RADHIKA COOMARASWAMY

IDEOLOGY AND THE CONSTITUTION

ESSAYS ON CONSTITUTIONAL JURISPRUDENCE

The collection of essays on Constitutional Jurisprudence covers the period 1987 to 1993 when Sri Lanka was in a state of political and social crisis. Insurgencies in the North and in the South were threatening to tear apart the social fabric. The period lends itself to reflection on many of the issues that animate our legal system and our political values. This collection is an attempt to understand the process of constitutional decision-making and political action from a framework of human rights, democracy and social justice.

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Essays on Constitutional Jurisprudence

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This book
is dedicated to
my mother
Wijeyamani

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SINCE this volume straddles a decade* of work on constitutional issues, I must thank my colleagues at the International Centre for Ethnic Studies for their tolerance, patience and affectionate sense of humour. They provided an environment which was both refreshing and inspiring for the formulation of creative ideas. I owe many of the concepts in this book to the long hours of discussion I have had with each of them at different times. I must also thank Neelan and Sithie Tiruchelvam for their everlasting belief that I had something important to contribute to the world of ideas and for their constant support and encouragement of my work. I am also indebted to Regi Siriwardena, "the mentor of many generations", for his scrupulous editing of my untidy manuscript, and to Vicky Esmond Morgan for her comments and suggestions. I am also thankful to Mr P. Thambirajah, the ICES Librarian, without whose encouragement this book would never have been published.

RADHIKA COOMARASWAMY

**Note*: These essays were written during the period 1987-1993. Therefore the developments since then are not covered. Where necessary, footnotes have been added to bring the reader up to date on specific issues.

Foreword

SRI LANKA's constitutional history offers an interesting contrast between two periods. Unlike in neighbouring India, our governments and legislators made no attempt, soon after independence, to frame a new constitution themselves. During the first quarter-century after independence, the constitution under which the country was ruled was that written substantially by a British constitutional lawyer in the years leading up to the transfer of power. (Prime Minister S.W.R.D. Bandaranaike, in his last year of office, did initiate a process that should have borne fruit in a new constitution, but his assassination short-circuited that attempt.) Then, in a single decade, the seventies, we had two constitutions enacted under two governments, each differing markedly from the other; and now, the government of President Chandrika Bandaranaike Kumaratunga has presented a draft of a third which is before a parliamentary select committee.

Constitutions, like any other human creation, cannot be expected to endure in perpetuity; but if a constitution is enacted, as it should be, after a due process of discussion and exchange of views among both political parties and the people, it can secure, if not unanimity, a certain degree of national consensus which will ensure its stability, at least for an historical era. Neither the 1972 nor the 1978 Constitution was produced in these circumstances. Each was, essentially, the creation of a governing party, made law by the preponderant parliamentary majority it enjoyed. Each of these constitutions, moreover, was founded on a governing idea to which every other consideration was sacrificed. In the case of the 1972 Constitution, that idea was the supremacy of

parliament, for which purpose the bureaucracy was stripped of any possibility of independence, and the jurisdiction of the courts circumscribed. In the 1978 Constitution the ruling idea was the executive presidency as the source of stable government and effective development. In spite of the manifest difference between one doctrine and the other, both constitutions were in one sense kindred in spirit, in that they were both directed towards the centralisation of power. Yet the same era in which these centralising constitutions were produced was that which saw the rise of intensified ethnic strife, separatism, and insurgencies in both north and south aiming at the overthrow of the state. Centralisation begot not order but disorder.

As rulers and ruled address themselves once again to the framing of a new constitution, it is vital that we should assimilate the lessons of the past in order to be guided by them for the future. Radhika Coomaraswamy's collection of essays, written from time to time between 1987 and 1993 as provocation offered itself, is an invaluable aid to this end. It is one of the greatest virtues of these essays that they do not bury themselves in the technical minutiae of constitutional law, but place the issues they confront in the larger context of social forces, political processes and cultural and intellectual traditions. Radhika Coomaraswamy has succeeded admirably in clothing what may often seem to the lay person the dry bones of constitutional law with the flesh and blood of the real issues of power, rights and justice that affect the everyday lives of the people.

REGI SIRIWARDENA

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Chapter 1

The Uses and Usurpation of Constitutional Ideology

ON January 2nd 1989, the second executive President of Sri Lanka took his oaths of office. From the sacred octagonal of the Dalada Maligawa, (the temple of the Buddha's tooth), in the presence of the Buddhist clergy, he swore to uphold and defend the Constitution of Sri Lanka. The President paid traditional obeisance to the relic, and to the clergy. But his speech reflected the crises of our times: the problems of pluralism, constitutional liberties and geo-political realities.

Political Legitimacy

It is the proposition of this paper that like the inauguration ceremony of the Sri Lankan President, there are two sources of political legitimacy in South Asian societies (India, Pakistan and Sri Lanka): the legitimacy derived from a liberal constitutional order and the legitimacy attached to the political forces of nationalism and ethnicity. The two sources of legitimacy are in constant tension with each other, the dialectic between them being responsible for much of the ideological conflict in these societies. Both are "used and usurped" either to push forward political reform or to engage in political repression. The process varies depending on the issue and the circumstance.

For the purpose of this paper, the term "constitutionalism" will

be used broadly, both in its ideological sense as well as to imply a process and style of decision-making which is specific to the genre of constitutions drafted in the Anglo-American tradition of jurisprudence. Though they vary in substance, and though many provisions in South Asian constitutions have been taken from socialist constitutions, the paper assumes, perhaps mistakenly, that there is a similarity of tradition, style and interpretation which reveals their origins in a liberal, social democratic political order. Each of these terms, "liberal", "socialist" and "democratic" can be the subject of year-long discussions; and yet, the bitter conceptual debates belie the fact that they are drawn from similar political traditions coming out of post-Enlightenment Europe. In the South Asian context, constitutionalism has been enhanced by these traditions, and like constitutionalism, these traditions, precisely because of their source, share a similar crisis of confidence: they are not considered legitimate, and are not widely accepted as the only means of conducting political life. This illegitimacy unites them in a common struggle, and for the purposes of this paper, that illegitimacy, coming from roots in eighteenth and nineteenth century European humanism, is enough similarity to begin this analysis.

In the latter day world, unlike in the United Kingdom, the source of legitimacy for liberal democratic values is a written constitution. But in India and Sri Lanka the source itself has been subject to repeal, reenactment and to an extraordinary number of amendments. This leads one commentator to state that the use of constitutions in these societies is "instrumental" for those who actually capture state power.[1] The definition of constitutions and constitutionalism in South Asia must therefore not be seen as fundamental law but as a process where the values of the constitution are mediated by realities of power and social antagonism.

The transfer of power in South Asian societies after an era of British imperialism saw the transfer, on paper, of the institutions of parliamentary democracy. Within a decade, Pakistani society witnessed the strengthening of the executive presidency and the growth of military dictatorships. In Sri Lanka, three decades

witnessed three different constitutions, each drafted by a different government in power. The Indian Constitution within three decades of existence had over 50 Amendments introduced by successive governments. Therefore the sense of constitutions as "fundamental law" has yet to emerge as a settled consensus, accepted by all shades of political opinion. The process has begun, but it may still take some time to acquire the characteristics of an accepted social contract.

It has been a characteristic of liberal scholarship in these societies to take the constitution as granted and then to spell out the enormous evidence of situations and contexts which violate the basic tenets of any liberal constitution. If one adopts this line of reasoning, the picture is very clear. Constitutions in South Asia emerge as formal pieces of paper, where fundamental provisions such as fundamental rights are observed more in the breach. However, what is also interesting but rarely analysed are the ways and means in which liberal democratic values are transformed by the contexts of cultural nationalism and economic and social underdevelopment. This process has created morbid symptoms where liberal values are openly perverted. But, in certain creative instances, and in very specific areas, experiments have created what may be termed a "genuine legitimacy" for liberal values.

State and Civil Society

In attempting to understand the growth and evolution of constitutionalism in the South Asian context, it is important to keep in mind the distinction between state and civil society. In the West, the forms of state were a natural evolution from the conflicts and struggles of civil society. In South Asia there is a fundamental disjuncture. Civil society is motivated by a set of factors conditioned not only by liberal norms but more fundamentally by traditional practices and discourses which have themselves been altered by contact with western colonialism. There is no pure tradition or religion left untouched by modern values. Such traditions are the illusions of romantic conservatives. But

the transformation of these traditions to meet modern needs follows a different imperative than the imperatives of constitutional change. Let me give you an example. Prof. Gananath Obeyesekere, in a series of articles points to the new developments in Buddhist practices in Sri Lanka to meet the exigencies of a modern society. For example, the modern wedding ceremony for Buddhists and Hindus has been transformed to model the forty minute sacrament which is the Christian marriage ritual.[2] New rituals have emerged which have transformed the nature of Buddhist religiosity to make it central to the political and social life of a modern Sri Lanka. This impulse does not come from international constitutional traditions; the dynamism draws its sustenance from the energies of civil society. The end result of all such changes in civil society has been to strengthen the hold of religion and religious values on modern Sri Lankan life. This has in some ways run contrary to the tenets of secularism and the separation of state and religion which are the bases of liberal constitutionalism.

The distinction between state and civil society is vital to an understanding of the parameters within which a liberal ideology functions in South Asian society. It is easy to engage in a sterile constitutional analysis of the words of constitutions, and their interpretations in different situations. But the more important question is: what are the cases which actually come before the courts? Is it not more likely that the average South Asian will go to the mediators in civil society from headman, priest to astrologer to resolve his conflicts rather than in open court with procedures which are alien to him?[3] The lack of access skews the presentation of issues which are of interest to constitutionalism in these societies and has an incontrovertible class bias. An empirical analysis of the type of cases which came up in early years in India and Sri Lanka shows the importance of such constitutional provisions as the right to property and freedom of speech. In Sri Lanka the most litigated clause is the equal protection clause, and it is used by Sri Lankan civil servants to protest against dismissal, transfers and political victimisation.[4]

There have been some major changes in the above process in the 1970s and the 1980s. Liberal democratic values have been transformed from a "passive inheritance" from the British to an active tool of political and social accountability. One instance of this transformation has been the growth of social action litigation in India, the language and the discourse of political opposition against military dictatorship in Pakistan, and in Sri Lanka, a creeping judicial scrutiny in such areas as freedom of speech and criminal procedure. These changes cannot all be called revolutionary, but liberal values are no longer valid only as "scraps of paper", they have become active, albeit in association with other values, interests and struggles which are peculiar to the South Asian context.

Uses

The 1970s and the 1980s saw the innovative use of constitutional ideologies in the South Asian context. Perhaps the most innovative of these developments was the phenomenon of social action litigation in India. There are many articles analysing the implications of this type of litigation in South Asia. Prof. Upendra Baxi, not usually known for adulatory positions, writes in his article *"Taking Suffering Seriously"*, "The Supreme Court of India is at long last becoming, after thirty-two years of the Republic, the Supreme Court for Indians."[5] It is his argument that the Indian courts, reacting to the special reality of India, have evolved a strategy for dealing with collective rights, especially those related to economic and social justice. In many hallmark decisions the Supreme Court raised social welfare legislation and practices of the executive to the level of constitutional issues deserving of constitutional scrutiny. They relaxed the procedures of the courts to allow for open letters by those who would normally lack standing in the courts of law and they introduced commission-style evidentiary procedures to allow for more complex fact-finding. All this was made possible by the Indian constitutional provisions which guarantee and protect human dignity. In this way, the Supreme Court dealt with the rights of construc-

tion workers, untouchable leather workers, women in remand homes, undertrial prisoners, pavement dwellers, bonded labour etc.[6]

The spirit of judicial activism in the above areas was contagious, spurring lawyers to take up cases hitherto unrecognisable in Anglo-American jurisprudence. The demonstration effect may have spread into other more traditional areas such as freedom of speech. In the famous *Doordarshan* case, the Indian Supreme Court held that the state media, in editing out the views of a legal activist on a particular case and thereby distorting her presentation violated her freedom of expression. The case is a hallmark one and goes much further than western cases, where the rights of viewers or participants in media activity are not as protected as the rights of the press industry.[7]

In Pakistan, the ideology of constitutionalism came into sharp focus and was used creatively by women activists in protesting against the Zina ordinance and the Islamisation of law, especially in the area of sexual offences. Modern consciousness about the rights of women, especially in Pakistani society, combined with a particular legal tradition of interpretation, led to victories in many famous cases. One case, involving a blind girl raped by a landlord and later convicted of adultery by the lower courts, was reversed on appeal by the judges. In many such cases, courts have used the modes of reasoning associated with constitutionalism to make the law less harsh in implementation.[8] Politically, the ideology of constitutionalism is especially powerful against authoritarian regimes. Benazir Bhutto's recent victory in Pakistan is in fact the victory of constitutionalism over dictatorship. The only other alternative which did not capture dissent in Pakistan, but which is also poised to confront dictatorship, is the discourse of Islamic fundamentalism.

In Sri Lanka, the values of constitutionalism were used to fight the excesses of a government in power for eleven years. In fact, the manifesto of the opposition party was firmly committed to these values, putting forward constitutional reform as its major platform. Constitutionalism was also used in a very unusual situation to give devolution of power to the minorities as part of a political solution to Sri Lanka's ethnic conflict.

The Thirteenth Amendment to the Constitution, introduced after the Indo-Lanka Accord, attempted to bring about some form of political settlement to the raging ethnic conflict. The arguments placed before the courts in favour of the amendment stressed that the amendment was made in the spirit of the democratic values which underlie a constitutional order, i.e., the ability to increase participation of the people at the grassroots level.[9] The arguments against the amendment were made in a western-style court of law but in favour of values and standards which are alien to modern liberal constitutions. The argument which was most strongly presented stated that such a scheme of devolution not only endangered the unitary status of the Constitution but would also result in destroying Buddhism and Buddhist institutions in those areas. The Court was evenly divided, and many of the dissenting judges adopted the argument put forward by the opposition. Their judgements will provide interesting reading material for those who believe that South Asian judges are "apolitical" and imitative of western discourse. In this case, these judges accepted arguments which have never been placed before any constitutional court under the Anglo-American tradition of jurisprudence because they felt that the country and religion were under threat. Here are some excerpts from the petition of the opposition: "Apart from other consequences, the loss of control over Buddhist shrines and places of worship some of them of great antiquity and held in veneration by the Buddhists of the country, which are scattered in these two provinces. The virtual handing over of these places of historic and religious importance to persons culturally alienated from Buddhism is an abrogation of the duty etc. . . to protect and foster the Buddha Sasana . . ."[10] The legal notion of persons who are "culturally alienated" must be quite a new invention for Anglo-American jurisprudence. In this case, constitutionalism, especially when challenged by the ideologies of nationalism and ethnicity, only barely managed to survive, and this in the apex court of the land, firmly rooted in

and committed to the values of a liberal constitutional order.

If one attempts to identify the areas of recent history where the ideology of constitutionalism has been used to further political reform, both in government and as a mobilising force, it could be stated that four decades of experience have in fact created their own case-histories. In India, constitutionalism has been most successful in the field of economic and social issues where the state has not lived up to certain obligations. In fact many have pointed out that the most successful social action litigation cases are those where the state is accused of not living up to the standards that it has set for itself. This is especially true in India in legislation with regard to caste, class and women. The ideology of constitutionalism has also been important as an ideology of protest against military regimes and authoritarian governments. The fact that Benazir Bhutto can be elected the first woman head of an Islamic state was due to the fact that she mobilised the country using the discourse of constitutionalism, fair play and democratic values. In this context, constitutionalism as a commitment to a type of process in public decision-making which lessens the arbitrariness of the executive has often been the only common rallying cry of diverse political groupings. But it is important to note that constitutionalism as substantive ideology, as opposed to commitment to process and procedural style, does not have a monopoly on dissent. Marxism, nationalism, ethnic chauvinism and religious fundamentalism are some of the alternative discourses competing for ideological legitimacy in many South Asian societies.

What is also important to note is that when some of the progressive reforms outlined above were introduced through a creative use of constitutional ideologies, the reactions against them were also diverse. The reaction to social action litigation in India came from lawyers and interest groups committed to a more conservative interpretation of constitutionalism. To them constitutions should be subject to the mechanical interpretation of the rule of law as postulated by positivist scholars.[11] The progressive use of constitutional ideologies was challenged from within the

tradition by those who also laid claim to constitutional legitimacy and who put forward the argument that the judiciary should not legislate, that plain meaning interpretations should prevail etc. There were bitter debates, but again within the accepted framework of the Constitution. On the other hand, the reaction to the women's struggle in Pakistan and the Thirteenth Amendment in Sri Lanka did not come from an alternative tradition of interpretation within the ideology of constitutionalism but from an alternative discourse altogether, the discourse of nationalism, ethnicity and religious fundamentalism.

Usurpations

Usurpations of constitutionalism can be said to take place when constitutional ideas and processes are used for partisan political ends, or to prevent progressive reform which is not in the language but in the spirit of the constitution. In South Asia there are many examples of these types of usurpations, and such actions by the executive have contributed to the illegitimacy of Anglo-American traditions in these societies. One such example is the use of the amendment process in Sri Lanka. It is clear that since the drafting of the 1978 Constitution, the amendment process has been primarily used to gain tactical advantage for the party in power.

In Sri Lanka, the courts have a handle with which they can curtail the amendment power of Parliament. There are certain entrenched provisions relating to the basic structure of the Constitution which require a referendum to be changed. As a whole the courts have been reluctant to call for a referendum on any particular amendment; the only exception was the *Kalawana* case when the government put forward an amendment to allow two members for one parliamentary seat following a reversal at a by-election. The court held that this preposterous amendment violated the right to franchise which is part of the entrenched provisions of the Constitution and that the passing of the amendment required a 2/3 majority and a referendum by the people.[12]

The actual history of the amendment process in Sri Lanka then

clearly reveals that the constitutional process may be used for partisan political ends and has no inherent safeguard against abuse. In fact, if it is used craftily, it may clothe an arbitrary process with a facade of constitutional legitimacy. This type of tactical manoeuvering by existing political parties has led to a great deal of disillusionment with the democratic process and the ideology of constitutionalism.

It is not only procedural manipulation which leads to the usurpation of constitutional values. In some instances it is also the substance of the ideology of constitutionalism. This is particularly true about a right such as the "right to property" in the Indian Constitution.

There is little doubt that when the political concept of constitutionalism gained currency in the eighteenth and nineteenth centuries, this manifestation of a social contract saw the right to property as a fundamental right, to be protected by a democratic constitutional order. Although Rousseau and the tradition of French constitutionalism may not have recognised the right to property, the Anglo-American tradition, from its inception, based on the philosophy of political reformers such as Locke, established the right to property as a fundamental right.

These traditions found their way into the Indian Constitution as articles 19 and 31, which became some of the most litigated clauses in the first two decades of Indian independence.

The 44th Amendment was introduced in India after the election of the Janata Government in 1977. The amendment removed property as a fundamental right and reduced it to the level of a legal right.[13] This Act of Parliament was a result of three decades of litigation and conflict over this right in the courts of law.

Some of the main issues of litigation before the Indian Supreme Court in its early years were in cases which came up under the right to property.[14] The very first amendment to the Constitution was itself a result of the controversy over the *Bihar Land Reform Act* of 1950. Landlords and propertied interests challenged the Act stating that it violated their right to property.[15] The fourth amendment to the Constitution also dealt with property

and the right to compensation. The notorious 25th amendment, which attempted to remove judicial review in certain instances, also involved the right to property. Every attempt by the government to change by legislation the structures of economic power was challenged by interested parties in courts of law. At the same time the government used the power of eminent domain to divest groups and parties which were hostile to its policies. The issues concerning property rights were so central to the constitutional process in the 1950s and the 1960s that until the 1970s and the advent of social action litigation, the law, the judiciary and the courts were often identified as the bastions of conservatism, the protectors of privileged interests. Constitutionalism, especially in the 1950s, may have been perceived as the ideology which allowed the middle class to challenge progressive economic and social welfare legislation. The executive and the legislature posited themselves as "the voice of the People"; the Constitution and the courts were portrayed during times of crisis as the brakes on social change. This type of characterisation had tragic consequences as it allowed the executive to discredit the ideology of constitutionalism as spelled out by the courts and engage in populist acts. Sometimes, as in the case of declaring emergencies and dealing with political opponents, the courts and liberal ideologues often found that they did not have the legitimacy with which to successfully challenge the arbitrary acts of the executive. By being identified with the property rights of vested interests, the constitutional process was not trusted by those who wished to challenge the repressive political acts of the executive. In fact, until the very last years of the emergency in India the constitutional process was seen to defend vested interests against progressive legislation on the one hand and to defer needlessly to the executive in times of political repression on the other. This type of identification saw the process as being against social justice and for political repression. It was perhaps the worst period of constitutional development in South Asian societies, and may be said to span the regimes of Indira Gandhi in India and Mrs. Sirimavo Bandaranaike in Sri Lanka.

Ironically, since the right to property put forward a great number of cases—those with property often being the ones capable of translating their grievances into the discourse of constitutionalism, some of the more interesting developments in constitutional law also came out of these cases. In 1973, the Supreme Court decided *Kesavananda* vs *Kerala*. In this case the 25th amendment to the Constitution attempted to take away judicial review in certain types of property cases. A divided court spelled out the innovative doctrine of "Basic Structure", i.e. that the legislature cannot amend the Constitution so as to change the basic structure of the Constitution. The court argued that removing judicial review of acts which affect fundamental rights was to transform the basic structure of the Constitution.[16]

The court's position may have been met with a great deal of scepticism from progressive groups in these societies since the activism appeared linked to the right to property. But, in a follow-up case where Mrs. Gandhi attempted to take judicial review away from election petitions after a by-election, the Court responded more fully and the doctrine was expanded beyond the right to property.[17] The case heralded the showdown between Mrs. Gandhi and the judiciary, finally leading to confrontation and impasse. Her defeat in 1977 saw the period through, and the executive and the judiciary have since then attempted to respect their separate spheres.

Substantive Constitutionalism

What the right to property cases show us most clearly is that constitutionalism as a substantive ideology may suffer from many of the same problems that the substantive due process line of cases suffered before the U.S. Courts. In this connection it should be recalled that substantive due process was initially used to prevent minimum wage and to limit workers' rights, protecting the employer's contract as a fundamental right.[18] In the 1960s the same doctrine was used to promote and foster the civil rights of blacks and women. In India too the Court's activism in the early years was with regard to the right to property. By the 1980s, the

activism and intervention was on behalf of economically underprivileged groups. A doctrine of usurpation, in time, is transformed into a doctrine of use. This protean quality of judicial activism is what makes many lawyers and scholars hesitant to put forward strategies for judicial intervention.

There are very few people who would not find the usurpation of procedural aspects of constitutional law, such as that which took place with the amendment process in Sri Lanka, to be offensive. The more difficult area remains that of substantive constitutionalism: when does a court intervene? with which doctrine? for whom? and at what time in a country's historical evolution?

Many constitutional scholars analysing the U.S. position have argued that constitutionalism should be seen in its narrowest sense with the emphasis on process, not principles. They would prefer that substantive issues be resolved by the legislature and the executive.[19] However, in developing countries this passive inheritance may be a luxury that we can ill afford. There is need for substantive but principled intervention in areas of democratic life which are threatened by legislative and executive arbitrariness, and areas which therefore require special scrutiny by the courts. Such intervention may naturally be reserved for areas such as fundamental rights. However, even within that sphere, rights such as the right to property raise very political questions. Which fundamental rights require greater protection? Should they all be treated equally? What are the guidelines that courts should follow to evolve a strategy of intervention? The answer must surely begin with constitutional doctrine which attempts to argue for judicial protection for fundamental rights in cases affecting the most vulnerable sectors of society who have no *access* to other types of recourse. There have been some attempts to devise such doctrines in courts of law with regard to discrete and insular minorities. John Hart Ely, again focusing on access, argues for that kind of approach to civil rights in the United States.[20] A more radical doctrine may have to be developed to meet the realistic constraints of South Asian societies.

Political Challenge and Constitutionalism

For a long time, lawyers and political scientists saw development in third world societies as a linear process. Until recently, for many of us, the challenge to mainstream politics in these societies came either from the discourse of socialism/Marxism or from a more radical tradition within liberalism, drawing from the experience of social democratic forces around the world. The debates among intellectuals in the first two decades since independence clearly indicated polarisation along these lines. The debates assumed that history and people's aspirations will always move toward greater democracy, equality and tolerance. The questions related to how fast social change could be speeded up. No one seriously questioned the nature and direction of social change.

In South Asia, especially in India and Sri Lanka, there has always been a third discourse coming from the tradition of politics which was heralded by Mahatma Gandhi.[21] But for many, Gandhi shared the essential humanism which is at the base of universal theories such as liberalism and socialism, but he wanted that humanism couched in terms and in cultural symbols which had relevance and meaning for the vast majority of South Asians. The essential values of freedom, dignity and social justice could have meaning only if they related to the actual reality of South Asian society.

The introspection that nationalist leaders like Gandhi fostered in India was imitated by leaders throughout Asia. The anger and resentment engendered was very progressive against colonialism. But, in the post-colonial era, the political forces generated by this self-awareness often broke away from the humanistic source to become autonomous ideologies, fostering ethnic chauvinism, religious fundamentalism and cultural exclusiveness.

Toward a Genuine Legitimacy

What are the implications for constitutionalism of the predominance of this culture-specific alternative discourse in South Asian political and social life? What happens when social change

is not necessarily within the spirit or even the framework of the liberal, democratic values spelled out in the constitution? How should the legal system respond? For many, such as the lawyers who were involved in litigation with regard to the Thirteenth Amendment in Sri Lanka there was nothing but despair, seeing constitutionalism, both mainstream and progressive, being swallowed up by primordial politics, with an emphasis on nation accompanied by a biting contempt for process and rationality in public decision-making. But, for others, the current impasse is a challenge out of which may emerge a constitutionalism with a "genuine and authentic legitimacy" in the South Asian context.

The terms "genuine" and "authentic" have always been treated with a great deal of scepticism in social science literature.[22] Genuineness and authenticity have often been the catchwords for political messianism, especially in those societies which are culturally intolerant. They are often artificial constructs which have fostered discrimination against "culturally alien" groups, migrant communities and assimilative folk culture. But at another level, the call for authenticity may be seen not as an end in itself but as a call for a process whereby the institutions of government and the law begin to interact with existing social processes in a creative and innovative manner so as to evolve an indigenous jurisprudence. Social action litigation in India is one such example, but such experimentation is still too rare. In addition, recent Indian decisions moving away from social action litigation point to the fact that the constitutional system can take such activism only in fits and starts and that the inherent conservatism of legal process requires a period of growth which has to be followed by consolidation.

How then can constitutionalism acquire "genuine legitimacy" in South Asia? To identify the factors, one must recognise what is considered to be the inherent strength of a constitutional process—the potential for evolution and growth. None of the other ideologies prevalent in South Asia today are as committed to as specific and detailed a process of non-violent decision-making, as the ideology of constitutionalism. Most of the other ideologies

pursue substantive values, and are near-Kautilyan or Machiavellian in their philosophy with regard to political process. The strength of constitutionalism as an ideology is that it spells out the ways and means of resolving conflict, of electing representatives, of making and implementing public decisions, of reconciling interests and rights in a systematic and open manner. No indigenous ideology in South Asia which has gained currency as a dominant political force has such a comprehensive project for consultation, compromise and conflict resolution. The main reason for this is that the political processes represented by the architects of indigenous ideology were either dynastic, religious or tribal. None of them were designed to cater to the needs of the modern nation-state.[23] To survive and grow as an important aspect of political life, constitutionalism must then attach these internal processes to the actual struggles taking place in South Asian societies. The more these processes attach to elite concerns and to elite rights such as property, the less legitimacy they will have in the society at large. If in the coming years the processes of constitutionalism were to attach to issues of poverty, political repression, social justice, regional backwardness etc. . . the more likely it will be that they will enhance and enrich the democratic process in South Asian societies. The uses of constitutionalism in the future are not only in the area of acting as a watchdog against an errant executive. Its uses have to be extended to become active and dynamic, to protect values using the language, discourse and doctrine which have some resonance in South Asian reality.

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14. See e.g. *Golak Nath* v. *State of Punjab* 1967 S.C. 1 1643.
15. See *Sankari Prasad Singh Deo* v. *Union* 1952 S.C.R. 89 *Bihar* v. *Maharajadhiraj Sir Kameshwar Singh*, 1952 S.C.R. 889.
16. *Kesavananda* v. *Kerala*, 1973 Supp. S.C.R. 1.
17. *Indira Nehru Gandhi* v. *Raj Narain* 1976 S.C.R. 347.
18. *Lochner* v. *U.S.* 198 U S 45 (1905).
19. See e.g. F.A. Hayek, *Law, Legislation and Liberty*, Norfolk, 1979.
20. See J.H. Ely, *Democracy and Distrust*, Cambridge, 1981.
21. Ashis Nandy and Veena Das have been putting forward an alternative humanistic discourse drawn from indigenous traditions. No one has fully analysed the implications for the legal system.
22. Authenticity, drawn from Heidegger's philosophy, expanded in application by the Frankfurt School, has been simplified into a paranoid defense of indigenous traditions by some South Asian scholars. See for a particularly bad example, S. Goonetileke, *The Crippled Mind*, London, 1979.
23. See B. Anderson, *Imagined Communities*, Cornell, 1984.

Chapter 2

The Constitution and Constitutional Reform

I

AN analysis of post-independent constitutions of Sri Lanka may take many forms. The classical approach would attempt to analyse the constitutions as part of the formal process of governance, reflecting the changing needs of the body politic. This would indicate how the constitution evolved from colonial times into the republican constitution of 1972 and finally into the presidential system. The analysis would primarily concentrate on the evolution of concepts and institutions and how the system attempted to incorporate the values of cultural nationalism, the problems of under-development, and the essence of pluralism. The constitution in this scheme of analysis would be the mirror of traditional Anglo-American jurisprudence.

The other approach to constitutional analysis would be from what is termed the vantage point of "embarrassment" or "crisis"[1], the illegitimacy of concepts and institutions, moulded by Westminster operating within the reality of Sri Lankan politics and civil society. The illegitimacy and disjuncture is seen to lead to morbid symptoms in the evolution of constitutional principles and their implementation. Thus, in some ways, they become part of the political and social crisis which has erupted violently in Sri

Lanka in recent years. The constitution, its values and its operation in this scheme of analysis are seen as a part of the problem which is central to the art of governance.

In some sense, both perspectives are necessary if we are to understand the issues related to the constitution and constitutional principles in the Sri Lankan context. In terms of the evolution of constitutional principles, the first constitution of independent Sri Lanka, the Soulbury Constitution, was in fact a product of colonial legal evolution. Though D.S. Senanayake and his ministerial colleagues took the political responsibility for the draft constitution prepared in 1944, the draftsman was Sir Ivor Jennings,[2] the Vice Chancellor of the University of Ceylon and the unofficial but very influential constitutional advisor to Senanayake. Jennings was the author of several standard works on the British Constitution.

The first principle behind the 1947 Constitution was that of a unitary state. Despite the many communal and ethnic representations made before the Soulbury Commission, the drafters felt that majoritarian democracy, as reflected in the supremacy of parliament within a unitary state—the classic Westminster model, was appropriate for Sri Lanka. They did not institute any scheme for the sharing of power between the majority and minorities, feeling that the minority was large enough to withstand wholly majoritarian initiatives. But they were to be proved wrong. With the disenfranchisement of the Indian Tamils, a political party catering only to the Sinhalese could easily muster a 2/3 majority in Parliament and rule without any sensitivity to minority demands. This is in fact what happened after 1956.

However, it must be noted, that this was not the only scheme proposed before the Soulbury commissioners and that other types of structures had been discussed by prominent Sri Lankan leaders. S.W.R.D. Bandaranaike, for example, had stated as early as 1926 in Jaffna that he thought federalism was an answer to the plural composition of the Sri Lanka polity.[3] He followed this up with a scheme for provincial councils in 1940 which the State Council accepted in principle, and without any opposition. The

scheme was not implemented. The call for federalism had also come from the Kandyan chiefs in the mid-twentieth century with their fears that they would be swamped by the upwardly mobile low country Sinhalese who had prospered under British rule.[4] None of these arguments, however, were adopted by Jennings as he felt that a British-style unitary constitution would meet Sri Lankan needs of the times.

In the scheme of his formulation, majoritarian rule was to be cushioned by judicial protection of minority rights, involved in the well-known section 29 of the Constitution which prohibited discrimination against minorities. But the drafters refused to enact an American-style bill of rights, believing that Sri Lankan political leaders would abide by the customs and conventions which had developed in Britain through practice and the common law to safeguard those rights. This again was at Jennings' insistence.[5]

The drafters of the Soulbury Constitution were not interested in much more than formulating the basic elements of a Westminster model of government—a supreme legislature, supported by an independent judiciary and a national level civil service. They were certainly not interested in the Constitution as an ideological document giving expression to the aspirations of a new nation; nor did they deal with guidelines for economic and social decision-making, except for section 29 and the protection of minorities. It was their belief that the customs and conventions of British parliamentary practice and British judicial precedent would fill the gaps. Since transfer of power was being enacted and given over to men schooled in British-style politics, this was seen as natural.

In the terms of reference laid down by Whitehall for the drafting of the Constitution, no easy amending process was envisaged. They did not foresee dramatic changes in the body politic. Theirs was a constitution for homogenous, litigious societies, not for a civil society steeped in religious and customary practices profoundly affected by economic underdevelopment. Their approach to reform was that it should be gradual and evolutionary. It is this

hidden trust in the customs and conventions, in proper etiquette and behaviour, those aspects which give flesh to constitutions, that the British drafters, took for granted. It is precisely this trust which was later betrayed, sometimes in the interest of the larger community, but for the most part to the detriment of democratic growth and practice.

The ideological vacuum of the Soulbury Constitution was to make it a target of attack: from nationalists who perceived it as a very western document, where Buddhism for example was not given its special place; from leftists and Marxists who regarded it as a 'slave' constitution imposed by Whitehall and therefore a poor substitute for an autochthonous constitution drafted by a constituent assembly; and representatives of the Tamil minority who claimed that section 29 was not protection enough and that the constitutional recognition of pluralism must be more explicit.

Despite all this, the Constitution set the framework for politics in Sri Lanka in the sense that it gave legitimacy to parliamentary democracy as the primary framework for governance. Very few parties, except those operating extra-legally, have challenged that proposition. Secondly, it entrenched the concept of a supreme and unitary parliament as the embodiment of democracy, an aspect which would pose major problems for the resolution of political disputes and the protection of fundamental and minority rights in the 1970s, and later the 1980s.

K.M. de Silva has argued that "the survival of the Soulbury Constitution after 1956 was not so much a matter of conviction as of convenience."[6] Despite being assailed from many quarters, it remained as the supreme law of the land for twenty-five years, but the victory of the United Front government in the 1970s was to alter the nature of constitutional decision-making. With its sweeping majority in parliament, it called for the creation of an autochthonous constitution, a new social contract based on the deliberations of a constitutional assembly. The rhetoric was not to match reality. With a 2/3 majority in parliament there was an awareness that the other political parties were not necessary, and the United Front government began to confuse mandate with

consensus. By the time the drafting was over, the Tamil political parties had walked out of the chamber and were to go on to fight elections on a platform of separatism. The other major political party, the UNP, was to become disillusioned with it, almost as soon as it was enacted. In the end, the exercise brought with it the new era of instrumental[7] constitutions which were to be closely identified with governments in power and not as the fundamental law of the land.

II

THE CONSTITUTION OF THE FIRST REPUBLIC

Although it claimed to be a revolutionary socialist constitution, the 1972 Constitution was in many ways a culmination of the Westminster system of democracy taken to its extremes. The National Assembly, or Parliament was the supreme body with nearly unfettered powers.[8] A government controlling a 2/3 majority therefore had a sense that it was invulnerable. The tyranny of the assembly was to become a real possibility, especially in the last years of the United Front government.

In actual operation, therefore, the 1972 Constitution made the politician the central figure of the body politic. In the past, systems of patronage were wielded by traditional elites who controlled political and economic power, were English-speaking and Colombo-based. In 1956, S.W.R.D. Bandaranaike, born to this class, led an electoral revolution against their dominance.[9] The 1972 Constitution was a belated victory for those social forces which backed Bandaranaike in 1956. A.J. Wilson in his analysis of the 1970 elections shows how many of the parliamentarians of the United Front government did not come from the traditional social elites, and that in fact there was a shift of political and economic power.[10] The MP became the centre of political decision-making as well as the patron of his area, with anyone seeking employment in the public service having to carry an MP's

chit of recommendation. The indirect effect of this system was the complete politicisation of public life along partisan political lines; the bureaucracy, the public service, local level officials and even private contractors and businessmen had to have a positive relationship with the MP. Space and autonomy, where people could be independent from party politics, quickly dwindled. This pattern was to continue even when the government changed in 1977, the only difference being that it was the former opposition political party that now wielded power. This pattern of politicisation was identified by the Presidential Commission on Youth[11] as one of the major reasons for the disillusionment of youth with the established order.

Another factor which needs to be mentioned about the radical difference between the 1947 parliamentary elite and the MPs of 1970 was that the latter were unschooled in the customs and conventions of parliamentary practice. This trend was to continue into the 1980s. But this is not to say that those schooled in parliamentary practice were to be a restraining force in what was perceived to be the abuse of constitutional power. However, since the backbenchers were only party loyalists with little understanding of the historical process behind parliamentary practice, there was no accountability within the party structure and therefore no internal lobby against the abuse of power.

The 1972 Constitution was the culmination of the ideological impetus of the 1956 movement led by Bandaranaike in that it gave Buddhism an elevated position within the polity[12] and enshrined Sinhala as the official language[13] at constitutional level. This cultural assertion in constitutional terms was of course a result of the nascent nationalism of the 1950s, and was heralded as a great victory, the real break with British imperial power which, until the day the Constitution was adopted, continued to have the Queen as head of state with the Governor-General as her representative. But it was to have a disturbing effect on ethnic relations. The victory of Sinhalese nationalism also heralded the beginning of Tamil separatism; the 1972 Constitution was a pivotal point in the terrible parting of ways between the two major

ethnic communities.

Ironically, the assertion of these values was more symbolic than real. However, the symbolic assertion was powerful enough, and with Sinhala becoming the official language, the Tamil minority's share of its traditional vocation under the British, the public service, which had once given them a disproportionate share of places, was substantially reduced.[14] Their response to the resultant "Sinhalisation of the centre" was to demand regional autonomy. This demand for federalism or devolution from the Tamil minority was completely ignored by the Constituent Assembly of 1972 and led to the call for separatism in 1976. The 2/3 majority in Parliament controlled by the ruling party was without any seats in the north and the east, the Tamil-speaking areas of Sri Lanka, and therefore they harboured an unreal belief that the country would be run and managed without Tamil support.

Another aspect which emerged in the 1970s and was to continue into the 1980s was the use of emergency power by successive governments. The majority of years when the 1972 Constitution was in effect were years of emergency. After it was imposed to meet the insurgency of 1971, it continued in fact till the end of the government's tenure in office. The Public Security Ordinance[15] which was enacted on the eve of independence has proved to be the single most important legal document in the political history of Sri Lanka, especially in the 1970s and the 1980s. More years have been spent under emergency rule during those two decades than outside it. Emergency power has been used to cover a wide variety of situations from full-scale civil war to changes in the rice ration, and even measures for agricultural and food production.[16] In this way the executive bypasses both parliament and the judiciary. The 1972 Constitution had no emergency accountability and its promulgation as well as its repeal was at "the sole discretion of the executive". The 1978 Constitution, enacted after years of emergency rule by a newly elected government, allowed for a measure of parliamentary accountability, requiring a 2/3 majority if the emergency was to be prolonged for longer than a

period of three months.[17] Even after the 1978 Constitution introduced this accountability, the same government, in 1988, substantially amended the Constitution when it felt that it would no longer command a 2/3 majority in the forthcoming general elections held under a system of proportional representation. Just before the 1988 elections, when it was evident that a 2/3 majority was not possible under the proportional representation system, the government introduced measures to ensure that only a simple majority was needed to extend the life of the emergency.

The 1972 Constitution was to have a lasting effect on other aspects of public life. It removed the notion of an independent civil service and brought the entire administrative structure of the country under the Cabinet of Ministers.[18] The argument was that independence and neutrality were not possible in a rapidly developing society and that the public service therefore had remained the partial instrument of the elite, unresponsive to the needs of the vast majority of Sri Lankans. This further accelerated the process of the politicisation of the bureaucracy. The use of populist discourse to challenge and intimidate the bureaucracy to bow to executive will was to become a commonplace occurrence.

The 1972 Constitution also undervalued the judiciary as a coequal arm of government. The judiciary in India and Sri Lanka in the early 1970s was seen as the protector of vested interest since the former had protected the right to property against fundamental social reform. In that sense, the reforms with regard to the judiciary were couched in populist language. The judiciary was never given the right to scrutinize bills, but under the 1972 Constitution they were also denied the right to question executive action. Although there was a fundamental rights chapter, article 18(2) allowed these rights to be limited by very broad principles including the principles of state policy, national economy, and public safety among others. As a result not one case on fundamental rights was decided by the courts during the tenure of the Constitution.

The 1972 Constitution divided the court structure into two; as in France[19] the constitutional issues were to be determined by a

special constitutional court. However, the determinations by such a court could be overridden by a 2/3 majority in Parliament, making the constitution easily amendable.[20] This was continued in the second republican Constitution of 1978.[21] It was felt that constitutional amendment should be made easy for rapidly developing societies—but often the easy process led to abuse by governments controlling large majorities within parliament.

The intrinsic weakness of the judiciary in the new system was underlined by provisions which required the Constitutional Court under the 1972 Constitution, and the Supreme Court under the 1978 Constitution, to set out its decisions in regard to bills certified as being urgent in the national interest, within twenty-four hours.[22] With a 2/3 majority and a crippled judiciary, the cabinet executive under the 1972 and 1978 Constitutions emerged as an unbridled wielder of political power.

In many ways the strong executive also fitted in with the economic programme of the United Front government which was encapsulated in the chapter on the Principles of State Policy.[23] The economic policy aimed at a state paternalism, in which it assumed responsibility for the delivery of services as well as managerial activities in important commercial corporations. A centralised, topdown, "socialist" paternalism, which was the thrust of developmental rhetoric of the era was embodied in the principles and in state action. Such a policy was to lead to a 2 per cent growth rate and a "ration" system which was eventually to make the government unpopular. Without the natural resources or the market to make state enterprises viable under a system of strict protection, and a nationalist platform which prevented too much resort to borrowing from international lending institutions, the government found that the economy could not keep up with the aspirations of its people. Though pledged to radical reform, the reality of implementation and the nature of the Sri Lankan economy was to make state programmes under the directives a failure in implementation. However, the notion that a developing country should have a chapter on Directives of State Policy was considered an important aspect of constitutional development.

It has been said that the drafters of the 1972 Constitution attempted to stimulate and accelerate radical economic and social reform within a liberal democratic framework, but using nationalist language and discourse for that purpose. In attempting to bridge the gap between a liberal framework and radical economic reform, they appeared to have fallen between two stools. The JVP insurgency of 1971 was a clear indication that they were not considered radical enough by a section of their erstwhile supporters. There were others, largely from the more affluent strata of society, who believed, on the other hand, that they had gone far enough, and that many of the institutions of governance as well as the economy had been destroyed. In the end, the collapse of the United Front regime may have been due to a lack of programmatic vision—a factor that would also plague them in opposition in the 1980s. Ideals and visions were articulated in the Constitution, but they were fundamentally transformed in application; the lack of programmatic direction[24] to the month by month developments in the country led to economic decline. However, because the Constitution was drafted without a consensus and because it was used in an instrumental manner, the Constitution was also defeated by the election results of 1977.

III

THE CONSTITUTION OF THE SECOND REPUBLIC, 1978

The Constitution of 1978 has been described by A.J. Wilson as a "hybrid, a cross between the French and British styles of government with a little bit of the U.S. thrown in".[25] But he also adds in his introduction to a study of that Constitution that "the whole framework hangs on the skill and ability of one person—the elected Executive President."[26]

The hallmark of the 1978 Constitution is the executive presidency.[27] Though there are many reforms in the Constitution which are more democratic in character than the 1972 Constitution— a

justiciable fundamental rights chapter, the right to challenge executive action, a more independent judiciary, an independent public service and more equitable language and citizenship provisions—the centre of power had shifted unmistakably to the personality of the executive President, especially when he commands a working majority or a 2/3 majority in parliament. Many commentators feel that this shift has actually led to a more authoritarian form of governance than a constitution which makes parliament the supreme organ of state power.[28]

Although there are indications that the presidential system may lead to a certain type of authoritarianism, where a President seeks a mandate from the people and not parliament, the notion of a national electorate was to have profound consequences for the rhetoric employed in electioneering. The 1988 presidential elections clearly showed that the head of the republic would need the confidence of a significant portion of the minority vote, and that in a close election the minorities may hold the balance. This is an important new development for politicians previously catering to their narrow constituencies which were often ethnic-based. The national electorate therefore requires a different type of electioneering if a candidate truly wishes to become President of the whole republic.

The style of decision-making under the 1978 constitution was seen to be "corporate" in that the Cabinet of Ministers was the executive body; the President sitting as the head of government, with the Prime Minister and a Cabinet of Ministers drawn from the party that commands the confidence of parliament.[29] The U.S. presidency is supported by executive officials and the bicameral legislature remains completely separate. The U.K. retains its parliamentary system of government. It is only France that combines the two systems of government and that is why the present Sri Lankan constitution is often described as the Gaullist constitution.[30]

So far, the President and the governments operating under the constitution have been drawn from the same party.[31] If, in the future, there is a UNP President and an SLFP-dominated parliament, or vice-versa, then the problems of governance would become more complicated under the presidential system. If the President has to rely on a coalition to get his measures passed in parliament, there may be a much greater degree of instability than before. The possibility of instability caused by different parties capturing different centres of power remains a very real possibility in the future.

The new "vision", however, does in some measure attempt to make parliament more technocratic in outlook, that is, to make it more sober and reflective in the passing of legislation. This is through the promulgation of a Standing Order of 20 April 1978 which set up consultative committees to ministries to provide a policy input into planning and development. This has been one of the noteworthy successes of the new framework. The constitutional history of Sri Lanka provides other examples of parliamentary consultative committees, most notably the powerful executive committee system under the Donoughmore system. The present committees' functions however are of a rather different sort: "advisory, investigative, inquisitorial and suggestive."[32]

Many critics argue that parliament has been diminished in the 1978 constitution under the dominance of an all powerful executive President. It is also pointed out that he could use the referendum to bypass parliament altogether with regard to major policy issues. However, much depends on what may be termed "parliamentary consciousness" i.e., the members' commitment to parliament as an institution, a commitment which often overrides partisan interests. In recent times, there is a sense that this is emerging. In December 1990, the Speaker, M.H. Mohammed, a member of the governing UNP, made a ruling which protected the integrity of parliament and its right to debate every issue, and he did this in the face of opposition from the government and knowledge that the debate which centered on the disappearance of a popular journalist would cause embarrassment to the government in parliament.[33]

The Sri Lanka parliament and the executive President can be held accountable to constitutional standards by the Supreme

Court.[34] In the case of parliament this power of judicial review can only be exercised before the enactment of such legislation and not after, the latter being the practice in the U.S. and U.K. This has a major drawback in that there is no opportunity to judge the legislation in operation, and very little time to thoroughly research and debate the issues raised by such legislation. Expediency was favoured by the drafters, an expediency which they felt was warranted by the underdeveloped nature of the society. In the case of the executive, there is no such constraint, and executive accountability embodied in section 126 of the Constitution is one of the more far-reaching provisions of the new Constitution.

One of the more democratic aspects of the new Constitution was the system of proportional representation it introduced.[35] Sri Lankan politics, especially in the 1970s, was characterised by unusually wide swings of the electoral pendulum. The composition of parliament was distorted by the sweeping majorities gained by the winning parties, and did not truly reflect the percentage of votes received by the defeated party or parties. The first parliamentary election under proportional representation was held in February 1989, and resulted in a much more representative legislature than under the previous system, with the government having less than a 2/3 majority and many shades of opinion being reflected in the house. The new system also incorporates the device of a national list.

A.J. Wilson believes that the system of proportional representation will, in effect, ensure that each of the two major parties—the UNP and the SLFP—will obtain a share of seats in the legislature in proportion to the votes polled, thus ensuring that no party will, in reality, receive a 2/3, much less a 3/4, majority in the future. But he also argues that the twelve and a half per cent cut-off point (i.e., those who poll less than twelve and a half per cent of the vote are eliminated) would work against small parties and special constituency groups.[36]

However, the system of proportional representation introduced in Sri Lanka already shows one serious weakness. It has ensured the dominance of the party and the party bosses over the process

of nomination, in a situation where there already was a lack of internal democratic processes within the major parties. The prospect for the future is that the party organisation, more than platforms or mandates, will remain the key to political victory unless certain basic guidelines for internal party politics are considered and defined.

Then again one of the important improvements brought about by proportional representation may also become a major drawback in that it removes the special equation between the MP and the electorate. It places party over personalities and district personalities over members representing smaller communities. There has been too little analysis in recent years about the working of proportional representation in general for any conclusions to be drawn as to whether the "popular will" is better served by this innovation.

The question of an independent judiciary was an important aspect of the rhetoric which surrounded the promulgation of the 1978 Constitution, especially after the experience under the 1972 Constitution. The 1978 Constitution envisaged a more powerful judiciary than that of 1972, and the Supreme Court also became the original court of jurisdiction for fundamental rights litigation.[37] Very specific grounds are laid down for the removal of Supreme Court and Court of Appeal judges. A majority of members of parliament is required before such a judge is removed from office, and a resolution for removal of a judge has to have the signature of at least one third of the total number of members of parliament.[38] The new constitution also saw the reintroduction of the Judicial Service Commission with wide powers over the appointment, promotion, transfer of and disciplinary control over the lower levels of the judiciary.[39]

While judicial review remains the sole prerogative of the Supreme Court,[40] it has only seven days within which to consider legislation before it is placed on the parliamentary order paper, and the Court has only to consider whether such a bill or sections of a bill is or are *ultra vires* the constitution, and if so, whether parliament could pass such legislation by a 2/3 majority or with

a referendum in addition to a 2/3 majority. There are also provisions for "bills that are urgent in the national interest". With regard to these the Supreme Court must give its determination within twenty-four hours.

In other words the scope of judicial review of legislation is very small in contrast to the judicial review of powerful federal judiciaries that exist in India and the US. It is also time-bound and therefore less effective. Though there is an active civil rights constituency, seven days or twenty-four hours is not time enough for groups to get lawyers and briefs ready to argue a comprehensive case against any piece of legislation. This hangover from the 1972 Constitution is being seriously questioned in many articles on the Sri Lankan judiciary.[41]

An interesting innovation of the 1978 Constitution concerned its referendum provisions.[42] Initially there were fears that this would lead to Bonapartism with a popular president using the referendum to bypass parliament. The fears about the abuse of power which may result from a referendum were realised in December 1982, when a referendum was held as a substitute for general elections, thus freezing the 5/6 majority in parliament which the UNP had held since 1977.[43] This wholly unwarranted and unprecedented resort to the referendum principle to circumvent the usual electoral processes delegitimised parliament and also deprived the opposition of the share of seats they would have been entitled to in a parliamentary election under the proportional representation system incorporated in the Constitution. Since, as in 1972, political patronage still came from the MP, opposition parties were placed at a patently unfair disadvantage. Not surprisingly, the referendum of 1982 has been identified as an important factor in the rise of extra-parliamentary agitation and violence in the south of Sri Lanka in the mid and late 1980s.

The referendum also has another face. Though the constitution is amendable by a 2/3 majority of parliament, there are certain provisions which require a referendum if they are to be amended. They include aspects such as the "unitary" nature of the Constitution, the franchise and sovereignty. This was to pose serious

difficulties when a scheme for devolution was introduced in parliament in November 1987 and some opposition parties (the SLFP and its allies) demanded that a referendum be held before the legislation was approved. Thus the referendum, the most democratic of measures, could be used in a majoritarian sense to deny concessions to a minority. Majoritarian politics, first enshrined in the 1972 Constitution and the referendum provisions of the 1978 Constitution, could have distinct anti-democratic effects in a society with a plural composition.

IV

CONSTITUTIONAL CHANGE, 1987-1991

Perhaps the most important aspects of the 1978 Constitution, apart from the central role given to the executive presidency and proportional representation, have been the several amendments introduced in the late 1980s which had the effect of fundamentally altering the very structure and nature of the Constitution of 1972. After years of prolonged ethnic conflict, two fundamentally important constitutional amendments were introduced, through which, for the first time, the principles of pluralism and devolution were recognised. These were the Thirteenth Amendment which brought a measure of devolution to the country and the Sixteenth Amendment which made Tamil also an official language.

The net effect of these was to impose pluralism on the polity, thus ensuring that the amendments are there to stay, perhaps with some measure of refinement through political bargaining. Since pluralism is now constitutionally enacted, it would be difficult to reduce its effects, much less to eliminate it altogether, especially after years of brutal ethnic conflict.

The amendments with regard to devolution fundamentally change the structure of local government.[44] They envision the setting up of eight provincial councils, the ninth being dependent

on a referendum to be held in the north and the east where the current ethnic conflict is raging, to see whether they would prefer to be merged as one province. The constitutional structure contains three lists; one which deals with the lists reserved for the centre, the second with regard to the areas reserved for the provincial councils and the third where the powers are concurrent. The central government retains the right to make national policy over all subjects. The provincial councils are entrusted with limited powers to pass legislation and to raise revenue. However, for the most part they are dependent on central government grants for their functioning, to be allocated after the deliberations of an independent finance commission.

Elections to these councils were held in a precarious security climate. At the moment the councils function in all areas except for the north and the east—precisely the areas for which they were designed. In addition, all the provincial councils are controlled by the ruling party.[45] Thus it is difficult to assess the success of this scheme until normality is restored and until there is a national consensus on the type of devolution which is ultimately acceptable to the country as a whole, and the minorities in particular.

One could therefore argue that the 1978 Constitution is structurally different from what it was at the time it was enacted in 1978. New and far-reaching changes in the area of devolution and fundamental rights have been added. The Constitution is therefore more plural and democratic than the initial draft, ironically, after provisions were introduced consequent upon negotiations with an outside power and others enacted after a bloody rebellion in the south of Sri Lanka.

NOTES

1. Roberto Unger, *Lectures on Politics*, Cambridge, Mass., Harvard University Press, 1981.
2. K.M.de Silva and Howard Wriggins, *J.R. Jayewardene of Sri Lanka*, London, [n.p.d.] 1988, pp.165-168.

3. See *The Ceylon Morning Leader*, 19 May to 30 June 1926, a series of six articles on federalism, by S.W.R.D. Bandaranaike.
4. *The Rights and Claims of the Kandyan People* (Kandy n.d., probably 1927) published by the Kandyan National Assembly. See also, *The Report of the Special Commission on Constitution* (The Donoughmore Report), Colombo 1928, pp. 103-108.
5. K.M.de Silva and Wriggins, *op. cit.*, pp.165-168.
6. K.M.de Silva, *History of Sri Lanka*, London, 1981.
7. N. Tiruchelvam, "The Making and Unmaking of Constitutions - Some Reflections on the Process", CJHSS N.S. VII(2), pp. 18-24.
8. See Chapter VII of the *1972 Constitution of Sri Lanka.*
9. See James Manor, *The Expedient Utopian: Bandaranaike and Ceylon*, Cambridge, 1990.
10. A.J. Wilson, *Electoral Politics in an Emergent State, The Ceylon General Election of May 1970*, Cambridge, 1975, p. 67.
11. Report of the Presidential Commission on Youth, Sessional Paper, 1 of 1990, Colombo 1990.
12. See Section 6 of the Constitution of 1972.
13. See Section 9 of the Constitution of 1972.
14. For an analysis of this see M. Roberts, "Elite Formation and Elites", 1832-1931, in M. Roberts (ed.) *Collective Identities, Nationalisms and Protest in Modern Sri Lanka* (Colombo, 1979).
15. Public Security Ordinance No. 25 of 1947; also see section 134 of the 1972 Constitution and Article 155 of the 1978 Constitution.
16. See Suriya Wickremesinghe, *Emergency* (unpublished mimeograph, Colombo, 1977).
17. Section 155(8) of the Constitution now repealed.
18. Section 106 of the 1972 Constitution.
19. Section 54 of the 1972 Constitution.
20. Section 55(4) of the 1972 Constitution.
21. See Section 123(1) of the 1978 Constitution.
22. See Section 55(1) of the 1972 Constitution and 122(1) of the 1978 Constitution.
23. See Chapter V of the 1972 Constitution.
24. R. Unger, *Lectures on Politics, op. cit.*
25. See A.J. Wilson, *The Gaullist System in Asia*, London, 1980, Introduction.
26. *Ibid.*, p. xiv.
27. Sections 30-41 of the 1978 Constitution.
28. See N.M. Perera, "Second Amendment to the Constitution" in *Socialist Nation*, Colombo, October 1977.
29. Sections 42-49 of the 1978 Constitution.
30. A.J. Wilson, *op. cit.*
31. There was an interregnum just before the parliamentary elections of 1994

when there was a U.N.P. President and a P.A. Prime Minister. But for the most part there have been Presidents and Prime Ministers drawn from the same party.

32. Wilson, p. 70.
33. See *Hansard*, 16 December 1990.
34. See Articles 120-125 of the 1978 Constitution.
35. See sections 92-102 of the 1978 Constitution.
36. Wilson, *op. cit.*, p. 88.
37. Sections 107-134 of the 1978 Constitution.
38. Section 107 of the Constitution of 1978.
39. See Section 114 of the 1978 Constitution.
40. Section 120 of the Constitution.
41. H.L. de Silva, "Pluralism and the Judiciary in Sri Lanka", in (eds) N. Tiruchelvam and R. Coomaraswamy, *The Role of the Judiciary in Plural Societies*, London, 1987, p. 79.
42. Sections 85-87 of the 1978 Constitution.
43. See the Fourth Amendment to the 1978 Constitution.
44. The Thirteenth Amendment to the 1978 Constitution.
45. The Provincial Council Elections of 1993 broke this trend. Now there are provincial councils which are controlled by the opposition.

Chapter 3

The Civil Liberties and Human Rights Perspective

I

THE LEGAL FRAMEWORK

IT is often said that fundamental rights analysis is the "cutting edge" of any form of political analysis. It is after all the indicator of how a society deals with the exceptions, those who are the dissenters and the politically and economically marginalised. It is therefore not only a source of concern for legal analysis, but an indicator of the democractic space that is available within a given society.

Fundamental rights on paper, on the one hand, and fundamental rights consciousness and implementation on the other have been two separate aspects of development in many third world societies. At independence, constitutional formats drawn from other democratic societies were adopted with fundamental rights as an integral part of the political framework. Post-independence events have however created a dialectic of their own where constitutional words were given life and interpretation in contexts which are very different to those anticipated by the "founding fathers". It is the latter which is perhaps the more interesting aspect in the third world societies of the 1980s.

Sri Lanka, unlike India, did not adopt a bill of rights at independence. This was not because of any desire to omit fundamental rights protection, but the belief that Sri Lanka would naturally adhere to British convention and tradition, in which the rule of law and the principles of natural justice play an intrinsic part. Unwritten laws built into traditional practice were the peculiarly British tradition of law which they felt could and would be transferred to the colonies. The only "fundamental rights provision" in the first Constitution of Sri Lanka related to section 29 which guaranteed a measure of equal protection to minorities. Other than that, only the case-law precedents set out in England protected the other freedoms such as speech and freedom from arbitrary encroachment.

However, since 1978, the formal framework for the protection of individual rights has become quite extensive. The 1978 Constitution contains a bill of rights and vests the Supreme Court with sole and exclusive jurisdiction in respect of the infringement or imminent infringement of a fundamental right.[1] It must be noted that the scope of fundamental rights as in other jurisdictions is limited to executive action; i.e. state officers and state institutions are the only bodies against which such action can be brought. Violations of human rights by others are not subject to such scrutiny. However, in other countries such as India, the courts have held the state responsible if it in any way has some form of nexus or contractual relationship with a private violator of human rights.[2] The Sri Lankan courts have not adopted such a posture.

Even though fundamental rights are enumerated in the Constitution, there is a near-equal emphasis on the fact that these rights are not absolute and are subject to certain restrictions enumerated in the Constitution: national security, racial and religious harmony; parliamentary privilege; contempt of court; defamation; and others such as public health or morality.[3] In more absolutist formulations of fundamental rights in other constitutions, the enumerations are not articulated but worked out on a case by case basis to allow for maximum protection of human rights. In the Sri Lankan context the justifications for limiting human rights are

given the same level of constitutional protection as the human rights themselves. This becomes particularly problematic when we deal with general clauses for limiting human rights such as the one that states that these rights may be limited "for the general welfare of a democratic society".[4] There are two fundamental rights, however, in the Sri Lankan constitution which are absolute: freedom of thought, conscience and religion[5] and the freedom from torture.[6] These are not subject to any limitations—at least in terms of the written provisions of the Constitution.

In addition to the Supreme Court, which is vested with the sole and exclusive jurisdiction with regard to fundamental rights litigation, there are two other institutions which also deal with human rights. The Parliamentary Commissioner for Administration[7] has jurisdiction over human rights complaints, but these complaints have to be channelled through parliament and parliament must decide what action to take. Given the nature of political patronage and influence in Sri Lankan society, this dependency on parliament has effectively limited the role of the Ombudsman. Secondly, there is the Commission for the Elimination of Discrimination and Monitoring of Fundamental Rights, established under the Sri Lankan "Foundation Law".[8] This Commission has reviewed over 1,000 cases and complaints in the form of administrative hearings, where, after inquiry, it attempts to settle the disputes with the consent of the parties concerned. It aims at compromise, consensus and corrective action rather than the punitive remedies available under the Supreme Court. If there is an impasse, a confidential report may be sent to the President of the republic for corrective action.

A third institution is the Official Language Commission, the purpose of which is to prevent discrimination against the users of Sinhala and Tamil. It has powers of investigation, mediation and the right to institute action in court. In that sense it is a stronger body than either the Commission for the Elimination of Discrimination and Monitoring of Fundamental Rights or the Parliamentary Commissioner for Administration.

This new approach of setting up specialised commissions for

different areas of human rights is drawn from the labour law model. Since fundamental rights violations are particularly sensitive and politically explosive, there is a belief that justice will be better served if the more innovative approach of mediation and investigation is followed. This allows for a non-adversarial context where a compromise may be worked out with the help of the commission. Of course, the fundamental rights remedy remains available for anyone who chooses to petition the Supreme Court and who wishes to receive compensation, punitive remedies and a public condemnation of the offending state authority.

In addition to the local laws on human rights, Sri Lanka is also a signatory to the International Covenants on Civil and Political Rights and Economic and Social Rights though it has not signed the optional protocol which deals with implementation at the international level.

An analysis of the formal law therefore makes it clear that Sri Lanka and Sri Lankan government are formally committed to the protection of human rights. But what actually happens in reality? This becomes particularly important because Sri Lanka has been seen in international circles as a frequent violator of human rights and is one of the few countries in the world against which a resolution was actually passed at the United Nations Sub-Commission on Minorities.[9] At an Aid group meeting held in Paris in October 1990, Sri Lanka was subject to admonishment on its human rights record, and even though the Aid group voted a large package of aid, much of it was conditional.

What went wrong with the model third world democracy, especially with such an effective formal framework for the protection and vindication of human rights? That is perhaps the most important question that needs to be considered in this chapter. The answer to the question may have to be given in two parts—the first must relate to the effectiveness of the judiciary in giving protection to the rights vested in the Constitution. The second must relate to the situations of emergency after 1983, when the country was in the throes of civil war, first against the northern separatists, then against a southern insurgency and then once

more against the Tamil separatists demanding a separate homeland for the north and the east. It is this period, nearly a decade of civil war, which has seriously impeded human rights protection and vindication in Sri Lanka, leaving civil society brutalised and thereby preventing effective local initiatives to protect even the basic human right, the right to life, from which all other rights must flow.

The Constitutions of 1972 and 1978 each contains a bill of rights. They leave implementation of these provisions to the Supreme Court. But what have the courts done, in fact?[10] "The quality of fundamental rights is not determined so much by the potentialities inherent in a piece of formal legislation but in the reality of specific cases decided by actual courts."[11]

Before 1983-1990, there was a definite pattern of cases that actually came up before the courts. The most popular type of case involved the equal protection clause, alleging discrimination in the area of education and employment. If one goes through the case material, it is very evident that we are talking about a fundamental problem, the problem of access to education and employment in a developing society. The cases allege discrimination, political victimisation, lack of due process in transfer, dismissal and promotions. The petitions are full of personal anger and a sense of outrage. The cases that come up before the powerful federal judiciaries of India and the U.S.A. are actually cases concerning issues of legal principles. But in Sri Lanka, because the Supreme Court is the court of original jurisdiction for fundamental rights, every grievance or alleged grievance comes up before that Court. And since many of these are so personal that they may be resolved by a telephone call, the government has set up the Commission for the Elimination of Discrimination to deal with these types of cases. And yet, these issues flood the courts, perhaps demonstrating the importance of employment in the state sector in a third world developing economy.

The second important area of litigation was trade union action, whether in terms of the right to join a trade union or with regard to the right to strike and peaceful assembly. This reflects the

powerful influence of Marxist and left-wing paties in urban work centres and their ability to go to court to resolve some of their problems. The courts have remained reticent in this regard although they have recognised the right of association as a fundamental right which cannot be contracted away.[12] But there is no expansion of the doctrine to the right of strike, nor is there an attempt, as in the Indian courts, to make issues such as a minimum wage a fundamental right. Since Sri Lanka does not have a right to life and dignity clause in the Constitution, these types of experimentation were denied to Sri Lankan judges.[13]

There has also been some litigation with regard to the freedom of the press and freedom of expression. The courts have recognised that there is a right to information,[14] but unfortunately, they have argued that the press, i.e. the company which owns the press, has no fundamental rights, only individuals have such rights.[15] This, of course, is a major problem, since freedom of information and the rights of the press are closely linked in modern societies.

There have also been cases arguing that the state has been arbitrary in its decision-making powers, but again the courts held that since the Sri Lankan Constitution does not have a due process clause, arbitrary and capricious acts by state officials, unless linked to a specific provision of the fundamental rights clauses cannot be challenged.[16] This, despite the opinions in many other jurisdictions that arbitrary action on the part of the state can, in itself, violate the rights of individuals. In India for example, the courts read in the term "reasonable" saying that state action if unreasonable can violate rights,[17] but again the Sri Lankan courts have been reticent.

This then was the pattern of Supreme Court decision-making prior to 1983. Equality of educational and employment opportunities was the first priority while speech and associational freedoms came second. What is more interesting is the type of cases which did not come up before the courts. Firstly, Sri Lanka is a poor and primarily rural country, but though there were urban worker cases before the Supreme Court, there were very few

fundamental rights cases from the rural areas. Unlike in India, there was no social action litigation linked to the right-to-life clause of the Constitution which allowed the courts to be open to the fundamental grievances in the rural areas. Second, although the country was to erupt into civil war over the ethnic question, since the promulgation of the new Constitution only one case with regard to ethnic rights has appeared before the courts, one which concerned the writing of a cheque in Sinhalese to a Tamil recipient.[18] No case with regard to gender equality has been decided upon by the Supreme Court. Given the fact that Sri Lanka was to face a youthful ethnic rebellion from the north and a southern insurgency in the rural areas of the south, it is remarkable that no important cases in either of these areas reached the courts. It only serves to accentuate the point that the legal process was far removed from the reality of the land and had not become a forum for the non-violent settlement of important issues which were politically explosive but linked to the fundamental values of the Constitution.

The period from 1983 onwards must be viewed differently, especially when one considers developments in the field of fundamental rights. Throughout these years the government has been engaged in emergency action with fighting often resembling a civil war, first in the north and then in the south. The northern insurgency, led by the Liberation Tigers of Tamil Eelam (LTTE), escalated after the 1983 riots aimed at Tamils living in the south of the island, and became a full-scale civil war with allegations that neighbouring India was involved in training and arming the Tamil militant groups. This conflict led eventually to the signing of the Indo-Lanka Accord and the presence of Indian troops on the island. The accord then became the basis for violence in the south, and the JVP used the occasion to mount a southern insurgency which paralyzed the country at various times between the end of July 1988 and December 1989. By January 1990, the southern rebellion had been crushed by the use of military force and all the leaders eliminated.

In this context of violent uprising against the state where the

state is directly under threat, the art of governance becomes a different type of enterprise than when the state is governing in times of peace, when violence is peripheral to its survival. Fundamental rights have always been the first to suffer in such a context, and in Sri Lanka this was no exception.

The first act of the state after the 1983 riots was not so much to punish the offenders, but to panic, in the belief that a southern insurrection was at hand, to pass the Sixth Amendment which outlawed the call for separatism and required that members of parliament take an oath of allegiance renouncing separatism. Whatever one may feel about separatism, the net effect of the law was to drive the Tamil political parties out of parliament and therefore allow the militant groups to emerge as main spokespeople for the Tamil population.

The riots and their aftermath led to a full-scale civil war, and over the period 1983-1987 scores of Tamil men were arrested or killed in the bloody battles waged in the north and the east. The Tamil militant groups were also responsible for massacres of Sinhalese civilians living in the Eastern province, and also for bomb explosions directed against civilian targets outside the north and the east. During the period November 1987- March 1989, the Indian army carried out operations in the north and the east, again with enormous civilian costs; thereafter, there was a period of relative calm when the Tamil Tigers had peace talks with the government, but after June 1990, the war broke out again sending, at last estimate, several hundreds of thousands of refugees fleeing south or into Tamil Nadu. When the southern insurrection broke out in late 1987, again scores of young Sinhalese were arrested or killed. The JVP, in its own acts of brutality, killed government supporters and their families, threatened to kill families of the security forces—and actually did so—and brought many of the essential services to a standstill, including hospitals. In this situation, the International Committee of the Red Cross was invited to the island to handle humanitarian relief.

The civil and legal processes have ground to a complete halt in the north. There is at present no legal process in that part of the

country; the courts do not function and the civilian administration functions only so far as to help in relief and rehabilitation. After years of war, this abnormal situation has become the norm. As a result people have lost all awareness of the presence or importance of legal, non-violent authority such as courts of law. Their lives have for the most part in the last ten years been ruled by the gun, though different parties have wielded the authority at different times. To speak of fundamental rights and their implementation in the traditional sense is a meaningless exercise for the people of the north and the east.

In the south the process came to a halt only for a period of one year, and has now regained its normal momentum. And yet that experience has left its mark. There has been an increase in the militarisation of the state but also concern that such events should not take place again. In the rethinking that eventually follows such upheavals, there have been many positive developments, especially in the field of human rights.

The years of experience under emergency are throwing new life into the courts of law. For the first time courts are beginning to become even moderately activist—perhaps the excesses witnessed during civil war make fundamental rights more meaningful and real in people's lives. For the first time the courts threw out an emergency regulation dealing with infringement of the freedom of speech—they claimed that the regulation was vague and lacked clarity. Earlier, emergency regulations were never challenged by the courts and the executive was given full discretion not only to declare emergency but also to frame the regulations governing that emergency.[19]

Again, for the first time the court allowed for "open letter jurisdiction" when a group of inmates kept at the Boossa prison wrote an open letter to the courts claiming that there was torture and mistreatment in the prison. The Court allowed the letter to stand as a petition, throwing aside technical regulations relating to petitions and the filing of petitions. This was along the lines of social action litigation in India. They have also directed the Bar Association to conduct investigations into the matter and report

directly to them as to the current status in the prison. This again is new, the appointment of an authority to conduct investigations on behalf of the court—again another strategy drawn from Indian experience with social action litigation.[20]

Third, the court has found police personnel guilty of torture and intimidation, and in a strongly worded opinion censured the security forces for intimidating those who wished to bring their cases before the courts.[21]

Fourth, there were also two important cases where the courts attempted to bring about justice despite the situation of civil war: the first was in the case of Nallanayagam, the head of the Batticaloa Citizens' Committee arrested in 1985 for "misinformation"[22], and the second in the Richard de Zoysa case,[23] when the latter's mother gave in affidavit the names of police officers whom she felt had come in civilian clothes and taken away her son. His body was later found floating in the sea.

The structures of human rights protection have traditionally been the courts. However, in more recent writings it has been underscored that these rights may only be vindicated if there are strong and independent intermediary institutions; "fourth estates" which will protect democratic rights in civil society.

Since 1970, Sri Lanka has witnessed governments with lopsided majorities ranging from 2/3 to 5/6 in parliament. This pendulum swing of parliamentary majorities has resulted in what has been termed the "over-politicisation of society". In this regard even intermediary associations became politically aligned, whether they be trade unions, the Bar Association, or the Press Council. Whenever there was a change of government, the leadership in many of these organisations also changed to reflect the shift in political opinion. In that sense, the notion of autonomous, independent organisations had been transformed by the over-politicisation of civil and political life.

In recent times a reversal of this trend has begun and the following tendencies, though not easily documented, are discernible, beginning with the growth of a large network of non-governmental organizations and revitalization of professional organizations. A recent govenment survey[24] has estimated that there were over 2,000 non-governmental organizations (NGOs), many of them autonomous and funded from diverse sources. The expansion of this sector and its activism in the field of human rights and rehabilitation have caused considerable concern to the government in recent times. A Commission was appointed in December 1990 to inquire and report on this sector.[25] Professional organisations such as the Bar Association, the Association of Working Journalists, and the Organisation of Professional Associations are more independent and increasingly active in many fields. This autonomy and independent spirit are a welcome return to a pre-1960 situation for Sri Lanka and should, in the future, serve to strengthen democratic institutions and values.

The whole area of human rights, constitutional law and the judiciary in post-independence societies raise fundamental questions with regard to the art of governance, especially with regard to the building and strengthening of institutions. While all other areas may grow and develop if there is enlightened executive leadership, justice, in so far as it relates to human rights, requires the development of strong and independent institutions to act as watchdogs of the executive. The development of such institutions does take time, and traditions which provide for shared values and practices have to be built. However, in most of our societies, Sri Lanka included, there has not been much emphasis on the development and strengthening of these independent institutions. In fact there is a sense of expediency, a desire to get things done and a belief that independent institutions and bureaucracies just get in the way of rapid development and progress. This, after all, is the developmental ethic in vogue for so long. However, after years of emergency and crisis rule, there is a growing belief that such institutions are important and should be nurtured because they remain the only fora the non-violent settlement of disputes. Without that safety-valve, no democracy will be able to survive.

II

HUMAN RIGHTS ACTIVISM IN SRI LANKA

In the human rights field, Sri Lanka is the kind of bad case which makes unusual law and precedent. Despite the high international visibility and the play of forces which keep Sri Lanka on the international agenda, the lack of local mobilisation and the formidable political obstacles to many human rights issues point to the fact that the Sri Lankan case is unusual. It refuses to be understood by the classical paradigm of human rights protection. As a result, a plethora of social science studies on ideology now accompany any serious human rights analysis of the Sri Lankan situation. At the same time, the fact that the larger social and political issues are not easily clarified solely by a human rights understanding helps create a dangerous illusion that human rights issues are irrelevant in the Sri Lankan context.

The classical paradigm of human rights action involves individuals or groups challenging the action of the state, using law and legal rights as the mechanism for articulating, mobilising and seeking redress for violated rights. There are always two parties, the state and the aggrieved, where the aggrieved is the clear victim of state action. In addition, legal rights and norms are articulated in a positivist manner setting forth the rule and the remedy. In this context there is often a bottom line posture, and the success of human rights movements carries with it moral condemnation and struggle. In the Sri Lankan context, in many situations, there are more than two parties and some of the issues cannot be defined by existing norms, except by an emphasis on processes of negotiation and compromise. Both these, the tripartite challenge (except in labour law) and the negotiation of rights, are not an integral part of the human rights tradition but they have proved to be paramount issues in Sri Lanka. Since there is the moral aspect to politics, negotiation is seen as compromise and demeaning. The moral overtones of human rights action, which have legitimacy in many contexts and play the important role of exposure of immediate

state action, may, in some unusual contexts, be counter-productive to negotiated political solutions. They tend to raise moral expectations and the bottom line reasoning of parties in the struggle—this is particularly true in the ethnic context.

The primacy of Sri Lanka's ethnic conflict has of course skewed human rights concerns in a particular direction. However, it is perhaps important to survey the type of human rights issues that have emerged in other sectors and the mechanisms and institutions which have been developed in the Sri Lankan context.

With regard to violation of civil and political rights since 1981 Sri Lanka's record has been dismal, and has attracted severe criticism in various international fora. This culminated in a resolution adopted in 1987 at the U.N. (Resolution at the Sub-Commission on the Elimination of Discrimination Against Minorities). The resolution read as follows:

> Calls upon all parties and groups to respect fully the universally accepted rules of Humanitarian law;
> Calls upon all parties and groups to renounce the use of force and acts of violence and to pursue a negotiated political solution based on principles of respect of human rights and fundamental freedoms.[26]

Amnesty International and other international organisations have also condemned Sri Lanka's human rights record. The following is a quotation from a recent Amnesty International report.

> Grave human rights violations have been committed in Sri Lanka for several years in a context of government measures to suppress armed opposition movements. Disappearances and extra-judicial executions have been reported with increasing frequency since mid-1983.[27]

Apart from Amnesty International, International Alert, PRIO, ICJ and other international human rights organisations have analysed the Sri Lankan issue from the perspective of its living

up to international norms of civil and political rights. However, in recent years, these reports which earlier used standard legal arguments have also attempted to politically understand the Sri Lankan context, finding the classical human rights paradigm slightly constricting in this regard.[28]

All these reports point to the fact that the right to life was the fundamental right that was primarily affected in the last decade. If one were young, male and against the establishment, one ran a high risk of being subject to arbitrary arrest and detention, and even to extra-judicial punishment. This was particularly true for Tamil youth since 1981, but became a stark reality for young Sinhalese during the JVP crackdown of 1988/89. Therefore, the international reports have continued to highlight the denial of the right to life and basic civil and political liberties in Sri Lanka of the 1980s.

Despite this international spotlight, the national dimension is quite at variance and more complex to understand. When the international campaign on civil and political rights of Tamil people was at its height with allegations of torture, extra-judicial killings and the need for a political solution, many of the local human rights groups were split on how to articulate their anger. The problem was that for the majority of Sri Lankans, except for some who belonged to the Tamil minority, separatism and the right to self-determination were seen as a "bad cause". The state was, therefore, supporting what in their impression was the long-term benefit of the country—unity, i.e. "the right cause". When perceptions exist that the state is using force with regard to the "right cause" then human rights work within the country becomes very difficult. How does one separate the means from the ends in a developing society that perceives itself to be fighting for survival? As a result, there is silence when the state builds up its arsenal, adopts draconian legislation with regard to preventive detention, when it promulgates emergency regulations for arrest and detention, and where loopholes exist for extra-judicial killings. Once the infrastructure is set up, it can be deployed against any "enemy" of the moment as the Sri Lankan case clearly illustrates, but the initial process is not resisted because the state is, in the eyes of the national community, if not the international community, on the right side.

The belief that the end justifies the means becomes a very emotional aspect of wars and is particularly acute in civil wars where the stakes are extremely high. The international community is seen as acting under the manipulation of vested interests, and conspiracy theories abound. This is a real problem in Sri Lanka—the dichotomy of perception between the international human rights community and a vast majority of Sinhalese, even Sinhalese NGOs. With international criticism of Tamil militant groups beginning to take the forefront in the news, the same dichotomy of perception is often felt between the international community and some Tamil NGOs. The primacy and immediacy of ethnic conflict has therefore skewed and distorted human rights work even in the area of civil and political rights.

An added dimension to the problem has been the use of force by non-state actors such as the LTTE among Tamil groups and the JVP among the Sinhalese, thus polarising civil society. When civil society is polarised in this manner, the possibility of human rights work, which requires the mechanisms and the strategies of civil society, becomes ossified and society is divided into armed camps. This happened during the campaign against the JVP in 1988/89 and also now in the civil war being waged in the north and the east. Human rights activity was at its highest during the period 1983-1987 because the war was primarily fought in the north and the east, and civil society outside those regions and even in those regions was still not completely overwhelmed and had autonomy. At present, the capacity for civil society and NGOs working in civil society to move effectively in the arena of civil and political rights, especially those related to arrest; detention, torture and extra-judicial killing is greatly limited by fear and confusion.

III

THE MEDIA AND THE PRESS

Article 14 (1) (A) of the present Constitution guarantees to every citizen freedom of speech and expression including publication. However, this right may be restricted by law in the interest of national security, racial and religious harmony, or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence.[29]

The Supreme Court of Sri Lanka has on occasion had to interpret these provisions. One cannot say they have been activist in protecting these rights or absolutist in their interpretations like the powerful judiciaries of the US, UK, and India. In that sense there are few landmark cases such as New York Times *vs.* Sullivan in the US.[30] But the Sri Lankan Supreme Court has made some important decisions, not all of them favourable to the rights of a free press. For example, they have stated that the press industry, being a corporate body, does not enjoy freedom of speech, only individuals do.[31] This is of course contrary to recent developments in other jurisdictions and has posed major problems for the protection of press freedom. The press after all are the main centres of information; if they do not enjoy freedom it is unlikely that freedom of speech and publication would be meaningful in any modern society. However, it must be recognised that the Court was sharply divided on this issue with a strong dissenting opinion on the part of Justice Wanasundera. At the same time the Sri Lankan Supreme Court has argued that every citizen is entitled to the freedom to receive information from the state,[32] a right that has been only recently recognised in other jurisdictions. In a recent far-reaching judgement, it threw aside an emergency regulation—the first time such regulations have been thrown aside, stating that "prior restraint" of publications bears a heavy presumption against its constitutional validity and that emergency regulations which vest police officers with broad discretion to censor without proper guidelines are unconstitutional.[33]

In addition to the above limitations the Supreme Court has held that freedom of publication cannot extend to matters of official secrets and confidentiality[34] and that the freedom to propagate one's ideas may be restricted in the interests of the national economy and the principles of state policy. This latter decision directly resulted in the takeover of one of the leading newspaper companies in Sri Lanka.[35] Both these decisions were under the 1972 Constitution but they remain as valid precedents in Sri Lanka. In addition, the Court had held that regulations made in the interest of efficiency, discipline, health, morality, public order and the like can also restrict freedom of speech, such as when an undergraduate published in a newspaper a show cause letter sent to him by the Vice-Chancellor of the University and was punished for doing so.[36]

One area of recent controversy has been parliamentary privilege, Law No. 5 of 1978 amended the Parliament (Powers and Privileges Act) by making all offences specified in the schedule of the Act punishable by the Supreme Court and the National State Assembly. This type of action, where one of the parties to the controversy is both victim and judge, has been strongly criticised. The National State Assembly at that time brought charges against two editors of newspapers. In addition, comments made by a leading lawyer in the papers criticising this piece of parliamentary legislation which endows parliament with judicial powers was challenged by the Attorney General before the Supreme Court. In that case the Supreme Court held with the petitioner that parliamentary legislation and proceedings are matters that may be the subject of fair comment.[37]

The judiciary itself has limited freedom of speech in matters relating to contempt of court—they have not shown as liberal a spirit as may have been expected by the watchdog body of fundamental rights. They have held that "deliberate and wilful publication in a newspaper of false and fabricated material concerning a trial"[38], "scandalising the judiciary[39] and even publishing parliamentary proceedings which are contemptuous of court proceedings"[40] all amount to contempt of court. Publication of articles

relating to matters pending in a court of law which has the effect of prejudicing the public or interfering with the trial process also constitutes contempt of court.[41]

It may therefore be said that all the arms of government, whether they be the legislature or the judiciary, jealously guard their privileges, and, in Sri Lankan context, have used the law of contempt as a sword not a shield; the institutions of democracy have shown little liberalism in fostering free comment or extreme and vitriolic criticism which is directed against them. That attitude toward free speech seems to pervade the society as a whole.

This fear of free speech is also one of the reasons that the area of defamation is a vibrant and very important area of the law. Defamation is a restriction on free speech and an individual is not free to impugn the "reputation" of another.[42] This is of course a long standing offence but has fallen into disuse in most modern jurisdictions. But in Sri Lanka it has been strictly construed.[43] The reason for this may be the smallness of our society and the fact that the "reputation" of an individual is of paramount importance, given the social norms and etiquette of a traditional society. Apart from defamation there are other restrictions on freedom of speech in the law: restrictions in the interest of religious harmony and public morality;[44] restrictions with regard to obscenity;[45] restrictions in the interest of public order and national security.[46]

The constitutional protection therefore is not absolutist, as is evidenced by the phrasing of the basic constitutional provisions which allow for many qualifications. In addition to the constitutional provisions on free speech, the press and the media are governed by the *Sri Lankan Press Council Bill* enacted in 1973. The objectives of the law were to ensure freedom of the press, set high standards of journalistic ethics, and the providing of research and training facilities for working journalists. There have been many models of press self-regulation; the latest Indian model for example has working journalists, owners of press industry along with government appointees setting up a tripartite body to regulate the press and to set standards of professionalism. In

India the appointments are made by a nominating body consisting of the President of the Republic, the Chief Justice and the Speakers of both houses. But the 1973 Sri Lankan model was one of administrative regulation, a body appointed by the President with semi-official powers and functions. It was seen as a regulator and was construed as a body that would "chill" free comment rather than a body that would encourage free speech.[47]

The major criticisms levied against the Press Council Law concern section 3 which sets out the composition of the Council. The Council has seven members, five appointed by government, a working journalist and a newspaper employee. Another aspect which has drawn criticism has been the quasi-judicial power given to the Council under section 12 to have contempt power and to hold inquiries against errant journalists. This inquisitorial aspect of the law is not conducive to the Council also being a body that would protect freedom of speech and the press.

The Press Council Law also imposes a measure of censorship on certain types of publications. Under the Press Council Law reporting of government decision-making, fiscal policy, official secrets and defamation are prohibited publications. The last one is of course a common law prohibition, but the first two pose serious problems for newspaper reporting. In modern journalism, "the leak" from the executive or government sources is a central aspect of keeping the public informed of decision-making; it also allows governments "to float ideas" so that public reaction can be ascertained before final decisions are made; and for a fuller debate of pending issues of public importance before the decision and not after. The provisions in the Press Council Law are therefore a major obstruction to a free press. Recently, when a political correspondent reported on internal cabinet decision-making, the newspaper was threatened with legal action, though the so-called "leak" was quite innocuous. The threat led to a change in the editorial composition of the newspaper.[48]

The most positive aspect of the Press Council Law is section 9 which deals with defamation. It empowers the Press Council, on receipt of a complaint or on its own powers to investigate allega-

tions of untrue, distorted or improper reporting and to order a correction, to censure or request an apology from the defendant. The flexible nature of the hearing and the remedies allow for quick and effective vindication of this right. If the defamation is considered truly injurious, only a court has the right to order large amounts of compensation as a remedy.

The annual reports of the Press Council give a sense of the justice that is meted out. The type of cases appear to be complaints brought by individuals, usually low-income but whose names appear in stories such as "Mother elopes." It may be said that this is a flexible administrative remedy for those who cannot afford the cost of court litigation.[49]

Apart from legislation such as the Press Council Law there are executive decrees which also restrict press freedoms. National security in recent times has been the major ground for the curtailment of press freedoms. This curtailment usually comes in the form of emergency regulations, and has the following characteristics: editorial comment, feature stories, news reports on any subject are subject to approval by the Competent Authority; publication of any Cabinet paper requires the prior permission of the Competent Authority; no publication of any matter which is considered or alleged to be considered by any relevant ministry as being a matter of national security interest is allowed; and no person may affix in public places or distribute among the public any poster, handbill or leaflet without prior police permission.[50]

This type of comprehensive restrictive regulation has been in effect intermittently in Sri Lanka since 1971. In addition, emergency regulations have been used not only to seal presses but to seize and nationalise the printing presses of certain newspapers. The use of emergency regulations to prevent freedom of speech and to restrict the press has in fact been the norm for over nineteen years since independence.

Apart from the press, there is also the electronic media which play such an important role in developing societies. The Broadcasting Act No. 37 of 1966 established a corporation for the purpose of carrying on broadcasting. The Corporation does not

follow the so-called BBC model; instead, it is an organ of the government with all members appointed by the Minister and subject to his general direction. Private broadcasting stations can only exist if there is a license—the license is not automatic and the programmes broadcast by them are subject to control and supervision by the Broadcasting Corporation.[51] The Rupavahini Corporation Act No. 6 of 1982 set up the Rupavahini Corporation which was established for the purpose of carrying on television broadcasting. Again the members are appointed by the Ministers and the terms of "media freedom" are similar to those of the broadcasting corporation.[52]

As a result of agitation on the part of working journalists and representations made before the Youth Commission, and the All Party Conference, the government in 1989 decided to amend the Press Council Law and to set up a Media Commission modelled more along the lines of the Indian Press Council but which would also cover the electronic media. The Commission would also attempt to raise the standards of professional journalism in Sri Lanka and ensure freedom and balance in press reporting and media broadcasting. The legislation is apparently being drafted and should be tabled in parliament sometime in the near future.[53]

IV

ECONOMIC AND SOCIAL RIGHTS

The primacy of ethnic conflict has put all other human rights issues into the background. Whereas in many Asian countries, innovative action has been taken to combat social and economic injustice, the situation in Sri Lanka is different. Although many NGOs continue to work in this field, the type of work and analysis done has not equalled the work in the Phillippines, or in India for that matter.

There are numerous NGOs in the field of economic and social rights. However, most of them do not accept and sometimes even

deny a rights consciousness. In fact, Sri Lanka's largest NGO working in this field refuses to articulate grievances in terms of rights since they perceive it as a divisive discourse. In the urban areas the concept of rights has been ingrained for a long time because Sri Lanka has had a vibrant working class movement. The strength of these rights, whether in courts of law or in agitation, has been greatly dependent on the success of Marxist and left-wing political parties. Since 1977, when the Marxist left parties went into oblivion with regard to parliamentary politics, and after the state successfully snuffed out a strike of public servants, state sector employees and others organized by the Marxist left in June 1980, strikes have been rare. Developments in Central and Eastern Europe have thrown much of the dogma which supported these actions into confusion. The left, and any other form of social democratic alternative, have yet to find their feet in Sri Lanka to articulate grievances in the new context and in a changing global climate. Therefore, despite the spiralling of prices and a great deal of legislation which has not been beneficial to the working class, workers, many of them belonging to the government trade union, have been relatively silent during the decade of the 1980s. This is remarkable because from independence to 1980 politically-inspired strikes were frequent, and the working class movement was in the forefront of the struggle for social justice.

Sri Lankan labour laws adopted from British precedent do not recognise the concept of the "rural worker"—so the term "rights of rural workers", especially with regard to trade union rights of association, has not been developed in the law in this sector, nor have any other forms of protection for rural workers. The only protected sector under the legal framework remains the plantation workers engaged in tea, rubber and coconut production, who live in enclaves and who have the support of powerful trade unions. The vast majority of NGOs operating in Sri Lanka operate in the rural sector. In addition many of the rural institutions in existence today are government-initiated. Since 1956, the spread of education and mass communication in the rural areas has

created high expectations and a better awareness of rights in those areas, so much so that many question the use of the "rural-urban divide" in social science analysis. However most of the organisations operating in these areas are not "rights" oriented but focus on the "delivery of services". The co-operative movement, rural development societies, cultivation committees, and gramodaya mandalayas all cater for delivery of essential services to the rural sector.

The notion of legal rights then remains a somewhat unfamiliar category for rural workers. The Legal Aid scheme has pointed out that most of the cases in the rural areas revolved around family squabbles and the partition of land. Very few cases involved issues such as squatters' right to land, the rights of tenant farmers, or issues such as the payment of water taxes. The law therefore does not even begin to touch the issues which are of the greatest concern to many people living in the rural areas. The only really reformist piece of rural legislation of recent times was passed in 1958, the *Paddy Lands Ordinance* which limited the rent paid by tenant farmers. However rural workers do not go to the law or legal aid schemes to vindicate these rights, at least according to legal aid workers or the Bar Association.[54]

The important government projects which have raised crucial questions with regard to social and economic rights in recent years have been: the Free Trade Zones in Katunayake and Biyagama, near Colombo with a primarily female labour force; the Mahaweli settlement scheme where large amounts of land have been acquired by the state and large numbers of people displaced but with new settler communities being built in the outlying regions; and the Moneragala and Pelwatte sugar factories where state lands have been given over to large sugar multinationals for development. Many villagers depended on these lands for their livelihood, and many farmers now have to accept a sharecropping relationship with the multi-nationals concerned.

With regard to the Free Trade Zones there has been a great deal of agitation, with some effect. Though the contracts in the zone are so operated that traditional trade union protection does not

seem to be active, many NGOs, women's organisations, and women's wings of trade unions have been quite active in the zone. However, the situation in the country has militated against many of these workers risking their jobs with direct action when other social and political issues have taken the lead. However, a lot of work has been done and discussions on such issues are still possible in these urban worker enclaves. Sri Lanka's labour laws and tribunals still retain progressive legislative handles for urban worker action.

With regard to the Mahaweli scheme, the human rights paradigm does not seem to have sets of norms and regulations, except for certain due process requirements with regard to land deprivation. As for the sugar companies, there has been much agitation by rural peasant groupings, some of it violent, and often xenophobic. There has been some spontaneous action, but again this seems to have subsided as other issues and other types of political mobilisations primarily aimed at capturing state power began to articulate these issues as grievances. The rise of the JVP and its dominance in these areas pre-empted agitation on human rights grounds, and the sugar companies became issues for political mobilisation.

In a situation of high inflation and the accumulation of economic grievances, a major problem had arisen in regard to the discourse of challenging these rights. In the past Marxist or left discourse has been the norm for the articulation of economic grievances. Even nationalist parties use Marxist discourse for this purpose. That has been the Sri Lankan reality. Human rights dicourse has never really touched economic and social concerns, except in recent years and then only issue by issue. With the recent developments in Central and Eastern Europe, the traditional discourse of dissent seems now illegitimate or faulty, and no social democratic alternative, using human rights or any other form of discourse, has really emerged within the country. Until that occurs, social and economic rights in Sri Lanka will remain muted, at least in the short term.

In the meantime, there is a great need to set in motion a process

for rights awareness, articulation, and vindication in the rural sector, through the establishment of institutions and dispute settlement mechanisms. There is need to ensure that: the bureaucracy actually performs its duties satisfactorily, there is less politicization of the processes; grievances are articulated; and there is effective dispute settlement at a non-violent informal level.

In this regard it has to be emphasised that the positivist tradition of human rights gives us little guidance as to what course to follow. Such a tradition did not grow out of this rural reality. However, the "spirit" of economic and social human rights, i.e. the vindication of the basic needs of people through due process of law and regulation and the right of the people to vindicate these rights in specified fora or courts of law has to animate action and creativity in this regard.

V

GROUP RIGHTS

With regard to group rights in the Sri Lankan context, the rights of ethnic groups has become the paramount political and social issue, the one that has completely torn apart the social fabric since the early 1980s. All other issues remain in its shadow. The human rights paradigm for ethnic and racial minorities has two hinges—the first which we may call the equal protection paradigm is aimed at the dispersed, marginalised ethnic group which is an underclass in society. The human rights paradigm offers many strategies with regard to affirmative action to remedy such a situation. On the other side, there has in recent years been an enormous interest in the rights of indigenous minorities displaced by colonial powers—again marginalised in their own homelands. In this context also, there is a remedy in the form of territorial settlement which recent submissions before international bodies seem to endorse.

The Sri Lankan case does not fall easily into either of the above categories. The Sri Lanka Tamil minority has claimed

political discrimination on the grounds of language and also the right to traditional homelands and therefore the right to self-determination. In the case of the first, international standards of human rights are quite clear—the language rights of minorities gain clear protection under international instruments, and finally today in Sri Lanka these rights have been conceded by all parties since 1987; the 16th amendment to the Constitution has established bilingualism as a political reality.

But with regard to the claims for autonomy, i.e. devolution to meet the right to self-determination demands of the Tamils, there are no clear international human rights standards for such settlements. There have been recent documents seeking to analyse this perspective, but it is clear that in the case of autonomy each society is left to find its own formula. The problem is that such a formula can only be discovered through intense and serious negotiation and dialogue. The conflicting views on this issue, and the tortuous negotiations over devolution and decentralization over the last three decades are described in other chapters of this book. It would suffice to state here that in this case, the political group representing the Tamil minority community also held bottom-line positions and the process of negotiation and serious discussion came to a halt. With no international guidelines, the particular context becomes the most important, and if the actors in that context are not animated even to a small degree by democratic human rights ideas, or committed to "process", as opposed to armed conflict, then the possibility of resolving issues becomes difficult. When negotiated political solutions have to become the framework for human rights protection of minorities as well as minorities within minority regions, then the situation becomes altogether too murky and there is a lack of clarity with regard to human rights issues. As a result, except for research institutions which have provided some alternatives to different political groupings, human rights groups have not been active in attempting to actually articulate what they feel would be the correct political solution in the Sri Lankan context. At such a time the issue becomes "political" and the traditional legal divide between political and legal, political and human rights, takes over. As a result there has now been total abdication to the state and the dominant Tamil political group, either in terms of acceding to armed conflict or in terms of leaving it to them to work out the contours of the final solution. Human rights groups intervene only to ensure that certain humanitarian concerns are met; organisations such as the International Committee of the Red Cross (ICRC) play an important role in this. In the South Asian context, with raging conflicts as complex as those in Sind, Kashmir, Chittagong Hill Tracts, Jaffna and the Punjab, the crucial issue of what constructive guidelines exist in the human rights tradition, where the right to self-determination of large minorities is the crux of the problem, has never been properly addressed by the national or international human rights movement. This is in spite of the large-scale violation of human rights which takes place during these ethnic conflicts.

Finally we come to more general questions which need to be raised as issues for discussion coming out of the present case-study: the human rights paradigm in the South Asian context has to be transformed to include civil society and cannot be directed only against the state. For this there have to be more innovative strategies and mechanisms to raise awareness and acceptance of democratic, human rights values as part of the process of civil society. The interpretation of human rights in the Sri Lankan context quickly collapses into populism. Populism, with its anti-institutional bias, does not allow human rights to develop beyond shrill rhetoric. It is therefore necessary, if not imperative, to start thinking creatively about alternative institutions in the South Asian context which will give real and meaningful effect to human rights institutions with an organic link to the polity and to civil society. Equally important is the need to devise guidelines and norms for the condemnation of human rights violations by non-state actors in the society, especially those committed to armed struggle, and to develop an international mechanism for making statements and seeking redress against their violations. On paper Sri Lanka has a most sophisticated networks for human

rights protection, including a bill of rights, a Supreme Court, Commissions and Conciliation Boards. Many of these positions are held by very honourable men and women. And yet this formal presence is superimposed on a stark reality where there are persistent violations of human rights by many actors. Even if institutions are set up or it is suggested that they be set up, how does one ensure that they work? What are the essential ingredients that will make them autonomous and active regardless of political climate or political pressure? If the 1980s were the era of human rights awareness and consciousness raising, then the 1990s must be an era of mobilisation as well as of human rights institution-building.

NOTES

1. Article 126 of the 1978 Constitution.
2. *People's Union for Democratic Rights* v *The Union of India*, Petition 8143 of 1981.
3. Article 15 of the 1978 Constitution.
4. Article 15 of the 1978 Constitution.
5. Article 10 of the 1978 Constitution.
6. Article 11 of the 1978 Constitution.
7. Act No. 17 of 1981.
8. Act No. 31 of 1973.
9. March 1987.
10. See R. Coomaraswamy, "The Sri Lankan Judiciary and Fundamental Rights: A Realist Critique" in (eds) N. Tiruchelvam and R. Coomaraswamy, *The Role of the Judiciary in Plural Societies*, London, 1987, p. 107.
11. *Ibid.*, p. 2.
12. *Gunaratne* v *People's Bank*, SC Application 5884.
13. U. Baxi, "Taking Suffering Seriously: Social Action Litigation" in (eds) N. Tiruchelvam and R. Coomaraswamy, *The Role of the Judiciary in Plural Societies*, London, *op. cit.*, p. 32.
14. See *Visuvalingam* v *Liyanage*, (1984) 2 SRI L.R. Part 1, p. 123.
15. See *Neville Fernando and Others* v *Liyanage* SC Application 116 of 81.
16. *Perera* v *Jayawickrema et al.* SC Application 13484.
17. SIR 1978 SC Application 597 of 1977.
18. *Kandasamy Adipathan* v *Attorney General et al.* (1984) 2 SLLR Part 1.
19. *Joseph Perera* v *Attorney General*, SC Application of 107-109 of 86.
20. The Boossa prison case.
21. 13 September 1990, Panadura case.

22. *Nallanayagam* v *Delgoda* (1987) 1 SLR 299 and *Nallanayagam* v *Gunatilake* (1987) 1 SLR 293.
23. The Richard de Zoysa case.
24. According to a survey conducted by the Ministry of Plan Implementation.
25. The terms of reference of the Commission were officially published on 13 January 1990.
26. The *Ceylon Daily News*, 14 March 1987.
27. Amnesty International *Report on Sri Lanka*, London, 1990.
28. See for example, Eduardo Marino, *Political Killings in the South of Sri Lanka*, International Alert, London, 1990.
29. Sections 14 and 15 of the 1987 Constitution.
30. 376 U.S.254 (1964).
31. *Neville Fernando and Others* v *Liyanage*, SC Application 116 of 1981.
32. *Visvalingam* v *Liyanage* (1984) 2 SRI L.R. Part 1, p. 123.
33. *Joseph Perera* v *Attorney General*, SC 107-09 of 86.
34. Sri Lanka Press Council Bill 1 DCC 1.
35. Associated Newspapers of Ceylon Ltd (Special Provisions) Bills 1 DCC 35.
36. *Dissanayake* v *Sri Jayawardenapura University* (1986) 2 SLLR 254.
37. *Attorney General* v *Siriwardena*, SC 3 of 1980.
38. In the Matter of a Rule on Hulugalle 39 NLR 294.
39. In re Wickremesinghe (1954) 55 NLR 511.
40. *Hewamanne* v *Manik de Silva and Another* (1983) 1 SLR 1.
41. *Verasamy* v *Sweart* 42 NLR 481.
42. See Penal Code Section 479.
43. See Malalgoda *v* Attorney General (1982) 2 SLR 777.
44. See Sec. 285 of the Penal Code.
45. See Publication Ordinance No. 4 of 1927.
46. See Sections 118 and 120 of the Penal Code and also Police Ordinance No. 16 of 1865, and of course emergency regulations.
47. Section 8 of the Sri Lanka Press Council Law No. 5 of 1973, and also see R. Coomaraswamy "Regulatory Framework for the Press in Sri Lanka", *Maraga Quarterly Journal 6*, No. 2, 1981, pp. 66-96.
48. The episode relating to Suranimala and the *Sunday Times* in the last quarter of 1990.
49. R. Coomaraswamy, p. 85.
50. Civil Rights Movement, *People's Rights* (Colombo, 1979).
51. R.K.W. Goonasekere, *Fundamental Rights and the Constitution: A Case Book* (Colombo, 1988), p.195.
52. R.K.W. Goonesekere, p. 196.
53. The present Government has not pursued the matter and legislation is no longer being considered.
54. S. Pieries, R. Coomaraswamy, *Sri Lanka: The Rural Worker*, a Report for the ILO; Law and Society Trust (Colombo, 1988).

Chapter 4

Legitimacy and The Sri Lankan Constitution
(With Special Reference to the Amendment Process and the Referendum)

LEGITIMACY and the state has been the subject of much research in political science theory. This chapter does not purport to explore and evaluate these discussions in the light of the Sri Lankan Constitution. Instead, it merely attempts to outline some of the issues of constitutionalism and the legitimacy attached to these processes in post-1978 constitutional history. It will not attempt to deal with the specific questions of the legitimacy of the 1978 Constitution. There have been arguments put forward that the Constitution did not pass through a Constituent Assembly and therefore its legitimacy is questioned because it lacked "consensual foundations" and was an imposition of the ruling party.[1] In answer it is stated that a party which receives a 4/5 majority in Parliament has the legitimacy to draft a new constitution. These discussions have taken place in other fora, especially in the late seventies immediately after its promulgation. This chapter is more concerned with legitimacy in the general sense of constitutionalism and legality. What one is witnessing today is the possible lack of legitimacy of the representative democratic system as a whole. There is a challenge to all existing constitutional and legal processes. This is in many ways a graver

crisis than the specific issues of legitimacy linked to the 1978 Constitution.

The problems associated with constitutional legitimacy are particularly acute in third world countries which do not share the same historical pre-conditions which gave birth to the Anglo-American tradition of constitutions. In his book *The Crisis of the Indian Legal System*, Upendra Baxi has put forward certain hypotheses with regard to the problems of legitimacy of law and constitutions in the Indian context. His propositions may have greater validity in the Sri Lankan context than theories of legitimacy put forward by American jurisprudential thinkers such as John Ely Hart and Ronald Dworkin.[2] The reason for the relevance is that Baxi is attempting to grapple with legal issues which come out of the context of exploitation and oppression in an underdeveloped society and also of cultural nationalism, the socio-political environment within which our legal system functions.

Upendra Baxi argues that the Indian legal and constitutional systems are facing a crisis of legitimacy. He states, "legalism in the sense of a moral and ethical attitude prescribing that the legal rules ought to be followed because they are rules of conduct" is under stress. It is delegitimised by rulers and the ruled because there is a sense that constitutions, legislation etc., can be bypassed or ignored if they conflict with strong group or personal interest. The power to bend laws and the constitution is seen as the real power. He points to six factors which have led to this crisis of legitimacy.

1. The Indian political elite and the middle classes have not internalised the values of constitutionalism. There has been no demonstration effect at least from the ruling elite for the rest to follow.
2. Rule-following is not only considered unnecessary but is also seen as being counter-productive because of bureaucratic and other accountability procedures.
3. Corruption has infected the whole system so that monetary gratification, political influence, patronage, coer-

cion and intimidation are preferred to the legal process.

4. Abuse of power, where the arbitrary will of those in power, especially with regard to the enforcement of laws, forces law to take a back seat.
5. Neither the government nor the opposition accepts the autonomy of the law or accepts responsible decisions of the judiciary as final and determining, especially if it goes against their interests. The question is posed as to whether the legal issue in question is hostile to your politics or not. There is no attempt to rely on any "correct" legal argument and to accept the decision of courts as binding.[3]

Baxi's arguments about legitimacy presuppose the existence and popular acceptance of an autonomous legal culture which is to some extent independent of politics. The autonomy of the constitutional legal sphere from overt political pressure is the hallmark of the Anglo-American tradition of jurisprudence and of representative democracy.[4] It may be argued that such an autonomy has not truly taken root in Sri Lanka or India for a variety of reasons besides those outlined by Baxi. Sri Lanka is a very politicised community. In the Anglo-American tradition the bureaucracy and the judiciary are guaranteed independence and autonomy from political interference. There are conventions and codes of ethics which give some sustenance to this autonomy though one may still argue that the situation is never ideal. The bureaucracy and the judiciary are what make rules and laws acquire that certain sense of legitimacy which transcends the particular political will of the moment. If these institutions are not autonomous there is no guarantee for a transcending autonomy of the legal system.

Today, given the nature of abuse of power, corruption and violent opposition, there is a demand for an independent judiciary and a politically neutral bureaucracy. This was not always the case. In the 1960s, with the Supreme Court of India, for example, holding the right to property against fundamental economic

changes, many people argued that an independent judiciary and a politically neutral bureaucracy would only protect the vested interests and place a brake on social change.[5] However, the experience of the 1970s emergency rule and large parliamentary majorities has made it increasingly clear that these institutions are the very bulwark of a legitimate constitutional and legal order. So, what then is the equation in a third world context between maintaining essential constitutional values while leaving the door open for rapid economic and social transformation? I think it can be said that we have as yet to find that formula or approach at both the legislative and judicial levels.

Though the institutions of the judiciary and the bureaucracy are the institutions which give neutrality and sanctity to laws, it is the constitution which is often the source of legitimacy for any given political order. It is, in Kelsen's words, the ground norm, the essential social contract.[6] Whatever disagreements we may have about the actual text of the 1978 Constitution, there is no doubt that when it was drafted it was a variation on a very familiar theme, the theme of representative democracy, an independent judiciary, and a scheme of checks and balances. There are arguments that can be made that a presidential system is more authoritarian than the Westminster model or that the bill of rights is not protected unless there is judicial review of legislation by the courts etc., and many of these are valid. But, in essence, if we were to take a global view, the Constitution, in text at least, is very much within the Anglo-American tradition which has been the basis of our legal and political processes since independence.

However, once a constitution is drafted, the purposes for which it is used, the nature of the amendments and resort to more controversial provisions, give us a better sense of the nature of the constitution as it works in the real world, i.e.—Sri Lanka's social and economic context. So the question of legitimacy is linked not only to the text of the original constitution but also to the constitutional aftermath, the actual processes which have followed its enactments, the type of amendments introduced, the actual decisions of the Supreme Court and what provisions of the

constitution acquire prominence. This is a realist's concept of constitutional legitimacy.

It is the argument of this chapter that the process of amendment to the 1978 Constitution was actually a process of delegitimisation, where amendments which were contrary to the spirit of the Constitution and the spirit of the Anglo-American constitutional tradition were introduced to serve instrumental needs of the government at that time. In addition the referendum has emerged as the most potent provision of the Constitution, and it too has been used as an instrumental tool. Major opposition groups to the government have responded to some of these amendments and the use of the referendum not very constructively but also in the spirit of delegitimisation. This is especially relevant in the context of the Thirteenth Amendment which attempts to set up provincial councils throughout the island.

Amendment

Let us begin with the amendment process. It is clear that since the drafting of the 1978 Constitution the amendment process has been primarily used to gain tactical advantage for the party in power. The First Amendment put in place the legal provisions which allowed for the deprivation of civic liberties of Mrs. Bandaranaike, the leader of the opposition party. The use of a constitutional amendment to politically neutralize the opposition cannot give much legitimacy to the constitutional order. The Second Amendment to the Constitution provides for the expulsion of members from a political party. Expulsion will lead to the loss of his or her seat, if after a Select Committee inquiry the majority of the House seeks to expel the member.[7] Though in written form this appears to be fair (i.e. the House being the judge of its members) in real terms what it means is that Government MPs who are expelled from the party will lose their seats, opposition MPs will not. They can in fact cross over and strengthen the government. The Second Amendment was therefore to provide a tactical advantage for the government in power. Mr. Rajadurai from the TULF crossed over and joined the ranks of the

Government. The MPs who abstained from voting for the Thirteenth Amendment will probably lose their seats, and join the ranks of the unemployed. Such partisan action with regard to fundamental electoral principles cannot lead to a greater acceptance of the legitimacy of the system.

The Third Amendment to the Constitution gives the President the right to determine the time of the presidential election.[8] In most other presidential systems the time for election is fixed, a period of, for example four years. In the Westminster model, the government can choose the time of elections; this gives it an electoral advantage. The Third Amendment allows the same advantage with regard to the President in Sri Lanka. Again though in actual terms one cannot say that this practice is not common in the Anglo-American tradition, the purpose was to give tactical advantage to the government in power and to allow for the 1982 Presidential Election.

The Fourth Amendment provides for the extension of the life of the first parliament and was introduced after the Referendum of 1982[9] and does not couch itself in any general democratic language. It merely states that the life of the first parliament is extended. By focusing on a national mandate, it deprived citizens of the right of choosing their local representatives. In doing so, it also entrenched a 4/5 majority beyond the life of the present parliament.

In addition to the above amendments, which are unabashedly for the tactical advantage of the government, some other amendments to the Constitution of 1978 have been anti-democratic in substance, in that their purpose was to lessen the strength of accepted democratic safeguards. The Sixth Amendment, for example, banned separatist movements, and whole parts of it were supposedly modelled on Indian legislation along similar lines.[10] But, again despite the form, the real effect of the amendment was to remove the representatives of the Tamil-speaking areas of the North and some parts of the East, thus providing the deathknell to any form of democratic opposition from those troubled areas, and in effect removing those areas from being accountable to and

from participating in the mainstream democratic process. In addition the Tenth Amendment removed the safeguards which the ruling party itself had built into the Constitution against the extension of emergency powers after 90 days without a 2/3 parliamentary majority.[11] The *Public Security Ordinance* which has been used so often in our history—and has dominated the years since independence, contains sweeping powers vested in the government and the security services. Certain built-in safeguards had to be legally formulated against abuse of power. These safeguards have been lessened by the Tenth Amendment making the extension of emergency after a period of ninety days subject only to a simple parliamentary majority. Any government in power therefore can extend the emergency over 90 days without requiring the approval of the opposition, providing no safeguard at all. Though both the Sixth and Tenth Amendments may not have given immediate tactical advantage to the ruling party unlike the First to the Fifth, their final effect weakens the democratic structure of government, both with regard to the right of franchise of an ethnic minority and with regard to the fundamental political and civil rights of citizens.

Ironically the Thirteenth Amendment to the Constitution is the only substantive amendment which attempts to broadbase and not limit democracy through the setting up of provincial councils. The controversy surrounding it also indicates that the Government did not pass the Amendment for tactical reasons, but out of a sense of national urgency. The text of the Thirteenth Amendment in itself is inoffensive. It provides the framework for a reasonable, and not very extensive, devolution of power to the provinces.[12] If it were not for the political factors it would probably have passed without excessive controversy as a part of a package of decentralization and participation. But again the ethnic factor, ethnic violence, certain aspects such as the North-East merger, and primarily the aggressive geo-politics of the region and the ways and means of its formulation and passage have caused grave concern. Despite the fact that this amendment may have been a valid compromise for Sri Lanka's ethnic conflict, it

is also true that the amendment, because of the manner in which it was imposed, has further delegitimised the Constitution, and led to popular unrest. However, it is my prediction that despite the present controversies no responsible party will ever reject the framework of provincial councils, though they may challenge some aspects such as the merger of the North and the East. No party is going to risk the enormous pitfalls, both national and regional, that may come with the rejection of this framework. So, we have an ironical situation where one of the least popular of amendments to the present Constitution, at least judging from the nature of unrest, will perhaps be one of the most long lasting.

Traditionally, the amendment of a constitution was considered to be a rare and exceptional act which requires the same degree of consensus as the drafting of the initial constitution. If a constitution is amended too often, the fundamental law aspect of the constitution is lost and therefore its legitimacy is in question. It becomes a "periodical", as Dr. Colvin R.De Silva once called our Constitution. For this reason, the amendment process is curtailed in many countries. In many federal constitutions such as in the U.S. there is a need for its passage not only through the House and the Senate but also a need for its ratification by States. In India the famous case *Kesavananda*, decided during the times of emergency, entrenched certain provisions of the Constitution and stated that they were beyond the amendment powers of the National Legislature.[13] The confrontation between the Indian Supreme Court and Mrs. Indira Gandhi's Government contributed to her electoral debacle in 1977.

The Sri Lankan Constitution provides in its text for the curtailment of parliament's amendment powers. The Constitution contains certain entrenched provisions which are beyond the amending powers of parliament alone, and which require the approval of the people at a referendum. Article 83 of the Constitution states clearly:

Notwithstanding anything to the contrary in the provisions of Article 82—

(*a*) a Bill for the amendment or for the repeal and replacement of or which is inconsistent with any of the provisions of articles 1, 2, 3, 6, 7, 8, 9, 10 and 11 or of this article, and

(*b*) a Bill for the amendment or for the repeal and replacement of or which is inconsistent with the provisions of paragraph 2 of Article 30 or of paragraph 2 of Article 62 which would extend the term of office of the President or the duration of Parliament, as the case may be, to over six years shall become law if the number of votes cast in favour thereof amounts to not less than two thirds of the whole number of members (including those not present), is approved by the people at a referendum and a certificate is endorsed thereon by the President in accordance with Article 80.

These provisions as enumerated relating to unitary status, sovereignty, the National Flag etc., in themselves would perhaps form the basis of a consensus of what can be amended and what cannot. Regardless of this we have seen that the government has amended the Constitution for tactical gain. In Sri Lanka there has been an instance of judicial activism where the Courts have used the entrenched sections outlined above to place certain matters beyond the reach of parliament and to stem the tide of amendments made purely for the advantage of governments in power. In the famous *Kalawana* case, when the government put forward an amendment to allow two members for one seat following a reversal in a by-election and a victory for the Communist Party, the courts used the entrenched provisions of the Constitution as a means of stopping this strange and unprecedented amendment. They argued that the proposed amendment affected the franchise of the people and was therefore against the sovereignty provisions of the Constitution. Though the text of the Constitution stated that only Article 3 which vests sovereignty in general terms was entrenched, the courts read Article 3 with 4, relating to specific aspects of legislative power and the franchise. This type

of interpretation of course opened the door for the whole Constitution to be entrenched through Article 3, as in fact all aspects of the Constitution are part of the people's sovereignty. The door was closed by five judges in the recent case with regard to the Thirteenth Amendment. Nevertheless, it can be argued that at least in one instance, in the *Kalawana*[14] case, the courts have prevented a very blatant and unprecedented use of amendment procedure through creative recourse to the entrenched provisions. In most democratic jurisdictions, the courts or sub-units, such as states in a federal structure, become the watchdogs of the amending process. In Sri Lanka, the judiciary has begun to play that role.

While it is conceded that a constitution, to be fundamental law, to be legitimate and long-lasting, should not be freely amended, it is also argued to the contrary that a constitution of a third world country must be easily amendable. Otherwise it is argued that constitutions will not survive long in a fast changing world. They will either be discarded by new generations, and if they can't be discarded they will foster extra-legal agitation. On the other hand experience during emergency in third world countries has taught us many historical lessons. Certain aspects of the constitution, especially those relating to the bill of rights and the structure of a democratic polity should be beyond the amendment powers of the parliament of the moment. Otherwise abuse by strong executives cannot be stemmed or vindicated. This balance between what is fundamental in a constitution and what is amendable is an important debate, and has yet to be worked out in the context of Sri Lanka's own constitutional history.

Referendum

A referendum has an inherent legitimacy. It involves direct participation of the people on a given issue. It is the instrument which more than anything else will safeguard the interests of the majority and the attributes of a majoritarian democracy. However, like all other constitutional instruments, if used in certain real life situations, it can actually be anti-democratic. The refer-

endum can lead to Bonapartist rule, i.e. the subversion of intermediary structures of democracy by a popular leader. It can also be an instrument for ethnic chauvinism to whip up frenzy against minorities and unpopular groups in society. The referendum in the Sri Lankan context has unfortunately been called upon to play both these latter roles. I would claim that the referendum, which at the inception of the Constitution had the promise of broadening democracy, has in fact diminished it.

When the government in power decided to hold a referendum to prolong the life of parliament, it could be argued that the referendum in this case was used as an instrument of Bonapartism —a popular President at that time led his party to victory; (of course it is claimed that the malpractices at the referendum void this election);[15] victory took place on a national electorate, thereby denying citizens the right to choose elected representatives who would actually represent their interests at the local level. In addition a 4/5 majority of parliament for the government party was prolonged without testing the popularity of individual members before the electorate. In other words the referendum was used to subvert the most democratic institution, parliament, in an unprecedented manner. Although the referendum is a majoritarian device, its use in certain circumstances can only undermine the structures and institutions of democracy; the very structures and institutions which give legitimacy to the system of representative democracy.

Ironically, it is not only the government which has manipulated the referendum clause for its own ends; so has the Sri Lankan opposition. The referendum as a majoritarian instrument is the perfect instrument for the tyranny of the majority; it is a ready-made instrument for the destruction of minority rights or any accommodation with the minorities. If the laws which have been passed throughout the world to protect interests of minorities whether in terms of civil rights Acts or devolution or regional autonomy packages, were subject to approval by the majority of people at a referendum, none of them would have seen the light of day. If the essence of democracy is rule by the majority, with

the protection of minority opinion, then the referendum is one way of destroying the structures set up for the protection of minorities. It is this aspect in the subversion of a package which comes to an arrangement with a minority that appears to have led to the opposition call for a referendum when the Thirteenth Amendment with regard to provincial councils was introduced. In this context, when the call for a referendum is used to whip up majority frenzy against concessions to a minority, the referendum is not only anti-democratic but extremely dangerous in a heterogenous multi-ethnic society.

The referendum is in the end a populist instrument. When it is used to break through vested interest of those in power, and to propel a country toward social change, a use it has not been put to in the Sri Lankan context, then it will be welcome as an important aspect of democracy, especially in a third world country. But, when this populist tool is aimed at the structures and institutions of democracy itself, and when it is used to whip up frenzy against minorities and legislation for minority protection, it becomes a negative tool with fundamentally anti-democratic characteristics. Up to date, we have witnessed only the negative aspects of a national referendum.

What then is the relationship between the referendum and legitimacy of the constitutional order? A referendum when employed will always have a short-term legitimacy. The direct appeal to the people and the politics which puts it forward as the "people's vote" carries with it an inherent legitimacy in the eyes of large segments of the population—at least for the moment. However, the use of the referendum for partisan constitutional needs will in the long-run undermine the structures and institutions of democratic government, not only parliament, but also the scheme of checks and balances. During times of mass support, a government could in all probability call on the people to vote the bill of rights out of existence. But, to do so would be to strike at the heart of democratic freedoms, that which gives sustenance and spirit to the constitution. Precisely, because it is a powerful tool, the referendum must be used sparingly, especially in third

world countries where institution-building is often an important part of the development process, as important as economic growth. Institutions and administrative structures must have legitimacy in themselves, and people perhaps should be aware that such institutions can only be bypassed in the most extraordinary circumstances. If democratic institutions are bypassed at the whim and fancy of the government of the day, then it is perhaps natural that those institutions will not be taken seriously as centres of real power. It is therefore important that the vulnerable institutions such as parliament, the judiciary, along with the bill of rights and schemes for minority protection be insulated from the mass mood of a particular period. There should be an amendment which seeks to ensure that the referendum will not be used for what may be termed constitutionally subversive purposes. The provisions with regard to parliament's power and composition, the bill of rights and the concessions to minorities such as provincial councils should be beyond the reach of the referendum.

Conclusion

The major dilemma with regard to the problems of legitimacy in Sri Lanka is that there are two parallel sources of political legitimacy which co-exist, but which are often antagonistic and which use different styles and modes of discourse. The first source of political legitimacy is institutional, and it appears to come from the legal system and from representative democracy. The right to vote, the need for elections, the bill of rights etc., have a great deal of legitimacy in a country where over 80% of the people participate in the election process. At the same time, the second source of political legitimacy is symbolic and often counters the imperatives of the first. This second source is not only symbolically important but is at the emotional root of our personal and group identification. For the Sinhalese, this legitimacy comes from a Sinhala nationalism which is anti-imperialist and which seeks to ensure the special place of Buddhism and the Sinhala language. The discourse of this nationalism is strident. It uses imagery and symbols drawn from ancient and medieval

history which are unrelated in any way to the tradition and symbols of representative democratic systems borrowed from Westminster and British legal practice. From the 1970s the source of legitimacy for Tamils living in the North and the East has been a vibrant form of Tamil nationalism, which like its Sinhala counterpart, draws its inspiration from history and language.[16] It too has developed a line of discourse and a style of reasoning which has nothing in common with the institutions and style of government which the Anglo-American Gaullist constitution and our common law-civil law legal system envisage.

It is for the above reason that the discussion of very specific issues with regard to the legitimacy of the 1978 Constitution, as valid as they are, do not come to terms with a much more fundamental crisis—the crisis of our legal-political order in the face of the ideological challenge from strident nationalism on each side of the ethnic divide. One cannot deny that these nationalisms have found reasonance not only in the vernacular educated elite, who put forward the ideology, but also among students, the lower-middle class and large portions of the rural peasantry. As an aspect of this ideology is the rejection of everything that is foreign, and the need to replace the existing political order with something "closer to the people", representative democracy, imported from Westminster, tempered by the Gaullist system, must itself undergo a crisis of legitimacy. The future of the system then rests on whether it initiates a dialogue with the existing schools of nationalism, whether it will adapt to local conditions, and whether it can retain fundamental values of freedom, tolerance, and human rights in the context of mass movements fuelled by ethnic chauvinism. What makes it even more difficult is that there are two such movements in the same country, one in the South speaking and fighting for Sinhala rights, and one in the North speaking and fighting for Tamil rights. Whether the middle, i.e. those pledged to forms of democratic government and constitutional models which come out of representative democracy will be able to survive beyond the portals of the institutions which are still primarily controlled by the English-speaking elites, is per-

haps the deepest fear, as well as the greatest challenge that faces the country in the course of the next few decades.

NOTES

1. See generally, U. Baxi, *The Indian Supreme Court and Politics*, Lucknow, 1980 and also N. Tiruchelvam, "The Making and Unmaking of Constitutions—Some Reflections on the Process" in the *Ceylon Journal of Historical and Social Studies*, Vol. 8, No. 2, Colombo, June 1977.
2. See generally, J.H. Ely, *Democracy and Distrust, A Theory of Judicial Review*, Cambridge, 1980, R. Dworkin, *Taking Rights Seriously*, Cambridge, 1977.
3. U. Baxi, *The Crisis of the Indian Legal System*, New Delhi, 1982. p.15.
4. See generally, R. Unger, *Law in Modern Society, Toward a Criticism of Social Theory*, New York, 1977.
5. Golak Nath Case 1961, A.I.R. (S.C.) 1643.
6. H. Kelsen, *General Theory of Law and State.*
7. Second Amendment to the Constitution, 26 Feb. 1979.
8. Third Amendment to the Constitution, 27th August 1982.
9. Fourth Amendment to the Constitution, 23rd December 1982.
10. Sixth Amendment to the Constitution, 8th August 1983.
11. Tenth Amendment to the Constitution, 6th August 1986.
12. Thirteenth Amendment to the Constitution (not certified)
13. *Kesavananda* Bharti Case, 1973 A.I.R. (S.C.) 1461.
14. *Kalawana* Case S.C. 5/78.
15. See generally Election Commissioner, *Report on the First Referendum in Sri Lanka* held on 22nd December 1982.
16. For a general survey of writings in this field, see Michael Roberts, *Collective Identities, Nationalisms and Protest*, Colombo, 1979.

Chapter 5

To Bellow Like a Cow— Women, Ethnicity and the Discourse of Rights
(Barriers and Ideology in South Asia)

"Why have you appeared before this gathering?
Why do you bellow like a cow in labor?
Our time must be near.
Hameless women with no sense of decorum
bellow in gatherings of respectable men."

—Bhola Moira on Poetess Jogeswari and her female troupe. 19c.

Introduction

STUART Scheingold writes in his book *The Politics of Rights*: The appeals made by the myth of rights for the support of Americans are rooted in traditional values and closely associated with venerable institutions. The symbolic voice of the myth of rights, can, moreover, be easily understood and readily adapted to political discourse. But just how compelling is it? How pervasive and widespread and uniform a grip do legal values have on the minds of Americans?[1]

Implicit in this argument is that for human rights to be effective, they have to go beyond the normative, textual essence and become a part of the legal culture of a given society. They must stike a responsible chord in the general public consciousness with regard to political and civil issues. This resonance is therefore the clue to whether "the myth of rights" works in a given society to ensure the political and civil rights of all persons.

This chapter argues that in the area of women's rights as human rights there is the least amount of resonance, especially in the countries of South Asia, and therefore this lack of resonance has prevented the effective implementation of rights.

The barriers to the implementation of human rights are two-fold. Firstly, there is obstacle of the lack of a proper implementation machinery to make rights real in the lives of women, as well as a lack of the awareness of the rights machinery on the part of women, so as to empower them. The second and more formidable barrier is the refusal to accept the values in and of themselves, i.e. an ideological resistance to human rights for women.

In saying this I do not want to get caught in what is called the Orientalist trap.[2] It is easy to divide the world into bipolar categories, the west is progressive on women's rights and the east is barbaric and backward. The reverse of this argument from the eastern point of view is to accept the distinction, but to say that the east is superior, more communal and less self-centred with no place for this "adversarial" concept of rights. I would argue that in South Asia both traditions exist. There are examples of personal laws and women's rights which came to issues such as no-fault divorce and the best interest of the child centuries before the west. The Kandyan laws of the Kandyan Sinhalese are one such example.[3]

The Privileged Female Personality

To analyse the barriers posed by culture, custom and personal laws with regard to women's rights as human rights, it is important to analyse the underlying assumption about the female personality which accompanies any discourse of women's rights,

especially in documents such as the *Convention on the Elimination of All Forms of Discrimination Against Women*. The personality which is privileged in such documents is the free, independent, woman as an individual endowed with rights and rational agency. It is the culmination of the Enlightenment project, the "rights of man" now being enjoyed by women. This is perhaps exemplified in the most controversial and therefore the most important provision of the Convention, Article 16.[4]

Article 16 requires that state parties, on a basis of equality of men and women, ensure that women have the same right freely to choose a spouse and to enter into marriage with their free and full consent.[5] It also requires the state to ensure the same personal rights for husband and wife, including the right to choose a family name, a profession and an occupation.[6]

Though the Convention's emphasis is on the principle of non-discrimination, and not on the principle of empowerment[7], there is the assumption that it privileges the free, independent and empowered woman. The only female difference accepted by the Convention relates to woman's condition of maternity in the section on labour law[8] and with regard to special rights relating to the redressing of historical grievances.[9] The highlighting of these differences is only to ensure that the state takes necessary measures to ensure that the woman is given the opportunity to develop her individual identity, rooted in an Enlightenment view of the human personality, a personality without fetters or community context.

I am in agreement with the Enlightenment view of the human personality. But it would be wrong to assume that the values contained in the Universal Declaration of Human Rights are truly universal. Such an assumption would make more than half the world the subject of ridicule. However, to work toward this Enlightenment ideal, it is important to expose the ideologies of power which sustain counter-ideologies which recognise women as inferior. It is also important to learn from non-western societies of other issues, rooted in Asian example, which may in fact further the rights of women even beyond those contained in

international conventions—those rights which must necessarily be attached to woman in context, i.e. her class, her caste, her ethnic group.

The Duality in Modern Law

For the greater part of the non-western world, the approach to women is couched in ambiguity. The Sri Lankan Constitution, inspired by liberal, socialist norms is one such example. It states after a general non-discrimination clause which includes sex:

> Nothing in this Article shall prevent special provision being made by law, subordinate legislation or executive action for the advancement of women, children and disabled persons. [10]

On the one hand, the drafters argue that this formulation is to allow room for affirmative action on behalf of women, but the juxtaposition of women, children and the disabled is an extremely interesting feature.

It is especially so if we compare it to Article 4 of CEDAW:

> Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discriminatory. [11]

The first formulation, as expressed in the Sri Lankan Constitution does not accept responsibility for historical wrong while the second implicitly does. The reason for this lies also in the fact that Sri Lanka is a Buddhist society, and that many of the leading scholars feel that there was no traditional discrimination against women and that discrimination is a colonial legacy. This line of thinking is a dominant school—i.e. discrimination originated with colonialism.[12]

Secondly, the Sri Lankan Constitution, in juxtaposing women with children and disabled persons accentuates the duality that is present in all the laws with regard to women. On the one hand, there is non-discrimination and an assertion of equality with men.

On the other hand, there is the belief that they are vulnerable and need protection. In this paternalistic project, women along with children and the mentally disabled are denied the right to protect themselves, with certain inputs from the state.

The special protection provision on behalf of women is also defended on the ground that the reality of working conditions in a developing country is such that a worker's health is often at risk. With that proposition one cannot disagree. But the argument of non-discrimination requires that men are also protected from the terrible working conditions which may impair health. Equality in this world view is only present to help women, it is not reciprocal. The line of thinking is similar to the cases on social security which came before the US courts in the early 1970s where men as widowers, husbands and dependents claimed social security benefits which they felt they were entitled to.[13]

The Anthropological Reality-Ideological Barriers

The Sri Lankan Constitution is a modern document drawn from liberal and socialist inspiration. In some sense the issues it raises are easily identifiable and are within the framework of discourse which characterises legal thinking with regard to women's rights as fundamental rights. The barriers, though real, are thought out, and solutions of various inclinations have been put forward. It is a modern problem in the realm of the world history and rights discourse. While the so-called modern constitution reflects this duality between freedom and vulnerability, the situation becomes even more complicated if one deals with what is often termed the anthropological reality.

The "extra-legal" factors which are barriers to the enjoyment of women's rights as human rights in South Asia are rooted in ideological aspects, especially as they relate to the tension between the law and civil society as well as within the legal system itself. Let us begin with the former.

Law and Civil Society

Ashis Nandy in India analyses the roots of the modern Indian

crisis in the disjuncture between the traditions of Indian civil society and the colonial inheritance of a modern nation-state run on Weberian lines with bureaucracy and the market being the central organisational features. The law is the central instrument in this colonial process which aims at erasing tradition, plurality and restructuring civil society along modern lines. The law and the state are the special targets of hatred, and the rights discourse is seen as a manifestation of this impersonal, homogenising, activist state. Judicial activism is anathema to scholars such as Nandy.

Nandy is one of the most influential scholars in South Asia. His challenge of rights discourse is the best articulated response to modern statehood, which through the use of law attempts to ensure equality. It is important to deconstruct his argument to recognise the type of ideological barriers that we face in South Asia when we talk about women's rights as human rights. The speeches and pamphlets of religious and ethnic dignitaries are self-evident in their rejection of the West, including rights, in what may be termed the Orientalist encounter. Nandy is the most sophisticated and perhaps the most enticing articulator of the rejection of the concept of an activist state intervening to impose a model of equality based on the values of the Universal Declaration of Human Rights.

In an article entitled "The Making and Unmaking of Political Culture",[14] he argues that India has a measure of cultural autonomy from western values and institutions, and that this autonomy persists despite the best efforts of the government. He argues that in the worldview of traditional Indian culture, politics was considered the Machiavellian art of the possible. It occupied only a very limited sphere, i.e. that of providing security to the population. Civil society was the centre for struggle and conflict in traditional India and it was ruled by precepts of dharma and ethics. Tolerance, he claims, was an aspect of everyday life. In the hierarchy of power, the power over self was valued over state power, which was the least respected and the most brutal. Nandy's argument is supported by the two-volume work on the Hindu

Equilibrium.[15]

In this view of the dichotomy between civil society and the state, the root of all evil is located at the colonial encounter, where the Weberian concept of state was transferred to Indian soil. The competition among political parties, the struggle for state resources and the supremacy of state power is what Nandy points to as the main reasons for what Kohli calls "the crisis of governability".[16]

The implications of this scheme of analysis for human rights is not very clear. On the one hand, Nandy is not opposed to the substance of human rights, which he feels is at the root of popular culture and the humanistic face of civil society. However, he is totally opposed to the mechanism employed for its enforcement, the law and the paternalistic state. He argues instead for strengthening human rights values in civil society.

Nandy's point of view has been criticised as a romanticised view of the Indian past and of Indian popular culture. The rigours of the caste system or sex-based oppression cannot all be laid at the doorstep of colonial India. Many practices in Indian civil society shock the conscience and cannot be willed away as an aberration. And yet there is a voice there that should also be heard.

If one looks at CEDAW and other international documents of human rights, every article begins with the word "state parties" and then goes on to unfold the obligation imposed upon the state. As states are the foundation of the international order, this is inescapable. However, if the state is entrusted with the responsibility of ensuring women's rights; if the state is always viewed as active and paternalistic in a benign manner, then this does pose serious questions. The nation-state in the third world does not carry this "Scandinavian aura". In addition there is a major problem of implementation in what Kohli calls the redistribution of poverty.[17] Nandy is correct in one sense, that unless these human rights values take root in civil society and unless civil institutions and NGOs take up the cause, then women's rights as human rights will have no resonance in the social institutions concerned.

There are situations of course, where state action or inaction with regard to a particular community galvanises an awareness of human rights as part of the struggle of elements within society. The Chipko movement in India is one such example with regard to women and the environment, where women protected their livelihood by wrapping themselves around trees when the bulldozers, which were part of a larger development project, came into their areas.[18] In Sri Lanka, ethnic and civil violence has galvanised groups into action from all strata of society, and has in itself instilled values of the right to life and freedom from arbitrary arrest. It is therefore lived experience which is the best fermenting ground for human rights awareness and action, including the rights of women. In that sense Nandy is correct. The future of human rights in the South Asian region does not lie with "state parties" but with the movements within civil society.

Where Nandy is wrong is that the law is not only an empty shell but a galvanising point for mobilisation. Even if the future lies in civil society, there have to be standards by which one can hold individuals and states accountable. In addition, in some rare instances the courts are also galvanised into action. In such a context, this artificial separation into civil society where the popular will resides and the state where the legal and bureaucratic will reside may create more problems in the realisation of women's rights. It is only a combination of the two, coming together at a particular historical moment which results in change, creativity and social action. The first is only limited to mobilisation and awareness, the second to articulation and implementation. Of course, after enactment, forces in civil society have to act as watchdogs to ensure that the rights guaranteed are protected. So Nandy's point is well taken: civil society is necessary for creating the conditions for law to be relevant, it is also useful in ensuring that law is enforced. But, at the same time it has to be recognised that without law, any human rights activist will only be fighting windmills of the mind.

While discussing issues of civil society, it may be important to reiterate here that the essentialist view that western civil society

and law empowers women while the eastern only subordinates them is not strictly correct. There are instances where the traditional laws have been more progressive than modern legislation and the colonial encounter actually robbed women of pre-existing rights. A case in point previously mentioned is the Kandyan law of the Sinhalese, where standards such as no-fault divorce and best interest of the child, and even polyandry, were recognised in the Kandyan areas of Sri Lanka and still have some legitimacy under the modern system of law, although of course the practice of polyandry faded with the importation of western values.

In addition, the colonial encounter forced reinterpretation of law according to legal norms prevalent in the West. The Thesawalamai of the Sri Lankan Tamils had notions of community property akin to that of the Roman Dutch law, but Dutch draftsmen interpreted the notion of community property according to their law before the nineteenth century reforms with regard to married women's property. They imposed on Tamil women the denial of the right of alienation of property without their husbands' consent with no reciprocal duty. Today, married Dutch women can freely acquire and alienate property acquired in their name, but married Tamil women, subject to this archaic law and its medieval interpretation, cannot do so and do not enjoy the rights given by the *Married Women's Property Ordinance* of the nineteenth century. Since Sri Lankan Tamil women are a minority, they have no power to change the law which for all purposes may govern them till the end of time, regardless of the change in circumstance or in the practices of the community.

Law and Other Ideologies of Empowerment

Since rights are, in the final analysis, about empowerment; what many South Asians argue is that the traditional roots of empowerment in South Asian societies is denied in rights discourse. The legal strategies which accompany rights discourse aim at an adversarial contest in the courts between the victim and the state. However, it is argued that women's empowerment in these traditional societies has manifested itself not through rights

ideology but by family ideology. There has been in South Asia recently a spate of writings about "Mother, Mother-Community and Mother-Politics."[19]

South Asia has the greatest concentration of women heads of state in the world. India, Pakistan, Sri Lanka and Bangladesh have all experienced rule by women heads of state. There is ideological acceptance of women in the realm of the public sphere but this is because they have appropriated the discourse of motherhood. Anthropologists have also noted a major rise in mother-goddess worship.[20] Of course the glorification of woman as mother means the denigration of unmarried women, widows, childless and divorced women. Yet this ideology is so powerful that the present Tamil Nadu chief minister Jayalalitha, who enjoyed a non-formal relationship with the hallowed hero, film-star turned politician, has appropriated motherhood as a symbol, even though she is neither married nor has children. She is called the "Avenging Mother" in a certain context, a protector of the poor and the underprivileged.

What women activists argue is that legal strategies do not allow women to touch base with their traditional sources of empowerment. In Sri Lanka the ideology of motherhood has been appropriated for political action with regard to the widows and mothers who have lost their husbands and children in the recent violence. The Mothers for Peace or the Mothers of the Disappeared, precisely because of their appropriation of the mother ideology, have found a great deal of political space which even politicians caught within the same ideological construct are hard pressed to overcome.[21]

There has been much criticism of this type of strategy which uses indigenous symbols, because of the other side of the same process. If one accepts mother ideology how do we privilege the voice of the unmarried, the widows etc...? The strategy appears to divide the female community with no real concrete political goal save that of agitation. But what is significant to realise is that rights discourse, because of its construction and its style of implementation, is not plugging into many of the dynamic social

movements taking place in South Asia. Perhaps one should accept that one is the realm of politics and the other the realm of law. Either way, it is important to recognise that there is an important disjuncture in the sphere of social action.

Whose Equality

Before we move onto a discussion of the law as a strategy for the attainment of women's rights through human rights, perhaps it is important to consider the discourse of equality. Often at the same conference, the word equality is used with diametrically opposite constructions placed upon it. Even international documents vary. For CEDAW, equality is non-discrimination, i.e. a constant measure of men against women. In other contexts, equality is access to empowerment as individuals, not as a measurement of the final end which men vs. women actually reach. In some cultures, equality retains notions of separate spheres, the public and private, separate but equal doctrine prevails, justified by the uniqueness of the maternal function.

In socialist societies, equality carries with it the responsibility for the state to socialise maternity and maternal functions so as to allow the woman to work and fulfil her public life. To many others equality is an ideological disposition, rooted in attitudes and psychological make-up which can only be removed through strategies drawn from psychology and post-structuralism. For others equality of women is completely dependent on their class, caste, or ethnic group; if these attain equality, then women in those groups will also achieve equality. For feminists, of course, equality is the other side of patriarchy; as every aspect of life seems to be infected by the gender bias and classification, equality will only be achieved if it is linked to social transformation of a very radical sort.

Given these diverse conceptions of equality, the law in many of these societies as well as at the international level has taken the easy way out. It is only in areas where discrimination can be factually ascertained through empirical data and actual case-studies that law is relevant to the question of female equality. It is

therefore not unusual that non-discrimination remains the model legislation in all parts of the world when it comes to the equality of women. Women's rights couched in this limited human rights discourse are also confined to conceptions of equality which are linked to the structure of the law and its relationship with the state in any particular society. In addition, in our part of the world, there is very little autonomy that law enjoys *vis a vis* the state and politics. Human rights are then confined to this post-colonial sector of law, legislation, the state, the bureaucracy, and political party mobilisation. This is the clue to its success as well as its failure.

Opportunities and Innovations

This is not to say that interesting innovations cannot take place which take women's rights beyond non-discrimination in certain constitutional contexts. Since the Indian Constitution recognises the right to life and dignity, in a series of cases the Indian courts dealt with situations which were clearly not issues of measuring men against women but rooted in life and dignity. The Agra Remand case where women in remand were living in dismal circumstances was one such case, and there have been others dealing with women under-trial prisoners, women construction workers etc. . . In this context, the principles contained in the Indian Constitution permitted a move away from simple non-discrimination—or the redistribution of poverty as it is sometimes called—in third world societies, to a more empowering stance focusing on the clauses relating to human dignity. Unfortunately many countries do not have these provisions, or judges willing to interpret them in a holistic light.

Barriers—Family and Personal Law

This paper is not about opportunities but about barriers. The issues of women, ethnicity and rights discourse eventually come to a head in the area of family law or personal law. Labour law and other forms of economic and labour legislation have a certain similar standard, modelled on ILO recommendations and directing themselves to the urban labour force. In this context the vast amount of women (87% of Sri Lankan women workers)[22] work in the agricultural sector and are unprotected by the law. The barriers relating to their rights are in the urban labour bias of labour legislation. The criminal law is of course the security safety net of any society, and though there are many issues to raise with regard to women and violence, issues that are not raised in CEDAW, the provisions are generally similar and have a certain uniform structure.

The family law, however, is where completely different and plural standards and constructions exist of how we must conduct our personal and social life. It is the litmus test in any given society with regard to legal norms and the status of women. It is also where the law, ethnicity and ideology with regard to the rights of women merge to become a powerful ideological force. Before we come to any conclusions with regard to the barriers that exist with regard to women in this area, let us look at four case-studies. The first relates to the case of Sati in India, the second to the *Hudood Ordinance* in Pakistan, the third to the recent attempts at divorce reforms in Sri Lanka, and finally to the well-known Shah Bano case of India.

Sati

On September 4th 1987 in Deorala, Rajasthan, Roop Kanwar, the widow, was burnt alive on her husband's funeral pyre. She was a university student aged eighteen, and her husband was an unemployed university graduate who died of a terminal illness. Her shrine became a place of pilgrimage, and many believed her to be a goddess and that offerings to her shrine would cure them of cancer, the illness that took the life of her husband. There are conflicting versions of her state of mind. Some commentators have argued that she was willing to die, others that she was coerced, and the third that she was unsure but in the end succumbed to family pressure.[23]

The newspapers carrying the story a week later stirred a huge controversy. Urban women's groups, as well as groups of women

from all over India, were horrified and organised a march in Rajasthan. The Rajasthanis retaliated and filled the streets with thousands of their own ethnic group, the right to commit sati they claimed was part of their ethnic culture. After months of waiting the police finally arrested Roop Kanwar's father-in-law and five other members of the family for abetting the suicide. Three months later the Indian parliament passed a tough law banning sati, even though an old law already existed, as a sign of central government intolerance of these ethnic practices which Rajiv Gandhi pronounced as "utterly reprehensible and barbaric".

Though the feminist movement had scored some type of legal victory, the case pointed to the terrible gulf between human rights and women rights activists, on the one hand, and those who see the status of women as an integral part of their ethnic identity. A leading Hindi journal pointed an accusing finger at secular, western-educated intellectuals, arguing that only godless people who did not believe in reincarnation would denigrate Roop's brave act. [24]

The debate over sati and Roop raged for weeks in the newspapers. There were those who argued that if voluntary it was alright, suicide is a time-honoured Rajasthani practice and should be accepted. It was cultural discrimination to prevent sati for those who really wished to commit sati. There were others, such as Nandy, who argued that sati was a terrible affair but it is no business of the state, the onus must lie with the people and communities of Rajasthan; they must be the ones to outlaw the practice and not the central government. There were women's groups that felt that sati was so offensive that as in the case of Indian penal provisions on custodial rape, if a woman dies of burns in a public place, the burden of proof should shift to the family to prove that the incident of sati did not take place. Human rights activists, many of them in the forefront of the struggle against arbitrary arrest and detention, called for the imposition of the death penalty on those who aid and abet sati. The international struggle against the death penalty was forgotten in the heat of the moment.

The Roop Kanwar case sent the human rights community of India into deep crisis. Firstly, Rajput defiance and Hindi language newspapers pointed to how human rights consciousness was not a given norm and was increasingly being allocated to the "urban, western intelligentsia". This marginalisation is purposeful, but given the fact that many of the leading activists are Delhi-based, it carries a measure of credibility and the counter-belief that these human rights people are out to denigrate national culture. Spectators in Rajasthan during those days saw the people as joyous, celebrating a great event and a courageous act, they did not see anything wrong. This realisation alone was terrifying to most feminists working in the twentieth century. Ironically, the state came down strongly on the side of the women activists, and yet there was a sense that the battle was lost and there were echoes of Nandy's initial analysis. What is the point of all these laws if the people do not believe that putting an eighteen year old girl on a funeral pyre and denying her life is not a violation of the most basic fundamental right, the right to life? What is the point of all the constitutional protection if "ethnic identity" is an acceptable justification for reducing the status of women according to diverse cultural practices? As one activist said in conversation, "something died in the Indian women's movement with Roop Kanwar; the innocence of believing that what shocks your conscience will also shock the world."[25]

Hudood Ordinance

The second case in point is the celebrated Pakistani case of Safia Bibi, a blind girl who alleged that she was raped. She was still a minor so her father filed a complaint of rape two days before she delivered the child, supposedly born of this union. Her parents claimed that Safia had told them of the rape incident but they did not want to disclose it for fear and humiliation. The alleged rapist retorted that the blind girl was of loose virtue.

Under the newly promulgated *Hudood Ordinance*, under the *Offences of Zina Ordinance*,[26] Safia and victims of rape faced a major dilemma. If Safia alleged rape and failed to prove it (rape

conviction requires four non-female witnesses), then she could be sent to jail for "adultery" if she was married, and "fornication" if she was unmarried. This is precisely what happened. The Sessions Court convicted her for Zina and sentenced the blind girl to three years rigorous imprisonment. There was a national and international outcry and the Federal Shariat Court set aside the judgement on technical grounds. However, the alleged rapist did not spend a day in court because of insufficient evidence.[27]

Safia Bibi's case was another crisis for the women's movement in South Asia. It is without doubt the mobilisation of women's groups in Pakistan along with their international network which brought enough pressure to bear on the judges in the revision of the judgement. Safia Bibi raises a very different set of issues to Roop Kanwar. In the former case, practices in civil society which were against women suddenly re-emerged in the context of new power and class struggles.[28] In the case of Safia Bibi, civil society had become accustomed to certain colonial norms with regard to criminal and civil procedure. The state in its infinite wisdom and under martial law introduced laws which had not been in operation in Pakistan for centuries, based on its own interpretation of the Koran. This act of state took place after Pakistan had joined the United Nations and was thereby bound by the Universal Declaration of Human Rights. The spirit of the *Hudood Ordinance* in the section on Zina and even with regard to criminal procedure in certain types of moral offences were clearly contrary to the Universal Declaration. In this case, the state flouted international norms so as to articulate religious fundamentalist ideals even when there was no pressure from below for its promulgation. This manipulative use of religion and religious codes to defy international norms is a new manifestation of the post-colonial nation-state, a trend which may develop in the near future. The only option against this type of activity cannot be the legal system which has become perverted by political will; it has to come from political mobilisation within and international support from without. The Safia Bibi case is an indication that such international efforts may succeed in some instances.[29]

No-fault Divorce

In the early nineties, a Committee set up to look into reform with regard to the divorce laws of Sri Lanka came up with the following recommendations:

(*a*) The establishment of family courts;
(*b*) non-adversarial approach to marriage break-up by adopting the theory of marital breakdown;
(*c*) a move away from fault-based divorce to consensual divorce with two years judicial separation and/or five years separation being evidence of marital breakdown;
(*d*) introducing standards with regard to the best interest of the child as the grounds for custody rather than the concept of a natural guardian: in Sri Lanka under Roman Dutch inheritance such a guardian is the father.

The Committee's recommendations were far-reaching in terms of Sri Lankan law, which was still fault-based and adversarial in its concept of the natural guardian; but the recommendations were well within the trend of divorce reforms sweeping most of the world apart from the Islamic countries. The reaction to the reforms was vociferously negative, even from an organisation such as the Sri Lanka Women Lawyers' Association. They argued vehemently for maintaining the old system with a few minor changes, their argument being that the present divorce reforms as suggested by the Committee threatened the family unit and therefore went against the interests of women.

The case law of the country had already set a precedent when a Supreme Court judgement stated that even a guilty man could move for divorce after seven years separation, thus allowing room for the introduction of no-fault divorce.[30] But this was not acceptable to the women lawyers who challenged the efficacy of that judgement.

The consensus was so openly against the proposed law reforms that they were not adopted. The main furore against the reforms was that no-fault divorce went against the interest of the family and especially the wife. Women were in the forefront in challenging the Committee, which comprised leading women academics

and professionals.

This crisis among women and their perceptions about family and divorce raises some extremely interesting questions. CEDAW, to which Sri Lanka is a signatory, clearly privileges an independent free woman, but in the case of Sri Lanka the ideology of the family remains supreme. It is the belief that the protection of woman lies in the protection of the family. Ironically, however, the data show an increasing number of female-headed households and females as the primary earner, whether in the plantations, the free trade zones or as migrant workers. This gap between myth and reality is the ideological construction, the barrier toward formulating laws which will protect women and children at the margins, margins which are increasingly becoming the mainstream.[31]

While the Indian and Pakistani cases show us the dilemma of the tension between civil society and the law, in this case all the struggle has been within the framework of the law, the preference for standards which were set in the late nineteenth century over modern day formulations. These divorce laws of course do not affect the personal laws of the minorities but only of the general population. Rights discourse with its notion of the empowered individual comes up against communitarian notions of the family, an ideological force far stronger than rights discourse and perhaps the most formidable obstacle women's rights activists face. It is only recently that Sri Lankan scholars could even talk about domestic violence without being considered family wreckers. So, even in a context where colonial legal norms prevail and have been indigenised, where rights discourse would be the natural outgrowth of these systems, the ideological barrier of the sanctity of the family unit will not allow for reform in these areas even if, in the long run, they would empower women and give them an equal status as individuals.

Shah Bano

The final case-study is the celebrated Indian case of Shah Bano. In 1975, Shah Bano's husband made her leave his home

after over forty years of marriage. Initially he paid her a small maintenance but then stopped. In 1978, Shah Bano filed under section 125 of the Criminal Procedure Code, a prevention of destitution provision, for maintenace of Rs. 500 a month. Her husband was a lawyer with a five figure income. While the application was pending her husband pronounced Talak on her and divorced her, gave back the "mehr", or the money she brought as dowry, Rs. 3,000, and then refused to pay maintenance. The magistrate under the criminal code ordered him to pay Rs. 25, the High Court raised it to Rs. 179. Her husband appealed to the Supreme Court. His argument was simple: saying he was a Muslim, that his marriage is governed by the Muslim Personal Law and under that law there is no duty of maintenance, only the duty of returning the mehr, and that the personal law is superior to the Criminal Procedure Code in this respect.

Ten years from the year the case began, the Supreme Court dismissed the husband's appeal saying that the provision against destitution is not in conflict with Muslim rules of maintenance. If the wife cannot maintain herself within the three month period of Iddat—i.e. initial separation before divorce, then she can have recourse to the criminal procedure.[32]

The case was the most controversial one of the decade and point to the enormous problems and dilemmas that South Asian nations face when they promote women's rights as human rights. In this case it would be Article 16 of CEDAW which would be relevant, the article on which India made reservations and therefore is not internationally bound.

The forces lining up with regard to this confrontation were:

(*a*) For Shah Bano — Women's groups, Hindu fundamentalists who wish to get rid of Muslim law in their country, and a very few moderate Muslims.
(*b*) Against Shah Bano — the Muslim community, and in the end the Indian state when Rajiv Gandhi moved to appease the minority community by passing legislation to override the Supreme Court judgement. Today destitute

> Muslim women do not have the right to go to court under the penal law.

The problem of Shah Bano was compounded by the fact that she was a minority woman in a country with a hostile majority, where communal prejudices run deep and are volatile and explosive. Her community considered her a traitor. She was also in a country which, like most others in South Asia, accepted a formal framework of law which stated in effect, "all men are equal, but women are bound by the position relegated to them by the different systems of personal law, laws which govern the most important area of their lives, the family." In 1984, Rajiv Gandhi made it clear that personal law was superior to any provision in the Criminal Code, it is privileged over all other legal provisions which may have some bearing on the provisions of personal law.

In Shah Bano's case the state stepped in to protect the rights of the minority community at the expense of women; a state, which in other contexts, may not think it wrong to fan the flames of communalism when it comes to other issues, especially in Kashmir. So as Hensman puts it, the triple oppression of Shah Bano is clearly demonstrated: she suffers as a woman, she suffers as a Muslim, and in this context suffers as a Muslim woman who wants to assert a different voice to that of her community. She is indeed the subaltern voice which had suddenly found itself in a court of law.

Initially, Shah Bano received a great deal lot of support, not least of which was the Supreme Court of the land. However, some of the Court's interpretation of the Koran angered many Muslims as wrong and insensitive.[33] The support she got from Hindu fundamentalists was also a terrifying fact. The leader of one of the Hindu movements said in anger, one country must have one law, meaning, of course, laws acceptable to the majority Hindus.[34]

Women's groups supported Shah Bano vociferously but their discourse of rights and equality was drowned by the voices of communalism on both sides. They were trapped in between, and

especially when riots ensued, their voice was naturally weakened. When a delegation went to see the Prime Minister at that time, Mr. Rajiv Gandhi, he sympathised but added "how many women can you get on the streets to defend the Supreme Court judgement and stop the rioting?" It was in the end a question of numbers, violence, fear and terror, the very factors which are least conducive to a rights regime. In the end Shah Bano had no rights, she became a metaphor in the political discourse of communalism which has shaped the violent history of post-colonial South Asia.

Shah Bano's case and the ones before it point to many problems which relate to barriers for implementing women's rights as human rights in the South Asian region:

(*a*) Rights discourse is a weak discourse, secondary to other legal discourses, especially when it comes to women and family relations.

(*b*) The values of rights discourse as it relates to women are not part of the popular consciousness, and in fact in some contexts, the reverse may persist in practices of civil society.

(*c*) The post-colonial South Asian state has played a very arbitrary and ad hoc role depending on its composition and priorities, siding with different parties, different discourses, depending on the political exigencies and the numbers game. While it may intervene to stop Sati, it will refrain from giving a Muslim woman maintenance. While it encourages modern commerce, usury and banking, it will bring in laws which impose extreme penalties with regard to issues of rape, adultery and fornication. It has mastered the art of cultivated hypocrisy with regard to women.

(*d*) Even if the conditions exist with regard to rights discourse, the Sri Lankan case shows clearly that even among women certain ideologies are far more powerful than the ideology of individual rights; the sanctity of the family

moves women more than the freedom and, perhaps, the responsibility that empowerment is supposed to bring.

In the late nineteenth century a renowned North Indian male poet charged a female poetess with bellowing like a cow, denying decorum and invading male public space. Ironically, with regard to the law at least, the public spaces, often governed by recent thinking in the law, grants equal access to women in most South Asian societies. In Sri Lanka, the most progressive in these aspects, women are 50% of the medical faculty, 50% of the law faculty, more than 50% of the arts faculty etc. . . and they are increasingly joining the urban labour force. Laws are also being drafted to assist women in the rural areas, who for centuries have worked in the field without protection.

But it is the private sphere, a distinction which came to us with a colonial inheritance of personal laws, that is most impervious to change with regard to women's rights. Here women are divided by community and amongst themselves about whether a rights discourse is relevant or necessary. Unless we begin to examine the law's approach to the family and to private space in greater detail, and understand the dynamics more fully with regard to ideological constructions which resist legal change, we will not be able to bring rights home to the family. The task is daunting but necessary. Without equity in the family, it is argued, there will not be equity in society. Without mutual respect in the family, we can be sure that there will be no respect for the rights of others in society. As has been often repeated, the family should not be defined in a formalistic, nuclear construction as a husband, wife and children. The family is the place where individuals learn to care, trust and nurture each other. The law should protect and privilege that kind of family and not any other.

NOTES

1. See S.A. Scheingold, *The Politics of Rights*, New Haven, Yale University Press, 1974, p. 62.

2. R. Inden, *Imagining India*, Basil Blackwell, Oxford, 1990.
3. S. Goonesekere, *Sri Lanka Law on Parent and Child*, Colombo 1987; see sections on Kandyan Law.
4. Article 16, United Nations Convention on the Elimination of All Forms of Discrimination Against Women (1981) hereafter CEDAW.
5. Article 16 (1)(b).
6. Article 16 (1)(g).
7. See Article 1 of CEDAW.
8. Article 11, Article 12.
9. Article 4.
10. Article 124 of the Constitution of the Democratic Socialist Republic of Sri Lanka, 1978.
11. Article 4 CEDAW.
12. See generally, SLFI, *Human Rights and Religions in Sri Lanka*, SLFI, Colombo, 1988 chapter on Buddhism. As for the colonial encounter and women see generally, J. Liddle and R. Joshi, *Daughters of Independence*, London, Zed, 1986.
13. See Davidson, Ginsburg and Kay, *Sex-Based Discrimination*, St Paul, West, 1974: section on Men as Victims, p. 35.
14. A. Nandy, "The Making and Unmaking of Political Cultures in India" in *At the Edge of Psychology*, Oxford University Press, New Delhi, 1980, p. 47.
15. See generally, Deepak Lal, *The Hindu Equilibrium*, Oxford, Clarendon, 1988.
16. A. Kohli, *Democracy and Discontent*, Cambridge, Cambridge University Press, 1991.
17. Kohli, chapter on Centralisation and Powerlessness, p. 303.
18. For journalistic account see E. Bumiller, *May you Be The Mother of a Hundred Sons*, New York, Fawcett Columbine, 1990, p. 133.
19. CS Lakshmi, *Mother, Mother-Community and Mother Politics in Tamil Nadu*, New Delhi, *EPW*, October 20-29, 1990.
20. Lakshmi, p. 73.
21. S. Abeyesekera, *The Subversion of Motherhood*, a talk given at ICES, Colombo, August 1992.
22. Sri Lanka Department of Labour, Employment Survey, 1981.
23. See for journalistic account including firsthand observation of the crowds, Bumiller, p. 62.
24. Bumiller, p. 72.
25. Kamla Bhasin in conversation, August 1990.
26. The Hudood Laws, promulgated in 1979 and enforced in 1980. See also A. Jahangir and H. Jilani, *The Hudood Ordinances: A Divine Sanction?*, Rhotas, Lahore, 1990.
27. Jahangir ed. pp. 88-89.
28. A. Nandy, "Sati: A Nineteenth Century Tale of Woman, Violence and

Protest" in A. Nandy *At the Edge of Psychology*, Delhi, Oxford University Press,1980.

29. See Jahangir, *op. cit.*
30. *Muthuranee* v *Thuraisingham*, Colombo, S Ct (1984).
31. See generally for the type of power women have in the informal sector, C. Risseeuw, *The Fish Don's Talk About the Water*, Leiden, Brill, 1988.
32. Rohini Hensman, 'Oppression within Oppression, The Dilemma of Muslim Women in India", *Thatched Patio*, ICES, Sept. 1990, p. 22.
33. *Ibid.*, p. 24.
34. Hensman, p. 26.

Chapter 6

Civil and Political Rights — Some Regional Issues

Introduction

IT is perhaps an understatement to say that South Asia is facing a crisis in the area of civil and political rights. The violence and brutality that has engulfed the sub-continent in the past few years has been without parallel. In many areas of our respective countries the right to life, from which all other rights flow, has been flagrantly violated by both state and non-state actors.

In some areas and in some contexts, the legal and judicial processes no longer afford the remedies that decades of human rights activism have fought so hard for. It is indeed a crisis of civilisation more than of law or legal institutions, for even civil society, torn apart by discourse rhetoric and "patriotism", seems to have lost the ability to respond collectively to issues which only a few years earlier may have led to an outpouring of moral outrage. South Asia has yet to learn the lessons that Europe learnt after World War II, but the process of learning is proving to be a hard and bitter experience.

At the start, it is perhaps important to attempt a working definition of human rights in the civil and political rights field so as to guide the discussions on these issues. In terms of substance, these rights, drawn from the Universal Declaration of Human

Rights and the Civil and Political Covenants on Human Rights, may be divided into three major areas. The first would be due process rights with regard to torture, arrest, detention, and fair trial, the second with regard to freedoms such as the freedom of speech, publication and association among others; and finally the equality provisions relating to minorities and gender discrimination. An understanding of the latter rights must of course be complemented by papers on group rights and socio-economic rights. The sources for the above substantive rights are the international instruments of human rights law and national constitutions which often enumerate these rights but with many exceptions.

In addition to this general definition, it is perhaps important to give a general typology of NGOs working in this field. Drawing and expanding on the definition given by Smitu Kothari[1] there have been five major activities taken up by these organisations.

1. Fact-finding missions and investigations;
2. Public interest litigation;
3. Citizen awareness programmes (including the publication of perspective statements on specific issues);
4. Campaigns;
5. The production of supportive literature for independent movements and organisations.

"In periods of major crisis they have also thrown their weight with independent action groups and mass movements in providing relief and lobbying on behalf of the oppressed and the victimised."

Of all the human rights enumerated in international instruments of human rights law, civil and political rights are a distinct category in that

(*a*) They are the rights whose violations are said to "shock the conscience"[2] i.e. torture, arbitrariness in the use of state violence, arbitrariness of arrest, detention and of the right to a fair trial. However, in recent years, in the dialectic between state violence and the violence of non-state actors, this aspect, which once motivated the moral outrage of civil society, is missing; there is an increasing desire for an eye for an eye, especially in ethnic and caste confrontations. One could, therefore, argue that these rights have suffered in recent times because not only the state but civil society also has lost its civilised conscience. Earlier, because of this "shock the conscience" potential these rights were the most universally acceptable and therefore had an international consensus backing their enforcement. Particularly after the atrocities of World War II there was a universal demand to set up international standards for the use of violence by the state. However that historical memory proved to be short and has never been part of the collective memory of South Asia. As a result, violations shocking the conscience of our respective societies cannot be taken for granted. The struggle to prove that some of these violations are shocking is in itself a part of human rights activism.

(*b*) These rights are profoundly linked to the democratic process. The measurement of their enjoyment, not on paper but in the real lives of people, is a good indicator of the nature of the democratic polity. A struggle for civil and political rights, even in isolated cases, is, therefore, an attempt to increase space for democratic action and expression. This is particularly true when it comes to the freedoms which have been outlined above.

The South Asian Commonality

An evaluation of civil and political rights in the South Asian context is therefore an attempt to discover the nature and limits of our democratic rights. Such a discovery can only begin after we have pulled out certain common elements in the South Asian experience which may condition a South Asian response to these

issues.

Firstly, except for the mountain kingdoms, most South Asian societies, at independence, pledged themselves to one form of representative government or another, i.e. the framework where civil and political rights would have maximum protection. Four decades after independence, all of these societies have had years of rule either under martial law or under states of emergency. Pakistan[3] and Bangladesh have experienced the former, India and Sri Lanka the latter. Except for India in the South Asian societies, more years have been spent under emergency or martial law than under the regular democratic framework. In India only the 70s were characterised by such rule but it left its mark on the body politic. Even the governments of India and Sri Lanka, when they were not under periods of emergency, have passed special legislation which allows for the deprivation of rights without the declaration of emergency. The genre of laws which relate to the "Prevention of Terrorism" comes under such a rubric.[4]

Therefore, one may argue that regardless of what is said in the constitution, the post-independent history of South Asia has not developed the framework of a polity where civil and political rights can thrive. In fact, the opposite may be said to have taken place. People, especially the elite, enjoyed more power at independence than they do now. Many rights were taken away for the sake of the "People" or "nationalism", but today neither the elite nor anyone else enjoys the same measure of civil and political rights that they enjoyed at independence. Free from colonial oppression, the societies may have gained certain "development rights", but in the area of political and civil liberties they have had to face new situations, much of which was unanticipated at independence.

If politics is a process, then these periods of emergency and martial law have also forced many human right groups to come of age, in different ways and using different strategies. This in turn has compelled the state to take on new types of activities which will be discussed later. But, as a whole, the emergencies and the martial law periods galvanised the birth of real and meaningful

human rights movements in all South Asian societies. Without these periods the rights may have been realized only on paper. With the emergencies came organisation, mobilisation and some measure of vindication: in India through social action litigation and in Pakistan by a return to democracy, at least for a few months.

The second factor which is common to our region is that of the human rights movement which has been greatly challenged by the growth of ethnic and sub-national movements, some of whom use acts of terrorism to make their presence and demands felt by unsympathetic states. This development has split the human rights movements right down the middle, and more importantly, by allowing the state to identify human rights activists with the movements involved in acts of terror, it has lessened democratic space and made human rights activists "social pariahs" in their own countries. Suspicion, doubt, conspiracy theories become far more effective instruments of the states, counter-human rights propaganda in the field of civil and political rights, thereby alienating human rights groups from the very constituency which will make them effective, i.e., the articulate middle class as well as the general public. State newspapers have done yeoman service in this regard, and are often outdone by private newspapers. The struggle for civil liberties in the context of ethnic wars, tainted by acts of terrorism by the state as well as non-state actors, is an enormously difficult one and has yet to be fully discussed and developed. What the correct strategy should be in this context must be an important part of the debate of the 1990s.

Having identified two of the factors which are at this point common to the South Asian experience and which profoundly influence our human rights reality, I would like to go on to pose some of the more general issues which have been raised by the experience of human rights activism in South Asia. But in doing so, it is important to realize that in recent years there has been a great deal of networking among human rights groups in the region, and the exchange of ideas and tactics. The impact of social action litigation in India, the research into human rights and

ethnicity in Sri Lanka, the struggle for gender rights throughout the region, have, in fact, created a certain solidarity at the regional level and an awareness of regional commonalities as never before in the past. This solidarity can therefore form the framework for future joint action on the part of South Asian NGOs.

The Classical Paradigm

The issues with regard to human rights activism in the field of civil and political rights are also integrally linked to the benefits and limitations of the classical human rights paradigm in the South Asian context.

The classical paradigm, as stated earlier, relies on a body of formal law which endows primarily individuals with certain rights which may be vindicated in a court of law or a similar conflict-resolving forum. This model comes out of the experiences of the North Atlantic states where the models of law were initially created. This does not of course make them irrelevant, but in their application to the South Asian context it is apparent that some type of transformation is necessary to make them real, relevant and effective. To do so we have to go to the roots of the paradigm, to try and map out the problem areas and thereafter perhaps have a discussion on the strategies which would make the spirit of human rights an organic part of South Asian reality. But the reality is often complex and confusing.

In August 1988, a lawyer named W. Liyanarachi died while in police custody in a suburb near Colombo. His body bore marks which may have sustained an allegation of torture. The state claimed he was a JVP activist but that it was willing to bring charges against the police officers concerned. The Bar Association responded by passing a resolution that no member of the Association should appear for the police officers, those who even tried received death threats. A lawyer and his wife close to the government party were killed. Within a month, lawyers filing habeas corpus for JVP suspects received death threats. Two young lawyers were killed by unidentified gangs. The legal process

ground to a halt. The right to a fair trial, the right to habeas corpus, the right to counsel, the right to due process etc., were effectively terrorised by state and non-state actors as civil society divided into armed camps. The laws were silent, and for a long time so were many human rights groups working within the country. They were confused. This was never a scenario envisioned by the black and white world of human rights activism.

Social Action Litigation

There have been some experiments in the past few years which have been successful in the South Asian context and are very much a part of the South Asian reality. However, critics argue that these innovations have come in fits and starts and after a while they lose their drive and efficacy. One such movement was the social action litigation movement in India in the early 1980s which was truly exciting jurisprudence from the point of view of human rights law. The Supreme Court of India, led by mavericks such as Justice Bhagwati and Krishna Iyer, adopted flexible rules of standing, allowed for open-letter jurisdiction and allowed pro bono groups to file cases on behalf of the underprivileged. They set up independent commissions to seek out facts which the Court's own evidentiary procedure would have found difficult to manage, and words like "government lawlessness" began to appear in Supreme Court judgements. In this way, they dealt with pretrial detentions in Bihar, atrocious conditions in women's remand homes, substandard conditions for workers in the ASIAD case, etc. They also set up monitoring agencies to ensure that the executive implemented the decision of the courts.[5] With many victories to their name up to 1987, Indian public interest groups brought every type of action before the courts from rape, dowry deaths (with the conviction of a mother and a husband), pavement dwellers, the right to be heard on state television, etc. Not all were successful but the court dockets were full. And then, much like the more mild public interest litigation in the U.S. in the 1960s, there came a saturation point. The precedents were not overruled, but the courts began to tire of the open floodgates.

Slowly enthusiasm was dampened and though the procedure remained, court activism and openness declined. Social action litigation lost momentum and many of the groups began to be filled with a certain cynicism.

Legitimacy

Despite innovations such as social action litigation, there has always been a problem of legitimacy for human rights activism in the South Asian context. The problems relating to human rights legitimacy in the area of civil and political rights, like all other rights, relates firstly to the individual focus of the human rights tradition. In the area of civil and political rights, this poses less of a problem than in the area of the other rights, since in most instances, as in the case of fair trial, the individual is the one who is affected. However, in the area of freedom of speech in Sri Lanka for example, the press, since it is not an individual, does not enjoy the same level of freedom.[6] This, of course, poses major problems since the press is the guardian of free speech.

In the area of minority rights, the individual focus allows the human rights tradition to be effective in areas of discrimination in education or employment, where a particular individual is discriminated against, but it has no solution for many South Asian problems which are of territorial minorities fighting for what they perceive as the right of self-determination. It has very little suggestion either with regard to process or solution, and since many of the human rights violations in recent years in South Asia have been within this greater context, the lack of a macro-view has not allowed for the resolution of these crises within well-defined norms. As has been said, gender rights, ethnic rights and ecology rights challenge the individual bias of the human rights tradition.

Social action litigation in India did get over some of these hurdles, whether with regard to bonded labour or Asiad workers, but because of the "Right to Life and Dignity" clauses of the Indian Constitution which have been used creatively by lawyers and judges.[7] Most other South Asian constitutions do not have such clauses and, therefore, many of these rights cannot be vindicated within the framework of fundamental rights. This is one aspect which must be explored further. The introduction of general clauses into our constitutions can serve as frameworks for more general group rights and socio-economic rights. Unless these clauses are introduced, there will be a problem of legitimacy for human rights groups and for an enlightened state. The lack of an effective, non-violent safety valve should be explored for political dissent that is issue-based.

State Focus

Another major problem with the human rights paradigm for the region is the state focus of human rights concepts as well as strategies. In societies such as in South Asia where civil society is in constant tension with the state, and where it may be said that great sections of civil society are even more repressive and arbitrary than the state, the bias of human rights litigation skews understanding and action. Of course, there are many instances where the state and more reactionary sectors of civil society act in collusion, such as the *Hudood Ordinance* in Pakistan. But there have been instances in India and Sri Lanka where the state has attempted to liberalise civil society. This is particulary true when we have had to use the state apparatus to help vulnerable and marginalised sectors. The anti-reservation struggle currently being waged in India over the Mandal Commission Report raises these issues with great urgency.[8] There will be further discussion of this aspect in the area of group rights, but it is also an aspect of civil and political rights, i.e., the use of quotas and instrumentalities of the state to uplift the marginalised or "perceived marginalised" groups. In the Indian case there is no doubt that the scheduled castes are a "marginalised group". They have had special status since independence. In the past, human rights activists were unanimous in supporting state affirmative action measures and quotas for such groups. This was very much the struggle of the 1960s and 1970s. But today even the human rights groups in India are split, some arguing that the state should not be left with the monopoly of enforcing these rights, that the state should

stay aloof and the struggle should be waged in civil society. This is a new and rather difficult argument to maintain, given the nature of vested interest groups in civil society, but there is so much distrust of the heavy-handedness and centripetal nature of the modern South Asian states that many human rights groups feel that the battle for such rights will be more effective if waged in civil society, but others disagree. Using the state apparatus to implement human rights provisions cannot be excluded, but it may not be the only or even the most successful means of ensuring those rights.

This rather ambiguous relationship that human rights groups have with the state is apparent in all areas. On the one hand, the struggle is often against the state for its action, such as in its denial of civil liberties, whether in the Sind, Punjab or Hambantota. On the other hand, it is also struggle demanding positive action on the part of the state to prevent sati, prevent dowry death, provide reserved seats for marginalised sectors, provide welfare and health facilities for the poor, etc. This is accentuated in developing societies for, unlike in the Anglo-American tradition where the state is indeed the arbiter of interests, in South Asia the state also has a benevolent face in many contexts, and if there is anger against the state it is for its lack of involvement and direction. Within the area of civil and political rights this is particularly clear. On the one hand, with regard to due process rights and political freedoms the human rights movement says "hands off" to the state, but in the area of equal protection and discrimination, especially in the area of vulnerable minorities and women, we are often asking the state for maximum intervention. Such is the paradox that some human rights groups in India called for the death penalty to be used against those who violated the sati laws as a deterrent, when for years there has been an international human rights struggle against the death penalty.

In recent years the state focus has also led to major problems with regard to non-state actors who indulge in violence. The human rights movement often assumed that if individuals take to violence against the state, it must be a response to state violence

or structural violence inherent in the social structure. Though they did not justify the violence, they understood it and placed the onus on the state, firstly to remedy the structural reasons which were causing the imbalance, and secondly to ensure that these groups were given due process with regard to trial.

Increasingly, however, groups which have taken to violence in South Asia do not mark the state for their target but the civilian population which belongs to a different ethnic group or those who dissent from within their own. This "terrorism", even as a response to state action cannot be justified in any way by good conscience, and the process only serves to deeply brutalise society and to close the democratic spaces which are available for action and debate. Whether in the Punjab, Assam, Kashmir, the Sind, Karachi, Jaffna or Ruhuna, this has become an absolutely despicable South Asian problem. When those supporting the reservation policy lock up a compartment on a train and set it ablaze with passengers as a symbolic act of terror, as happened in South India recently, or where those supporting ethnic rights attack villagers or mosques in the East of Sri Lanka, the human rights movement cannot afford to be silent. Recently even Amnesty International in its report on Sri Lanka has begun to comment extensively on the use of violence by non-state actors, though of course, the thrust of their report, as required by their mandate, has to be against the state. The human rights movement has not as yet worked out a stand on this issue, how to articulate this stand and how to mobilise effectively against it. In this context, the traditional tools of law, courts and the judiciary are meaningless.

The state focus in human rights action requires that violations, especially those regarding arrest, detention and fair trial be carried out under "colour of the state" if it is to receive attention. In this regard, security forces throughout Asia have learnt the lesson that if you violate human rights, do it in civilian gear and do it in unlicensed cars. Gone are the innocent days when police officers dressed in uniform will arrest you, perhaps beat you up, keep you in jail, interrogate you, bring you to trial or release you. All that has led to too much awareness of human rights violations, espe-

cially leading to court cases. The response has not been to make procedure conform, but in the face of counter-terror aimed at families of security personnel the response has been to bypass the civil process altogether. What do human rights groups do then? Incidents are chronicled, people are identified but given the type of evidence needed to prove guilt and the reticence of the judiciary in these types of cases, there can be no vindication of these rights in any court of law. If that is not possible, then one is left with political mobilisation or international pressure, with all its benefits and pitfalls, as the only recourse.

Pluralism and Diversity

Another major problem with the human rights paradigm is that there is no real apparatus to deal with the problems of pluralism and homogeneity, except in the area of discrimination against a marginalised ethnic group which is territorially dispersed. The structures of pluralism, i.e., devolution and federalism, legislative safeguards etc., have evolved in many societies out of political negotiation and bargaining and as part of constitutional settlement, but they have never been part of the heritage of human rights. The judgements of the dissenting judges in the 13th Amendment case[9] of Sri Lanka, which devolved powers to the provinces, clearly shows that neither human rights jurisprudence nor Anglo-American jurisprudence has any simple answers to these complex issues. When there is such a lacuna, the discourse may be filled with unusual recourse to tradition and nationalist symbols which are outside the liberal paradigm of human rights understanding.

In South Asia, more and more, ethnicity, human rights and the structures of pluralism are becoming the paramount issues, capable of completely destroying our social fabric. It has taken a very heavy toll in Sri Lanka, and India, too, is faced with enormous problems despite a federal framework and a very secular constitution. Another aspect of pluralism, however, is its negative face. Human rights activists have pointed to the negative role played by too much attention to pluralism. The Shah Bano case in India is perhaps the most striking example—the issue over

women's maintenance which fired a nation and forced the political executive to back down. This also raises problems when it is linked to the creation of separate courts such as the creation of a Federal Shariat Court in Pakistan with "parallel jurisdiction".[10]

In the early period of ethnic confrontation most groups adopted the classic civil liberties approach, i.e. expose the state by chronicling arrests, detentions, extra-judicial killings and abuse of state power. The approach was not aimed at a solution or creating a process that would bring about a solution but as an expose of state brutality. Actions by non-state actors were considered irrelevant, and every statement ended with a call for a political settlement without any suggestion as to how such a settlement could take place, given the position of the parties. In addition, the expose politics soon had its repercussions. Given the fact that these were ethnic wars with some groups engaging in "terrorist activity", human rights activists were seen as terrorist sympathisers. This was aided by the process by which the non-state actors involved in the struggle also set up their own human rights organisations pledged to the ethnic cause. Therefore, human rights was seen as an ethnically partial slogan, partial to the group which was staging an uprising. It became ethnically identified, and therefore was easily discredited by the state with the mass media at its disposal.

A classic example of this type of dangerous slippage was the series of articles written by Dr. Susantha Goonetileka in the *Island* newspaper of Sri Lanka where he claimed that there was a foreign-funded, ethnic studies, human rights cabal which was anti-national, anti-Sinhala and pro-Eelam. Couched in social science language, the message was clear, these are traitors, and given the fact that his article was written during the time the JVP was killing off anti-national elements, it was pointing a very dangerous finger, whether that was the stated intention of the author or not. The Sinhala newspapers carried headlines with the article which loosely translated said "People who Sell the Country for Dollars". Dr. Goonetileka claimed that he wanted to start a debate, but given the timing, it was a debate with a cocked pistol in the background.[11]

Sri Lanka is not the only place where this has occurred. Indian human rights activists in the Punjab, Assam and Kashmir have begun to face the same kind of barrage. The problem of chauvinist blinkers is not the only reason for this quandary. Another reason is that the human rights movement, because it was born in homogenous societies like Great Britain or Scandinavia or "melting pot" realities like the U.S., does not have a clear identifiable stand or strategy with regard to pluralism and diversity in complex multi-ethnic societies. The lack of clarity has compounded the problem, and it is one aspect which must be fully discussed since these issues will become important factors in the 1990s.

Process and Institutions

Another aspect of the paradigm which is somewhat linked to the above issues and needs serious consideration is the vision of *process* which the human rights movement puts forward, especially for long-term issues. It has been said that in the Third World, human rights are conceptual and rhetorical whilst carrying symbolic import for political mobilisation; in the West, human rights implies a process of settling disputes within the framework of norms; the former emphasizes mobilisation and shame, the latter aims at institutional development and growth. Human rights activists in South Asia, like their compatriots in any other field, have paid very little attention to the building of institutions. In fact, the mere discourse of "institution building" is seen as some sort of woolly compromise with the established order. And yet, in the long run, there can be no non-violent settlement of human rights disputes without effective institutional machinery, whether it be the courts, commissions or ombudsmen. The process and the personnel that man these institutions are absolutely crucial. It is therefore important that human rights groups constantly call for reforms in this area, reform that is realistic and which may capture the imagination of opposition parties or the public, even if not that of the government. In addition, they must require that those appointed to the seats of justice are appointed by a process which has accountability and legitmacy in the larger

society. Without such institutions, it is unlikely that human rights activism will get very far except as an issue-by-issue, luck-of-the-draw, perspective.

This lack of process has other implications for civil and political rights, especially in the ethnic area. There are some political and civil issues that cannot be resolved within the framework of positivist law. They are the products of the reality of the country and political and ethnic consciousness. There is a particularity in these issues which is country-specific, and any solution has to be achieved through political negotiation and bargaining. It is precisely because of this uncertainty that human rights groups have usually adopted a hands-off policy, except for the documentation of violations committed by the state. However, there is no constructive engagement with the larger issues which make these violations an everyday fact of life in South Asia. The need to define guidelines for a process of negotiation, to invite observers or mediators for such negotiations from the human rights community, to suggest frameworks of devolution or federalism which will help break deadlocks, or to engage all sides to the conflict in dialogue, discussion and persuasion—these are strategies which the human rights movement has not evolved but which many of their members are called upon to do on an ad hoc basis. There is need for a thorough exploration of all the possibilities, again because this is an area of human rights activism for the 1990s, and neither our constitutions nor the Universal Declaration of Human Rights provide us with any normative framework for such action.

Human Rights and Politics

This brings us to the larger question of the relationship of human rights to politics. There have been some recent models of transformation from authoritarian rule to democracy wherein human rights activity has been an integral part of that transformation. In our region, the example has been Pakistan, but Eastern Europe, the Philippines, Chile, Brazil, Korea, etc.[12] are examples of this close link between human rights and political transforma-

tion. The historical Lahore Convention and the conventions in Karachi and Peshawar which led to the formation of the Movement for the Restoration of Democracy in 1981 united all political parties and human rights groups. For the traditional human rights activist, however, the link is not to be made. The purpose of human rights activism is to be vigilant against all governments, authoritarian and democratic. If one involves oneself in political transformation, then one is handicapped in the post-transformation phase, vigilance against the state is lost and a partisan attitude develops. On the other hand, many South Asian human rights activists argue that unless human rights work is part of a larger movement for the transformation toward a democratic society, it becomes ad hoc and marginalised. These are issues which must also be discussed in detail in the next decade. The discussion is made even more important in light of the developments in Eastern Europe. In many South Asian societies, especially in India and Sri Lanka, Marxist discourse has always been a part of "dissent". It has, in fact, been the social democratic alternative. After Eastern Europe there is a dire need to develop an alternative discourse, and in that sense, human rights and other "liberal" concepts may provide a handle for ideas and innovations to ensure social justice.

The Rural Sector

Another aspect which deserves discussion in this area is that political and civil rights may differ in content and style in developing societies with large rural sectors. As the Sri Lanka country study mentions, the human rights tradition only recently recognised the category of rural workers as requiring protection. In addition, the lack of access to law courts etc., requires a different type of standard procedure in these types of cases. It is for this reason that the experiment of social action litigation in India is absolutely necessary in terms of the openness of procedure, and that concepts of dignity and the right to life be introduced to deal with the type of injustices which pervade our rural sector. Without such type of action these sectors will continue to be the

hotbeds of insurrections, whether in Bihar, Bengal or Southern Sri Lanka; and the movements born out of such neglect are usually very populist and have not shown any greater vision with regard to the protection of human rights. Unless human rights consciousness and processes are introduced in a comprehensive and innovative manner to the rural sector to make justice accessible and credible, the problem of injustice in these areas will continue as a festering sore and the articulation of these grievances may not be in the discourse of human rights or even secular democracy.

Law Focus

Finally we come to the central issue which is at the crux of the dilemma or the paradox of human rights—the law focus of human rights. Upendra Baxi[13] points out that the law has to be the inevitable focus of human rights action, either as a deterrent or as the focus for mobilisation and, therefore, as the symbol for the change of consciousness. The law to him is seen as empowerment. But to be effective, the law has to be implemented by the courts, and as many human rights activists argue, the judiciary has not really come up to meet its task in many of our societies. In fact, country papers signal this out, though of course in each of the South Asian countries there have been exceptions and some fine judgements: the *Doordarshan* case in India for example[14] is an example of exceptional activism outside the framework of social action litigation. The Joseph Perera case in Sri Lanka is another example of the tentative steps being made by the judiciary,[15] but they have not been able to stem the tide of abuse, either by the state or non-state actors. What strategies can then be put forward to strengthen the judicial backbone in the years to come? This is another area we must ponder, for it cannot be left to the executive to ensure that sort of independence and integrity. The appointment procedures in our societies must be kept open and non-partisan, and effective strategies should be adopted to ensure such structures and procedures.

NGOs

In discussing the operation of civil and political rights in the South Asian context, it is perhaps important to point out a typology of NGOs working in this field here before discussing the strategies and problems faced in the implementation of the rights in the South Asian context.[16]

There are two types of NGOs working in the civil and political rights field in the South Asian context.[17] The first are the "law focus" groups whose primary aim is to respond to legislation passed by parliament and to file cases in court with regard to the violation of civil and political liberties. They usually work out of a lawyer's chamber or are an informal collection of lawyers or a lawyers' collective. Among those well-known in South Asia are Civil Rights Movement, Lawyers Collective, PUCL, PUDR, etc.[18]

The second type of NGOs concerned with civil and political right are those related to mobilisation of public opinion. Although they have links to lawyers, their primary aim is to lobby the government, mobilise the public and take effective civic action to ensure that certain measures are not carried out by the state. Especially in India, these groups are extremely powerful in their own right, but in most other South Asian societies, whether in Nepal, Sri Lanka or Pakistan, they are usually linked to political parties and are part of a large movement for some type of political transformation. The exceptions to this of course are issue-based mobilisation such as on the gender issue in Pakistan[19] and the women's forum on the sati issue in India. Mobilisation around human rights issues is seen as the first step toward expanding democratic space and calling on the state to be accountable to the public. This has its limitations. Women's groups may be able to bring out 5,000 women to demonstrate against sati; the Rajputs may the next day hold a demonstration of 5,00,000.[20] If one has not instilled civil society with human rights concerns then, for some issues, mobilisation may be counter-productive.

But this is not to say that there have not been successes. The social action litigation experiment in India is one such success. The Indian social action groups such as PUCL and PUDR have gone very far with regard to the right to life and dignity of many of their fellow Indians, and their recent report on Kashmir, for example, has displayed extraordinary courage in a very volatile context. In a country like Sri Lanka, the victories and activities of human rights groups have been of a lower key, though Amnesty International has consistently stated that the documentation of human rights violations in the Sri Lankan context has always been excellent. In Bangladesh, Pakistan and Nepal human rights groups have been involved in larger struggles for democratic transformation, often providing key issues for mobilisation. The success of these movements is to some extent the work of small groups of NGOs fighting for these rights under very repressive circumstances.

In recent years, though the activities of human rights groups have received both national and international attention, there has been a great deal of disenchantment with the process of human rights litigation. The paradox of the situation is that while they have reached the heights of influence and visibility, human rights groups are facing major problems and crises with regard to strategy and organisation.

On the one hand, many of them feel that the state is always one step ahead of their actions, and that new forms of repression have emerged, where action is no longer carried out under the colour of the state but by unidentified gangs, thus making human rights work guesswork and far more dangerous for individuals. Secondly, with the rise of ethnic movements, the state has managed to mobilise public opinion against human rights groups by linking them to "terrorist groups" and therefore as public traitors. This "social" repression has been very effective in recent years, especially in India and Sri Lanka.

In addition to the above, there is a sense of capriciousness about the way human rights issues actually emerge and get adopted, and a lot depends on personality, timing and the personal energy of individuals.There is also a great deal of infighting and competition among and across such groups, resulting in very little opportunity to forge a common front or community. Finally, espe-

cially in India, the anathema toward receiving funds from outside sources, other than by subscription, has forced a certain voluntariness about the movement. This lack of funding and resources, given the resources of the state and powerful sections of civil society, also poses a major problem and must be discussed in greater detail.

Agenda for the Nineties—Civil and Political Rights

1. There is a dire need for the creation of a SAARC type of Helsinki watch—a network of human rights groups who support each other in a very particular way, using standard human rights techniques to call attention to violations of human rights in their region—a regional solidarity which would be a macro-concern giving protection to isolated activists within these countries.

2. There is a need to iron out certain conceptual and strategic problems which have emerged in the last few decades from the civil liberties perspective:

—the human rights approach to non-individual violations in the case of minorities, gender and ecology;
—the human rights approach to the rural sector, the need for effective machinery with regard to civil and political rights at the local level;
—the human rights approach to pluralism and homogeneity, especially those related to rights of territorial minorities;
—the human rights approach to long-term process and institution building in the South Asian context, and strategies to make these institutions viable and effective;
—the clarification of human rights abuses by non-state actors and a process by which they can be held accountable;
—the relationship of human rights to political transformation in the South Asian context;
—the process of networking and solidarity among human rights groups and how that can be best achieved;
—how human rights groups should react to new forms of repression, especially social repression on the part of the states; and the state exchange of information among security establishments;
—human rights groups and funding; how does one raise resources, maintain credibility and effectiveness of action.

NOTES

1. S.Kothari in S.Kothari, H.Sethi ed. *Rethinking Human Rights, Challenges for Theory and Action*, Delhi 1989.
2. See, for example, the Report of the Tiwana Commission on the Ladha Kothi Jail, 1985.
3. See for a survey, *Paksitan: Human Rights After Martial Law*, Report of ICJ Mission 1987.
4. See Sanobi Keshwaar, Abuses of the Terrorist Act in *The Lawyers Collective*, October 1987.
5. For a survey see Hon. P.N. Bhagwati, *Social Action Litigation: The Indian Experience*, Colombo, ICES,1985.
6. See *Dr. Neville Fernando and others* vs *D.J. Francis Douglas Liyanage and others*, S.C.Application No.116 of 1982.
7. See the Asiad Case, a general description in Bhagwati, *op. cit.*
8. See for the new approach, D.L.Sheth, 'Reservation Policy Revisited', *EPW*, 14th Nov. 1987, p.1957.
9. See *Hansard*, 10th November, 1987, Col.1309.
10. See Shariat Benches of Superior Court Order, 1978.
11. See Susantha Goonetileka, *Sunday Island*, October 1987.
12. In Nepal for a better understanding see *Report of the Prisoners of Conscience*, 1 Jan.–30 June, 1989.
13. Upendra Baxi, 'Law, Democracy and Human Rights' in *Rethinking Human Rights*, p. 101.
14. Doordarshan censorship case, writ number 1980 of 1986.
15. *Joseph Perera* vs *Attorney-General*, SC. Nos. 107-109 of 1987.
16. For a comprehensive analysis of NGOs working in the human rights field throughout the world, see H. Steiner, "Assessing the Human Rights Movement; Roles and Views of NGOs", Harvard, 1990.
17. For an interesting article see S. Bastian,'NGO Movement', ICES,1988.
18. For a comprehensive survey in India see B. Rubin, "The Civil Liberties Movement in India", *Asian Survey*, Vol.xxii, Nos. March 1987.
19. For a comprehensive survey see R. Patel, *Islamisation of Laws in Pakistan*, Lahore, 1986.
20. See discussion around the Rajasthan Sati Prevention Ordinance of 1987.

Chapter 7

Devolution, the Law and Judicial Construction

THE question of devolution in the Sri Lankan context raises two fundamental questions about constitutionalism. The first, the problem of constitution decision-making in times of political emergency; the second, the inability of the positivist, legal tradition, inherited from the British, to come to terms with problems of power sharing in a plural, Third World society. Both questions go to the heart of what I would call "illegitimacy"—the tortuous dialectic of a colonial legal tradition coming to terms with the reality of Sri Lankan social relations.

The recent devolution package contained in the Thirteenth Amendment[1] to the Sri Lanka Constitution is an attempt at formulating a new social contract for the sharing of power between the majority and minority community, and between the centre and the periphery. Though the ideal scenario would have been for these provisions to be negotiated between the parties to the conflict, in actual fact the devolution package was imposed on the Sri Lankan government by a third party intermediary. This has created a measure of resentment and dissatisfaction among both communities, and the final social contract, if it is to ultimately evolve, will probably have different contours.

However, an analysis of the context as well as the proposals

that led up to the Thirteenth Amendment, such as the Political Party Conference documents,[2] may give us some insights into the legal aspects which have begun to emerge from the negotiating process. We will be able to identify where there is agreement and where there is contention. Such an analysis will give a clue to future legal issues.

This paper will, therefore, begin with the analysis of the legal package contained in the Thirteenth Amendment, not from a positivist point of law but as a measure of its reflection of political will. In other words, it will be a study into the negotiating process rather than the actual text of the law, since it is envisioned that the actual text will change, depending on the final resolution of the ethnic conflict. The paper will then go on to a discussion of the judiciary and the judicial approach to issues of devolution as they have emerged in two major cases before the court. In this way there will be an attempt to see how conflicts arising in the context of devolution will be solved by the courts and what approach they will bring to bear on these issues. Finally, there will be some recommendations with regard to the process of conflict resolution on issues arising from the scheme of devolution.

There are two ways in which to approach a legal package coming out of a negotiating process. One is from the vantage point of pre-conceived ideas, the other is to take the positions of the parties concerned and then work out a compromise formula. Given the intensity of emotions which surround the present conflict, the latter remains the only realistic alternative.

In looking at the Thirteenth Amendment and the political party proposals, let us first begin by identifying those aspects of the law which are acceptable to the government and the Tamil groups as a matter of principle. These are the principles which will withstand any future legislation and which will probably provide the core to any final resolution of a devolution package.

The first basis that both parties appear to agree on is that the provincial councils should be validated by a constitutional amendment which allows for a substantial devolution of power. The

nature and extent of the devolution, and whether it should be federal in character but unitary in spirit or unitary in character but federal in spirit etc. . . are truly discussions on a spectrum of values and powers, the contours of which will change with time and debate. However, the use of the word unitary[3] in the Constitution and its amendment requiring a referendum may in the end allow for a scheme of devolution, but the juggling and wording of the provision will lead to legal awkwardness with drafters attempting to sidestep constitutional provisions. This is why many people feel that if a just solution is finally worked out, it would be better to present the package at a referendum and have a new social contract approved by the people rather than engage in awkward law-making. Of course, others argue that the failure of such a referendum may have even more dire consequences.

There is also agreement on the structure of legislative power that should be devolved to the units and that provincial councils (PCs) should be the product of direct elections by the people. There is also agreement that the Chief Minister of each council should be drawn from the party which commands a majority in the House.[4] He should be aided by a Governor in executive matters. Aspects of the Governor's power are controversial since he is the representative of the centre at the provinces.[5] The system envisions a Westminster model at the PC level, though it will operate under the checks and balances of a presidential system at the centre.

There is also general agreement about the structure of the judiciary, the presence of the high court in each province and the location of the courts of appeal.[6]

Except for the subjects outlined in the next section there appears to be a general agreement on the nature of the subjects to be devolved and the presence of three lists, the Provincial List, the Central List and the Concurrent List.[7] The debate, however, is how national policy, which has been reserved for the centre on all matters, will affect this allocation of subjects.

The allocation of subjects by law, of course, does not envision the practical administrative problems that arise in the implementation of these provisions. The major discussions of the last few years in this field have been on how to rationally devise a bureaucratic and planning process which will give effect to both the will of the centre and the will of the PC without duplication and waste. Many consultations and programmes are on-going in this regard; and the rationalisation of the infrastructure has emerged as the major area of debate and discussion in the post-1988 period. Except for the transport case discussed later, none of these have come to the courts for judicial determination but are at the centre of the planning debate.

There also appears to be general agreement that the unit of devolution should be the province, though the North-East merger is a major departure from this principle and will be discussed later. Although there are still many who argue for a return to district development councils, the provincial structure appears to be the more viable and the more acceptable framework for the operation of devolution. In addition, since it has been in operation for a few years and since practices and precedents have and are being set, it is likely that the unit will continue with a provincial base.

In other words, after years of ethnic conflict, there is emerging a consensus on the skeletal structure of a package of devolution which is at the core of any final legal resolution. Regardless of the sentiments around the present Thirteenth Amendment, there is no doubt that a final package, if it is ever to emerge, will involve these aspects as part of its core.

Having said that, we must move on to the points and areas of contention which threaten any consensus on the devolution package. None of these have been brought to the courts because all the PCs are controlled by the government party and therefore conflicts are resolved through a system of barter or internal party give-and-take. The North-East PC did go to the courts in one or two instances. From 1988, however, it has ceased to exist. Therefore, when we speak of areas of contention, it is from the negotiating standpoints taken by the Government and the Tamil political parties. These areas of contention are political at the moment,

but will in time have to be resolved by the courts in their reading of the Thirteenth Amendment. It is, therefore, not incorrect to raise them at this point of discussion as a prediction of what future debates will inform the devolution discussion, at least from a legal point of view.

The first area of contention which involves all the PCs relates to finance. As set up, there is a Finance Commission[8] responsible for principles of allocation of the national budget to the provinces. Yet the essence of devolution is self-reliance, but there is little in the amendment which encourages the raising of revenue by the PC, either based on taxation (only up to 25 per cent of the revenue base) or by engaging in new forms of enterprise and financial dealing using modern methods of financing. The North-West Province has been attempting to set up a banking system, but the proposal is still on hold.[9] The Western Provincial Council attempted to raise foreign funds, and again the projects appear to require the support of the central government. So the question remains, how much flexibility is there with regard to the raising of funds? Are the PCs limited to the allocated funds from a central budget, or are they allowed creativity and opportunity to engage in new forms of financing of provincial government projects? It is very likely that one of these schemes, either to start a banking system or to put forward proposals for foreign funding, will come up before the courts in the near future for interpretation of financial powers under the Thirteenth Amendment.

The other area of contention which involves all provincial councils relates to executive power and the interpretations of the power of the Governor.[10] The centre naturally sees the Governor as an intervening, effective force protecting the interests of the centre, while those who stand for greater devolution argue that he should merely be "ceremonial ambassador" except in times of emergency. His ability to veto provincial bills and refer them to the centre places him in a powerful position. However, since all the PCs are controlled by the government party, the obstructive power of the Governor is not felt, and, in fact, there has been very little interference on the part of Governors in all the provinces.

The situation will naturally change if those who control the provincial council are not from the ruling party.[11]

The powers of the Governor will, of course, be heightened during times of emergency.[12] The powers in this regard are extensive and allow for direct rule on the part of the centre. Again, the contours of this will be truly felt only when there is a clash between the centre and the councils on issues of security and, more important, on "perceptions" of threats to security.

The last three areas of contention relate primarily to the North-East and will in fact be the most difficult issues to resolve. The first relates to the merger of the North-East. The current legal position as of the adoption of the Provincial Council Act[13] and the subsequent Proclamation, is that there is a temporary merger of the provinces. That merger should have been approved by a referendum in 1987. Since the referendum was not held, the question as to whether the merger is still valid may be asked. To debate the question at that level would be of no constructive use. It is quite evident that neither the bottom line positions of the Government, i.e. no merger nor that of the Tamil paries i.e. for merger, will form the final basis. In this regard various alternatives are being formulated in the hope of working out a compromise:

> The delimitation of the Eastern Province to allow for a Tamil ethnic region merged with the North, a Muslim province, and the Sinhala areas to be absorbed by the Uva and North Central province.[14]

> The retention of the North-East merger with more powers to the Pradeshiya Sabhas, and the Muslim Pradeshiya Sabhas having their own sub-council, as well as the Sinhala Pradeshiya Sabhas to have their own sub-council: what is known as the Pondicherry principle. The authority of the sub-council does not derive from territorial contiguity but from ethnic identity.[15]

The 19 December proposals, so named after the proposals of

December 1986: Amparai to be taken out of the North-East province and run as a separate province.[16]

We do not know the shape of the negotiating position as it will finally emerge, but there is no doubt that once it is formulated, there will be constitutional challenges of all kinds and the courts will have to be prepared to face the onslaught.

The second issue, which is less contentious, at least on paper, is the question of land. On the eve of the Accord, a formulation was arrived at which appeared to receive the approval of all political parties, at least with regard to the Mahaweli Settlement Scheme. With regard to the Mahaweli, it was accepted that the ethnic balance of the North-East will not be altered. Although settlements will be on a national ethnic quota basis, all Tamil allotments under the national ethnic quota will be settled in the East.[17] This was the practical accommodation arrived at by the parties.

However, the settlement is limited to the Mahaweli. What of future schemes? In addition, though land is a devolved subject, state lands even with regard to provincial projects cannot be alienated without central government permission. If land is one of the most important resources of the province, how does this affect devolution and self-reliance? It will most likely lead to tension, and if and when the PCs are controlled by parties not in power at the centre, the issues will emerge in a much more acute form.

Finally, there is law and order.[18] The proposals accept law and order within the province as a devolved subject, and there are provisions for a Provincial Police Force to be set up under the watchful eye of a DIG sent from the centre. The powers of the provinces will be limited to intra-province crimes and misdemeanors. Though the solution looks good on paper, one has to wonder what will actually happen. Any final settlement of the North-East problem will involve the recruitment of a large number of Tamil youth, who have served a different master, into the police force. How will this operate in actual fact? Again, one can

see a hornet's nest of issues arising in the future under these provisions of the Thirteenth Amendment.

The negotiating process which ultimately led to the enactment of the Thirteenth Amendment has not really been tested in courts of law because of the control the ruling party exerts on the PC system. But this need not be the case in the future. And yet, if such issues are to flood the courts, how well-equipped are they to handling such issues? Let us take a look at two judgements involving devolution and see how, in actual fact, the courts have handled the situation.

The first important decision of the Supreme Court relates to the Thirteenth Amendment itself, imposed on the country after the signing of the Indo-Lanka Accord. In any legal tradition, political emergency has always led to confusion, leading to the dictum that "hard cases make bad law".[19] Since legal traditions evolve over time and rely a great deal on continuity, tradition and precedent, political emergencies create major problems for legal argument and judicial decision-making. The law has to come to terms with the political exigencies of the moment. In most cases the judiciary bows to executive will, regardless of constitutional principles or practice; in a few exceptional situations it compounds the crisis by challenging the executive, leading often to the collapse of the political regime.[20]

In the context of Sri Lanka's ethnic crisis, the judiciary was twice faced by constitutional amendments arising from political emergencies; the first was when the Sixth Amendment was passed in 1983,[21] the second when the Thirteenth Amendment was passed after the Indo-Lanka Accord.[22] In the first instance, the judges had no qualms about bowing to the executive will which wanted to outlaw the call for separatism, and the executive was backed by a unanimous court. In the latter case of emergency the court was far more divided, splitting three-one-three and posing a fundamental challenge to the executive—a majority holding that the Amendment granting devolution was unconstitutional without certain modifications, which were then later introduced. What was the difference between 1983 and 1987? If the judiciary was

committed to the principle of deference to the executive during times of political crisis, then what happened in 1987? If, on the other hand, they were to be more interventionist and protective of constitutional principles, what happened in 1983?

The 1983 Amendment goes to the heart of free expression in a democratic society, and, in retrospect, it also proved to be politically disastrous, removing moderate Tamil opinion from the political mainstream and leaving militant groups to become the spokespeople for the Tamil community. One school of argument is that the Thirteenth Amendment, passed in 1987, was a fundamental structural change and therefore more offensive to the Constitution than the 1983 Amendment. In addition, the Indian factor made the court acutely aware that the executive decision may not have been "free" and "democratic".

> On 25th June, 1987 the Indian Government compelled the Government of Sri Lanka to accept Indian ships and personnel, together with media representatives, to ports in Jaffna with food, medicines, etc. . . ostensibly for the suffering people of Jaffna.
>
> Your Petitioner further states that on 29th July,1987, an Accord was entered into between the two countries. . .
>
> The Petitioner respectfully submits that the proposed amendments to the Constitution and the Bill to establish Provincial Councils must be studied in the background of the events outlined above. . .[23]

The other line of argument is that the courts are made up of judges and that they share the opinions of fellow citizens, that judicial notice of those opinions and prejudices is inbuilt and often comes to the fore in times of emergency. In the context of ethnic war those opinions must inevitably represent the will of the majority community, even more than deference to the executive.

This Sri Lankan experience, then, poses some problems. For years constitutional lawyers have been arguing that the judiciary, unlike the legislature, must be the special protector of minorities.[24] Since it does not need to cultivate a political base but only interpret constitutional principles, it was argued that it is the forum for the articulation of minority grievances and that the minorities must take their case to the portals of the courts. It has always been argued that the Supreme Court is the real safety valve for minority grievances. This line of reasoning has to some extent succeeded in India, the UK and USA, with the judiciary taking the lead in cases involving ethnic minorities. But in Sri Lanka the nature of the crisis has been far too acute for detached judicial decision-making. The judiciary is always referred to after a *fait accompli* by the political executive; it is asked to give approval for sudden drastic remedies in an emergency situation; it is rarely called upon to reflect soberly on the issues and to suggest alternative approaches away from the hurly-burly of politics. The failure of law and the legal tradition to evolve non-violent forms of conflict resolution is part and parcel of Sri Lanka's ethnic crisis and is therefore at the centre of its constitutional crisis.

It is the argument of this paper that the positivist legal tradition inherited from the British, along with judicial notice of majority community nationalism as being synonymous with democracy, have been some of the major reasons for this failure. A quote from the submissions of the Buddhist Theosophical Society will clearly illustrate the latter point.

> The history of the island establishes several facts of great importance to. . . constitutional lawyers. . . Firstly, Sri Lanka was perhaps the oldest nation state in the world the governance of which was subject to what the history books frequently refer to as bringing the entire island under a "single sovereignty". This principle has been asserted and enforced at least from the second century B.C. Secondly, the political identity of the island state has been Sinhalese until the entire island came under British rule in 1815.[25]

An examination of the judgement and submissions made during the Thirteenth Amendment argument before the Sri Lankan Supreme Court illustrates this point very clearly.

On the one hand, there was the line of argument of three judges, including the Chief Justice, which accepted the position of the bill as valid, not contradicting the unitary provisions of the Constitution and therefore not requiring a referendum. The legal discourse used to justify their position was drawn from the petitions submitted by the state and certain human rights organisations such as MIRJE and the CCNH. The legal discourse of the judgement was very much in the tradition of the new thinking in Anglo-American jurisprudence, i.e. the bill enhances "participation", and the modern trends in participatory development were toward local government, decentralisation and devolution. The three judges, keeping well within the Anglo-American tradition, attempted to be "ethnic blind"; principles were evaluated as though they were equally applicable to all communities. According to the three judges, the schemes as spelt out did not affect the sovereignty or the unitary character of the state. By refusing to recognise the actual political context within which the Amendment was drafted, the three judges spelt out a judgement easily justified by recent trends in constitutional law. They held out two tests for a unitary constitution: Thus it is fundamental to a unitary state that there should be:

1. Supremacy of the Central Parliament.
2. The absence of subsidiary sovereign bodies.[26]

The judges held that since the central legislature could, through various procedures, override the legislation of the provincial council, the structure remained unitary. They therefore held that the scheme did not violate the Constitution and therefore did not require a referendum.

The rest of the judgement related to the concept of delegation, which they interpreted as the "manner and form" of unitary governance. These judges went for a simple test to be used as the

criteria for a unitary state. They envisioned a flexible government, realising that power sharing was an essential aspect of modern democracy. In fact, if it were not for the ethnic factor, much of the decision of the Supreme Court may have been unanimous.

For many commentators, this refusal to accept the political context in which the Amendment was presented gave the judgement an unreal quality and therefore made it unacceptable. Prof. G.L. Pieris argues this point quite strongly in a recent article. He says that while the judges in the main judgement were playing with principles, the dissenting judges had a historical, political sensitivity guiding their judgement,[27] though I am sure he will concede that such sensitivity was quite unprecedented and limited to this particular case.

The Ranasinghe judgement, which made this main judgement the majority differed with the line of reasoning on a technical point. It accepted the main argument that the test for whether a state was unitary or federal rested on whether the Parliament has the power to override subordinate legislation. Though he recognised that with the ability to formulate national policy and to question certain acts of legislation, parliament did have such power, he felt that the need for a two-third vote of all PCs to take away legislative power from the PC List was unconstitutional. What parliament gave with a simple majority, it could not require a two-third majority to take away. His point was technical, and the legislation was accordingly amended, but the main line of argument was in keeping with the main decision of the three judges supporting the Thirteenth Amendment, i.e. ethnic blind and in keeping with Wheare's treatise[28] on unitary constitution, a more modern approach to centre-state relations.[29]

The dissenting judges, led by Justice Wanasundera, actually put forward a two-pronged attack against the Thirteenth Amendment. The first, within the positivist legal tradition, was animated by principles related to the Austinian concept of a strong centralised state, and the U.S. case law on "delegated legislation" within states (but only after the initial federal principle was recognised).

Their arguments, drawn from primarily pre-1970 British and American cases, appeared to recognise the "limits of delegation" as the central theme to be thrashed out by the courts, in that the unitary state did not "delegate its authority" beyond certain limits.[30] In other words, the test for a unitary state was very rigid, technical and positivist, and aimed at seeing whether there was any "diminishing of central legislative competence".[31] For these judges, in a real sense, a "federal situation" existed at the time, a situation which had nurtured separatism,[32] and the Amendment was an illegitimate attempt to sneak in a federal exercise under the banner of a unitary character. What is interesting in their perception is that federalism and separatism are part of the same process: to resist one, it is important to resist the other.

This argument, taken to its extreme as in the Wanasundera and Seneviratne judgements, has the potential to ossify constitutional development in this field. Everything new and innovative can be seen as a diminishing of central legislative competence, what with Commissions, Ombudsmen, Gramodayas and village reawakening programmes etc. . . All in some way challenge the monopoly of the legislature, not to mention the increased power of the executive.

Throughout the world, and especially in Europe, parliaments are deliberately and systematically delegating powers to local government. It is, in fact, a distinct and fully acceptable modern trend. Perhaps they do so because they are not under threat. In Sri Lanka, given the political context when the Thirteenth Amendment was introduced, there was a sense of great insecurity and actual threat to the political establishment. The Court was called on by the petitioners against the Government to preserve what was left of legislative power in the face of a perceived threat from an external and internal enemy. Their submissions identified the enemy in no uncertain terms. Judicial notice of the political context was therefore an extremely important aspect of the dissent. But one has to ask a very honest question: Was this judicial notice one-sided? Was it a notice of the "as is" situation, with very little attempt to understand how we got to the impasse, and

whether the rights of minorities were a reason for the crisis? Given the fact that the Tamil political parties did not come before the Court, the Court was denied access to this viewpoint; nor did they make an attempt to guess at what the argument would be.

In the final event, the dissenting judges were not concerned with finding a solution to the crisis or in helping the executive in finding realistic alternative solutions. They wanted to preserve the status quo, the framework that they had taken an oath to defend. And, of course, since they were judges in the traditional sense, one may argue that this was their perceived sense of duty. Their deliberations, without any input from the Tamil political parties, had to be limited to what was laid before them. It may be termed a "holding on operation", a need to reiterate the values and structures which have governed us since independence in the face of onslaught from all types of political and social forces which were inimical to the judges making the judgement. One may ask the question whether if, at this point of our history, the call for devolution had been led by a Gandhian or a Tamil "gentleman" schooled in judicial ways which had some resonance with the judges, would the response have been less hostile?

Devolution in the Sri Lankan context was seen as more than mere principle. It was going to place power in the hands of political groups who the judges felt were not going to respect the traditional order; therefore their dilemma was compounded. Fear and suspicion are elements which come out of all the dissenting judgements despite the veneer of jurisprudential language, fear that they could not trust the parties who were being given control of provincial councils. As judges, they could not single out particular parties as being offensive to them, their resistance therefore had to come in terms of discourse: firstly, the discourse of the positivist legal tradition which accentuated a strong centralised state and also the discourse of Sinhala-Buddhist nationalism. Both Wanasundera and Seneviratne pointed to the fact that Buddhist relics in the North and East would not be protected, and Wanasundera also argued against Tamil being made an official language.

> It is a matter which I cannot avoid dealing with. . . the joinder of the Northern and Eastern province and the official recognition of the traditional homelands of the Tamils will toll the deathknell of the Sinhala people in those provinces. There is an undertone of this fear in all the petitions opposing the Bills. . .
>
> Even the most naive of people could not expect a single Sinhalese to go back to the North and/or East if the maintenance of law and order within those areas become the exclusive preserve of the political leaders and patrons of the very terrorists who chased them out.[33]

The judgement of the dissent was by no means "ethnic blind":

> Sinhala as the official language in this country (with the reasonable use of Tamil in Northern and Eastern Provinces and by Tamils) has been the major plank in the manifestos of the leading Sinhala political parties throughout the last four decades. It has been submitted that such a fundamental change cannot be effected without consulting the people.[34]

This then is the lesson of constitutional decision-making in times of crisis. Fear and distrust become part of judicial decision-making. Some may argue that they are justifiable fears, given the history of recent years, but in an institutional sense those considerations, which have the underlying assumption that some part of your people, especially those who are ethnically different, are more prone to act as barbarians, destroying relics and archaeological evidence, cannot form the basis of judicial discourse in a plural society, especially one in which groups of all ethnic and political persuasion have shown a clear proclivity toward uncivilised and savage behaviour.

This is not to argue that the dissenting judges were not expressing real sensitivity and real fears, and that in the unfolding of political events, some of those fears may have been realised.

What this paper suggests is that the judiciary, as we have inherited it and as judges have chosen to interpret it, has not devised the tools and techniques for resolving conflicts of "power-sharing" in plural societies. We do not have the concepts, the processes or the style for such resolution. It is important to develop those traditions if we are to live and grow as a plural society. But the judiciary as constituted cannot be the ideal forum for the resolution of these conflicts, especially those not relating to fundamental structural questions.

It is also important to make a point about the use of the referendum provisions of the Constitution to solve minority issues. There is a belief running through all the dissenting judgements as well as all the petitions before the Supreme Court in the Thirteenth Amendment that the most democratic option was to submit the Amendment to approval by the people at a referendum. What could have been more democratic? This belief that 'majoritarianism is always democracy' has been one of the major fallacies of Sri Lankan political thinking and one of the major causes of ethnic conflict. In fact, to use such procedures to resolve the issues of minorities is actually anti-democratic, as it inevitably spells the tyranny of the majority. It is the submission of this paper that if important legislation such as the Civil Rights Amendment in the USA, the Punjab Accord, or even Meech Lake were submitted to the popular will and to majority principles, they would never have been passed. In fact, the whole point of legislation to protect minorities is to protect them from the prejudices and practices of the majority. In this context the nearly self-evident proposition that a referendum is the final solution to all political issues, an inbuilt assumption in many of the submissions before the Supreme Court, reflects a certain populist view of politics which still animates our political discourse.

There was a third position which was never argued before the Supreme Court, primarily because the minority groups did not come before the Court: the Quebec formula of "distinct society". Quebec has argued that a general federal structure does not recognise the true reality of Canada, that Quebec is not only a

province but a distinct society and therefore should have special rights related to its distinctiveness.[35] The Tamil groups have made this argument in their political programmes but not before courts of law. Given the political consciousness in Sri Lanka today, such an argument would never have succeeded, even with regard to the Northern Province.

It is my belief that the Supreme Court itself recognises this dilemma and the nature of the crisis that these issues present. In an excellent judgement, Justice Mark Fernando indirectly pointed to the need for the development of process in the resolution of centre-province relations. In the Transport Board Case of 1990[36] he argued the issues with clarity and force. Though one may disagree with some of his conclusions, there is no doubt that it was a fair and honest judgement, attempting to come to terms with the means of resolving these difficult issues.

The facts of the Transport Statute Case were as follows. On 7 June, 1989, the North-East Provincial Council passed a statute to transfer and vest in the Council, without compensation, assets and liabilities and everything else connected with the transport services of the Northern Regional Transport Board and the Eastern Region Transport Board. In addition, the statute transferred to the Provincial Minister in charge of transport duties and powers presently exercised by the national Minister of Transport. Finally the statute transferred to the Council all contracts and obligations of the two Boards.

The Governor refused assent to the statute under Article 154H(2) of the Constitution, but the statute was again passed on 21 September, and the President referred the statute to the Supreme Court under Article 154H(4) of the Constitution. The question, then, emerges as to whether the statute is inconsistent with the Constitution.

Justice Fernando in his judgement held that a PC has the right to carry out transport powers as mentioned in List I of the Ninth Schedule of the Constitution, but does not have the right to deprive the state of its powers of transport as mentioned in List III, the Concurrent List of the Ninth Schedule. The PC may

regulate but it cannot abolish central government transport. This appears to be a correct decision, not only in terms of what has been defined as concurrent powers, but also in terms of the needs of the consumer and the nature of services to be made available to him by both the provincial Government and the central Government.

In addition Justice Fernando argued that the PC, under powers of acquisition mentioned in List III, Item 6 may acquire bare land, vehicles and buildings owned by public corporations, but this power of acquisition could not extend to the take-over of an entire business undertaking, especially when those undertakings have some sanction in terms of the Concurrent List.

An interesting aside to the judgement is the problems posed by bilingualism in the judiciary. The Sinhala text, as presented to the court, states that the PC has the power to regulate "inter-provincial" transport, while the English text speaks of "intra-". The Sri Lankan courts have always argued for plain meaning interpretations of statute, and in this case the Sinhala text would have prevailed. So, out of necessity, the court had to go beyond plain meaning, to look at other places in the document for "intrinsic consistence" and reference to legislative intent, as presented before the Speaker, for guidance with regard to the meaning of the word. After this search, Justice Fernando concluded that the Sinhala words "inter-province" was an obvious mistake.[37] So, perhaps, we may now thank the legal draftsman for forcing the Court to engage in "legal methods" which, for years, had been resisted by the Supreme Court and the Courts of Appeal. Quoting Justice Learned Hand, Justice Fernando added, "It is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary."[38]

However, the most important aspect of Justice Fernando's judgement was his analysis of Section 154(G)(5)(b). The provision required provincial government consultation with parliament on matters relating to the Concurrent List. Even though he articulated it within the framework of "delegated legislation" which normally requires consultation, it is clear that he felt that

only such consultation and compromise would prevent a proliferation of cases before the Supreme Court. He reiterated that such consultation was not discretionary but absolutely mandatory, unless the issue was truly "trivial".

One may argue that Justice Fernando had reduced the scope of PC freedom in lessening space for discretionary action, but given the nature of Sri Lankan politics, it was a reasonable call, a call for process and procedure in decision-making, away from arbitrariness and confrontational decision-making. Though he did not suggest that there be an alternative mechanism, one may reasonably conclude that a commission or body vested with jurisdiction to deal with centre-provincial issues in a non-adversarial, mediatory manner is more likely to handle the problems of power sharing than the Supreme Court.

Power sharing has never been an intrinsic part of Sri Lanka's political tradition. Whether they be the major political parties or ethnic groupings, political discourse has been characterised by "bottom line" positions. A tradition of mediation and conciliation will evolve only if an institutional framework is created and the institution manned by those trained in the arts of negotiation, mediation and arbitration. No other area of our political life requires such a process more than ethnic relations.

This is not to say that we should mediate away fundamental values that are essential to a liberal polity. Parochial elites and provincial leaders have not shown a better record for the protection of these values than central government politicians. It is therefore important that the Supreme Court remain vigilant to ensure that basic values related to fundamental rights and constitutional structures are protected with the right of appeal from any such mediatory body. The problem is a real one and should not be dismissed. It is not limited to Sri Lanka. In 1982, Quebec Canada rejected the Charter of Rights and Freedoms because the Charter guaranteed access to minority language schools. Quebec's Bill 101 required that Quebecois children could go to English schools only if one parent had initially been educated in the English system. They refused the concept of free choice and the imposition of bilingualism in Quebec. They wanted to preserve a unilingual French community and refused the policy of bilingualism in their province.

In such a context where the province refuses to accept plural and democratic values to govern itself, it is imperative that any dispute arising from such a refusal be referred to the Supreme Court and a decision be made by the supreme judiciary. However, such cases may, in fact, be rare. It is more likely that the primary, controversial issues of security, land, education, etc. will be better solved in a more conducive atmosphere, accentuating give and take, than by an adversarial procedure before the Supreme Court. This will still remain true if we are to live and work in a united Sri Lanka, regardless of the outcome of the present crisis and regardless of the political leaders who come to the fore.

NOTES

1. Thirteenth Amendment to the Constitution, 14 November, 1987.
2. Proposals before The Political Conference (Chidambaram proposals), June, 1986.
3. Article 3 of the Constitution of the Democratic Socialist Republic of Sri Lanka, 1978.
4. Section 154F of the Thirteenth Amendment.
5. Section 154B of the Thirteenth Amendment.
6. Section 154P of the Thirteenth Amendment.
7. The Ninth Schedule of the Thirteenth Amendment.
8. Section 154R of the Thirteenth Amendment.
9. The present North West Provincial Council has not pursued the matter since 1993.
10. Section 154b of the Thirteenth Amendment.
11. Section 154j of the Thirteenth Amendment.
12. Section 37 of the Provincial Councils Act No. 42 of 1987.
13. This is precisely what happened in 1993 and 1996 when governors dissolved "opposition provincial councils" on flimsy excuses. The 1996 cases are before the courts.
14. See V. Samarasinghe, "Spatial Inequalities and the Ethnic Conflict in Sri Lanka", ICES, Kandy, August 1985.
15. The Thondaman Proposals, reported in the newspapers. See *Sunday Times*, 3 November 1991, p.1.
16. 19 December 1986.

17. Appendix II to the Thirteenth Amendment.
18. Appendix I to the Thirteenth Amendment.
19. See R. Dworkin, *Taking Rights Seriously*, Cambridge, 1977, for a survey of such cases in U.S. law.
20. See the history of *Kesavananda Bharati* vs. *State of Kerala*, 1973, A.I.R. S.C. 1461, for an example of this type of impasse.
21. See Sixth Amendment to the Constitution of the Democratic Socialist Republic of Sri Lanka, September 1983.
22. See Presidential Reference No.S.D. No. 1 and No. 2, 1987.
23. See application of Mrs. Sirimavo Bandaranaike, S.C. Special Application No. 7 and No. 8 of 1987, para 4.8, 4.9 and 7.
24. See J.H. Ely, *Democracy and Distrust*, Cambridge, 1981, for the best exposition of this theory.
25. S.C. No. 17/87, p. 2.
26. See *Hansard*, 10 November, 1987, p. 1318.
27. G.L. Pieris, "Provincial Autonomy within a Unitary Constitutional Framework: The Sri Lankan Crisis" in *Comparative and International Journal of South Africa*, Vol. xxii, 1989, p. 189.
28. K.C. Wheare, *Federal Government*, London, 1966.
29. *Hansard*, pp. 1358-1359.
30. *Ibid.*, pp. 1327-1357.
31. *Pieris*, p. 172.
32. *Ibid.*, p. 181.
33. Wanasundera, *Hansard*. pp. 1354-1355.
34. Wanasundera, *Hansard*, p. 1357.
35. C. McAskie, "The Meech Lake Accord" in *The Thatched Patio*, May 1989, p. 29.
36. S.C. No. 7/89.
37. S.C. No. 7/87, p. 5 of judgement.
38. *Cabell* v. *Markham*, (1945), p. 148, F 2nd, pp. 737-739.

Chapter 8

Let Fools Contest

PARLIAMENTARY DEMOCRACY VS. PRESIDENTIAL SYSTEM: A REALIST APPROACH

Idea *v* Practice

THE idea of democracy is today part of a universal discourse on government. But the concrete manifestation of this idea within institutional forms of governance is as diverse as the history of the modern world. Representative democracy is a near-universal political goal, but the form of representative democracy and its effects in a particular society are empirical questions of fact. Such an analysis can come not from a priori assumptions about structures of government but from the evaluation of actual historical experience.

This disjuncture between the idea of representative democracy and its concrete manifestation must be the starting point for our analysis.[1] Some may argue against the proposition of representative government[2], but very few have put forward a viable alternative to such a form of government at the national level. Though we may want to foster indigenous traditions, we must also recognise that a world heritage of ideas, institutions and practical experience have cracked open the internal processes of developing societies.[3] The acceptance of representative democracy as a universal political goal is a manifestation of this dynamic. No

serious actor on the Sri Lankan political scene is asking for its removal as the cornerstone ideal for our own democratic system.

The debate about the choice between parliamentary democracy and a presidential system currently taking place must be understood in this context. At one level it is a debate about the perfect ideal institution—a positivist debate about words and forms. At another level it is a debate about structuring government and a contest about whose voice will be heard, whose voice will be privileged and what rights will be protected. In other words it is also about the actual results of electoral hustings. The constitution one supports must therefore reflect the values one sees as important in a given society.

Since constitutional advocacy is deeply affected by the values of the author, I will state my predispositions very clearly. An ideal constitution for Sri Lanka in my opinion must be one that

a. maximises checks and balances and therefore reduces arbitrariness in decision-making;
b. maximises sharing of power between the centre and the periphery so that as many people as possible participate in public decision-making;
c. maximises the efficient delivery of state services within the parameters of a democratic set-up, services which must be the welfare safety net of any given society, especially a developing one;
d. maximises protection of minority rights and allows territorial minorities the right to fully determine decisions which affect their future in their areas, so long as they respect the rights and privileges of individuals and minority groups living in these areas and so long as they are committed to a democratic process;
e. maximises fundamental rights protection, the cornerstone of any constitutional order which ensures democracy not only at times of election but in the everyday life of people.

These are the cardinal principles which will guide this paper in

evaluating whether we should adopt a presidential or parliamentary system. The paper does not argue that either one of these systems is a panacea for all evils, and the choice between them or as part of a combination of both of them must be anchored in the political realities of any given society.

Checks and Balances—A Westminster Consciousness

In actual historical terms, checks and balances among the arms of government has come from those who advocate the presidential system. The alternative tradition of parliamentary democracy, in its Westminster formulation, sees the triumph of parliament as the central and superior institution which reflects the will of the people. The restraint of governmental conduct would be maintained by systems of accountability and conventions of parliamentary conduct and not by any clearly articulated doctrine of checks and balances.

In other words, checks and balances were seen to be necessary only when one had a powerful executive presidency and the checks were on the use of arbitrary power by an elected individual. Majoritarian democracy as a step away from monarchy was to be unbridled, especially in a society with the homogenous population of England. However, in Sri Lanka the 1972 Constitution and its operation has proved to us that parliamentary democracy, when the government has 2/3 of the MPs in its party, is as unbridled and as arbitrary as a presidential system. The tyranny of the majority results not only in the repression of other political parties but also of minority groups. Without effective checks and balances on the legislative process there is as much arbitrariness as in the presidential system.

Checks and balances as defined by traditional constitutional wisdom are grounded in the premise of "balanced government". J. Uyangoda says that this notion of balance comes from the anti-despotic idealism of Montesquieu but also from the practical shrewdness of the US drafters of the Constitution.[4] In Sri Lanka we have not only inherited Westminster forms of government but also Westminster consciousness. In other words, unlike

Montesquieu or Jefferson, English leaders from Cromwell onward did not really believe in balanced government; they believed in the supremacy of parliament as the institutional cornerstone from which everything else follows. This supremacy of parliament, coupled with leftist notions of people's assemblies and centralised party structure, led to the 1972 Sri Lankan Constitution where even fundamental rights, though formally adopted as an element of the Constitution, was watered down in the interest of the "National State Assembly".

Sri Lanka has therefore no accepted historical consciousness or practice with balanced government. At the same time this historical consciousness is absolutely necessary if a presidential system is to avoid its most despotic phase. The institutional system of checks and balances manifests itself by deliberately placing a check on the executive as well as the legislature by the judicial interpretation of constitutions. For a system of checks and balances to work, one has to have a powerful judiciary and a legislature which is suspicious of presidential action and sees itself as a watchdog of the President. It is this mutual suspicion which gives the system of checks and balances meaning. In Sri Lanka we have neither the powerful judiciary which has the capacity to review legislation, only bills and executive action, and since the inception of the presidential system, we have not had a practice of eternal legislative vigilance with regard to the practices, the finances, and the spending and appointing power of the President. The constant vigilance, the mutual suspicion is lacking.

What are the elements which contribute to this lack of suspicion and mutual accountability?

1. The President as head of government is not accountable to parliament—only his ministers. At the same time he can hold portfolios so that in important areas he makes policy, is responsible for policy, but remains unaccountable. In the U.S.A. the President is not accountable to parliament but the powerful legislative committees keep him under constant scrutiny and his officials may be summoned at any moment for public hearings on

any question. So the immunity of President from parliament in Sri Lanka is not compensated for by any effective machinery which allows for the policies and officials of the President to be subject to scrutiny. The machinery exists in the Sri Lankan context, but the realities of politics in which the executive presidents have enjoyed a docile parliamentary majority, has prevented the effective use of this mechanism.

The rather bizarre impeachment motion led by some members of parliament was the only exception to this docility of parliament with regard to the executive presidency. But impeachment is an extraordinary measure; an act of truly the last resort which has never been very successful even in the United States. Since it is a move against an elected representative, most systems have acted with caution in bringing him to book by impeachment. It is more commonly used against the judiciary since judges are not elected, and are therefore more accountable to the other institutions of government.

The fact that a docile parliament would suddenly move against a President in an impeachment movement points to something more fundamental in the body politic. Constitutions and parliaments are still seen in an instrumental sense—i.e. whether they will allow one section to capture state power, and "anything goes" in that attempt. This is not the weakness of any one political party but appears to be endemic to the Sri Lankan body politic. However, if there is no possibility of grabbing state power, then the only option is docility. The whole middle ground of using parliament as a watchdog, of keeping a check on the day-to-day activities of the executive, of increasing the technical competence of parliament to deal with crucial issues of policy, especially financial policy, are issues that have not been cultivated or developed.

Checks and balances are important concepts in any form of representative government. If Sri Lanka is to maintain a presidential system it would have to increase the power of the judiciary, including the scope for judicial review of legislation, as well as to develop mechanisms whereby parliament, regardless of party

affiliation, sees itself as a watchdog on an errant executive, not only on impeachment day but in the everyday life of politics.

In addition it may be argued that the 1970-1977 period has also shown to us the pitfalls of an unbridled legislature in the alternative system of parliamentary democracy. It is therefore imperative that no matter what system is chosen, whether a presidential system or a parliamentary system, it is necessary to have the safeguards—a judiciary that can review legislation without fear or favour and a parliament which is competent to be a watchdog on day-to-day policy-making. Without these effective checks on both the executive and the legislature, the era of arbitrariness, patronage and unbridled power—Sri Lanka's post-colonial political legacy—will never really leave us.

2. The other factor which has prevented the healthy mutual suspicion, which is at the heart of checks and balances between the executive and the legislature, has been the proportional representation system in relation to an executive president. The system of proportional representation has had one salutary feature, which is to allow for the representation of political parties in terms of the votes that they have actually polled. This has prevented the pendulum swings reflected by the first-past-the-post system which had characterised our early years with parliamentary democracy, often leading to the tyranny of the majority.

But the system, which had as one of its objectives the placing of the party over the personality, has led to political power being concentrated in the hands of the political party. This has led to major problems in the political system, because very few of the political parties in Sri Lanka have the organisational structure of modern political parties. They have often been characterised as loose associations where the whims and fancies of the party leadership have more clout than the internal processes of selection and election.

This has led to the development of party oligarchies, a condition which has been well analysed in western political parties. As Michels writes, "It is the party organisation which gives birth to the domination of the elected over the electors, of the mandatories over the mandators, of the delegates over the delegators. Who says organisation says oligarchy".[5]

This oligarchy may be an intrinsic part of any bureaucratic apparatus in the modern world, but in Sri Lanka there are no minimum standards with regard to the conduct of the internal affairs of the political party. While we may have company law with regard to private enterprise, there is nothing with regard to the conduct of political party business. In some sense there should not be a law which makes all political parties into similar organisations; freedom of internal experimentation should be given maximum leeway; the party should not become an entrenched bureaucracy. And yet, there should be minimum standards with regard to the conduct of business to ensure a measure of integral democracy and financial accountability to the membership.

Whether we have a presidential system or a parliamentary system, this factor has to be underlined. In both institutions, the political party is the foundation, the core of the system. Unless we devise strategies and policies to ensure the minimum standards of democratic deliberations within the party structure, the system itself will not be able to function. It is only a democratic and effective party system which will be the final check, either on an errant president or a runaway parliament with an errant prime minister. It is also only an effective party system which will groom and put forward candidates who will be our future political leaders. If there is some blockage within the party structures, quality future leaders will never emerge. In any system they are the final protectors of democratic values.

Sharing of Power

It is said that a parliamentary system is better suited for the implementation of a scheme of devolution and sharing of power as described in the Thirteenth Amendment of the Sri Lankan Constitution.[6] The scheme replicates the Westminster model at the provincial level, where the head of the executive, the Governor, is the appointed head with many ceremonial powers, but the

effective executive in terms of legislation and cabinet policy is the Chief Minister—the person who commands the confidence of the provincial council.[7]

Many commentators have pointed to the problem of having a parliamentary model at the provincial level and a presidential model at the centre, the areas of contention and discrepancy which may arise in the implementation of the Thirteenth Amendment. A strong presidential system with power vested in an executive president is inherently a centralising force. Innovations such as the presidential mobile secretariat and even such massive programmes as the Janasaviya and the village awakening programme, which originated within the central executive, create a direct equation between the President and the people. This so-called Bonapartist style has very little room for intermediaries. It has been argued that even the Cabinet of Ministers would be bypassed, but in the same way, and perhaps to a larger degree, the provincial councils will also be bypassed in the implementation of these schemes. So a President with a grand vision may actually subvert the autonomy and delegative powers of a provincial council.

And yet, the same could be said of a Cabinet of Ministers and a Prime Minister in a first-past-the-post legislative system if they wish to implement national policies. The experience from 1970-1977 clearly points to a great deal of centralisation both in the state and the industrial sector, but this time under the Prime Minister and powerful Cabinet Ministers. The combination of economic and political centralisation was much more effective during those years of parliamentary democracy.

Centralisation in the past has had much less to do with the forms of government and more to do with the vision of the political leaders. Activist, interventionist political leaders who wanted to impose a vision on the society were more likely to be centralist than those who were pragmatic and oriented toward problem-solving. What is important is that neither system is inherently conducive to power sharing without the necessary structures of protection built into the scheme.

The United States is a presidential system, but under their federal powers the states have a great deal of authority. The French are also a combination of presidential and parliamentary rule, but their system is very centralised and uniform. The Canadians have a Westminster model, but theirs is perhaps one of the more far-reaching constitutional structures with regard to the sharing of power with the provinces; while the Indians also have a Westminster model with a great deal of centralisation, at least with regard to the state sector. It is often said that India is kept together by the All-India bureaucracy and the All-India army; two extremely centralising forces in the Indian sub-continent.

If the forms of government do not determine the nature and extent of power sharing, then what does? The extent of power sharing must be reflected in the constitutional sections relating to the provincial councils. If they are federal in character, i.e. where the provinces have exclusive spheres of legislation, there will be more power sharing; if they are unitary in character, that is if all the decisions of the provincial council can be overridden by the centre, then there is more scope for centralisation and the subversion of the devolution scheme.

In the final analyses the protection against arbitrariness must be found in relevant and specific constitutional sections, though it could be argued that an executive presidency has a tendency to centralise more in a developing country, where the personal style of the leader of the state is extremely important and where systems of patronage have not been overtaken by Weberian systems of objective rules and procedures. Since a personality style is more important than bureaucratic procedure, it is argued that the style of executive presidency would be more conducive to authoritarianism in a developing country.

Protection of Minorities — From All-Sinhala to All-Sri Lanka

Whilst the Thirteenth Amendment duplicates the Westminster model at the provincial level, and there is a belief that a parliamentary style of government would be more conducive to a system of devolution aimed at meeting the aspirations of the

people of the North and the East, especially the Sri Lankan Tamil minority, there is no doubt that a presidential system will be more conducive to meeting some of the aspirations of minorities in a much more significant way than a parliamentary system.

Before the advent of the executive presidency the parliamentary system which existed in Sri Lanka was completely insensitive to the needs of the minorities. Individuals could be elected in electorates which had no minority representation and become Prime Ministers. In the context where their electoral base was completely Sinhalese, they did not even have to attempt to deal with minority grievances. The tradition set by the 1956 election is a case in point.

However, with the advent of the executive presidency and a national instead of divisional electorate, the minority voice suddenly became important. At the 1988 presidential election all sides attempted to address minority grievances. The DPA platform of the Opposition was even more progressive than the election manifesto of the UNP, the party which traditionally attracted the Tamil votes outside the North and the East. The Muslim vote was also catered to.

The electoral hustings therefore put the minorities in a position which they have never before enjoyed in an election in Sri Lanka. They had been happy to sit on opposition benches screaming for federalism and separate states, or worked within the major parties but without an effective voice. But the moment there was a national electorate, no political party could afford to be outrageously racist as the minorities held an important block of votes. The parameters of electoral discourse were also forced to change. This has been one of the positive contributions of the presidential system, even if it is often seen as the only one. For the first time the minorities in the country felt that they had a stake, they had a say. In the end this may not translate into actual action, but the setting of electoral discourse within the parameters of having to have an All-Sri Lanka ideology is extremely important, since it was the electoral competition among political parties for the All-Sinhala vote which had led to the primacy of the parochial con-

stituency and the days of strident nationalism and ethnic mobilisation in the 1950s, the 1960s and the 1970s. By the time the system changed in the 1980s, and a new President was elected in 1988, the minorities living in the North and the East were being led by militant groups who had no interest in a national electoral process.

The call for a return to a parliamentary system in contemporary Sri Lanka comes from two quarters. The first is the liberal and socialist constituency which feels that the operation of a presidential system has led to an increase in authoritarianism. They argue that the imposition of a presidential style on a civil society used to personal patronage only reinforces traditional authoritarianism and develops new avenues for such patronage centred around one individual, his friends and family.[8] There is a sense that a return to parliamentary democracy with a system of proportional representation will strengthen democratic structures and traditions, at least those which are supposedly entrenched in the legislature. There is a strong case for this argument.

The second constituency which is demanding a return to the practice of parliamentary democracy is the Sinhala Only constituency, which resents the new voice and the new power that minorities have in the election of the President. They especially resent the bloc vote provided by the CWC and the Indian Tamils to the ruling party. They wish to return to the days of the "All-Sinhala electorate" and are resentful at the shift of discourse resulting from an "All-Sri Lanka electorate".

The final formula is therefore not an essentialist one, i.e. a choice between parliamentary democracy and a presidential system. What is needed is a system of representation which gives the minority a voice in electing the executive and therefore ensures an All-Sri Lanka consciousness at election time, but which, at the same time, minimises the authoritarian trends which may be present in a centralised executive presidency.

Fundamental Rights

Not every constitutional system formulated a bill of rights as

integral feature of government. It is said that the bill of rights is "what the British Crown feared—and what the American founders decided to risk."[9] In Sri Lanka, with our Westminster consciousness, the fear of fundamental rights as a volatile element in the constitutional scheme is subconsciously expressed. For example, at the moment, legislative action can be challenged for fundamental rights only before the enactment of bills and not after the law becomes legislation. From the point of view of fundamental rights this is completely unsatisfactory since one has very little notice of the bill, very little public discussion, and most important, one does not see the law in actual operation. Because of the Westminster consciousness and the emotional attachment to doctrines of parliamentary supremacy, none of the drafters of Sri Lankan constitutions have given the judiciary the right of judicial review of enacted legislation. In that sense, fundamental rights has been far less protected in a system of parliamentary democracy, modelled on the British system, than under a system of the executive presidency modelled on the American or the Indian constitutions. If judicial review of enacted legislation is permitted, this situation would of course change.

Since 1978 and the adoption of the new Constitution, individuals have had the right to go to court and challenge executive action under section 126 of the Constitution.[10] All the fundamental rights cases flooding the courts are under this section. Ironically it is argued that a presidential system, where the President as Commander-in-Chief has direct access to the security forces, is far less conducive to the protection of fundamental rights. But the nature of the Constitution is such that the actual and only cases which are truly successful with regard to individual rights are those which challenge executive action. It is the violation of fundamental rights by the executive which is the subject of the scrutiny of the Supreme Court.

Again the point has to be made, that whether it be a parliamentary system or a presidential system, the protection of fundamental rights ultimately rests on a powerful and independent judiciary. Both the US and India have been held out as models of

fundamental rights protection, one for the west and one for the developing societies, with their new innovations of social action litigation. The US has a presidential system, India has a Westminster system. What makes their judiciaries sensitive to the power they actually wield?

Firstly, they are federal judiciaries, and therefore the apex judicial body, the Supreme Court, is a powerful overlord of a vast network of lower courts. Secondly, both have the right of judicial review of enacted legislation so that the acts of the legislature are constantly under review, not only before enactment but also in practice. Thirdly, judges of the courts in recent years have shown a marked independence and initiative in experimenting with new legal ideas and approaches; the confidence to do so comes from their sense of power as an equal arm of government, as well as from built-in structures.

If we are to have fundamental rights protection which is truly effective in Sri Lanka, we have to strengthen the judiciary. The first chapter of the Constitution itself places the judiciary as a derivative body of parliament and therefore reduces its role in the arena of checks and balances. Life tenure for judges or retirement with special benefits so that they do not need to covet office once they have retired, and judicial review of enacted legislation, are some of the other measures which may be necessary. In addition there has to be the executive which will implement and carry out court orders. We cannot ever revert to a situation where policemen fined for violating fundamental rights are then promoted by the Cabinet of Ministers.[11] This type of crude subversion is one of the many reasons why the judiciary has been somewhat timid. However, recent cases such as the Boosa case[12] point to the fact that the Supreme Court is suddenly coming alive with regard to fundamental rights cases, especially with regard to those relating to detention and torture. This is a recent trend which can be strengthened only with a grant of greater independence through other measures aimed at enhancing judicial power.

The paramount importance of the judiciary with regard to the enjoyment of fundamental rights was no better expressed than by

Justice Potter Stewart in his address to the media:

> Where, ladies and gentlemen, do you think these great constitutional rights that you were so vehemently asserting, and in which you were so conspicuously wallowing yesterday, where do you think they came from? The stork did not bring them. These came from the judges of this country, from these villains here sitting at table. That's where they came from. They came from the courts of this country. . . the Constitution of the U.S. is not a self-executing judgement.[13]

The Efficient Delivery of Services

The main problem that parliamentary democracies are facing around the world is the problem of an incoherent executive which then affects the delivery of services to the people. This is a particular problem in third world societies where state action and intervention requires them to reach growth rates of significant proportions if they wish to develop, and where the safety net of welfare provisions is particularly important.

In an era where one political party such as the Congress in India can no longer claim an absolute majority without coalition building; and where in Sri Lanka, with a tripartite electoral billing in the future, coalition building may become essential, the problem of an incoherent executive with little "decisional mobility"[14] may emerge as a fundamental problem. The Italian nightmare may strike closer to home.

The failure of successive governments in India to maintain coalitions has posed serious issues, but the nature of the Indian bureaucratic system, its all-India character, its considerable autonomy, allows the system to continue regardless of politicians. In Sri Lanka since the 1970s there has been a steady erosion of the independent public service. The power of the public servant was so feared that there was a concerted attempt by all regimes from all political parties to curtail that power by politicising the bureaucracy. As a result, without politicians, the systems will not function.

Given this reality, the thrust of coalition politics, i.e. the failure of opposition parties to accept a common platform or mandate, may result in an incoherent executive and a collapse of the system. This may be a good thing in that it would foster more democratic approaches and force a polity unused to building coalitions in a meaningful way to start such attempts with new vision and direction.

But while this political maturity develops, it is imperative that there is a cadré of public servants who can perform their duty with regard to the delivery of services and guidance to the economy without fear or favour. Whether it is a parliamentary system or a presidential system, it is imperative that the independent public service is strengthened, that they be fully trained and that they be given a certain measure of protection from political victimisation. As Max Weber argued in the nineteenth century, the true test of a modern system lies not in the market nor in its legislature but in the nature of the bureaucracy: it is impersonal, objective and efficient and is it manned by the best and brightest of the country.[15] Without a cadre of modern bureaucrats operating efficient systems of management, there will be no effective delivery of services to the people.

Pros and Cons

Besides the thematic aspects discussed above, the evaluation of the choice between the parliamentary and presidential systems must also take into consideration the overall picture, i.e. the basic assumptions and dynamics behind the system. The parliamentary system gives the appearance of being less arbitrary, more modern in the Weberian sense of the word, less bound up with personalities, less eccentric and more democratic. Its weaknesses are that, especially with proportional representation and the inevitability of coalition building, the failure of successful coalitions would result in an incoherent executive, a thrust toward dominance by political parties whose structures are highly oligarchic, a tendency toward majoritarian democracy and primacy of the parochial constituency over an All-Sri Lanka consciousness.

The presidential system on the other hand gives the appearance of a coherent executive which can efficiently deliver services, coupled with the progressive concept of a national, All-Sri Lanka electorate, but is problematic because it has a thrust toward centralisation, toward personal styles of authority over programmes, and is Bonapartist in that it weakens intermediary organisations, whether within the political system or as part of the bureaucracy.

Mix and Match

It is the suggestion of this paper that neither a parliamentary system in and of itself, nor a presidential system in and of itself, will solve the problems of political democracy in Sri Lanka. Both systems have operated in the Sri Lankan reality and they have led to major pitfalls in the management of our political life. The final resolution of our constitutional framework must be based on this actual experience and not on any pre-conceived positivist ideal of what is more perfect in theory, parliamentary systems or presidential systems.

In this regard let me summarise the conclusions that must necessarily arise from the previous sections. Any new constitutional framework in Sri Lanka would require a consensus based on the following:

1. The primacy of democracy. In this regard the legislature must be the centrepiece of any form of representative government. The Cabinet of Ministers must be drawn from the parliament and must have substantial powers, and also be responsible to parliament for their actions and for collective cabinet decisions. Parliament itself must be strengthened by a "technocratic system" with the operation of effective committees. A system of legislative interns, of young people who can research and advise the members of parliament may also be a useful experiment; it would also expose some of the best of our young minds to the workings of parliament as apprenticeship or investment in quality future leadership.[16]

2. There is need for a coherent executive and an electorate

which sees Sri Lanka in terms of a national electorate so as to strengthen the unity and integrity of the electoral process. There should be an elected president who sits as the head of the Cabinet of Ministers. Ministries should not be assigned to the President since he is not accountable to parliament, but he should be in charge of devising broad policy areas and in conducting the meetings of the Cabinet of Ministers. He should be requested to address parliament twice a year to give a statement on general government policy. The day to day workings of government should be left to the Cabinet of Ministers precisely because they are answerable to parliament. The President however must be responsible to ensure that government policy is coherent and that ministers are in fact implementing policy as decided by the Cabinet. This monitoring of ministerial function is essential but should be done collectively at the level of Cabinet meetings. This would be to ensure that the Cabinet of Ministers, who are the representatives of the legislature in the executive, are not subordinate to the President. This will be particularly important if the President is drawn from a different political party from the Prime Minister and the members of Cabinet. In this eventuality, the balance of power with regard to policy-making must rest with the Cabinet of Ministers and the legislature, otherwise there would be a serious threat to democratic practice.

3. The protections with regard to an independent judiciary should be strengthened. An amended version of the Seventeenth Amendment[17] currently under consideration should form the basis for the fundamental rights section, but there should also be judicial review of enacted legislation and special provisions with regard to the tenure of judges, their emoluments and conditions of retirement.

4. The delivery of services to the population finally rests with the efficient functioning of an independent public service. Their position should be strengthened and special procedures should be adopted to prevent victimisation of public servants. In addition, in line with the Youth Commission report, there should be national policy with general guidelines which has bipartisan support

from at least the major political parties in the areas of health and education. This is crucial to prevent dislocation in the welfare and education system every time there is a change of government; something which has weakened our services in recent years.[18]

5. Sharing of power with the provinces. A system of federal units or maximum devolution must supplement the system at the centre to ensure local level participation and to prevent not only the centralisation of resources but the intensive conflicts which result from the struggle over centralised resources, including the struggle for political power.

Conclusion

Atul Kohli in a recent book on "governance" in India has conducted an empirical study on the problems of governing India, and the major problems of a post-colonial developing state practicing democracy of any sort.[19] He argues that the failure rests on three aspects, at least with regard to the Indian experience. The first is the existence of an active, intervening state which has stifled the market as well as free initiative at the local level. It has also created a system where access to resources with regard to the society rests on control of the state apparatus, i.e. with the politicians and the bureaucrats, a very limited circle in the Indian context. This has led to wide-scale dissatisfaction with the state apparatus.

Secondly, he argues that the system of political parties in intense competition with each other has resulted in elite-led mobilisation, where various sectors are mobilised from ethnic and tribal groups to caste and class groups for electoral purposes, but with no real intention of satisfying their aspirations. This has led to what Naipaul calls a million mutinies[20] which not only demand their rights from the centre but in some cases take to armed rebellion and separatism, many of them rejecting the hypocrisy of elite-led mobilisation with a world view which is anathema to liberal democratic values. They refuse to be governed by the Indian state as we know it. As a result they are a threat to the state as well as to the liberal democratic, secular

system which India adopted at independence.

This Kohli formulation for India is relevant for our discussion in Sri Lanka, for the two factors have also been very important in the growing problem of governance in third world societies. A constitutional system is the apex system in any framework of governance. How does one remedy the pitfalls outlined above as well as ensure the democratic ideals which have animated our politics since independence?[21]

In answering the question, it may also be important to recognise that we are also dealing with only one half of the problem. From a political scientist's point of view, the difference between a presidential system and a parliamentary one is minimal in the face of other ideological constraints. Ashis Nandy and others have argued that any of these systems of representative government and the bureaucracy which accompanies modern nation states are colonial experiments in contradiction to, and struggling with, a civil society animated by other concerns.[22] One may be able to dismiss this without much disagreement by stating that no other alternative exists for developing societies, but the reminder is particularly salient in the light of the two youth insurrections which have characterised our social conflict in recent years.

The ideologies of the alternative are no longer the Marxist or the left liberal which to some extent share the same world view as the liberals in the celebration of democratic values and modern industrial growth. The ideologies that proliferate today, and which have captured the hearts and minds of our youth, are "the ideologies of the vernacular", i.e., born out of the symbols, discourse and mythology of Sinhala speaking and Tamil speaking intellectuals. "We are skating on thin ice", said a leading social scientist when he appeared before the Youth Commission in 1989. This ideology, as manifested in the JVP, the Jathika Chintanaya group and the Tamil nationalist formations such as the LTTE, has little in common with, and little respect for, the liberal values which animate the parliamentary process. In fact they are animated by a unitary totalitarian vision which has neither the presidential system nor the parliamentary system as its reference point.

This lack of liberal values is not only the sole prerogative of our extremist groups, since, as Upendra Baxi puts it, one of the major aspects of the present crisis lies in the very classes which debate such matters as constitutional structures:

> It is quite clear that the Indian political elite and the upper middle classes have not internalised the value of legalism. . This creates a demonstration effect.[23]

So the real task, in addition to ironing out the framework for a perfect constitutional order, is to begin the task of educating people in liberal citizenship.[24] We have to begin a contest for the imagination of our young people.[25] Our text books are full of dynastic history, with perhaps a few pages left for liberal or socialist nationalist heroes, who pale in comparison to the magnificent kings who fought with valour and swords. We must make the democratic alternative an attractive one for the South Asian imagination.[26] Unless we do that, the nuances between different types of democratic formulations would only be an intellectual exercise for the benefit of constitutional lawyers.

NOTES

1. R. Unger, *Politics*, Harvard Law School, 1981, p. 83.
2. S.D. Bandaranayake in his speeches in parliament and in the presidential election campaign of 1988. See also Jehan Perera in "Constitutional Reform is irrelevant for Sri Lanka." Law and Society Trust Newsletter, July 1992
3. R. Unger, *Law in Modern Society, Toward a Criticism of Social Theory*, New York, Free Press, 1976, p. 64.
4. J. Uyangoda, "The President and Parliament in Sri Lanka: Conflicts, Checks and Balances" in *The United States and Sri Lanka Constitutions: A Comparative Study*, Dehiwala, 1992.
5. R. Michels, *Political Parties*, New York, 1962.
6. Thirteenth Amendment to the Constitution of the Democratic Socialist Republic of Sri Lanka, Nov. 1987 and also Provincial Councils Act No. 42 of 1987.
7. See R. Coomaraswamy, *Legal Aspects of Devolution*, CRDS, Colombo, 1992.

8. See for example the debates on the impeachment, *Sunday Times*, September-October 1991.
9. F. Friendly and M.J.H. Elliott, *The Constitution, That Delicate Balance*, New York, 1984, p 1.
10. Article 126 of the Constitution.
11. *Vivienne Goonewardene* v *Hector Perera*, SC Application 20/83.
12. See the Proceedings of the Sri Lanka Bar Association, September 1991.
13. Friendly, p. 6.
14. A.J. Wilson, *The Gaullist System in Asia*, London, 1980.
15. See Peter Blau, "Weber's Theory of Bureaucracy" in D. Wrong, ed., *Max Weber*, Englewood Cliffs, 1970, p. 141.
16. See Report of the Commission on Youth, Colombo, February 1991.
17. See Civil Rights Movement, Comments on the Proposed Seventeenth Amendment, December 1990.
18. Youth Commission, Introduction.
19. A. Kohli, *Democracy and Discontent, India's Growing Crisis of Governability*, Cambridge, 1991.
20. V.S. Naipaul, *India: A Million Mutinies*, London, 1991.
21. From the legal perspective with regard to the crisis of governability see U. Baxi, *The Crisis of the Indian Legal System*, New Delhi, 1982.
22. A. Nandy, *At the Edge of Psychology*, New Delhi, 1984.
23. U. Baxi, *The Crisis of the Indian Legal System*, New Delhi, 1982, p. 7.
24. In this context the writings of what is called the Republican Tradition of liberalism is something worth considering: see J.A.G. Pocock, *The Machiavellian Movement, Florentine Political Thought and the Atlantic Republic*, Princeton, 1975. Also, Carol Pateman, *Participation and Democratic Theory*, Cambridge, 1980.
25. Benedict Anderson, *Imagined Communities*, London, 1984, especially the last chapter on primary education.
26. Also see Youth Commission, the Chapter on Values.

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