or as

European fantasy. Pathbreaking work such as Said's *Orientalism* allowed scholars to become more sensitive to constructions of the world. However Said's text is now twenty years old and its binary dissolution of the West and the Rest requires a nuanced interpretation. It makes for better social science to view their development historically, as part of the formation of modernity.

Feminism retains strategic importance as an oppositional discourse to patriarchal discourse. A politics of opposition needs to retain a concept of the subject through which to organise politically. Even if we recognise the becoming of our being we **can** live in an ontology of potentials.

***Ethnicity and Constitutional Reform in South Asia.*, Edited by Iftekhharuzzaman, Regional Centre for Strategic Studies, Colombo, 1998.**

Reviewed by C. S. Dattathreya

The introduction to the present book, setting out the agenda for its collection of papers, presents the basic approach that has been adopted by all its contributors. Iftekhharuzzaman, the editor, in his introduction says a couple of things that betray a fundamental world view which is itself problematic to me. He starts one of his paragraphs with the words "This book probes into the *problem of ethnicity in South Asia.....*" (p.8) (emphasis mine). He starts another paragraph with the words "The challenge of transforming ethnic and religious diversities into nationhood remains endemic in South Asia....." (p.8). If one does not share his fundamental characterisation of the problem itself, it is difficult to go ahead and actually review the things that are being said in the book. However, acknowledging the futility of such an attitude, I would like to structure my review thus: in the first part of this review, I will try to review the papers in the book within the parameters that the Introduction itself sets for the book, and then in the second part, because my misgivings are so fundamental in nature, I will take the liberty to try and articulate my own thoughts on the themes that are in currency here.

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Part I

All the contributors to the present volume share a belief in the ability of a constitutionally constructed nationhood to solve the "problem of ethnicity" in South Asia. In fact much of the book goes even further in concurring in a positivist notion of the legitimacy and "efficiency" of constitutional mechanisms in "managing ethnicity". It is perhaps understandable that this should be so given the context in which these papers were presented, that of exchanging south Asian state experiences in "managing ethnicity". In fact, as one reads through the book, one senses that some of the material in the book is constrained by such a context. Consciously justifying such a statist approach to the "management of ethnicity", Partha Ghosh says that "The more the disaffected parties indulge in bargaining with the state the more they realise the feasibility limits of their demands as well as their own mortality" (p.78) and further that "so long as the Indian state vouches in the name of territorial nationalism, that is, civilisational nationalism, and not on cultural nationalism, its ethnic problems would remain manageable and would not probably threaten the territorial integrity of the nation". (p.79) (Although I don't quite see how territorial nationalism and civilisational nationalism are interchangeable

ble). How far such a belief in the nation-statist ideology of constitutionalism is any longer viable is, of course, itself in question.

At a conceptual level, there seems to be a lack of consensus among the different contributors as to what the term "ethnicity" actually means. If to the Editor, ethnicity, apart from being one of the most pervasive features of political life, is a problem in South Asia, to Mohammad Humayun Kabir, the Bangladeshi contributor, ethnicity is a form of separatism. (n. 1 at p.24). Subhash C. Kashyap, one of the two Indian contributors, invokes a series of Western scholars to seek to clarify the content and connotations of the term "ethnicity". One of the people he invokes is Werner J. Cahnman who, in what Kashyap considers to be his "definitive writings on the subject", laid emphasis on the shift from 'ethnos' to 'demos' as the basis of social organisation. This idea envisages a 'progressive development' from a kinship based 'ethnos' to a territorially delimited 'demos'. 'Demos' is purported to be a fundamental premise of democracy, in a situation of whose supremacy all different ethnicities or cultural diversities can get fulfilled, transcended and subsumed. (p.30). Partha S. Ghosh, the second Indian contributor adopts the catch-all definition of 'ethnic' given by

the UNESCO team, INTERCOCTA (International Committee on Conceptual and Terminological Analysis), according to which the term would "include problems of minority groups, nationalities and race relations, at both the intra-state and inter-state levels". (p.50). Lok Raj Baral, the Nepalese contributor, views ethnicity "both as a device as well as a focus for group mobilisation by its leadership through the select use of ethnic symbols of socio-cultural and politico-economic purposes". (p.84). One of the definitions of the term that Ambalavanar Sivarajah quotes goes like this: "The word 'ethnic' derived from the Greek word 'ethnikos' refers to: (a) nations not converted in Christianity, heathens, pagans; (b) races or large groups of people having common traits and customs, or (c) groups in an exotic primitive culture". (p.139). That, more or less, represents the spectrum of connotations that the term is deployed with in the book.

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

Mohammad Humayun Kabir in his presentation of the Bangladesh situation, points out that Bangladesh is the one state where ethnically speaking, there could be said to be almost total homogeneity. The population in the Chittagong Hill Tracts forms about 1% of the total population of Bangladesh. The majority, irrespective of whether they are Hindu or Muslim, is Bengali. And further, as he notes, while the Hindu-Muslim relationship has, by and large, been peaceful, the population in the Chittagong Hill Tracts had been the main source of national instability in the country. (pp.10-11). The overwhelming homogeneity in terms of demography also found reflection in Bangladesh's Constitution which originally said (in Article 6) that the 'citizens of Bangladesh shall be known as Bengalis'. This was subsequently amended. Further one of the four state principles enshrined in the Constitution was, as the author points out, Bengali, significantly not Bangladeshi, nationalism. (p.15). The state in Bangladesh was heavily oriented towards a purportedly overarching Bengali identity. Since this paper was written, of course, the Chittagong peace accord has been concluded which, we are given to believe, has ended the "stalemate" in that

country. What is perhaps more noteworthy is that the Chittagong Peace accord conspicuously did not involve any constitutional changes.

Partha Ghosh after initially setting out the basic political and historical background, offers a detailed paper which methodically structures the different levels of constitutional organisation on which the ethnic issue has been sought to be "contained" and "managed" in India. He identifies four broad categories of politico-constitutional responses to the ethnic demand: the state centric, the intra-state centric, the region (inter-state) centric and the village or district-centric (the state here referring to a federal component). (p.60). He goes on to detail how each of these categories attempted to tackle the situation and also assesses the extent of their success or failure. Partha Ghosh's paper is also valuable because it draws attention, perhaps only to a limited extent, to the tragedy of the Indian state's involvement in the north-east¹.

Lok Raj Baral's paper on Nepal concentrates on the political context of the adoption and implementation of its Constitution and also brings out a few illustrative points. The Constitution of Nepal says that the Election Commission is to withhold registration from political organisations which restrict membership on the basis on religion, class, tribe, language, or sex. (p.98) In other words the Constitution wishes that politics is not to be practised on these grounds. And yet, the Nepalese Constitution itself proclaims that Nepal is, inter alia, a Hindu Kingdom and that Nepali is the national language. It is clear that the former provision has been included in furtherance of what may roughly be termed as the secularising desire or impulse

of rational governance mechanisms. But at the same time, when it comes to the assertion of identity of the state itself, the hegemonic symbols in society come to the fore. This is a discrete instance of a fairly endemic paradox, which can, of course, be seen in Sri Lanka too.

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

Much as I was determined not to let the Introduction's agenda slip out of my mind, I couldn't resist picking out one choice dash of wisdom that Subhash C. Kashyap vouchsafes us in his paper. He quotes, with approval, the Pakistani editor of *Mashal*, Iqbal Khan: "Modern politics is a game of numbers, power belongs to those who command the highest number of votes. In a backward society where people's behaviour is governed by emotions and prejudices rather than reason, and where society is fragmented into numerous groups on religious, ethnic, tribal, casteist, biradari, etc., lines, it is not surprising that politicians win votes by playing off one group against another". (p.41). Clearly such "analysis" is beyond redemption even in one's most charitable mood.

The positivist underpinnings of the book are most overt and explicit in Prof. Lakshman Marasinghe's paper. His position is announced at the outset: "The conditions that make constitutions necessary are based on mistrust. Constitutions are therefore not built on trust. They are meant to contain and deter the activities of miscreants." (pp.146-147). In a foray into a discussion on the legitimacy or otherwise of extra-constitutional change in Sri Lanka, Prof. Marasinghe invokes Hans Kelsen's version of positivism. Prof. Marasinghe says that "..... the jurisprudence available today allows extra-constitutional changes and such changes, when they have been successfully completed, are none the less considered to be constitutional and, therefore, legal". (p.155).

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

Bosnia Struggles for Formula War

David Buchan

Nearly three years after the end of the vicious war that tore it apart, Bosnia is still showing few signs of self-sustaining economic improvement or self-motivated political reconciliation between its three ethnic groups.

What progress there has been is due overwhelmingly to its international protectors, rulers and donors. The presence of 35,000 Nato-led troops prevents any return to war, but not the occasional outbreak of communal violence.

In the absence of any properly functioning central government, the international community's High Representative in Bosnia has imposed a common currency, car licence plate, passport, flag and is working on a national anthem. The annual injection of \$1 bn (£600m) in foreign government aid is steadily repairing the country's shattered infrastructure, but no matching foreign private investment is on the horizon.

Hopes were raised earlier this year when the moderate Milorad Dodik became prime minister in the Serb-ruled part of the country, Republika Srpska, that there would be a more conciliatory attitude to the Moslem-Croat federation in the other part of the country.

The theory was that, with the Dodik government being more welcoming to returning Moslem and Croat refugees, the federation would be shamed into allowing more Serbs back into its territory.

In fact a mere 10,000 refugees – out of a total of 1.3m people still displaced inside and outside Bosnia – look like returning this year to areas where they would be in an ethnic minority. Designated the year of refugee returns, 1998 has instead just become “the year of talking about refugee returns”, comments Carlos Westendorp, the High Representative, ruefully.

These “minority returns”, as they are known in Bosnian aid speak, are crucial to the Dayton peace process. For unless they acquire some multi-ethnic character,

Bosnia's two entities, the Republika Srpska and the Moslem-Croat federation, are never going to make the political compromises needed to operate their weird central government in which there are effectively three Bosnians – Moslem, Serb and Croat – for every post. Since the end of the war in 1995 only about 50,000 refugees have returned to their original homes where they formed or would now form a minority.

Less than a tenth of these have gone back to Republika Srpska. Until last year this was because it was controlled by hardliners loyal to indicted war criminal Radovan Karadzic. Now they are partly deterred by the headlines about Serb atrocities in nearby Kosovo.

But Moslems and Croats have behaved no better. The international community has brought special pressure on Moslem-controlled Sarajevo, on the grounds that as capital of the overall state, as well as of the local federation, it needs to be a multiethnic example to the rest of the country.

Sarajevo was set a target of 20,000 “minority returns” this year, but so far has only got 5,000. Mirza Hajric, chief aide to Alija Izetbegovic, the Moslem war leader who is on the state presidency, admits progress in Sarajevo has been “disappointing”, but complains that international aid agencies are deliberately holding up housing money that could speed resettlement.

Perhaps most obstructive have been the Croats. With so many of their people streaming into relatively prosperous and stable Croatia, the remaining Croats, who now form around 9 per cent of Bosnia's population or half their pre-war level, are regrouping – for reasons of safety or eventual secession – into the western Hercegovina part of Bosnia. And they want to prevent others diluting their presence there, sometimes violently.

The arrival in April of a batch of 180 Serb refugee families in the town of Drvar, to join 1,600 Serbs already there, led to the murder of two Serbs and a

Croat riot in which Serb homes and international aid offices were burned.

One hopeful sign has been a crack in the Croatian Democratic Union (HDZ) of Bosnian Croats, who are allied with the ruling party in Croatia. This spring saw the defection of Kresimir Zubak, who sits on the state presidency, to form a new moderate party called the New Croat Initiative.

“Despite having Croat in its name, my party is directed at other voters”, he says, “because it is time for people to start voting on practical issues, the standard of living, rather than on ethnic lines”. But Mr Zubak may have made his move too late for this September's Bosnian elections.

These elections are also a crucial test for Mr Dodik, who, with only two seats for his own party in the 83-seat Republika Srpska legislature, depends on coalition allies and, behind them, Nato's backing. He is under attack from Serb nationalists who deride him for subservience to the international community and Nato.

Ognjen Tadic, secretary general of the Radicals, who hold 15 seats, puts Mr Dodik's rule down to the fact that “while we have seven times his seats, he has 100 times more tanks behind him”. Mr Dodik is plainly hoping that the foreign aid and acceptability that he has brought Republika Srpska will sway voters, although others are less sanguine.

Over all this, Kosovo casts a new cloud, fuelling tensions between Bosnian Serbs and the others and giving foreign investors the impression of endemic Balkan instability. Nato may be committed to staying in Bosnia for the next few years.

But Mr Westendorp worries about Bosnia's current divisions setting in concrete. “Some people say don't push the refugees to return to their original homes unless there is first security and jobs for them. I don't agree. If we don't push them in the period of 1998-2000, then they will never go back”.

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